WA-25-386-12/2021
Encl No. 37
This is NON-PAYABLE document
H0272101 WA1322563986 27/12/2022 17:51:40
WA-25-386-12/2021
TSH002.............................0.00 x 1
Jumlah RM******************************0.00

Applicant's Written Reply Submission (Merits)

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)

PERMOHONAN SEMAKAN KEHAKIMAN NO. WA-25-386-12/2021

Dalam perkara laporan atau pengesyoran yang disediakan oleh Pasukan Petugas Khas yang ditubuhkan oleh Kerajaan Malaysia;

Dan

Dalam perkara Artikel-Artikel 5, 8 dan 10 Perlembagaan Persekutuan;

Dan

Dalam perkara Akta Rahsia Rasmi 1972;

Dan

Dalam perkara Seksyen 25(2) dan/atau Jadual, Akta Mahkamah Kehakiman 1964;

Dan

Dalam perkara Aturan 53, Kaedah-Kaedah Mahkamah 2012 dan/atau bidang kuasa sedia ada Mahkamah;

Antara

NORHAYATI BINTI MOHD ARIFFIN
(NO. K/P: 730225-10-5992) **...PEMOHON**

Dan

1. **MOHD RUSSAINI BIN IDRUS**
   (NO. K/P: 770330-09-5163)
2. **KERAJAAN MALAYSIA** **...RESPONDEN-RESPONDEN**

APPLICANT'S WRITTEN REPLY SUBMISSION (ENCLOSURE 18)

I Introduction

1. This submission outlines the reply arguments of counsel for the Applicant against the contentions raised by the Respondents in their written submission at Enclosure 28.

2. The Applicant adopts all definitions and abbreviations used in her written submission at Enclosure 35.

3. Given the narrow issue before this court on the legality of the Decision, the following issues are in dispute:

   3.1. The appropriate test to be adopted in reviewing the Decision;

   3.2. The burden of proof and the failure of the Respondents to adduce the SOP; and

   3.3. The appropriateness of the mandamus relief sought.

II The appropriate test

4. The Respondents essentially take the position that by reason of the Certificate and section 16A, OSA, this court cannot question the validity of the Decision. They rely on the following decisions:

   4.1. ***Datuk Seri Anwar Ibrahim v Kerajaan Malaysia [2021] 6 MLJ 68*** ("***DSAI***");

4.2. ***Minister of Energy, Water and Communication v Malaysian Trade Union Congress [2013] 1 MLJ 61*** ("***MTUC COA***"); and

4.3. ***Lim Kit Siang v Public Prosecutor [1980] 1 MLJ 293*** ("***LKS***").

5. With respect, those decisions are irrelevant.

5.1. The decision of the Federal Court in ***DSAI*** was concerned with the constitutionality of the National Security Council Act 2016. As is evident from the passage cited by the Respondents themselves, the majority decided that the courts should be slow in interfering with matters concerning national security when reviewing the constitutionality of statutes as opposed to administrative decisions. Zaleha Yusof FCJ said[1]:

> *"[206] In the circumstances, I hold that the measures adopted in s 22 are justified as it has a rational nexus and is proportionate to the objective to be addressed, namely, national security. It must always be borne in mind that matters of security involve policy consideration which are within the domain of the executive. This has been aptly explained by this court in the case of Kerajaan Malaysia & Ors v Nasharuddin Nasir [2003] MLJU 841; [2004] 1 CLJ 81, that courts do not possess knowledge of the policy consideration which underlay administrative decisions; neither can the courts claim it is ever in the position to make such decisions or equipped to do so* ***. Of course we are not reviewing any administrative decision in this special case. However, the NSCA also concerns national security and public order.*** *Hence, regardless how challenge is mounted, where matters of national security and public order are involved, the court should not intervene and should be hesitant in doing so as these are matters especially within the preserve of the Executive, involving as they invariably do, policy considerations and the like."*

