MALAYAN PRACTICE SECTION

" CONDITIONAL RELEASE " UNDER THE PRESERVATION OF PUBLIC SECURITY ORDINANCE

[As this *Review* went to press, the P.P.S.O. was extended, with highly significant amendments. As a result, some of the evils I have attempted to expose in this note are no longer outside the law. In my view they remain evils. It has not been technically possible to make any changes in the article below; I hope to discuss the new P.P.S.O. in the next issue of this *Review.* Meanwhile, the points made hereunder may still help practitioners to see the context of the new amendments. — *A.E.S.T.*]

Paradoxically, detention under Singapore's Preservation of Public Security Ordinance (No. 25 of 1955, as amended) creates fewer legal difficulties than subsequent release. Orders for detention have been challenged by the inevitable writ of *habeas corpus,* but rarely has the legislation looked so ominous for counsel. Section 3(1) of the Ordinance gives the Chief Secretary[1] power to make an order for detention against any person if the Governor in Council[1] *is satisfied* that such detention is necessary with a view to preventing such a person from acting in any manner prejudicial to the security of Malaya, or the maintenance of public order therein or the maintenance therein of essential services. The section requires merely that the Governor in Council shall be satisfied, not that he shall have "reasonable cause to believe." The latter phrase, as we see from *Liversidge* v. *Anderson*[2] supplemented by *Nakkuda Ali* v. *M. F. De S. Jayaratne,*[3] could be interpreted as imposing a subjective or an objective test, depending on the nature of the legislation in question. " Is satisfied" could hardly be treated as establishing anything but a subjective test. In fact, Singapore's Chief Secretary has met orders to show cause with an affidavit merely stating that the Governor in Council was satisfied that detention was necessary, and that the Chief Secretary's order was made in consequence of this. In May this year, Ambrose J. again held such procedure to be sufficient.[4] In the same case, counsel (no doubt foreseeing such decision) had also submitted that section 3(1) of the Ordinance was *ultra vires* the Singapore

1. The Singapore (Constitution) Order in Council, 1958, s. 121(2)*(b), (c),* now in force, provides that earlier references to the Governor in Council shall be construed as references to the Yang di-Pertuan Negara (Head of State) and references to the Chief Secretary as references to the Minister for the time being charged with the responsibility for the subject in relation to which the reference, in any instance, is made. In the case of the P.P.S.O. the relevant Minister, at the time of writing (August, 1959), is the Minister for Home Affairs. To facilitate reference to the text of the Ordinance, I have kept to the original designations.
2. [1942] A.C. 206; [1941] 3 A.E.R. 338.
3. [1951] A.C. 66; 66 T.L.R. Pt. 2, 214.
4. *In re Choo Jee Jeng,* (1959) 25 M.L.J. 217.

Legislative Assembly, because, in referring to the security of Malaya, it seeks to effect extra-territorial operation beyond the powers of a subordinate legislature. The learned judge held that the section did have extra-territorial operation, but that this was not *ultra vires* the Singapore Legislative Assembly.[5]

With the writ of *habeas corpus* proving ineffective in practice,[6] appeals against detention have largely gone, as the Ordinance intended they should, to the special Appeal Tribunal established under section 6, which hears such appeals *in camera,* examines secret documents which the Government refuses to produce in open court,[7] and whose decisions, under section 5(4) are "final and shall not be called into question in any court." In these circumstances, counsel contesting detention orders have found themselves preoccupied with issues of political fact or personal pleas as their only argument on behalf of their clients. Precisely for this reason, no doubt, counsel are not much disposed to query orders of release subject to conditions, whether made by the Chief Secretary or the Appeal Tribunal. In most cases, to obtain a release at all is a signal success. In this atmosphere it is easy to move toward a situation in which "conditional releases" are granted without much attention being paid to the powers of those granting them.

The P.P.S.O. in fact provides for very few conditions that may be imposed upon a person not detained. Section 3(4) allows the Chief Secretary, who may make an order of detention only at the direction of the Governor in Council, to impose in lieu of such an order certain conditions under which the person concerned may remain at liberty. The conditions are limited, however, to restrictions in regard to the person's place of residence, the imposition of a house curfew, orders to notify his movements to a specified authority, and prohibitions against travelling beyond the limits of Singapore Island. Section 4 gives the Chief Secretary power to impose the same conditions as part of his power, under the same section, to suspend an order of detention; in regard to suspensions it gives him the additional power to permit the person concerned to emigrate to a country willing to receive him. The Chief Secretary has no power under the Ordinance to make additional conditions under sections 3(4) and 4, or to make any conditions under other sections. He has no power to exact, as the condition of non-confinement, guarantees regarding the person's professional, business, political or social activities; he may not debar him from writing, attending public meetings, joining associations, or making speeches. In fact, the majority of persons released by order of the Chief Secretary since 1957 have been released in ways not made fully public; where they have been freed under

5. See case note in this issue.
6. Governors in Council rarely exercise their powers or discretion while demonstrably drunk, insane, or obviously not applying their minds.
7. Even counsel before the Appeal Tribunal receive copies of only a portion of the documents used in evidence against their clients.

conditions specified in Government press releases these conditions have been in conformity with the strictly defined limits set down in sections 3(4) and 4. The Government press releases, however, in the past have obscured the distinction between an order for release (which cannot be accompanied by any conditions whatever) and a direction suspending an order for detention (which may be accompanied by the conditions set down above, but which cannot be imposed for a period exceeding the period of validity of the original order — though the order can be extended). It is precisely because its discretionary power to order detention is so wide, that the Government can afford to obscure these distinctions.

