

THE USE OF DEPOSITIONS IN COURT FOR HUMAN TRAFFICKING OFFENCES IN MALAYSIA

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ABSTRACT

Background and Purpose: Human trafficking is a serious global issue, including in Malaysia, where victims often comprise illegal immigrants, making them particularly vulnerable to exploitation. In 2010, section 61A was introduced through the Anti-Trafficking in Persons (Amendment) Act 2010 (Act A1385) to allow for the admissibility of depositions made by trafficked persons or smuggled migrants who cannot be found during court proceedings. With the introduction of this provision, human trafficking offences may be proven not only through the oral testimony of illegal immigrants in court but also by way of depositions, subject to the prescribed statutory conditions. This expands the modes of proof and addresses practical challenges in securing their physical presence during trial. However, the use of depositions raises important concerns relating to the accused's right to a fair trial. This research aims to examine the legality of the use of depositions under section 61A of the ATIPSOM 2007 in proving human trafficking related offences.

Methodology: This research employed doctrinal legal research by conducting a thorough analysis of relevant laws, namely the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIPSOM 2007) (Act 670), the Immigration Act 1959/63 (Act 155) and the Federal Constitution. In addition to statutory analysis, an examination of case law was undertaken to gain insights into the court's stance on the use of depositions in human trafficking offences. Scholarly writings in this field were also examined to provide a thorough understanding of the subject.

Findings: The research found that section 61A of the ATIPSOM 2007 allows for the admissibility of depositions made by trafficked persons who cannot be found during court proceedings. The provision aims to ensure that crucial evidence is not lost due to the removal or unavailability of such persons. While the use of depositions has been debated for potentially infringing on the accused's right to a fair trial under Article 5 of the Federal Constitution (FC) and compromising their right to equality under Article 8 of the FC, the Federal Court in *Ketheeswaran Kanagaratnam & Anor v. Public Prosecutor* [2024] 2 CLJ 341 upheld the constitutionality of section 61A of the ATIPSOM 2007.

Contributions: This research contributes to the corpus of legal knowledge on the use of depositions in court for human trafficking offences in Malaysia within the legal framework of the criminal justice system.

Keywords: Human trafficking, Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, deposition, evidence, fair trial.

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1.0 INTRODUCTION

Human trafficking is a worldwide issue that impacts almost every region (Dimas et al., 2022). It is linked to various other crimes such as money laundering, the use of fraudulent travel documents and cybercrime (Dolhan et al., 2021). Human trafficking causes not only physical harm but also severe mental health consequences, such as depression and anxiety (Pascale et al., 2024). Additionally, human trafficking leads to the deprivation of their basic of human rights such as the right to life and movement, often through violence, torture and threats affecting their human dignity (Moskoff & Serafeim, 2022). The term “human trafficking” can be defined as “*the recruitment, transportation, transfer, harbouring or receipt of people through force, fraud or deception, with the aim of exploiting them for profit* (United Nations, n.d.)” This definition implies human trafficking as a process where individuals are exploited for profit through coercive or deceptive means. Human trafficking is a serious violation of human rights involving the forced exploitation of individuals for the profit of others, typically through labour or sexual exploitation (Recknor et al., 2022). Referring to section 2 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIPSOM 2007) (Act 670), the term used is “trafficking in person” has been defined as means “*All actions involved in acquiring or maintaining the labour or services of a person through coercion, and includes the act of recruiting, conveying, transferring, harbouring, providing or receiving a person for the purposes of this Act.*” In short, it involves any action to obtain or keep someone’s labour or services through coercion.

Recognising that human trafficking is a serious offence, the Malaysian Government has enacted a specific statute to address this issue through the Anti-Trafficking in Persons Act 2007. To ensure that the legislation remains effective and responsive to the evolving needs of enforcement and prosecution, the Act was subsequently amended by the Anti-Trafficking in Persons (Amendment) Act 2010 (Act A1385). The amendments expanded the scope of the Act to cover the prevention and combating of migrant smuggling as a criminal activity alongside trafficking in persons, resulting in the renaming of the Act as the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007. These amendments were introduced in response to security concerns and Malaysia’s obligations under humanitarian international law, while also strengthening the legal and institutional framework through revised definitions, the introduction of new offences, enhanced penalties and the imposition of liability on those who profit from or facilitate such crime. In addition, the amendments improve protection and prosecution mechanisms including mandatory interim protection orders and notably the introduction of section 61A which allows the admissibility of depositions made by trafficked persons or smuggled migrants who cannot be found during court proceedings.

