HABEAS CORPUS AND PREVENTIVE DETENTION IN SINGAPORE AND MALAYSIA

PART I — INTRODUCTION

IN 1982 an International Mission of Lawyers visited Malaysia to investigate the operation of certain aspects of internal security legislation.[1] In consequence of that investigation the Mission recommended that a number of changes be made, both in legislation and in administrative practices. One recommended change was that: "the I(nternal) S(ecurity) A(ct) be amended to provide for adequate judicial review of all administrative acts taken, including the initial determination that (preventive) detention of an individual is necessary."[2]

In this paper I will argue that no such legislative amendment is necessary, at least in respect of initial decisions to detain.[3] I accept without reservation the implication that in this fundamental area of personal liberty the judiciary should have an important reviewing role over administrative acts, but I contend that this may be done quite adequately in proceedings on applications for writs of habeas corpus. This contention is, however, dependent upon the satisfaction of an essential condition—that in performing their functions in habeas corpus applications, the courts exhibit a willingness to utilise the powers available to them to the full. As I will hope to demonstrate, the courts in both Singapore and Malaysia have adopted an unduly restrictive approach to their reviewing role when applications for habeas corpus in respect of preventive detention have been made. This restrictive approach is unjustified, for the authorities which are said to support it can no longer do so, even if they ever could (which in some cases is very doubtful). It is still open to the courts to adopt a more generous attitude—at is only if they refuse to do so that further consideration would need to be given to the Mission's recommendation.

To advance my argument I shall concentrate on preventive detentions under the Internal Security Acts of Singapore and Malaysia, although I shall make occasional reference to cases of preventive detention under other legislation. In focussing on the Internal Security Acts I will not be concerned to discuss whether such legislation is

[1] The Mission's Report is published in "Insaf, The Journal of the Malaysian Bar", Vol. XVI No. 1 (January 1983) at pp. 3-45.

[2] *Ibid*., at p. 42.

[3] Administrative decisions taken subsequent to the initial decision to detain — for example, decisions to put the detainee in solitary detention, or to subject him to a more rigorous regime—are not considered here. There is some Commonwealth authority that habeas corpus may be used to challenge the legality of detention consequent upon such decisions (see *Re Cardinal and Oswald* (1982) 137 D.L.R. (3d.) 145; *Re Miller* (1983) 141 D.L.R. (3d.) 330; and *R.* v. *Police Commissioner ex p. Nahar.* The Times 28th June 1983), but local cases take a more restrictive view — see *Chok Kok Thong* v. *Minister for Home Affairs, Singapore* (1963) 29 M.L.J. 232 and *Lau Lek Eng* v. *Minister for Home Affairs, Singapore* [1972] 2 M.L.J. 4.

either necessary or justified in principle, for this has been done elsewhere.[4] Rather, I will be directing my attention to the judicial role of review when challenges to the validity of individual detentions under the Acts are brought before the courts.

The structure of the paper will be as follows. In Part II, I outline the legal provisions and administrative practices relating to the initial decision to detain individuals. In Parts III and IV I consider the reviewing role of the courts in respect of these initial decisions to detain. Finally, in Part V I provide a summary of the legal argument and offer some concluding remarks.

PART II — THE MACHINERY OF DETENTION

(a) *Legal Provisions*

Although the security legislation applicable in each country has common origins, there are now divergences in the details of the provisions. This may be demonstrated by citation of s. 8 of each of the Internal Security Acts. The Singapore Internal Security Act[5] (hereinafter "the I.S.A.(S)") provides:

> s. 8(1) If the President is satisfied with respect to any person that, with a view to preventing that person from acting in any manner prejudicial to the security of Singapore or any part thereof or to the maintenance of public order or essential services therein, it is necessary to do so, the Minister shall make an order —
>
> (a) directing that such person be detained for any period not exceeding two years....

The Malaysian Internal Security Act[6] (hereinafter the "I.S.A.(M)") in contrast provides, by s. 8(1):

> If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as a detention order) directing that that person be detained for any period not exceeding two years.

A number of points of difference emerge. First, the I.S.A.(S) requires Presidential "satisfaction" of certain matters, whereas the I.S.A.(M) requires "satisfaction" of "the Minister".[7] The practical significance of this is, however, minimal, because in *Lee Mau Seng* v. *Minister for Home Affairs, Singapore*,[8] it was held that the I.S.A.(S) requires not the personal satisfaction of the President, but his "constitutional satisfaction", acting on the advice of the Cabinet. In this

[4] Tan Yock Lin, "Executive Detention in Malaysia and Singapore", to be published in the Malaya Law Review.
[5] Cap. 115 of the Revised Edition (1970).
[6] Internal Security Act 1960, Revised 1972 — now Act 82 of 1972.
[7] It is noteworthy that whereas the I.S.A.(S) defines "the Minister" (for other purposes) as "the Minister charged with responsibility for internal security", the I.S.A. (M), no doubt through oversight, does not identify who is "the Minister" who can order an individual's detention.
[8] [1971] 2 M.L.J. 137.

regard the President has no independent discretion and functions as a constitutional head of state. Thus, in both Singapore and Malaysia the ultimate "satisfaction" will be ministerial.

Secondly, the I.S.A.(S) permits detention orders to be made on satisfaction that it is necessary to detain to prevent acts prejudicial "to the maintenance of public order", whereas the I.S.A.(M) does not explicitly do so. This also seems of minimal significance, in so far that actions prejudicial to public order might equally be characterised as actions prejudicial to the security of Malaysia, or any part thereof, for which detention is available.[9] On the other hand, and of far greater significance, is the fact that the I.S.A.(M) permits detention orders to be made on satisfaction that it is necessary to detain to prevent acts prejudicial "to the economic life" of Malaysia. No such provision is to be found in the I.S.A.(S). As the International Mission point out,[10] this provision might enable the Malaysian Minister to order the detention of strike leaders and participants, in industries other than those falling within the category of "essential services" (already broadly defined in both Acts[11]) for whom detention is in any case already available. The Mission also expressed concern that detention powers on "economic life" grounds might be used disproportionately against Chinese Malaysians, as part of the Malaysian Government's policy of improving the economic position of the Malays and other bumiputras.[12]

Finally, we may note a difference in wording in the respective section eights. In the I.S.A.(S) the President, on satisfaction of the requisite matters, "shall" make an order (which may be a detention order or a restriction order), whereas in the I.S.A.(M) the Minister "may" make an order for detention or restriction in such circumstances. Nothing would seem to turn on this — although the Malaysian Minister apparently has a discretion not to make any form of order, it is surely inconceivable that no order would issue if he were satisfied of the relevant matters.

These powers to make detention orders are supplemented by arrest powers. Under I.S.A.(S) s. 74 and I.S.A.(M) s. 73 a police officer may:

> without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe
>
> (a) that there are grounds which would justify his detention under s. 8; and
>
> (b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Singapore (Malaysia) or any part thereof (or to the maintenance of essential services therein or to the economic life thereof).[13]

[9] The Indian Supreme Court has held that the expression "internal security" is broad enought to comprehend the concept of "public order" — *Abdul Aziz* v. *District Magistrate, Burdwan.* A.I.R. 1973 S.C. 770.

[10] Report, note 1 *supra,* at p. 17.

[11] I.S.A. (S), s. 8(1B) and Sched. 3; I.S.A. (M) s. 8(2) and Sched. 3.

[12] Report, at p. 18.

[13] The passage in brackets is applicable only in Malaysia.

The length of "detention pending enquiries" differs. In Singapore the initial detention is for twenty-four hours, or, with the authority of a police officer of, or above the rank of, assistant superintendent, forty-eight hours. However, this period may be extended for a further twenty-eight days if an officer of, or above the rank of, superintendent is satisfied that the necessary enquiries cannot be completed within forty-eight hours.[14] In Malaysia, on the other hand, the maximum period of detention pending enquiries is sixty days, rather than the total thirty days in Singapore.[15] In both cases a person detained "pending enquiries" under the Acts is deemed to be in lawful custody.[16]

(b) *Administrative Practices*

Having outlined the relevant legal provisions we may now turn to the administrative practices developed to apply them. The position in Singapore appears to be as follows.[17] The Internal Security Department has thirty days from the moment of arrest to decide whether to apply for a Detention Order. In the first and second week of an individual's detention the Department "does a great deal of checking; different levels of checks and counter-checks are enforced." Presumably the individual is also interrogated during this time. Following the checks and interrogation, the Director of the Department meets with his senior officers and the case officer to decide whether the individual should be served with a Detention Order or a Restriction Order, or whether he should be released.[18] If the decision is to seek a Detention Order, the case-file is put up to the Ministry of Home Affairs for consideration. This would probably be in the third week of detention. The Ministry conducts its own checks, and if satisfied that there is a case for detention, sends the case-file to Cabinet for discussion and deliberation at its weekly meeting. If the Cabinet approves the proposed detention, a Detention Order is drawn up and sent to the President for his approval and signature. Alternatively, the President may direct the Minister to issue the Order.[19]

Although no equivalent information on Malaysian practice is available, it seems unlikely that it would differ significantly. It is true that the power to issue Detention Orders resides in "the Minister", and so there would seem to be no legal requirement that the matter

[14] I.S.A.(S) s.74(3), (4).

