

# INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS

Report of the International Observers on the appeal in

## **Chin Peng v Government of Malaysia**

21 April 2008

### PART ONE

1. The President of the International Association of Democratic Lawyers (IADL) Mr Jitendra Sharma, Senior Advocate of India, and Mr Michael Pearce SC, barrister of Australia, as international observers attended the appeal heard on 21 April 2008 in the Malaysian Court of Appeal brought by Ong Boon Hua (aka Chin Peng) from an order of the High Court of Malaysia summarily dismissing his proceeding against the Government and other authorities of Malaysia. This is the report of the international observers on the appeal.

#### **Background to the proceeding**

2. Chin Peng is the former Secretary-General of the Communist Party of Malaya (CPM). During World War II he led the armed resistance to Japanese occupation of Malaya in alliance with the British and was awarded an Order of the British Empire for his war service. After the war he led the armed insurgency of the CPM first against the re-established British colonial regime and then, after 1957, against the newly independent Malaysia.
3. In 1989 agreement was reached between the Governments of Malaysia and the CPM for the cessation of hostilities. A peace agreement was signed by the parties and

witnessed by the representatives of the Government of Thailand which had facilitated the talks and the agreement and a more detailed agreement of administrative arrangements was also entered into. Pursuant to the peace agreement and the administrative arrangements all members of the armed units of the CPM who were of Malaysian origin would be permitted to return to Malaysia if they applied within one year from the date of the peace agreement.

4. Chin Peng, who was born in Sitiawan on the Malay peninsula in 1923, applied within the stipulated time for permission to resettle in Malaysia. His application was rejected by the authorities on the grounds that he did not present for an interview as required, though he was not informed of the interview. The CPM has in all respects honoured its side of the peace agreement by disbanding its armed units and destroying its weapons.
5. After exhausting all other avenues of redress Chin Peng launched a legal proceeding in 2005 against the Government of Malaysia, seeking a declaration that it is bound by the 1989 peace agreement to permit him to re-enter Malaysia and an order requiring it to do so.

#### **The legal proceeding**

6. Chin Peng's legal proceeding has also encountered delay and obstruction. It was transferred from the High Court in Penang to the High Court in Kuala Lumpur to a non-existent court and then allocated to a judge who later died. Chin Peng's

applications for a speedy hearing have not been granted though he is now 84. A Malaysian consular official at the Bangkok Embassy even refused to attest an affidavit by Chin Peng required in the proceeding.

7. In July 2007 the proceeding was summarily dismissed by order of Justice Mohd Zabidin bin Mohd Diah. The order was made pursuant to an application by the defendants for orders that Chin Peng produce for inspection his birth certificate, failing which the proceeding be dismissed.
8. The summary dismissal of the proceeding was irregular for the following reasons:
  - (i) This was a proceeding commenced by originating motion, not writ, and under the rules of court there was no obligation to make discovery except pursuant to an order. No order for discovery had been made.
  - (ii) Even if there had been an order for discovery of the birth certificate, Chin Peng was not in default as he swore an affidavit that he last had a copy of his birth certificate in June 1948 and that he lost possession of it when it was amongst belongings abandoned by him when British police raided his place to capture him.
  - (iii) Furthermore, the failure by Chin Peng to produce his birth certificate does not prejudice the defendants' defences. It is Chin Peng who must prove his

Malaysian origins and, if he cannot produce his birth certificate, he must prove his origins by other means. The lack of a birth certificate aids the defence, it does not prejudice it.

- (iv) Finally it was not demonstrated the application was so hopeless as to justify its summary dismissal nor was there any persistent and wilful default of court orders which might have justified an “unless” (or self-executing) order.

### **The appeal**

- 9. Chin Peng appealed against the summary dismissal of his proceeding and has sought an order re-instating it. The IADL has sent the two international observers to observe and report on the appeal.
- 10. The two observers conferred with Chin Peng’s legal team in Kuala Lumpur on 20 April. The legal team comprised Raja Aziz Addruse, Chan Kok Keong, Darshana Singh and Yau Wei Leong. The observers also met Mr George Varughese, the Treasurer of the Malaysian Bar Council, who was to appear at the appeal on behalf of the Bar Council.
- 11. The appeal was heard the next day on the morning of Monday 21 April in the Court of Appeal in Putrajaya. It was one of a number of appeals listed before a three judge bench comprising Justices Low Hop Bing, Abdul Malik Ishak and Suliman Daud.