The powers of the Appeal Tribunal to impose conditions are as limited as those of the Chief Secretary, yet in two cases [8] at least the Tribunal has openly imposed conditions, in the form of undertakings, which are clearly beyond its powers and not binding upon the persons giving the undertakings. Under section 7 the Appeal Tribunal "may in its discretion revoke, amend or confirm an order or direction made by the Chief Secretary, and when it so amends or confirms such an order or direction, may make with regard thereto, such recommendations, if any, as it shall think fit." It is clear that when ordering a detainee's release by way of revoking an order made by the Chief Secretary the Tribunal has no power to add any conditions of its own; section 7 does not even give it power to make recommendations in this case. In confirming or amending an order made by the Chief Secretary, the only conditions the Tribunal could impose would be conditions within the powers of the Chief Secretary. Section 7 gives the Tribunal additional power to make "recommendations" in respect of amended or confirmed orders; it seems clear that such "recommendations" are not themselves part of the Tribunal's order and would be addressed not to the appellant, but to the Chief Secretary or other persons concerned with the execution of the Tribunal's order. The Tribunal could, for example, recommend that a case be reconsidered at a specific time, or that certain detainees be held in specific places; such recommendations, however, would not be binding on the authorities concerned.

That the Appeal Tribunal is to some extent conscious of the limitations outlined above, is obvious from the way it went about exacting conditions beyond the class of conditions regulating a person's movements, to which its powers and the Chief Secretary's are clearly confined. In the two cases mentioned above, those of the detained journalists Fu and Lee, the Tribunal did not order them to observe certain conditions after their release; it ordered their release *after* obtaining a written undertaking from each of them that he would observe such conditions, and warned the men that they would be subject to re-arrest if they broke

8. Orders of the Appeal Tribunal *re* Fu Wu Mun and Lee Say Long, made on November 15, 1957. *(Vide Straits Times* and *Tiger Standard,* November 16, 1957.)

their undertakings.[9] While the distinction between an order and a threat is obviously blunted when the threat is an effective one (even if its efficacy is not connected with the legal powers of the Tribunal), the distinction becomes important when a man seeks to free himself of an undertaking in the face of changed circumstances. It may legally be possible to appeal against an order; it is not legally possible to appeal against a threat. In the type of "conditional release" outlined above, the person affected can do neither.

Such a "conditional release" in fact involves three distinct issues: the Tribunal's order, which is in fact and in law an *unconditional* order for release, the appellant's undertaking, which no doubt influenced the Tribunal as an embezzler's promise to repay may lighten his punishment, but which is in no way legally binding on the appellant, and the Tribunal's threat. The appellant who is released (unconditionally) obviously cannot appeal against the order for release; he cannot appeal against his own undertaking because it is not an order and has no binding force. Clearly his only concern is the threat that he will be arrested again; this threat is real not because the Tribunal has any power to exact undertakings, but because the Governor in Council's powers to order detention are so wide that the appellant's violation of his undertaking could easily be regarded as a sign that he is once again a danger to the security of Singapore.

The exacting of extra-legal conditions, then, leads to two vicious results. A man may find himself completely without legal remedy in seeking to escape an undertaking exacted under special circumstances and made inapplicable by changing events, when he knows that his legal right to break the undertaking with impunity has no value in fact. He is naturally driven from open (or at least partly open) legal appeal to reliance on administrative sympathy and the effects of political bargain-

9. In a statement issued to the press immediately after the proceedings, and published in Singapore's morning newspapers on November 16, 1957, the Tribunal described its proceedings thus:

"These two detainees have been established to our satisfaction as having been closely associated with a Chinese newspaper *Sin Pao,* which for several years has been expressing pro-Communist views to the detriment of the security of Singapore.

"In view of the fact that each of the detainees is an elderly man, and each furthermore is in a bad state of health, we do not feel that to-day they constitute a danger to security, particularly as the newspaper to which they previously contributed has now ceased publication following Government action. "Before ordering their release, and as an extra safeguard, this Tribunal obtained from each detainee a written undertaking that, save for social purposes, neither of them would communicate with any member of the Press, by word or letter, or indulge in any journalistic activities whatsoever themselves. "Should either commit a breach of this undertaking, he will be subject to immediate re-arrest.

"On these terms the orders of detention are revoked."

ing. In a social climate where many forces combine to prevent the searching light of publicity from constantly playing on the actions of the Government and its servants, and where a habit of compromise for the sake of personal security is strong, it is clear that the exacting of extra-legal conditions can spread all too readily, undermining precisely those procedures of appeal and review for which the P.P.S.O. tries to make at least some provision. Few clients may be willing to turn their back on extra-legal straws and risk continued detention in the interests of law; but at least their counsel should help them draft undertakings in such a form that the appellant has a legal right to subsequent review.

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