[15] I.S.A. (M) s. 73(3). The International Mission received a number of complaints that the sixty-day limit had been exceeded in individual cases — Report, at p. 18.

[16] I.S.A. (S) s. 74(7); I.S.A. (M) s. 73(7).

[17] The information in this section is drawn from Ho Tai Yan, "Origins and Application of the Internal Security Laws of Singapore 1945-1977" (unpublished thesis, University of Singapore, 1979). The author based his thesis on information provided by the Director of the Internal Security Department, Ministry of Home Affairs, Singapore.

[18] For example, in 1976, 50 individuals were arrested. Of these, 23 were released after questioning, with a caution against continuing subversive activities; [17] were issued with Detention Orders; and 10 were handed over to the Malaysian authorities.

[19] The Minister under the I.S.A. (S) has no independent power of action or direction under s. 8, and so an Order containing a Ministerial direction to detain without Presidential authorisation for such direction has been held to be invalid — *Lim Hock Siew v. Minister of the Interior and Defence* [1968] 2 M.L.J. 219. The order in that case was additionally invalid in that it had been signed by a civil servant, rather than the President, the Minister, or the Secretary to the Cabinet.

be referred to Cabinet for approval, but the period of "detention pending enquiries" in Malaysia is up to sixty days, which would seem to give "the Minister" sufficient time to have the matter discussed at Cabinet level.

Once the Detention Order has been issued it must be served on the detainee "as soon as may be" after its making.[20] Additionally, the detainee must at the same time be given a statement setting out the grounds on which the Order is made and the allegations of fact on which the Order is based. The purpose of this is to enable the detainee to make best use of his entitlement to make representations against the Order to an Advisory Board, and he is also entitled to "such other particulars, if any, as he may in the opinion of the Minister reasonably require in order to make his representations."[21]

The function of the Advisory Board is to advise the Minister (the President in Singapore) as to whether the individual detainee should indeed be under detention. The Co-Chairman of the Malaysian Advisory Board insisted to the International Mission that the Board's recommendations were accepted by the Malaysian Minister, but the force of this is considerably lessened by the admission that it is rare for the Board to disagree with the initial decision.[22]

Three further points may be made about the Advisory Boards. The first relates to extension of Detention Orders beyond the initial maximum period of two years.[23] In Singapore there is no entitlement to make representations to an Advisory Board against such extensions, but in Malaysia such an entitlement exists where the extension is made on different or partly-different grounds from those which occasioned the initial detention.[24] Secondly there are now differences between the two systems in relation to the timescale within which the respective Advisory Boards must carry out their functions. In Singapore a detainee must make his representations within fourteen days of being issued with the Order,[25] and the Advisory Board must make its recommendations within three months of commencement of the detention. There is Malaysian authority, dating from the time when Malaysia had a similar provision, to the effect that failure by the Board to make recommendations within this period is sufficient to render the continued detention of the detainee after three months unlawful.[26] The position in Malaysia is now rather different, in that detainees may seek to make representations at any time, and it is the duty of the Advisory Board to make recommendations within three months of receiving the representations.[27] The reason for this has been explained thus:

> Obviously it would be unrealistic to expect the Board to conduct any meaningful enquiry and make suitable recommendations within three months of the detention if the detainee were to choose

[20] I.S.A. (S) s. 11(1); I.S.A. (M) s. 11(1). *Cf.* the position under the Malaysian Immigration Ordinance 1959, where there is no requirement that the order be served: *Andrew* v. *Supt. of Pudu Prisons, Kuala Lumpur* [1976] 2 M.L.J. 156.
[21] I.S.A. (S) s. 11(2)[b]; I.S.A. (M) s. 11(2)[b].
[22] Report, note 1 *supra,* at p. 20 and p. 38.
[23] This is permitted by I.S.A.(S) s. 8(1A) and I.S.A.(M) s. 8(7).
[24] I.S.A.(M) s.8(7).
[25] Ho Tai Yan, *op. cit.* note 17, *supra.*
[26] *Re Tan Boon Liat* [1977] 2 *M.L.J.* 108.
[27] Constitution (Amendment) Act 1976, s. 40.

> to make his representations, say, only two weeks before the expiring of his detention. Hence, the period was altered to one of the three months after the receipt of the representations by the Advisory Board, and this would, no doubt, encourage a detainee to make his representations as early as he could.[28]

This situation could not, of course, arise in Singapore because of the requirement that the detainee submit his representations within the first fourteen days of his detention.

Finally the Advisory Boards under each system have a continuing review function while a Detention Order remains in force.[29] The object of this is to make recommendations as to whether the continued detention of an individual is necessary. In Malaysia, individuals' cases must be considered bi-annually. This is done on the basis of reports obtained during a "Rehabilitation Process" which is described in detail in the International Mission's Report.[30] In Singapore, an individual's case is periodically reviewed:

> For the first six months only the Advisory Board makes a report but thereafter both the Internal Security Department and the Advisory Board will review the case independently of each other before the end of each calendar year. The I.S.D. may or may not accept the recommendations of the Advisory Board.... If the detainee is not released at the end of year one, then the whole procedure described above is repeated again at the end of year two. If the I.S.D. still thinks that the detainee is stubborn and refuses to recant and be rehabilitated, then it will apply for a reneway of the Detention Order which is renewable every two years.[31]

So, to summarise the position thus far, an individual may initially be arrested under I.S.A,(S) s. 74(1) or I.S.A.(M) s.73(l) and detained for up to thirty days (Singapore) or sixty days (Malaysia) pending enquiries. During that period an administrative decision must be made as to whether a Detention Order should issue, This decision will effectively be made at ministerial, and in all probability at Cabinet, level. An order may provide for detention for any period up to two years, but may be renewed. A detainee is entitled to make representations to an Advisory Board against his detention, but in Singapore there is no such entitlement in respect of renewals of Orders, whereas in Malaysia there is a limited entitlement. During the currency of the Detention Order the Advisory Board is required periodically to review individual cases, and to make recommendations as to whether detention should continue.

(c) *The Constitutional Context*

It only remains in this section to set these legal provisions and administrative practices in their wider constitutional context. Article 5(1) of the Malaysian Constitution (Article 9(1) of the Singapore Constitution is in the same terms) provides: "No person shall be deprived of his personal liberty save in accordance with law."

[28] Tan Sri Dato Haji Mohd. Salleh bin Abas, [1977] 2 M.LJ. Supp. ms xxxiv at p. xl.
[29] I.S.A.(S) s. 13; I.S.A.(M) s. 13.
[30] Report, at pp. 21-24.
[31] Ho Tai Yan, *op. cit.,* Appendix E.

Article 149 of each Constitution permits the respective Parliaments to legislate incompatibly with (inter alia) this Article on the recital that a substantial body of persons has undertaken or threatened to undertake the subversive activities mentioned in Article 149. Nevertheless, if either Parliament utilises its Article 149 power to provide for preventive detention, Art. 151 of each constitution stipulates that certain procedures must be followed in effecting detentions. The two Internal Security Acts under consideration here were enacted on the authority of Art. 149, and the procedures previously referred to — provision of grounds of detention and allegations of fact, and opportunities for making representations—meet the requirements of the common Art. 151.

A constitutional remedy for unlawful deprivation of liberty is provided by incorporating into the respective constitutions an entitlement to seek a writ of habeas corpus. Article 5(2) (Malaysia) and Art. 9(2) (Singapore) provide:

> Where a complaint is made to the High Court or any Judge thereof that a person is being unlawfully detained, the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court, and release him.

Habeas corpus has been well described by Abdoolcader J. in *Yeap Hock Seng @ Ah Seng* v. *Minister for Home Affairs, Malaysia:*

> Habeas corpus is a high prerogative writ of summary character for the enforcement of this cherished civil right of personal liberty and entitles the subject of detention to a judicial determination that the administrative order adduced as warrant for the detention is legally valid....[32]

Provision is made in the respective Criminal Procedure Codes for applications for writs of habeas corpus,[33] and applications may be made in accordance with R.S.C. Order 54 (Singapore) and R.H.C. Order 54 (Malaysia).

The procedure on applications for writs of habeas corpus should be briefly described.[34] The prisoner or detainee initiates the procedure by making an *ex parte* application, supported by affidavit evidence raising some question or doubt about the validity of his detention. Given the fact that the application and affidavit may be made under conditions of considerable difficulty, this need not be a very detailed or extensive pleading. If the applicant succeeds in raising some issue of doubt which requires further investigation, the judge adjourns the matter to give the detainer an opportunity to justify the detention. This would normally be done, in the present context, by production of the Detention Order.