It is important to note that cases involving trafficked persons often also involve illegal immigrants, whose testimony is essential for criminal proceedings against the accused (Mahendra et al., 2025). Despite their status as victims, such individuals may at the same time be regarded as having violated immigration laws. The offences commonly attributed to illegal immigrants include those under section 6(1)(c) of the Immigration Act 1959/63 (Act 155), which criminalises entry into or presence in Malaysia without a valid pass or permit, and section 15(1)(c) of the same Act, which concerns overstaying beyond the period permitted under a pass or permit. Following the introduction of section 61A, human trafficking offences may be proven not only through the oral testimony of illegal immigrants in court but also by way of depositions, subject to prescribed statutory conditions. This provision expands the modes of proof by allowing their testimony to be recorded and relied upon without requiring their physical presence at trial, thereby reducing the risk of prolonged detention and trauma (Ab Hamid et al., 2018). However, the use of depositions raises important concerns relating to the accused’s right to a fair trial as can be seen in the Federal court’s case of *Ketheeswaran Kanagaratnam & Anor v. Public Prosecutor* [2024] 2 CLJ 341. In this regard, Ward and

Fouladvand (2018) advocate a principled balancing approach, recognising the importance of protecting trafficking victims from secondary victimisation while emphasising that such protective measures must not override the accused's fundamental fair trial rights. This research therefore examines the legality of the use of deposition under section 61A of the ATIPSOM 2007 in proving human trafficking related offences. Accordingly, this research is guided by the following research question:

RQ 1: How far is the admissibility of depositions under section 61A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 constitutional?

2.0 RESEARCH METHODOLOGY

This research employed doctrinal legal research by conducting a thorough analysis of relevant laws, including the ATIPSOM 2007, Immigration Act 1959/63 and the Federal Constitution. In addition to statutory analysis, an examination of case law was undertaken to gain insights into the court's stance on the use of depositions in human trafficking offences. Secondary legal sources comprising textbooks, journal articles and scholarly commentaries were referred to provide a thorough understanding of the subject. Journal articles and scholarly materials were gathered through systematic searches using key terms such as "human trafficking", "Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007", "deposition", "evidence", and "fair trial" to ensure a focused identification of scholarly materials relevant to the study. The materials were retrieved from official websites such as the Malaysian Parliament and the United Nations Office on Drugs and Crime (UNODC), as well as online academic databases such as CLJ Prime and Lexis Advance Malaysia and Google Scholar. The selected materials were examined analytically and critically, with particular focus on the legality of the use of deposition under section 61A of the ATIPSOM 2007 in proving human trafficking related offences.

3.0 RESULTS AND DISCUSSION

Discussions on human trafficking have garnered wide discourse at the international level. Existing studies examine, among others, the investigation of organised human trafficking crimes (Pajon & Walsh, 2025), the health impacts of trafficking on victims (García-Vázquez & Meneses-Falcón, 2024), trafficking as a human rights issue (Landman et al., 2024), as well as the intersection between human trafficking, victims' rights and fair trial guarantees (Ward & Fouladvand, 2018). Likewise in Malaysia, human trafficking has been discussed from various aspects, such as factors affecting human trafficking (Hamzah et al., 2023), prevention measures and challenges related to human trafficking (Othman et al., 2023) and challenges encountered by Malaysian prosecutors in human trafficking (Ab Hamid et al., 2018). Also discussed were depositions in court and the High Court's case of *Ketheeswaran a/l Kanagaratnam v. Public Prosecutor* [2022] 8 MLJ 23 (HC) (Ong, 2024). It is important to note that this case had been appealed to the Federal Court, making it crucial to examine its development and current status. This gap in research underscores the need to explore the extent of the court's acceptance of such depositions.

3.1 International Law on Human Trafficking

At the international level, human trafficking is considered to fall under the ambit of organised crime, with transnational criminal groups exploiting vulnerable individuals in various forms of exploitation (Ludvig & McMillan, 2021). The General Assembly resolution 55/25, adopted on 15 November 2000 adopted the United Nations Convention against Transnational Organized Crime (UNTOC), which serves as the primary international instrument in the fight against

transnational organised crime. The Convention is further supplemented by three Protocols, one of which is the Protocol to Prevent, Suppress and Punish Trafficking in Persons (TIP Protocol) (United Nations Office on Drugs and Crime, n.d). The Protocol entered into force on 25 December 2003. The Conventions and its Protocols specifically require all state parties to make human trafficking and migrant smuggling specific offenses in their respective countries. They aim to protect and assist victims of trafficking while promoting international cooperation to combat and prevent human trafficking. Malaysia ratified the UNTOC on 24th September 2004 and acceded to the TIP Protocol on 26th February 2009 (MAPO, 2021).

According to the ILO (2012), women and young girls are the primary victims of human trafficking. Studies indicate that women are often trafficked for sexual exploitation, while men are typically targeted for forced labour (UNODC, 2020). The influx of human trafficking victims and smuggling of migrants into Malaysia has become an issue that needs to be addressed by all relevant parties, especially the Malaysian government (Othman et al., 2023). To fulfil Malaysia’s obligations under the TIP Protocol and establish a comprehensive and robust mechanism to address the issue of human trafficking in Malaysia, ARTIPSOM 2007 was enacted (Kamaruddin & Mohd Zin, 2022).