When reached at 10.20 am it was stood over to be heard last and the court dealt first with shorter matters. It was reached again at 12.05 pm.

12. Raja Aziz Addruse handed up a written outline of submissions and made oral submissions for approximately one hour. His submissions detailed the irregularities in the procedure below. He was heard in silence by the bench. Aziah Nawawi then addressed on behalf of the Government. She spoke for approximately half an hour. She too was heard in silence. Much of her submissions dealt with the merits of Chin Peng's application for orders permitting him to return to Malaysia. In a brief reply Raja Aziz Addruse said that the merits of the application were not in issue in the appeal and were matters ultimately for trial if the appeal is allowed.
13. The court reserved its judgment and adjourned at approximately 1.40 pm.

#### **Observations**

14. The international observers were impressed by the professionalism and dedication of Chin Peng's legal team and are satisfied that the failure of the appeal would not be attributable to inadequate representation.
15. The Court of Appeal's conduct of the appeal hearing could not be criticised for displaying any predisposition against Chin Peng. It listened attentively to both sides and heard argument without interruption. Nevertheless there is cause for genuine concern that no member of the bench sought any explanation from the Government

for the clear irregularities in the procedure below. An impartial and independent appeal court might have been expected to “grill” the Government’s counsel on these matters. Indeed, in such a clear case it might have dispensed with oral submissions from the appellant’s counsel.

16. One had the impression of a bench acutely aware of the political sensitivity of the case which did not wish to betray any predisposition. It is doubtful that this demonstrates impartiality and independence.
17. Be that as it may, judgment is reserved and there is still hope that Chin Peng may get justice. It will be necessary to revise this report once the Court of Appeal gives judgment.

## PART TWO

18. This part of the report deals with other activities of the observers during their time in Malaysia.

### **Meeting with Mr George Varughese**

19. On the evening of 20 April the observers met Mr George Varughese, the Treasurer of the Malaysian Bar Council. Mr Varughese appeared at the hearing of Chin Peng’s appeal on behalf of the Bar Council.

### **Meeting with Mr Tian Chua**

20. At lunch after the hearing of the appeal on 21 April the observers and Chin Peng's legal team met Mr Tian Chua, a Member of Parliament for the People's Justice Party. The discussion covered Chin Peng's appeal as well as wider matters such as the independence of the judiciary.

#### **Meeting with Y.B. Datuk Zaid Ibrahim**

21. On the morning of 22 April the observers together with Chan Kok Keong met Y.B. Datuk Zaid Ibrahim, recently appointed Minister in the Prime Minister's Department responsible for legal affairs. There was no discussion of Chin Peng's appeal. However, on Chin Peng's application to re-enter Malaysia, the Minister said he would raise the matter with the Prime Minister. There was general discussion of legal reforms that the new Government is proposing including the independence of the judiciary.
22. The Minister was receptive to the IADL's proposal to hold in Kuala Lumpur later this year a seminar on the right to return, focussing in particular on the rights of Palestinians to return.

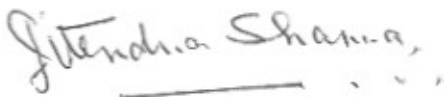
#### **Press conference**

23. The international observers gave a press conference at 12 noon on 22 April, chaired by Yap Swee Seng, the Executive Director of the Malaysian human rights body SUARAM. The conference was well attended. Both observers made introductory remarks and then answered questions on human rights generally and on the Chin

Peng case in particular. Mr Sharma foreshadowed IADL's proposed seminar on the right to return.

**Lunch with the Bar Council Human Rights Committee**

24. After the press conference on 22 April the observers had lunch with a number of members of the Malaysian Bar Council's Human Rights Committee. There was general discussion of human rights, Chin Peng's case and the IADL proposal for a seminar on the right to return.



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