At this point it becomes difficult to describe the correct procedure without assuming the validity of the argument soon to be presented, for it is an element of that argument that the courts in Singapore and Malaysia have adopted an incorrect approach to questions of burdens of proof, and further that this (as it is submitted) incorrect attitude

[32] [1975] 2 M.L.J. 279.
[33] C.P.C. (Singapore) Cap. 33; C.P.C. (Malaysia) Cap. 36.
[34] R.J. Sharpe, *The Law of Habeas Corpus,* Chap. 10.

goes some way to explaining the unduly restrictive approach to applications for habeas corpus earlier referred to. It will therefore be sufficient if the argument to be presented is outlined here. It is the practice of both Singaporean and Malaysian courts to assert that once a public authority has prima facie justified the detention by production of the Detention Order, the burden of proof then shifts to the detainee to establish some further invalidity in his detention. It will be argued that this type of assertion exhibits a failure to appreciate the distinction between types of burden of proof, a distinction which is crucial to habeas corpus. The contention will be that once the Detention Order is produced, an *evidential* burden, the nature of which will be described, falls upon the applicant to cast some further doubt on the validity of the detention, but that if the applicant succeeds in satisfying this requirement, a *legal* burden of proof falls upon the public authority to show that the detention is valid. The argument may be summarised by saying that the local courts require an applicant to establish the invalidity of his detention, whereas the position ought to be that the public authority has to show that the detention is valid.

One final point may be made about habeas corpus applications. Unlike the other prerogative orders, it is not a remedy of last resort. It is therefore of no significance that some form of alternative remedy, such as the possibility of making representations to the Advisory Board, is available, for this will not bar the issue of the writ.[35] The contrary was suggested in *Re Choo Jee Jeng*.[36] One cannot improve on Professor Sheridan's comment:

> This mean that a person who thinks he is wrongly imprisoned must sit in detention and wait until a body having no concern with the validity of the original imprisonment orders his release.... Never before has it been suggested that a person who can establish that there is no lawful authority for his imprisonment must be denied habeas corpus because at some later date some other adjudicating authority may decide to release him for some other reason.[37]

PART III — DETENTION DECISIONS: THE PRINCIPLES OF REVIEW

In Parts III and IV I shall be concerned to examine the principles of judicial review applicable on applications for habeas corpus. As Dr. Sharpe has pointed out:

> ... the use of habeas corpus where the liberty of the subject is restrained on account of an order made by the executive branch of government... is but one aspect of the question of the review of executive action by the courts. The issue here is simply the extent to which the courts should control the exercise of discretionary powers. Broad discretionary powers may be conferred which affect even such basic rights as personal freedom, but the judges can control the exercise of executive discretion when they

[35] Sharpe, *op, cit.* at pp. 56-7, and *Yeap Hock Seng's* case, note 32 *supra.*
[36] (1959) 25 M.L.J. 217.
[37] (1960) 23 M.L.R. at p. 79. The comment relates to the procedure then operating under Preservation of Public Security Ordinance 1955 (Singapore), whereby the final decision on detention was taken not by a Minister but by an Appeal Tribunal. The case for barring habeas corpus in favour of an alternative remedy would be even weaker where the "remedy" is the possibility of making representations to an Advisory Board having no power to make binding decisions.

> wish to do so by defining the lawful limits of the power granted, and by making certain that the official has acted within those limits.[38]

In this Part I outline the principles of review as they are normally applied in applications for one of the prerogative orders of certiorari, prohibition or mandamus, concentrating on the scope of review of the factual basis of administrative decisions. In Part IV I consider how those principles should be applied when review is sought by way of application for habeas corpus.

(a) *Judicial Review*

Administrators who are in receipt of statutory discretionary powers must, if they propose to exercise such powers, ask themselves two questions. First, do the preconditions laid down by statute before the powers may be exercised themselves exist? If they do, the second question is, how should the powers be exercised? In the context of the Internal Security Acts, the precondition which must be met before the President (or Minister, in Malaysia) may exercise his powers is that he "is satisfied" of the matters set out in the respective section eights. If he is so satisfied, the second question comes into play — how are the discretionary powers to be exercised? Should he, for example, order that a given individual be subject to restriction rather than detention[39]—or, if detention is decided upon, for how long and under what conditions?

A court exercising judicial review is equally concerned with these two questions, as Lord Sumner observed in a well-known dictum on the supervisory role of the courts: "That supervision goes to two points: one is the area of the inferior jurisdiction, and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise."[40]

In this paper I am concerned only with the first issue, but the possibility of review based on the second question should not be forgotten — one possible such situation might be where a detainee is able to show (and this, admittedly, will be very difficult to prove) that the Minister (President), once satisfied of the requisite matters, decided to order detention rather than restriction on irrelevant considerations such as personal antipathy to the detainee.

Returning to the first issue, in the context of the Internal Security Acts the "qualifications and conditions" of exercise of the power to arrest under I.S.A.(S) s. 74(1) and I.S.A.(M) s. 73(1) are that a police officer "has reason to believe" certain matters. The equivalent condition for exercise of the power to order detention is that the President (Minister) "is satisfied" of certain matters. What supervisory role repose in the courts in respect of these conditions? It has long been established as a principle of administrative law that an administrative authority cannot, by *incorrectly* finding that the conditions for the

[38] Sharpe, *op. cit.* note 34 *supra,* at p. 89.
[39] As previously mentioned, there is, theoretically, a third possibility in Malaysia — that the Minister may choose not to make any form of order.
[40] *R. v. Nat Bell Liquors Ltd.* [1922] 2 A.C. 128 at p. 156.

existence of power are satisfied, thereby give itself jurisdiction to act.[41] It is the duty of the courts to ensure that the necessary preconditions are indeed satisfied — the administrative authority's *ipse dixit* ought not to suffice. (Of course it further follows that if the reviewing court finds that the necessary preconditions were not satisfied, any decisions taken by the administrative authority are invalid and a nullity). The difficulty, however, in the present context is that the preconditions to the exercise of arrest and detention are expressed in terms that seem to permit a degree of executive judgment. Does not this significantly reduce, indeed obliterate, the powers of the courts to review administrative decisions on the existence of any necessary preconditions?

(b) *Liversidge* v. *Anderson*

In *Liversidge* v. *Anderson*[42] the House of Lords held that it did. The facts of that case are too well known to require extensive repetition, but it will be remembered that the decision, in an action for damages for false imprisonment, turned on the question of whether the court would review the factual basis on which the British Home Secretary claimed to have "reasonable cause to believe" that Liversidge was "of hostile origin or associations" under the Defence (General) Regulations 1939, reg. 18B. The majority of their Lordships refused to do so, over the vigorous dissent of Lord Atkin. In view of subsequent developments, little purpose would be served by extensive quotation from the judgments — it suffices to say that the effect of the majority's decision was that: "The question for the courts was not whether the belief was justified, but whether it existed."[43] Provided that the Minister indicated in his affidavit that he had the required belief, the court's role was limited to ensuring that this was expressed in good faith (and of course there is no conceivably effective method of testing that).

The approach in *Liversidge* has been repeatedly applied by courts in Singapore and Malaysia when they have been called upon to review detention decisions. Two examples from each jurisdiction may be cited. In *Re Choo Jee Jeng*[44] the detainee sought habeas corpus in respect of a detention under s. 3(1) of the Singapore Preservation of Public Security Ordinance 1955, which was in the same terms as s. 8(1) of I.S.A.(S) now is. The condition precedent to detention was that the Governor in Council was to be "satisfied" of certain matters, and it was contended for the detainee that:

> if it could be shown that there were no grounds on which he could be satisfied, the court might infer either that he did not honestly form that view or that, in forming it, he could not have applied his mind to the relevant facts.[45]

The judge summarily rejected this argument:

> In my opinion, as s. 3 (1) of the (Ordinance) imposed a subjective test, it was not open to the court to inquire whether in fact the

[41] *Bunbury* v. *Fuller* (1853) 9 Ex. 111; *R.* v. *Income Tax Special Commissioners* (1888) 21 Q.B.D. 313.
[42] [1942] A.C. 206.
[43] Heuston, "*Liversidge v. Anderson* in Retrospect", (1970) 86 L.Q.R. 33, at p. 34.
[44] (1959) 25 M.L.J. 217.
[45] At p. 219.