3.2 Offences Relating to Human Trafficking

The key legislation that governs matters pertaining to human trafficking is ATIPSOM 2007 (MAPO, 2021). Under the Act, Malaysian courts have the jurisdiction over the individuals charged with an offence regardless of where the offence took place within or outside Malaysia or the offender’s nationality, if Malaysia is involved as a receiving or transit country, or if the trafficking begins in Malaysia (Section 3 of the ATIPSOM 2007). The Act not only regulates offences related to human trafficking under Part III but also the offence of smuggling of migrants under Part IIIA. In brief, there are key differences between human trafficking and smuggling of migrants are as shown in Table 1.

Table 1: Differences between human trafficking and smuggling of migrants

NO	ASPECT	HUMAN TRAFFICKING	SMUGGLING OF MIGRANTS
1.	Coercion and Exploitation	Involves elements of coercion, force, fraud, or threats; victims are exploited (e.g., forced labor or sex).	No coercion or exploitation involved; individuals willingly seek the help of smugglers.
2.	Control and Freedom	Victims are often controlled, confined, or have their documents confiscated, restricted movement.	Migrants are generally free to change jobs or leave after arriving at their destination.

For the purpose of this research, the focus of the discussion is related to human trafficking offences. The Act prescribes human trafficking as an offence under sections 12 and 13 respectively. Section 12 states:

“Any person, who traffics in persons not being a child, for the purpose of exploitation, commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding fifteen years, and shall also be liable to fine.”

Pursuant to this section, anyone who traffics in person for the purpose of exploitation commits an offence. What is meant by traffic in person? The term is defined under section 2 of the same Act to mean: *“all actions involved in acquiring or maintaining the labour or services of a person through coercion, and includes the act of recruiting, conveying, transferring,*

harbouring, providing or receiving a person for the purposes of this Act.” In *Siow Hee Liong & Anor v. Public Prosecutor* [2017] MLJU 289, the court stated that acts involving the acquisition or retention of a person’s labour or services through coercion imply that human trafficking cases differ from other criminal cases, as they are not isolated incidents but rather continuous or cumulative, based on the coercive retention of labour. In light of this definition, coercion is an essential element of human trafficking that must be proved in such cases. The phrase “coercion” is defined as:

- (a) *threat of serious harm to or physical restraint against any person;*
- (b) *any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or*
- (c) *the abuse or threatened abuse of the legal process.*

It is worth noting that human trafficking has been broadly defined to include recruiting, transporting, transferring, harbouring, providing, or receiving a person. The term “exploitation” means “*all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs.*” In addition to this, human trafficking is also an offence if it involves any of the following means as stipulated in section 13 of the Act as follows:

Any person, who traffics in persons not being a child, for the purpose of exploitation, by one or more of the following means:

- (a) *threat;*
 - (b) *use of force or other forms of coercion;*
 - (c) *abduction;*
 - (d) *fraud;*
 - (e) *deception;*
 - (f) *abuse of power;*
 - (g) *abuse of the position of vulnerability of a person to an act of trafficking in persons;*
- or*
- (h) *the giving or receiving of payments or benefits to obtain the consent of a person having control over the trafficked person, commits an offence and shall, on conviction, be punished with imprisonment for a term not less than three years but not exceeding twenty years and shall also be liable to fine.*

In essence, both sections classify human trafficking as an offence with the main difference being the method by which it is committed. If the offence involves elements such as force, coercion, abduction or fraud, it falls under section 13, which carries a harsher penalty of up to 20 years’ imprisonment compared to section 12, which has a maximum sentence of 15 years. However, if the offence of human trafficking has been committed by means of coercion, then it might fall under section 12 or 13 respectively. Based on case law, proving human trafficking requires establishing several elements. Firstly, the accused must have committed the act of trafficking in persons. Secondly, the act must have involved coercion. Thirdly, it must have been committed for the purpose of exploitation. Additionally, under Section 13 of the Act, it must also involve any means prescribed under that section (*Chai Vun Hing v. Public Prosecutor* [2022] CLJU 584; *Wong Chee Kong & Anor. v. Public Prosecutor* [2021] CLJU 2265).