[1] Enclosure 31, p.126

5.2. The decision of the Court of Appeal in ***MTUC COA*** concerned an agreement and an audit report. Disclosure of the audit report was refused as it was tabled in a Cabinet meeting. It was therefore caught by the Schedule to the OSA. Abu Samah JCA (as he then was) said[2]:

"[80] Japar bin Abu, who affirmed the affidavit on behalf of the Minister categorically states in paras 5 and 7 of his affidavit that the concession agreement and the audit report are classified as 'SULIT' AND 'RAHSIA' and that they had been tabled before the Cabinet:

> *5. Saya menegaskan di sini bahawa Perjanjian Konsesi di antara Kerajaan Persekutuan, Kerajaan Negeri Selangor dan pihak SYABAS adalah dokumen berperingkat yang dikategorikan sebagai 'SULIT' berasaskan Klausa 45 Perjanjian Konsesi dimana Perjanjian tersebut hanya boleh didedahkan kepada pihak ketiga dengan persetujuan semua pihak kepada Perjanjian tersebut.*
>
> ***7. Saya menegaskan di sini bahawa Laporan Audit adalah dokumen berperingkat yang dikategorikan sebagai 'RAHSIA' kerajaan dan tidak boleh didedahkan kepada umum. Ini adalah berdasarkan fakta bahawa Laporan Audit telah dibentangkan dan diputuskan dalam Mesyuarat Jemaah Menteri yang bersidang pada 11.10.2006. Justeru itu, dokumen tersebut merupakan dokumen peringkat 'RAHSIA' di bawah Jadual kepada seksyen 2AAkta Rahsia Rasmi, 1972****.*

[81] The term 'official secret' is defined in s 2(1) of the Official Secrets Act 1972 ('OSA') as 'any document specified in the Schedule and any information and material relating thereto and includes any other official document, information and material as may be classified as 'Top Secret', 'Secret', 'Confidential' or 'Restricted', as the case may be, by

[2] Enclosure 31, p.145

a Minister, the Menteri Besar or Chief Minister of a State or such public officer appointed under section 2B'.

…

[83] The documents listed in the schedule include, among others, 'Cabinet documents, records of decision and deliberations including those of Cabinet Committee'. *The averment in Japar bin Abu's affidavit that the concession agreement and the audit report are classified as 'SULIT' and 'RAHSIA' is not seriously challenged. These documents remain as classified document until they are declassified under s 2C or deleted under s 2A of the OSA: See See Kok Kol @ See Liong Eng v Chong Kui Seng & Ors [2009] MLJU 1098; [2010] 2 CLJ 481."*

5.3. The Respondents have conceded that the Report was not classified as an official secret under the Schedule. It was classified under section 2B, OSA which involves an exercise of discretion by the 1st Respondent. ***MTUC COA*** is therefore irrelevant as the report in question was classified under the Schedule which does not involve any exercise of discretion.

5.4. ***LKS*** concerned a criminal trial for receiving prohibited official information. This was before the Amending Act came into force on 01.01.1987. As explained in paragraph 12.1 of Enclosure 35, before the Amending Act, the OSA did not contain the term "official secret". Sections 2A and 2B were only introduced through the Amending Act. ***LKS*** is therefore irrelevant.

6. The Respondents have completely ignored the recent string of decisions concerning the review of Executive discretion on matters such as public order or national security.

6.1. As set out at paragraph 12 in Enclosure 35, the court can question the validity of such decisions which must be based on evidence and not just bare averments.