> Governor had reasonable grounds for being satisfied that the detention was necessary: *Liversidge* v. *Anderson.*

The same point is made in the Malaysian case of *Yeap Hock Seng* v. *Minister for Home Affairs, Malaysia*,[46] a case arising under the Emergency (Public Order and Prevention of Crime) Ordinance 1969:

> It is of course settled law that the subjective determination of the Minister is not justiciable.... The court cannot be invited to undertake an investigation into the sufficiency of the matters upon which the satisfaction of the Minister purports to be grounded....[47]

In *Re Ong Yew Teck*[48] a case of arrest and detention under the Singapore Criminal Law (Temporary Provisions) Ordinance 1955, and *Re P.E. Long and Others*,[49] arising under the 1969 Malaysian Ordinance, attempts were made to challenge the initial arrest of the detainees, on the ground that the arresting officers had no "reason to believe" that the specified matters existed. In *Ong Yew Teck* the judge concluded that the Ordinance:

> imposes a subjective test, and as (the policeman) honestly supposed that he had reason to believe the required thing, this court cannot go behind his statement that he had such reason to believe.[50]

Long's case produces a similar result:

> ... the discretion to decide on 'reason to believe' that there are grounds to justify detention must necessarily rest with the officer arresting and the courts cannot go behind his decision.[51]

These cases follow the *Liversidge* reasoning perfectly correctly. Nevertheless, they must now be seen in the context of a consistent rejection of that reasoning by higher British courts over the last thirty years. In *Nakkuda Ali* v. *Jayaratne*,[52] a case from Ceylon, the Privy Council was concerned with an administrative act (the withdrawal of a licence), the condition precedent to which was "reasonable grounds to believe" certain matters. The Privy Council distinguished *Liversidge* observing that:

> it would be a very unfortunate thing if the decision (in *Liversidge)* ... came to be regarded as laying down any general rule as to the construction of such phrases.

When included in statutes, such words:

> must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power. But if the question whether the condition has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect nothing.... Their Lordships therefore treat the words... as imposing a condition that there must in fact exist such reasonable grounds.[53]

46 [1975] 2 M.L.J. 279.
47 At p. 282.
48 (1960) 26 M.L.J. 67.
49 [1976] 2 M.L.J. 133.
50 At p. 69.
51 At p. 135.
52 [1951] A.C. 66.
53 *Ibid*., pp. 76-7.

It is to be noted that *Nakkuda Ali* did not overrule *Liversidge* — this would not have been possible, since the Privy Council cannot overrule the House of Lords — but merely limited its application. In *Re Ong Yew Teck* the court was pressed with the dicta from *Nakkuda Ali,* as indicating an approach preferable to that in *Liversidge,* but, as we have seen, the court (for reasons which will be examined in the next Part) concluded that the satisfaction of the condition precedent was wholly within the arresting officer's subjective judgment, and not subject to judicial review.[54]

Following the implicit disapproval of *Liversidge* in *Nakkuda Ali,* little attempt has been made to apply it. In 1964 Lord Reid described it as a "very peculiar decision",[55] and in 1972 the Court of Appeal implied approval of the then Attorney-General's decision to rely on Lord Atkin's dissenting judgment in support of contentions advanced for the Government.[56] In 1980 the House of Lords explicitly preferred the *Nakkuda Ali* approach,[57] and Lords Diplock and Scarman disapproved the decision in *Liversidge*,[58] a view which Lord Scarman has recently re-iterated.[59] In the words of Lord Scarman in the *Rossminster* case: "The ghost of *Liversidge* v. *Anderson* ... need no longer haunt the law. It was laid to rest... in *Nakkuda Ali* v. *Jayaratne*... and no-one in this case has sought to revive it. It is now beyond recall."[60]

(c) *"Satisfaction" Preconditions*

It must immediately be admitted, however, that this wholesale disapproval of *Liversidge* might be thought to prove too much, since its concomitant is expressions of approval of Lord Atkin's dissenting speech in that case.[61] This presents a problem because Lord Atkin, no doubt in his anxiety to emphasise the reviewability of "reasonable cause to believe" preconditions, contrasts such clauses with those where the precondition is expressed in the subjective "if the Minister is satisfied" form. As to the latter: "In all these cases (where there are such clauses) it is plain that unlimited discretion is given to the (Minister), assuming as everyone does that he acts in good faith."[62]

In other words, in contrast with "reasonable cause to believe" clauses, the court's role of reviewing the factual basis of the Ministerial "satisfaction" is minimal or non existent, for the discretion is "unlimited". This would, of course, be of crucial importance in the

[54] As has been pointed out, this preference for *Liversidge* over *Nakkuda Ali* raises important questions as to the relative authority of House of Lords and Privy Council cases in Singapore and Malaysia. See John Tan Chor-Yong, "Habeas Corpus in Singapore" (1960) 2 Mal. L.R. 323 at p. 330.

[55] In *Ridge* v. *Baldwin* [1964] A.C. 40, at p. 73.

[56] In *Secretary of State for Employment* v. *A.S.L.E.F. (No. 2)* [1972] I.C.R. 19, especially at p. 74.

[57] *R.* v. *Inland Revenue Commissioners, ex p. Rossminster* [1980] A.C. 952.

[58] [1980] A.C. at 1011: "...the time has come to acknowledge openly that the majority of this House in *Liversidge* v. *Anderson* were expediently and, at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right." (Lord Diplock).

[59] In *R.* v. *Home Secretary, ex p. Khawaja* [1983] 2 W.L.R. 321, at 343. See also Lord Bridge at 354.

[60] [1980] A.C. at 1025.

[61] See, for example, Lord Diplock, note 58 *supra.*

[62] [1942] A.C. at 233.

context of the Internal Security Acts, where the precondition to the exercise of the power to detain is expressed in the subjective "satisfaction" form. Acceptance of Lord Atkin's speech as the final word on the subject would mean that judicial review of the factual basis to administrative decisions would be limited, in the context of the Internal Security Acts, to whether an *arresting officer* had "reason to believe" specified matters.[63] It would not, on this view, be open to a court to review the factual basis of a *ministerial* assertion of "satisfaction" prior to authorising detention. Yet it is the latter type of decision which is, in practice, far more important, if only because the Minister can order detention for up to two years.[64]

It is submitted that, notwithstanding the repeated expressions of approval of Lord Atkin's judgment in *Liversidge,* his Lordship's speech is not the final word on the court's role of review of the factual basis to Ministerial "satisfaction". Reliance may be placed upon another line of cases dealing specifically with "satisfaction" (or other subjectively worded) preconditions. In the *A.S.L.E.F.* case,[65] the relevant statute authorised a Government Minister to order a strike ballot if it appeared to him that certain preconditions were fulfilled. The trade union whose members were taking industrial action challenged a Ministerial decision to order such a ballot on the ground that there was no evidence on the basis of which it could "appear" to the Minister that the preconditions were fulfilled. On behalf of the Minister it was argued, relying on Lord Atkin's speech in *Liversidge,* that this was a wholly subjective decision, not subject to review. The Court of Appeal rejected that contention, Lord Denning saying that:

> … if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law, it may well be that a court would interfere; but when he honestly takes a view of the facts or the law which could reasonably be entertained, then his decision is not to be set aside simply because thereafter someone thinks that his view was wrong.[66]

Because the Minister may only reach a decision on the facts which may "reasonably be entertained", it will be necessary for the court to review the factual basis of the Minister's decision.

That this is the correct interpretation of Lord Denning's judgment is confirmed by Lord Wilberforce's explanation and expansion of it in *Secretary of State for Education* v. *Tameside M.B.C.* Dealing with a pure "satisfaction" precondition,[67] his Lordship observed:

[63] Furthermore, even review of these decisions might be rendered impossible by I.S.A. (S) s. 74(7) and I.S.A. (M) s. 73(7), by which an individual arrested under the section is deemed to be in lawful custody. See *Lee Mau Seng* v. *Minister for Home Affairs, Singapore* [1971] 2 M.L.J. 137; Daw, "Preventive Detention in Singapore — A Comment on the Case of Lee Mau Seng" (1972) 14 Mal. L.R. 276 at 281-2; and *cf. Greene* v. *Secretary of State for Home Affairs* [1942] 1 K.B. 87 at 116-7 (C.A.).

[64] Another way of putting this would be to say that a court could, subject to the point raised in note 63, review the factual basis of decisions in circumstances such as those in *Re Ong Yew Teck* and *Re Long,* but not in cases like *Re Choo Jee Jeng* and *Yeap Hock Seng,* previously mentioned.

[65] *Secretary of State for Employment* v. *A.S.L.E.F. (No. 2)* [1972] I.C.R. 19.

[66] [1972] I.C.R. 19 at p. 57.

[67] Education Act 1944 (U.K.), s. 68.

> This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the courts must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge....[68]

(citing Lord Denning's speech in the *A.S.L.E.F.* case as authority for this proposition). Here is a most clear assertion of a reviewing court's power, indeed its duty ("must inquire"), to investigate the factual basis to a ministerial claim of "satisfaction" as to specified matters.

From this lengthy citation of authority it is submitted that the following proposition can be extracted. Where a public authority or Minister is statutorily authorised to exercise powers subject to preconditions such as "satisfaction", "appearance", "reasonable belief" or "reasonable grounds", it is open to a reviewing court, where the exercise of power is challenged, to examine the factual basis on which the authority or Minister concluded that it or he was entitled to act. If the court, on review of the factual basis, concludes that no reasonable authority or Minister, properly advised, could have decided that the necessary preconditions were satisfied, then it may hold that any official action taken was invalid in law and a nullity.