3.3 Case Law Relating to Human Trafficking Offence

Victims in criminal cases often serve as primary witnesses. This is also the case in human trafficking cases. Victim testimony is often central to trafficking prosecutions, particularly

where corroborative evidence is limited. As a victim of trafficking, the witness can provide direct testimony about who was involved, how the trafficking occurred and what forms of exploitation occurred. This can be seen in *Zaimatulhakma Abdul Hamid v. Public Prosecutor* [2022] 1 LNS 302 where the accused was charged under section 13(b) of the ATIPSOM 2007 for trafficking an Indonesian (victim) (Prosecution Witness 1) (PW1) For the purpose of forced labour exploitation through the use of coercion. PW1 had run away from her Chinese employer and was introduced to the appellant to work as a domestic helper. During her time as a domestic helper, she had moved houses 4 times. Initially treated well, the victim was mistreated and subjected to physical violence, including being scolded, whipped, slapped, splashed with hot water, and stabbed in the hand with a knife. After enduring repeated abuse and unable to bear it any longer, PW1 managed to escape with the help of a bus driver and met SP4 who assisted her. After evaluating all evidence, the court found that the accused was guilty of committing the offence under section 13(b) of the ATIPSOM 2007 and sentenced to 10 years of imprisonment and ordered to pay compensation to the victim in the amount of RM 50,000 in six instalments, in accordance with the provisions under Section 66A. Dissatisfied with the decision, the accused filed an appeal, which was dismissed and the High Court upheld the findings of the Sessions Court. In considering the first element of the offence, which is the trafficking of persons, the court referred to the case *Siow Hee Liong & Anor v. Public Prosecutor* [2017] MLJU 289, where the term “*Trafficking in Persons*” under section 2 was defined any act involving the acquisition or retention of a person’s labour or services through coercion. Hence, although PW1 initially worked voluntarily for the accused as a domestic helper, she was later subjected to ongoing abuse and exploitation to retain her forced labour, thereby also satisfying the element of trafficking in persons. The second element was also met, where from the evidence, the accused threatened serious harm or physical restraint against PW1. Likewise, the third element, which is exploitation for forced labour, was satisfied by the fact that PW1 was often beaten and threatened with being beaten if he did not perform his work properly. In addition, the victim worked involuntarily because he was bound to the accused, who did not provide a work permit and withheld his salary, which clearly shows that the victim was exploited for forced labour.

Next is the case of *Mabel Amen Monye v. Public Prosecutor* [2022] 1 LNS 951. The appellant was charged under section 12 of the ATIPSOM 2017 for trafficking a Nigerian woman (victim) (Prosecution Witness 1) (PW1) for the purpose of sexual exploitation. PW1 gave testimony in court and said that the appellant lured PW1 to Malaysia with a promise of a job as a makeup artist, but upon arrival in Malaysia, she was taken to the appellant’s house. The appellant took PW1’s passport and placed him in a room in the house, with the front and back doors shut at all times. She was forced into prostitution. PW1 refused to comply and the appellant beat her and denied her food and drink. Eventually, with the help of a Malaysian couple, she was able to report the case to the police. At trial, the accused was found guilty and sentenced to 10 years imprisonment and to pay a fine of RM5000 as compensation to the victim. Dissatisfied, the appellant appealed against the conviction and sentence, but the High Court upheld the Sessions Court’s findings.

Looking at both cases, the victims are foreign nationals, namely from Indonesia and Nigeria. It is worth noting that the application of sections 12 and 13 of the ATIPSOM 2007 is general, where human trafficking does not only involve foreign nationals but can also involve Malaysian citizens. This can be seen in the case of *Yap See Yah v. Public Prosecutor* [2024] CLJU 2067, where the Court of Appeal upheld the High Court’s decision convicting the accused of trafficking in person a female Malaysian citizen for the purpose of sexual exploitation through threats, violence and coercion under section 13 of the Act. The Court of Appeal allowed the appeal against the sentence reducing it from 10 years to 5 years.

The accused in all three human trafficking cases were successfully convicted. One of the main factors contributing to the convictions is that the victims themselves appeared as prosecution witnesses to testify in court, fulfilling the elements of trafficking under sections 12 and 13 of the Act. Furthermore, the fact that a victim voluntarily works with or for the accused does not negate the element of trafficking if coercion or threats are used to retain the victim in forced labour, as established in *Zaimatulhakma Abdul Hamid*.