This proposition is subject to only one qualification, that stated by Lord Wilberforce in the *Tameside* case — the situation where the precondition involves "a matter of pure judgment", not dependent upon factual considerations at all. His Lordship did not elaborate, nor give examples of this category. It is, however, necessary to ask whether detention decisions under the respective Internal Security Acts fall within this category — for if they do, all of the foregoing argument as to principles of review becomes irrelevant. It is submitted that detention decisions cannot be so categorised. The question for the Minister (President) in each case is whether he is satisfied that it is necessary to order the detention of a *given, named individual,* to prevent that individual from acting prejudicially to Malaysia (Singapore) contrary to s. 8 of the applicable I.S.A. In order to reach that decision he must have some factual material as to the given individual's propensity to act in that manner. It is, of course, a matter of judgment for him to determine whether that factual material justifies detention, restriction, or, in Malaysia, no action at all. Nevertheless, the fact that the Internal Security Departments gather the evidentiary material with such thoroughness is indicative that the final decision is not "a matter of pure judgment", in which the Minister is unencumbered with a case-file of evidence.

If this is right, the Minister's decision must be based on his evaluation of the facts. Where there are facts, so, as we have seen,

[68] [1977] A.C. 1014 at p. 1047.

may there be judicial review. The question for the reviewing court will be, was there factual material on which the Minister could reasonably conclude that detention of this individual was necessary to achieve the specified purposes? If there was such evidence, the detention is valid (even though the court itself, in evaluating the evidence, might not have thought that such detention was necessary); if there was no such sufficient evidence, the detention is invalid and the detainee should be released.

(d) *Justification for this View*

It may, however, be argued that these cases, important though they may be in their various contexts, are not really relevant to elucidating the scope of judicial review under the Internal Security Acts. It has, for example, repeatedly been asserted that the scope of review available in any given case depends very much on the interpretation of the statute in issue, and the particular context in which the public authority is claiming to act. However, law is not a wilderness of single instances: "While each statute falls to be interpreted on its own language and in its own context, the interpretation can only take place in the broader context of constitutional and administrative law."[69]

An illustration of this proposition is to be found in *A-G for St. Kitts* v. *Reynolds*[70] where the Privy Council, faced with a "satisfaction" clause as a condition precedent to preventive detention, relied on the relevant Constitution's protection of personal liberty provision to infer a scope for judicial review of *Tameside* proportions. Indeed, their Lordships expressed the view that any other construction would amount to conferring dictatorial powers on the Governor, whose satisfaction was the necessary precondition for detention.[71] It is of course the case that equivalent personal liberty protections are to be found in the Malaysian and Singaporean Constitutions respectively, and habeas corpus is entrenched for enforcement of these protections. It is submitted that this constitutional context is crucially important to determining the scope of review of detention decisions, just as the relevant Constitution was crucial in the *St. Kitts* case. My argument here is quite simply that *Tameside* (and the other cases referred to) demonstrate a scope for review of detention decisions which best accords with the protection of fundamental liberties guaranteed by the Constitutions of Malaysia and Singapore. The consequence of any other view would be that personal liberty is granted by one (Constitutional) hand but liable to be taken away by another (Executive) hand with the minimum of supervision or control.[72] To quote Lord Diplock in an admittedly slightly different context: "the purported entrenchment... would be little better than a mockery."[73]

Furthermore, it is worth taking a moment to consider why, quite independently of constitutional or other legal authority, the extensive

[69] Sharpe, *op. cit.* n. 34 *supra,* at p. 102.
[70] [1980] A.C. 637.
[71] At p. 656.
[72] Given the prevailing political situations in both Singapore and Malaysia, parliamentary supervision of ministerial decisions is not likely to provide a significant alternative to judicial review. See generally, M. Puthucheary, "Ministerial Responsibility in Malaysia", Ch. 6 of *The Constitution of Malaysia 1957-77,* edited by Tun Suffian, Trindade and Lee.
[73] *Ong Ah Chuan* v. *Public Prosecutor* [1981] 1 M.L.J. at p. 71.

review advocated here *ought* to represent the law. The answer lies in human error, the likelihood that Ministers may occasionally make mistakes. Judicial review provides a mechanism whereby some, at least, of those mistakes may be detected and the innocent be set free. The history of the use of preventive detention by the British Government during the Second World War illustrates both how such mistakes may occur,[74] and how the innocent detained may be left helpless if the courts, *Liversidge* — like, wash their hands of the matter. In the *Liversidge* case itself, the material on which the Home Secretary expressed his belief that the detainee was "of hostile origins or associations" consisted of an accusation that he had been engaged in commercial frauds; an accusation of having been in touch with persons suspected of being enemy agents; and an accusation of being the son of a Jewish rabbi. Heuston's comment is opposite: "If indeed these were the grounds for Anderson's belief that it was necessary to intern Liversidge, it was fortunate for the executive that the courts held that they had no power to inquire into the matter."[75]

In the *Greene*[76] case, decided at the same time as *Liversidge* on the same reasoning, habeas corpus was denied to an applicant, who was a Labour Party member and an active Quaker, on the ground of his Nazi sympathies. These had been "identified" by a paid informer of the Intelligence Service, M.I.5, who subsequently admitted that there had been no truth whatsoever in any of his allegations.[77] This reality behind the two cases should be born in mind when Malaysian and Singaporean courts rely, as they so often do, on these authorities to justify a refusal to review.

(e) *Local Cases Considered*

If the foregoing propositions of law are accepted as correct, how does this affect the local authorities? The leading cases in each jurisdiction are, respectively, *Lee Mau Seng* v. *Minister for Home Affairs, Singapore,*[78] and *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri.*[79] In both cases it was argued that the Minister (President) had reached his decision of "satisfaction" *mala fides,* and that therefore the court should hold that the necessary precondition to detention had not been fulfilled. It is unfortunate that the argument was presented in terms of "mala fides", for this phrase may easily occasion misunderstanding.[80] As Megaw L.J. has pointed out, an allegation of had faith: "always involves a grave charge. It must not be treated as a synonym for an honest, though mistaken, taking into consideration of a factor which is in law irrelevant."[81]

74 See C.K. Allen, "Law and Orders" (3rd ed.), pp. 364-378, and the case of Mr. Hamilton Knight, recorded in Appendix 1 of the First edition of the same work.

75 *"Liversidge* v. *Anderson* in Retrospect", (1970) 86 L.Q.R. 33, at p. 66.

76 [1942] A.C. 284.

77 N. West, "A Matter of Trust: M.I.5 1945-1972", pp. 36-7. It is noteworthy that even Lord Atkin was nevertheless satisfied that the detention in this case was lawful — see *Liversidge* v. *Anderson* [1942] A.C. 206 at pp. 246-7.

78 [1971] 2 M.L.J. 137.

79 [1969] 2 M.L.J. 129.

80 It is submitted that such a misunderstanding vitiates the force of Ms. Daw's analysis of *Lee Mau Seng,* since she interprets counsel's argument as alleging an *intentional* abuse of power. See Daw, *op. cit.* note 63 *supra,* at p. 288 *et seq.* As stated in the text, this was not in fact counsel's contention.

81 *Cannock Chase D.C.* v. *Kelly* [1978] 1 A.E.R. 152, at p. 156.

The reports of the two cases make clear, however, that it was the latter type of error being alleged here — that there had been inadequate consideration, on the part of the authorities, of the circumstances of the individual case, that a decision had been reached in a casual and cavalier fashion.[82] In the words of Lord Wilbeforce in *Tameside,* the question was whether the administrative authority had reached its decision "upon a proper self-direction as to (the) facts"

In both cases it was held that the court could not engage in such an inquiry, as this would be incompatible with the "subjective theory" whereby the Minister (President) has exclusive power to declare his "satisfaction". In *Lee Mau Seng,* Wee Chong Jin C.J. said:

> In my view the logical result of the argument... would be that a court can substitute its own judgment for the subjective satisfaction of the President acting in accordance with the advice of the Cabinet, which satisfaction the Act provides is to be the sole condition of a lawful detention.[83]

With respect this is difficult to understand. The function of a court on judicial review is to examine the *legality* of a Ministerial decision, not its merits. No question of substitution of judgment can arise, since the court is concerned not with whether the Minister reached the "right" decision on the "satisfaction" question, but whether he reached a decision which was legally possible (that is, with whether there was material on which he could reasonably reach the conclusion that he did).[84] In any cases, as we have seen, the "subjective theory" enunciated in *Liversidge,* and explicitly relied on in *Kamm Singh,* is no longer good law, and insofar as these two decisions depend upon that authority, they should not now be followed.