Referring to ATIPSOM 2007, in addition to the victim himself testifying in court, there are other methods for proving the elements of the offence of human trafficking through deposition under section 61A of the Act as can be seen in the case *Yong Yew Hin v. Public Prosecutor* [2024] CLJU 2542. In this case, the accused was charged for committing the offence of trafficking a Vietnamese woman for the purpose of sexual exploitation under section 12 of the Act. Evidence of trafficking victims was submitted through deposition (Exhibit P17). The deposition explained, among other things, that the victim was offered a job at a bird's nest processing factory in Melaka, Malaysia, by a woman named Thao. As soon as she arrived in Malaysia, she was taken by a Vietnamese woman (Mummy) and the accused. The victim was brought to Melaka and taken to a house. Mummy informed the victim that he would not be working at the bird's nest factory but would instead work as a prostitute. That same night, the victim was forced to serve four (4) Chinese clients and was coerced into providing sex services to approximately eighteen (18) clients until she was finally rescued by the police. Mummy and the accused stood guard outside the location to ensure the victim did not escape. The victim did not know how much the clients paid, as payments were made directly to Mummy, and she never received any payment from her. At the end of the defence case, the accused was found guilty of the offence and sentenced to three years in prison and a fine of RM 5,000.00, which, if failed to pay, four months in prison. The conviction and sentence were confirmed by the High Court. Dissatisfied with the decision, the accused appealed to the Court of Appeal against the conviction and sentence (M-09-37-02/2021). Among the issues that arose was whether the High Court Judge erred in fact and law by admitting the victim's deposition (Exhibit P17) and the CD recording of the proceedings (Exhibit P16) through the investigating officer (PW5), which were made pursuant to the provisions of Section 61A of ATIPSOM without presenting a transfer order or "removal order." The Court of Appeal ruled that since there was no "removal order" presented in Court, the Sessions Court Judge could not take the recording of the deposition under section 61A of ATIPSOM. The Court further stated that the Exit Check Memo (Exhibit P7) presented in court by the prosecution was not a "Removal Order". Hence, failure to present "removal order" caused the victim's deposition to be inadmissible as evidence. This is because the submission of the document is a mandatory pre-condition that must be strictly adhered to before the deposition can be recorded and accepted by the Court under section 61A ATIPSOM. This decision is in line with the decision of the Court of Appeal in the case *Public Prosecutor v. Sumon Khan & Anor* [2018] MLJU 1401, where it was held that:

"Section 61A of the Act also requires that before the depositions of the Bangladeshis can be admitted as evidence, there must be an order for removal of the Bangladeshis issued by the Director General (DG) of Immigration Department. In the present appeal, there was never any order of removal by the DG of Immigration ever produced by the prosecution. The rationale of allowing admissibility of depositions of persons under section 61A of the Act was to cater for situations where the migrants were removed by order of the DG of Immigration and hence their presence as witnesses could no longer be support a charge under the Act against Accused persons. Hence the depositions (which are hearsay evidence) are allowed to be admitted. Without the order for removal, these depositions cannot be admitted."

In brief, section 61A of the Act requires an order for removal by the Director General (DG) of Immigration before the depositions of PATI can be admitted as evidence. In this appeal, as no removal order was produced by the prosecution, the depositions could not be admitted.

3.4 The Use of Deposition under Section 61A of The ATIPSOM 2007

Section 61A was only inserted into the ATIPSOM 2007 pursuant to Anti-Trafficking in Persons (Amendment) Act 2010 (Act A1385). The use of deposition under section 61A of the ATIPSOM 2007 is not only confined to human trafficking offences but also to smuggling of migrants. The section states the following:

- (1) *Notwithstanding anything contained in this Act and any written law to the contrary, where in any proceeding for an offence under this Act a testimony of any person in respect of whom an order of removal from Malaysia has been made by the Director General under section 32 or 33 or subsection 56(2) of the Immigration Act 1959/63 is required by the court, there shall be admissible in evidence before that court any deposition relating to the subject matter of that proceeding made by that person—*
 - (a) *in Malaysia before a Sessions Court Judge or a Magistrate in the presence or absence of the person charged with the offence; or*
 - (b) *outside Malaysia before a consular officer or a judicial officer of a foreign country in the presence or absence of the person charged with the offence, and any such deposition shall, without further proof, be admitted as prima facie evidence of any fact stated in the deposition.*
- (2) *It shall not be necessary for any party in any proceeding to prove the signature or official character of the Sessions Court Judge, Magistrate, consular officer or judicial officer before whom the deposition under subsection (1) was made.*
- (3) *For the purposes of this section, a reference to—*
 - (b) *an “oath” includes an affirmation or declaration in the case of persons allowed by law to affirm or declare instead of swear.*
- (4) *Nothing in this section shall prejudice the admission as evidence of any other depositions.*

Based on this section, there are a few conditions that must be satisfied. Firstly, an offence under the ATIPSOM 2007 must have been committed. Secondly, a person whose deposition is to be taken must have been ordered for removal from Malaysia by the Director General under section 32, section 33 or subsection 56(2) of the Immigration Act 1959/63 is required by the court. Thirdly, the deposition was made in Malaysia before a Sessions Court Judge or a Magistrate, either in the presence or absence of the person charged with the offence. Alternatively, the deposition can also be made outside Malaysia before a consular officer or a judicial officer of a foreign country, either in the presence or absence of the person charged with the offence. The legal effect of this deposition is that it is admissible as *prima facie* evidence of any fact stated in the deposition without the need for further proof. Based on section 61A of the ATIPSOM 2007, it is not necessary for the trafficker to be charged first before the victim's deposition can be admitted as evidence. The provision allows admissibility of the deposition regardless of the stage of the proceeding. The phrase “*where in any proceeding for an offence under this Act*” refers broadly to any stage of the legal process, whether it is during the investigation or trial. The key condition is that the victim (or witness) must have been removed from Malaysia by the Director General under section 32 or 33 or subsection 56(2) of the Immigration Act 1959/63. For the purpose of clarity, the aforementioned sections are reproduced as follows.

Table 2: List of sections 32 (1), 33(1) and 56(2) of the Immigration Act 1959/63

Immigration Act 1959/63	Wording
32(1)	“Removal of illegal immigrants <i>Any person who is convicted of an offence under sections 5, 6, 8 or 9 shall be liable to be removed from Malaysia by order of the Director General: Provided that no citizen convicted of an offence under s. 5 shall be ordered to be removed from Malaysia under this subsection.”</i>
33(1)	“Removal of persons unlawfully remaining in Malaysia <i>Where the presence of any person in Malaysia is unlawful by reason of sections 9, 15 or 60 the person shall, whether or not any proceedings are taken against him in respect of any offence against this Act, be removed from Malaysia by order of the Director General.”</i>
56(2)	<i>“Any person who is not a citizen unlawfully entering or re-entering or attempting unlawfully to enter or re-enter Malaysia or unlawfully remaining in Malaysia shall whether or not any proceedings are taken against him in respect of the offence be liable to be removed from Malaysia by order of the Director General.”</i>

The purpose of the provision is to ensure evidence is not lost due to the victim’s removal. This section addresses situations where victims or witnesses may be deported or removed from Malaysia before the trial. The law allows their deposition to be admitted to avoid jeopardising the case due to their unavailability. Not only is it admissible, but pursuant to the said section, it may also serve as *prima facie* evidence of any fact stated within the deposition. Section 61A clearly states that the deposition can be taken under two circumstances: with the attendance and in the absence of the accused. If the accused is present, the question arises: can the deponent be cross-examined by the accused? In the Federal Court case of *Ketheeswaran Kanagaratnam & Anor v. Public Prosecutor* [2024] 2 CLJ 341, it was held that the word “presence” meant merely in physical attendance with a view to observing and not to the extent of cross-examining.

It is worth noting that the right to cross examination is an integral aspect of criminal trial. It allows the accused to question the prosecution’s witnesses in order to challenge the credibility of their testimony, highlight any contradictions, and cast doubt on the reliability of their evidence. Furthermore, it also aims to challenge the credibility of the witness that their testimony may be discredited or deemed unreliable by the court. Hence, this right is very important for the accused to defend himself effectively against the charge. This right can be seen in section 173(e) of the CPC and 137 of the Evidence Act 1950. Section 173(e) of the CPC states that “*The accused shall be allowed to cross-examine all the witnesses for the prosecution.*” This section is general in nature and applies to all types of prosecution witnesses, whether local or foreign. The reason why this right to cross examination is important can be seen in *Wong Swee Chin v. Public Prosecutor* [1981] 1 MLJ 213, where the Federal Court ruled that “... *general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness’s testimony.*” Given that the deposition’s legal admissibility is *prima facie* as to its contents, potentially incriminating the accused in the offence, and that the accused cannot cross-examine the illegal immigrants during the trial because they have been removed from Malaysia, this limits the accused’s ability to mount an effective defence.

4.0 ANALYSIS OF THE CASE OF KETHEESWARAN KANAGARATNAM & ANOR v. PUBLIC PROSECUTOR [2024] 2 CLJ 341

The constitutionality of deposition under section 61 of the ATIPSOM 2007 was discussed in the Federal Court case of *Ketheeswaran Kanagaratnam & Anor v. Public Prosecutor* [2024] 2

CLJ 341. In this case, the appellants were jointly charged at the Sessions Court for three offences under section 12 of the ATIPSOM read with section 34 of the Penal Code. They pleaded not guilty to the charges and sought to challenge the constitutionality of section 61A of the Act. The case was transferred to the High Court. The High Court decided on the constitutional questions and dismissed the appellants' motion to transmit the special case to the Federal Court. On appeal to the Court of Appeal, the High Court decision was set aside and the case was ordered to be transmitted to the Federal Court. Below is a table explaining the grounds of appeal for the constitutional questions advanced by the appellants.