A further consequence flows from the rejection of the "subjective theory". In both of these cases it was held that the courts had no power to investigate the legality of a given detention by reference to the observance or non-observance of the procedural requirement that the detainee be given allegations of fact sufficiently certain to enable him to make representations to an Advisory Board.[85] In *Karam Singh,* Suffian F.J. said that:

> ... when the power to issue a detention order has been made to depend on the existence of a state of mind in the detaining authority, which is purely a subjective condition, so as to exclude a judicial inquiry into the sufficiency of the grounds to justify the detention, it would be wholly inconsistent to hold that it is open

[82] *Karam Singh* [1969] 2 M.L.J. 129 at p. 144; *Lee Mau Seng* [19711 2 M.L.J. 137 at p. 146.

[83] [1971] 2 M.L.J. 137 at p. 146. For a statement to similar effect in *Karam Singh,* see Ali F.J. [1969] 2 M.L.J. 129 at p. 157.

[84] The matter, it is submitted, was accurately stated in R. v. *Board of Control, ex p. Rutty* [1956] 2 Q.B. 109, in the context of review of a magistrate's decision to order detention of an alleged mental defective: "On an application for a writ of habeas corpus this court does not sit as a court of appeal. It will not re-hear the matters which were to be decided by the judicial authority. The court will, however, admit affidavit evidence to decide whether there was any evidence before the judicial authority such as would justify his finding that he had jurisdiction to deal with the patient and to make an order."

[85] *Cf.* the Indian position — see Jain, "Judicial Creativity and Preventive Detention in India: An Aspect of Indian Constitutional and Administrative Law", (1975) 2 Journal of Malaysian and Comparative Law 261 at pp. 295-6.

to the court to examine the sufficiency of the same grounds to enable the person detained to make a representation.[86]

Quite apart from the fact that the process of reasoning exhibits a non-sequitur from the initial assumption (since the court would be concerned not with the "sufficiency" of the expressed grounds but with their intelligibility), once the premise of the argument is refuted the conclusion falls. Since, as we have argued, the power to detain is not dependent upon a "purely subjective condition" but may be the focus of judicial review, there is no objection in principle to the courts ensuring that allegations of fact against detainees are expressed in a form sufficient to enable them meaningfully to exercise their constitutional right to make representations. Indeed, if a Minister issued the factual allegations in such vague terms as to frustrate the detainee's ability to exercise his representation rights, such an action in itself might well be regarded as ultra vires.[87]

In summary, then, I have in this Part sought to establish that the initial ministerial decision of "satisfaction" may be subject to judicial review, in that the courts can examine the factual basis to the ministerial decision and consider whether that basis is such that the Minister could reasonably have come to the conclusion that he did. These are the principles normally applicable when review is sought by way of application for the prerogative orders of certiorari, prohibition and mandamus. Intimately connected with these principles are, however, problems concerned with burdens of proof, and it is in this context that special consideration must be given to habeas corpus applications. It is to these issues that I now turn.

PART IV — HABEAS CORPUS APPLICATIONS

(a) *The Burden of Proof*

In the normal case, an applicant for one of the prerogative orders bears the burden of proof that a public authority has acted ultra vires. This is no more than an application of the general principle that he who alleges must prove. Applied to habeas corpus proceedings, this principle would mean that once the public authority produced a Detention Order in due form, the burden of proof would then fall upon the applicant to show that the detention was nevertheless invalid, by reference to the tests referred to in the last Part. As we shall see, this is precisely the conclusion which has been reached by the local courts, with the consequence that it has been extremely difficult for detainees to establish the illegality of their detentions.

It is submitted that in operating in this manner, local courts have failed to take account of the particular nature of habeas corpus proceedings. It must be admitted that they have not been alone in this, for in a series of cases English courts — including the House of Lords[88] — have committed the same error. Nevertheless the true position has now been re-established in the seminal *Khawaja*[89] decision, and the

[86] [1969] 2 M.L.J. 129 at p. 150. See also *Lee Mau Seng* [1971] 2 M.L.J. 137 at p. 145.
[87] *Padfield* v. *Ministry of Agriculture* [1968] A.C. 997.
[88] *R.* v. *Home Secretary, ex p. Zamir* [1980] A.C. 930.
[89] *R.* v. *Home Secretary, ex p. Khawaja* [1983] 2 W.L.R. 321, in which the House of Lords overruled its own previous decision in *Zamir's* case, note 88 *supra.*

way is now open for a much more "activist" approach to judicial review of administrative decisions on habeas corpus applications. This has been achieved by the simple expedient of putting the burden of proof in habeas corpus cases back on to the public authority, rather than on the detainee.

Although habeas corpus is a writ of great antiquity,[90] it did not attain its modern form as a mechanism for securing the liberty of the subject until the seventeenth century, when its application was one aspect of the constitutional struggle between the English King and his Parliament.[91] Following Parliament's victory the position of the writ was secure, but in the following years it became clear that its efficacy was significantly limited by the common law rule against "controverting the return" — as Dr. Sharpe explains:

> The common law rule... was that the judges were bound by the facts as set out in the return[92] unless there was the verdict of a jury or a judgment on demurrer in an action for false return which determined the facts to be otherwise.[93]

It was to remedy this defect that the Habeas Corpus Act 1816 was passed. The effect of this has been explained by Lord Scarman:

> The great statute of 1816... substantially extended the scope of the process. It conferred upon the judges the power in non-criminal cases to inquire into the truth of the facts contained in the return.... The court's duty is to examine into the truth of the facts set forth in the return: the section thereby contemplates the possibility of an investigation by the court so that it may satisfy itself where the truth lies.[94]

But this was not all, for Lord Scarman (with whom Lords Fraser and Bridge agreed) drew attention to the fundamental principle: "that in English law every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act."[95]

Thus, these two principles, taken together, mean that it is for the public authority to establish the legality of the detention, while the court's duty is to satisfy itself that the factual basis for the detention is as the public authority claims it is.

Lord Scarman then explained the appropriate procedure for habeas corpus applications.

> The writ issues as of right summoning into court the person in whose custody the subject is. It gets the custodian into court: but discharge from custody is not possible unless 'the party hath a probable cause to be delivered' as Vaughan C.J. put it (in *Bushell's case* 1670 T.J. 13, p. 132). This remains the law today...

90 Sharpe, *The Law of Habeas Corpus,* Ch. 1.
91 *Darnel's Case* (1627) 3 St. Tr. 1 (also known as *The Five Knights' Case).*
92 The "return" in the present context would be the Minister's Detention Order.
93 *Op.cit.*, note 90 *supra* at p. 61.
94 [1983] 2 W.L.R. 321 at 342-3.
95 Quoting Lord Atkin in *Liversidge* v. *Anderson* [1942] A.C. at 245. See also *Eshugbayi Eleko* v. *Government of Nigeria* [1931] A.C. 662 at 670, and Blackstone's Commentaries, Bk III, p. 131 (12th ed.).

> the party seeking relief carries the initial burden of showing he has a case fit to be considered by the court.[96]

This burden his Lordship felt would be satisfied by the establishment of a prima facie case.[97] Once this is achieved, the burden reverts to the public authority to justify the legality of the detention, which may be achieved on a balance of probabilities, save that, given that personal liberty is in issue, "the degree of probability required will be high."[98] It is, therefore, of crucial importance to distinguish between the "evidential burden"[99] on the applicant to establish a prima facie case that his detention is unlawful, and the "legal burden"[1] on the public authority to establish on a high degree of probability that the detention is lawful—and in respect of the latter it is the duty of the court to satisfy itself as to the truth of the facts alleged by the public authority in support of its case.

Khawaja is clearly a decision of the first importance in the law of habeas corpus, but is it to be regarded as of persuasive authority in Singapore and Malaysia? It is submitted that it is to be so regarded. Under the normal rules of reception of English law applicable in Singapore, the Habeas Corpus Act (on which *Khawaja* turned) would, as a pre-1826 statute, be part of Singapore law.[2] The position so far as Malaysia is concerned is less certain. Reception of English law there is established by the Civil Law Act 1956.[3] Section 3 of the Act provides (as revised) that any court of competent jurisdiction shall:

> (a) in West Malaysia... apply the common law of England and the rule of equity as administered in England on 7th April 1956;
>
> (b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1st December 1951;
>
> (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12th December 1948....

From this it may be seen that the Habeas Corpus Act 1816, as a "statute of general application" at the relevant dates, is clearly part

96 At p. 343.

97 At p. 344.

98 *Per* Lord Fraser at p. 331. See to similar effect Lord Scarman at p, 346, Lord Bridge at p. 356.

99 "The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue, due regard being had to the standard of proof demanded of the party under such obligation." Cross on Evidence, 5th edition, p. 87.

1 "The legal burden of proof is the obligation of a party to meet the requirement of a rule of law that a fact in issue be proved (or disproved) either by a preponderance of the evidence or beyond reasonable doubt, as the case may be." Cross, *op. cit*., p. 86.

2 G.W. Bartholomew, "The Singapore Legal System", in (ed.) Riaz Hassan, *Singapore Society in Transition,* at pp. 89-90. Note also Lord Scarman's firm statement in *Khawaja;* at p. 344: "And, I would add, it is not possible to construe s. 3 of the Habeas Corpus Act 1816, as meaning anything different" (from their Lordships' construction of it in that case).

3 Revised 1972, as Act 67 of 1972.

of the law of Sarawak and Sabah respectively. The omission of that phrase in respect of West Malaysia may lead one to conclude that statutes have not been received there. It has nevertheless been strenuously argued, and the better view appears to be, that (subject to limitations not here applicable) English statutes enacted before 7 April 1956 are applicable throughout West Malaysia.[4] If this is so, *Khawaja,* as a House of Lords decision on a statute received by Malaysia as a whole, must be regarded as having some persuasive force on Malaysian courts.

Nevertheless, a further formidable attack might be made on the authority of *Khawaja* in the context of review of detention decisions under the Internal Security Acts. *Khawaja* was a "precedent fact" case, in which the condition precedent to exercise of the administrative power was that the subject of exercise of the power was an "illegal entrant" to Great Britain — an apparently *objectively-verifiable* pre-condition. It might be argued that the House of Lords' emphasis on the requirement that the public authority bear the burden of proof was applicable *only* where the question of whether the precondition was satisfied was susceptible of objective determination — a precedent *fact.* If this were so, *Khawaja* would be irrelevant where the precondition to the exercise of power, ministerial "satisfaction", was not objectively — determinable, as in the case of preventive detention under the Internal Security Acts.

It is submitted that such an argument would be fallacious, for two reasons. First, it fails to take account of the fundamental principle enunciated by Lord Atkin in *Liversidge*:[5] "that in English law *every* imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act." (emphasis added).

Secondly, it omits to take into account the constitutional context, in which habeas corpus is a constitutionally guaranteed mechanism for securing personal liberty. As a general principle it must be true to say (and it has been so held in Singapore, in *Lee Mau Seng's* case[6]) that such constitutional guarantees may not be taken away, save by the most clear words. The effect of placing the burden of proof on the applicant would be to require him to prove a negative, that the Minister had no good grounds for doing what he did. Clearly this would be quite impossible to do, in the absence of any general obligation on public authorities to give reasons for their decisions. Thus, the *practical effect* of denying the applicability of *Khawaja* to cases of detention where preconditions to exercise of the power to detain are not objectively-determinable would be to take away habeas corpus in such cases altogether[7] — to achieve in practical terms that which, as a matter of law, cannot be achieved save by the most clear words. This situation has been graphically described by Lord Shaw, as giving

[4] G.W. Bartholomew, *The Commercial Law of Malaysia,* at pp. 26-32.

[5] [1942] A.C. at p. 245.

[6] [1971] 2 M.L.J. 137, at p, 141. See also Lord Scarman's observation in *Khawaja* [1983] *2* W.L.R. at p. 344: "If Parliament intends to exclude effective judicial review of the exercise of a power in restraint of liberty, it must make its meaning crystal clear."

[7] See Abdoolcader J. in *Yeap Hock Seng* [1975] 2 M.L.J. 279 at p. 284, quoted *infra,* text to note 10.

> due formal respect to the procedure of remedy, but to deny the remedy itself by inferring the repeal of those very fundamental rights which the remedy was meant to secure. This is to allow the subjects of the King by law to enter the fortress of their liberties only after that fortress has been by law destroyed.[8]

This cannot be what the constitution-makers intended, and it is in no way required by authority. Accordingly, it is submitted that, to avoid this result, the approach to burdens of proof laid down in *Khawaja is* applicable to detentions ordered under the Internal Security Acts.

(b) *The Local Approach to Burden of Proof*

How does the approach in *Khawaja* compare to that of local courts? In *Karam Singh,* Azmi L.P. said:

> (I)t is for the authority who has detained the detainee to show that the latter has been detained in exercise of a valid power. Once that is shown it is for the detainee to show that the power has been exercised mala fide or improperly....[9]

That it is quite unrealistic to expect that this can be done may be seen from the judgment of Abdoolcader J. in *Yeap Hock Seng:*

> The onus of proving mala fides... is on the applicant and is normally extremely difficult to discharge, as what is required is proof of improper or bad motive in order to invalidate the detention order for male fides, and not mere suspicion. It might perhaps be open to the applicant to suggest that the circumstances surrounding his case might possibly reflect some suspicion of mala fides, but this cannot be taken for granted or considered sufficient proof by itself.... Mere circumvention of the ordinary process of law cannot by itself amount to mala fides as otherwise this would in most cases virtually result in rendering moribund and impotent the laws legally enacted to provide for preventive detention for specified purposes.[10]

How is it that the local courts have reached this conclusion which, notwithstanding the constitutional entrenchment of habeas corpus, effectively denies detainees any meaningful opportunity to challenge the validity of dention orders? In *Kharam Singh* we find two lines of authority relied upon. Azmi L.P., approving the judge of first instance, quoted the following extract from Basu's Commentary on the Constitution of India, Fifth Edition, at p. 90:

> Where a person who has been deprived of his liberty challenges the detention by a petition for habeas corpus, it is for the authority who has detained him to show that the person has been detained in exercise of a valid legal power. Once that is shown, it is for the detenu to show that the power has been exercised mala fide or improperly.

[8] In *R.* v. *Halliday* [1917] A.C. 260, at p. 294.
[9] [1969] 2 M.L.J. 129 at p. 138. See also Suffian F.J. at p. 152.
[10] [1975] 2 M.L.J. 279 at p. 284.

Suffian F.J. also expressed approval for this proposition, which is repeated in the Sixth Edition of the Commentary.[11] The authority cited in support is the English case of *R.* v. *Halliday.*[12]

It is submitted that that case cannot support the proposition contended for, *in relation to burdens of proof.* The issue in *Halliday* was a quite simple one — whether, to use Dr. Basu's words, the applicant had been detained "in exercise of a valid legal power". Under the Defence of the Realm Consolidation Act 1914 s. 1(1), the King-in-Council was empowered "to issue regulations for securing the public safety and the defence of the realm." In purported exercise of that power a scheme of preventive detention was promulgated, and Halliday was duly detained. He contended that the powers granted by the 1914 Act could not, as a matter of construction and legal principle, extend to the authorisation of preventive detention. The argument was rejected, not because of any failure to shift a burden of proof, but because as a matter of construction the House of Lords held that there *was* such power. *Halliday's* case is clearly quite different from those exemplified by *Karam Singh,* because in *Halliday* the issue was whether there was a valid scheme of detention at all, a matter of legal construction in which no issues of burden of proof could arise. In *Kharam Singh,* on the other hand, the validity of the scheme was taken for granted, and the question was whether the applicant fell to be detained under it (or, more accurately, who had to prove whether he fell within it or not?). Since *Halliday* was not concerned with burdens of proof,[13] the case cannot, with respect, stand for the broad proposition advanced in the Commentary. The case is authority only for the contention advanced in the first sentence of the extract quoted by Azmi L.P. in *Kharam Singh.*

The second line of authority relied on in *Kharam Singh* is the two House of Lords cases, *Liversidge* v. *Anderson* and *Greene* v. *Secretary of State for Home Affairs.*[14] *Liversidge* has already been discussed, and no further comment need be made on it here. The background to the *Greene* case has already been explained.[15] It is true that there are passages in the judgments which seem to support the proposition advanced in *Kharam Singh* — in particular Lord Wright, in speaking of a return, said: "It is good on its face unless and until it is falsified."[16]

As Lord Parker C.J. has pointed out,[17] however, these passages must be understood in the context of the case. Upon production of the detention order in that case, the applicant's only response in effect was "I do not know why I am being detained" — and, in circumstances of fabricated evidence previously explained, such a response is hardly surprising! Nevertheless, the point was that in so limiting his argument,

[11] At p. 118.
[12] [1917] A.C. 260.
[13] "The only question is as to construction of the Act of Parliament" — Lord Dunedin [1917] A.C. 260 at p. 270. See to similar effect Lord Finlay L.C. at p. 264, Lord Atkinson at p. 271, and Lord Wrenbury at p. 305.
[14] [1942] A.C. 284.
[15] Text to note 77, *supra.*
[16] [1942] A.C. 284 at p. 306. See also Viscount Maugham at p. 295.
[17] In *R.* v. *Governor of Brixton Prison, ex p. Ahsan* [1969] 2 Q.B. 222, approved in *Khawaja* (see, for example, Lord Wilberforce [1983] 2 W.L.R. at p. 334: "There can be no doubt as to the correctness of this case...").

the applicant failed to shift the evidential burden of proof of establishing a prima facie case of invalid detention — to use Lord Wright's terminology, he failed to "falsify" the order to the extent of putting the burden of proof back on to the public authority to justify the detention.[18] It is therefore submitted that there is nothing in *Greene's* case which can properly justify any contention that a *legal* burden of proof falls upon the detainee to invalidate the detention order — the case is solely concerned with shifting the *evidential* burden. In any case, even if this explanation is not accepted, it must be conceded that *Greene,* intimately connected as it is with *Liversidge,* must be taken to have suffered the same fate as that case.