Table 3: Grounds of appeal

No.	Ground of Appeal	Issue	Constitutional Provision Allegedly Violated
1.	Judicial Power	Whether section 61A of the ATIPSOM 2007 unconstitutionally allows Parliament to exercise judicial power, violating the doctrine of separation of powers.	Article 121(1) of the FC Separation of Powers
2.	Fair Trial	Whether section 61A of the ATIPSOM infringes the right to a fair trial of the accused.	Article 5(1) of the FC Right to Life and Personal Liberty
3.	Equality	Whether section 61A of the ATIPSOM 2007 violates the accused's right to equality under the law.	Article 8 of the FC Equality Before the Law

There are three grounds of appeal in this case. The first concerns judicial power, arguing that section 61A of the ATIPSOM violates the separation of powers by removing the court's authority to decide whether there is a *prima facie* case and assigning that decision to Parliament instead. The second and third grounds of appeal focus on the appellants' rights under the Federal Constitution, specifically Articles 5(1) and 8 respectively.

4.1 Judicial Power

On the first appeal, the FC ruled that section 61A of the ATIPSOM 2007 does not remove judicial power because courts retain the authority to evaluate facts, weigh evidence and make independent findings. While depositions under section 61A are considered *prima facie* evidence, they do not automatically establish a *prima facie* case. The Court distinguished between *prima facie* evidence and a *prima facie* case. The former can be defined as "... evidence that can be accepted at face value and which calls for rebuttal evidence from the other side to render it unbelievable or too incredible to rely on." In short, *prima facie* evidence refers to the weight given to the deposition testimony and the weightage given to that testimony is not absolute and can be challenged. In other words, it must be considered together with other prosecution witnesses' testimonies to determine whether the prosecution has successfully established a *prima facie* case at the end of its case implying that the term "*prima facie*" has a more expansive meaning. This can be seen in sections 173(f)(i) and 180(1) of the CPC, where both sections state, "*When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.*" In accordance with sections 173(h)(iii) and 180(4) of the CPC, a *prima facie* has been made out against the accused, where the prosecution "*has proved credible evidence proving each ingredient of the offence made out a prima facie case against the accused which if un rebutted or unexplained would warrant a conviction.*" When a *prima facie* case has been established, then only the accused will be called to enter upon his defence.

4.2 Fair Trial

On the second ground of appeal, the appellants argued that section 61A of the ATIPSOM 2007 deprived the right to a fair trial under Article 5 (1) of the FC as it prevented cross-examination of the deponents. The Article states that “*No person shall be deprived of his life or personal liberty save in accordance with law.*” The Federal Court held that although section 61A limits the accused’s right to cross-examine the deponent, such a right is not absolute and may be lawfully restricted pursuant to the proviso “*save in accordance with law*” under Article 5 of the Federal Constitution. Section 61A of ATIPSOM 2007 permits depositions to be taken even in the absence of the accused, provided the prosecution still bears the burden of proving the case beyond a reasonable doubt. A key principle of a fair trial is the concept of “equality of arms”, which ensures that the accused has reasonable opportunities to defend themselves and is not disadvantaged compared to the prosecution. While cross-examination is a vital component of criminal trials, procedural rights can be limited if such limitations are justified on objective and reasonable grounds without causing unfairness or injustice. The Federal Court highlighted the importance of triangulating interests, balancing the rights of the accused, the victims and society that can be seen its judgment:

“... while cross-examination is a very important aspect of a criminal trial, in light of the need to triangulate rights (balancing the rights of the accused with that of the victim and the society), there might be instances where the ability to cross-examine has to be limited.”

The Federal Court explained that in ATIPSOM cases, where foreign victims are often deported, the use of depositions is justified as it prioritises the victims’ human rights by facilitating their speedy return home through deposition orders, when appropriate (from victim’s perspective). A balance is thus achieved by allowing their evidence to be recorded without requiring the victims to remain in the country and be subjected to prolonged delays until the trial. A balance is also struck in the public interest in that prosecution gains an evidential advantage in terms of the deposition (from public perspective). At the same time, the accused is afforded ample opportunity to challenge the deposition evidence by presenting rebuttal evidence or cross-examining other prosecution witnesses (from the accused perspective). The Federal Court further noted that:

“In assessing whether the right to a fair trial has been curtailed, the court cannot be too focussed on piecemeal arguments that allege that a trial is unfair because certain features in a trial are missing as compared to other ordinary trials.”

It means that the right to a fair trial is not solely about procedural formalities but focuses on whether the trial ensures fairness and avoids miscarriages of justice. Although cross-examination may be limited, the accused retains the ability to challenge depositions, call rebuttal evidence and put forward their defence. Eventually, the Federal Court concluded that section 61A fairly triangulates the interests of the accused, the victims, and society, ensuring a balanced approach that does not violate Article 5(1) of the FC.

4.3 Equality

On the third ground of appeal, it was argued by the appellants that it violates the right to equality before the law as enshrined in Article 8(1) of the FC. The Article is reproduced below:

- (1) *All persons are equal before the law and entitled to the equal protection of the law.*
- (2) *Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.*

In light of this Article, all individuals are equal before the law and have the right to its equal protection. Discrimination on the grounds stated in Article 8(2) such as religion, race, descent, place of birth, or gender is prohibited unless explicitly permitted by the Constitution. The Federal Court in this case explained that Article 8 permits discrimination under the following conditions.

- “Firstly, there must be an intelligible differentia between the categories of persons (or classes of persons) that are classified within a certain group against persons (or classes of persons) who can be clearly classified outside of that group.”*
- “The second element of art. 8(1) which is usually the one at issue in most cases, looks at the basis of discrimination. Here, it must be established that the differentiation in the first element was enacted in furtherance of a legitimate Legislative aim and that there is a reasonable nexus between the discrimination and that Legislative aim.”*

The Federal Court applied two tests to assess the permissibility of the differential treatment. The first requirement is the existence of an intelligible differentia, namely a clear and understandable distinction between persons who are included within a particular group and those who are excluded from it. The distinction should not be arbitrary or unjustified but instead should be based on logical reasons. The law must clearly define who is being treated differently. This ensures that any discrimination is not random or done without reason. The second element of Article 8(1) focuses on the reason for the differential treatment. It requires the court to examine whether the distinction is based on a legitimate legislative aim and whether there is a reasonable connection between the differentiation and that aim. If the differential treatment lacks an objective and justifiable basis, the differentiation will be regarded as discriminatory and will therefore violate Article 8(1).

(1) There is an intelligible differentia between the categories of persons

The Federal Court accepted that section 61A satisfies the requirement of intelligible differentia, as it applies uniformly to all accused in cases where the victim has been removed from Malaysia. The provision clearly specifies the circumstances under which it applies, namely where a removal order has been made against the deponent under the Immigration Act 1959/63. When invoked, section 61A operates consistently across all criminal proceedings. Although this results in differential treatment between cases that apply section 61A and those that do not, the basis for such differentiation is clearly defined and non-arbitrary.

(2) Proportional to the aim pursued

While section 61A of the ATIPSOM 2007 applies to all accused individuals it covers; however, the issue remains whether excluding cross-examination is proportionate to the legislative objective behind enacting section 61A. In relation to the legitimate legislative aim, as previously discussed, section 61A triangulates the rights of the accused, the victims and the public. And although the inability to cross-examine may seem disproportionate compared to other criminal trials, the Federal Court emphasised that the defence’s right to present rebuttal evidence and the prosecution’s burden of proof remain intact. Therefore, the Federal Court

ruled that when read as a whole, section 61A represents a proportionate intrusion into the right to a fair trial in light of the legislative reasons for its enactment.

5.0 CONCLUSION

Overall, human trafficking remains a serious global problem, including in Malaysia, as it constitutes a grave violation of human rights by depriving individuals of their liberty and dignity. In 2010, section 61A was introduced through the Anti-Trafficking in Persons (Amendment) Act 2010 to allow for the admissibility of depositions made by trafficked persons or smuggled migrants who cannot be found during court proceedings. The purpose of the provision is to ensure evidence is not lost due to the victim's removal. The law allows their deposition to be admitted to avoid jeopardising the case due to their unavailability. Although the admissibility of depositions has raised constitutional concerns, particularly in relation to the accused's right to a fair trial under Article 5 of the Federal Constitution and the right to equality under Article 8, owing to the absence of cross-examination of deported witnesses, the Federal Court in *Ketheeswaran a/l Kanagaratnam & Anor* upheld the constitutionality of section 61A. The Federal Court recognised that while the right to cross-examination is fundamental, it is not absolute and may be lawfully restricted in accordance with the law. Accordingly, the use of depositions under section 61A reflects a legal mechanism that seeks to strike a necessary balance between the protection of trafficking victims, the effective prosecution of serious offences and the safeguarding of the accused's right to a fair trial, thereby triangulating these competing interests within the criminal justice system. It is worth noting that once a deposition is accepted by the court, it carries *prima facie* evidence. The status given to its contents may create the perception that the evidence has already proven the elements of the offence, with other evidence merely serving as corroboration. This was also explained in the same case, where the Federal Court clarified that *prima facie* evidence refers to the weight given to deposition testimony and not a *prima facie* case. This weight is not absolute and can be challenged by the accused, who bears the burden of providing rebuttal evidence. Importantly, the court will consider all available evidence from both prosecution and defence witnesses before reaching a decision in the trial. In order to further strengthen the procedural safeguards governing the use of depositions under section 61A of the ATIPSOM 2007, it is recommended that section 61A be amended to expressly clarify that depositions admitted thereunder constitute *prima facie* evidence is not absolute and remain subject to challenge by the accused. Such clarification would reinforce fair trial safeguards by ensuring that although admissible, depositions are not treated as conclusive and remain open to challenge by the defence.

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