It is therefore submitted that the Federal Court in *Kharam Singh* was in error in placing the burden of proof on the application to establish the invalidity of his detention. Neither line of authority relied upon in *Kharam Singh* for that proposition will support it. The true position is that it is for the applicant to establish a prima facie case of an invalid detention, which, once achieved, throws a legal burden back on to the public authority to establish the legality of the detention on a high degree of probability — and it is for the court to satisfy itself as to the factual basis behind the public authority's action. The next question which thereof arises is, how does the court so satisfy itself? What are the tests it must apply?

(c) *Satisfying the Court*

In answering this we must bear in mind the structure of preventive detention law. Preventive detention may be ordered if the Minister (President) "is satisfied" of certain matters. The recipient of the detention order must then raise a prima facie case that the Minister could not have been so satisfied, because he (the detainee) is not the sort of person who has acted, or is likely to act, in a manner prejudicial to the security of the state or to the maintenance of essential services, etc. It will clearly be for the court to determine whether a prima facie case has been made out. As Dr. Sharpe points out:

> This tactical burden of adducing evidence is not to be minimized. In many cases it may present an almost insurmountable burdle in the way of the applicant. Especially where the case involves a challenge to an executive order under broadly construed discretionary powers, the burden of adducing evidence may be the most decisive factor.[19]

This being so, the court should be prepared to accept evidence of good character and community standing as going some way to establish a prima facie case that the Minister could not properly have been satisfied as to the detainee's evil acts or intentions.[20]

[18] For a very similar local example, see *Aminah* v. *Superintendent of Prisons* [1968] 1 M.L.J. 92: "Applicant in her affidavit merely asserts that she does not know that there are any reasons for the Minister's belief, and at the same time denies that there are or can be any reasons for such belief. This, in my view, is clearly insufficient to discharge the onus cast upon her." (Wan Suleiman J.).

[19] *The Law of Habeas Corpus,* at pp. 81-2.

[20] *Cf.* Abdoolcader J. in *Yeap Hock Seng;* "(I)t is not open to me to entertain the protestations of the applicant that he is innocent of the allegations made against him and that he is not a person who has acted or would act in any way prejudicial to public order or resort to violence." [1973] 2 M.L.J. 279 at p. 284. On the view taken here, this is precisely the sort of material which the court ought to entertain, although its assessment of the weight to be attributed to such material in the particular circumstances would be within the judge's discretion.

If the detainee succeeds in establishing a prima facie case, then *Khawaja* shows that the legal burden returns to the public authority to establish the validity of the detention. This it can do by satisfying the court, on a high degree of probability (*Khawaja*), of the truth of the facts on which the Minister purported to act, and, further, that those facts constituted sufficient evidence for the Minister, properly advised and taking into account only relevant materials, reasonably to have reached the conclusion that he was satisfied of the relevant matters (*Tameside*). Failure to demonstrate this to the satisfaction of the court must render the detention invalid, and the detainee should be set free.

Once the matter is seen in this way, the particular problem raised in *Re Ong Yew Teck*[21] may be resolved. In that case, it will be remembered, it was held that a police officer's statement that he had "reason to believe" certain matters was not reviewable by the court, which followed *Liversidge* in preference to *Nakkuda Ali* v. *Jayaratne*. Chua J.'s reasoning on this point placed strong emphasis on s. 53 of the Criminal Law (Temporary Provisions) Ordinance, which provided:

> Nothing in this Ordinance or in any rules made under s. 59 of this Ordinance shall require the Chief Secretary or any other public servant to disclose facts which he considers it to be against the public interest to disclose.

His Lordship inferred from this that since the legislature had provided that neither the court nor the applicant for habeas corpus could compel a public servant to disclose the material facts on which he claimed to have "reason to believe", then the legislature must have intended that the factual basis to the decision should not be the subject of review. Given that both the Singaporean and Malaysian legislation presently contains provisions similar to s. 53,[22] this might be thought to present a formidable obstacle to the arguments for reviewability which have been advanced above.

It is submitted, however, that if my arguments on burden of proof are accepted, then Chua J.'s reasoning may be seen to be misconceived. The argument was simply that once the applicant had raised a prima facie case against the legality of his detention, it was for the Minister to demonstrate its legality on a balance of probabilities. That being so, no question of *compelling* the Minister to disclose information, as Chua J. seems to have thought, can arise; rather, the issue for the Minister is what evidence he *chooses* to disclose, in attempting to shift the legal burden placed upon him, and this is a matter of judgment for him. Authority for this view may be found in the judgment of Lord Denning M.R. in *R.* v. *Governor of Brixton Prison, ex p. Soblen*,[23] which was concerned with an application for habeas corpus by an individual who was about to be deported from Britain. The question arose as to whether the Home Secretary was exercising his deportation powers for ulterior purposes, and the applicant raised a prima facie case that this was so. Lord Denning said:

> The court cannot compel the Home Secretary to disclose the materials on which he acted, but if there is evidence on which it

[21] (1960) 26 M.L.J. 67.
[22] I.S.A.(S.) s. 16; I.S.A.(M.) s. 16.
[23] [1962] 3 All E.R. 641.

> could reasonably be supposed that the Home Secretary was using the power of deportation for an ulterior purpose, then the court can call on the Home Secretary for an answer; *and if he fails to give it, it can upset his order.*[24] (emphasis added).

It is submitted that this is, or ought to be, precisely the position in the present context. The presence or absence of a "no-compellability" clause in the respective Internal Security Acts has no bearing on the scope of judicial review of ministerial decisions under the Acts. The only relevance of such provisions is that a Minister may not be required to disclose information to an applicant who is seeking to establish a prima facie case — but once such a case has been established, it will be for the Minister to *decide* what evidence to reveal in court. If necessary the court may choose to hear such evidence in camera, since both Singapore and Malaysia make provision for this if the court is satisfied that it is expedient in the interests of, *inter alia,* public safety or public security.[25]

PART V — SUMMARY AND CONCLUSIONS

The argument may be summarised as follows:—

1. Before a public authority may lawfully exercise its powers, the preconditions necessary for such exercise must be satisfied, and whether this has been done is a matter for the court.

2. The position is no different where the precondition is expressed in an apparently "subjective" form, such as "if the Minister is satisfied "or" if the officer has reason to believe." It is a matter for the court to decide whether the precondition is satisfied. This requires a consideration of the factual basis to the Minister's declared satisfaction, to see if there is evidence that can properly support the Minister's assertion of "satisfaction".

3. Whereas in prerogative order cases the burden of proof falls upon the applicant, in habeas corpus cases the ultimate ("legal") burden of proof falls upon the Minister. It is therefore for the Minister to lead evidence sufficient to satisfy the court, on a high balance of probabilities, that there is an adequate factual basis to support his assessment of "satisfaction" of the requisite matters. If he fails to shift this burden, his decision must be quashed and the detainee set at liberty.

It is therefore submitted that there is abundant authority to justify local courts engaging in an extensive review of decisions to detain under the Internal Security Acts. If the courts are prepared to make full and proper use of this authority, the recommendations of the International Mission of Lawyers,[26] at least in respect of initial decisions to detain, would not require further consideration.

[24] [1962] 3 All E.R. 641 at p. 661. It was held that the material disclosed by the Minister *did* establish that the deportation power had been used for the proper purposes.

[25] For Singapore the proviso to s. 9(1) of the Supreme Court of Judicature Act (Cap. 15 of the Revised Edition); for Malaysia, the proviso to s. 15(1) of the Courts of Judicature Act 1964 (Revised 1972, Act 91 of 1972).

[26] See Part I of this paper.

In the end, of course, it must be conceded that the scope of judicial review undertaken by the courts is determined not only, and possibly not even primarily, by the content of legal and constitutional rules. It is also a matter of political judgment, reached in the last resort by a political assessment by courts of their role vis-a-vis the executive power in a democratic polity. What must be understood, however, is this — local courts which, as a matter of judicial policy, continue to refuse to review preventive detention decisions, can no longer purport to justify that refusal by citation of English cases decided forty years ago which have now been totally repudiated. It must further be understood that the consequence of a refusal to engage in an extensive review necessarily involves placing individual citizens at the mercy of an all-powerful state. It is submitted that the incorporation of habeas corpus into the Constitutions of Singapore and Malaysia was designed to prevent precisely that result, and the power to prevent it lies in the hands of the judiciary in each country. In *Liversidge* v. *Anderson,* Lord Atkin said,

> It has always been one of the pillars of freedom … that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.[27]

Will we be able to say the same of the courts in Singapore and Malaysia?

H.F. RAWLINGS *

[27] [1942] A.C. 206 at p. 244.

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