6.2. The approach advocated by the Respondents is out of step with these binding cases. It also ignores the recent decision of the Federal Court in ***Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal [2019] 3 MLJ 443*** on justiciability. The Federal Court spelt out the limited matters which the courts would not usually interfere with. Zawawi Salleh FCJ said[3]:

"[50] There are certain areas which the court is reluctant to delve into. These include the power of the state to enter into treaties and conduct of foreign policy, the defence of the realm and the control of the armed forces, the prerogative of mercy, the dissolution of Parliament and the appointment of Ministers. Such powers are governed by broader policy considerations which are more appropriately entrusted to the political branches of government, and which are unsuited to be examined by the *courts. One such instance is the case of Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (HL) ('the GCHQ case').*

…

[57] With respect, we are unable to agree with the learned SFC that the orthodox common law immunity from judicial review of the AG's prerogative powers laid down in the Gouriet's case is still good law in view of the House of Lords decision in the GCHQ's case. The judgment in the Gouriet's case is a reflection of past judicial refusal to enquire into the way in which a prerogative power had been exercised. ***With the progressive development of judicial review, the courts have been more willing to review the exercise of discretionary power, whether derived from statute or a prerogative power****."*

6.3. In summary, all discretionary powers are reviewable save for the limited areas identified by the court. Decisions made under the OSA do not fall within any of these categories. The said decision was reaffirmed by the

[3] Enclosure 36, p.27

Federal Court in ***Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors [2021] 5 MLJ 209***, where the court reiterated that deference does not mean that the court should not interfere with an Executive decision. Tengku Maimun CJ said[4]:

"[97] Deference does not however translate to complete surrender. Ours is a system built on constitutional supremacy where accountability, separation of powers and Rule of Law take centre stage. Much headway has been made in our constitutional jurisprudence to curate the fine balance between policy considerations on the one side, and the adjudication and supervision of the legality of State action by the judicial branch — on the other. *This gradual shift from unfettered discretion to restricted supervision is apparent from the judgment of this court in Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal [2019] 3 MLJ 443 ('Chin Chee Kow')."*

6.4. Section 16B, OSA does not change this. As made clear by the Federal Court in ***Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545***, ***Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750*** and ***Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors [2022] 3 MLJ 356***, the court's power of judicial review cannot be completely ousted. The Applicant reiterates paragraph 12 of Enclosure 35.

6.5. In any event, the Certificate is only conclusive for the fact that the Report was classified as an official secret. It makes no mention of national security.

[4] Enclosure 36, p.69

III Burden of proof and the SOP

7. As explained in paragraph 13 of Enclosure 35, the Respondents have not adduced any material to support the averment that disclosure of the Report would be prejudicial to national security.

7.1. Instead, they rely on the SOP to justify the classification of the Report as an official secret.

7.2. Section 30A, OSA makes it clear that the manner of classifying any information or document under the OSA must be done by way of regulations made by the Minister.[5]

"The Minister may make regulations to carry out the purposes of this Act and, without prejudice to the generality of the foregoing words, may-

(a) prescribe the manner of classifying information, documents and other materials*;*

(b) prescribe the procedure for handling, storage and delivery of official documents and other information;

(c) prescribe the manner of disposing waste official documents;

(d) prescribe the manner of communication of official information;

(e) prescribe all other matters necessary to protect the safety or secrecy of any information or thing*;*

[5] Enclosure 32, p.15

(f) provide for offences and penalties not exceeding a fine of five thousand ringgit or imprisonment not exceeding one year for the contravention of any provision of the regulations; and

(g) provide for the compounding of any of such offences."

7.3. In response, the Respondents contend that the provision is discretionary as it uses the word "may".

7.4. With respect, the Respondents' contention is misplaced. The use of the word "may" indicates that the Minister is not obligated to make regulations. This is not in dispute.

7.5. However, where there is a need to prescribe any of the matters listed in section 30A, it must be done by way of regulations made by the Minister and gazetted. Any other reading would render section 30A and all similar provisions in other legislations otiose. It is settled law that Parliament does not legislate in vain.[6]

IV The mandamus relief

8. The mandamus relief in prayer 1.5 of Enclosure 1 is merely consequential to prayers 1.3 and 1.4.

8.1. In the event this court quashes the Decision, there is no longer any legal basis for the 2nd Respondent to withhold the Report.

8.2. The Respondents reliance on section 44, Specific Relief Act 1950 is also misplaced. This application is made under Order 53, Rules of Court 2012

[6] ***Puganeswaran a/l Ganesan & Ors v Public Prosecutor and other appeals [2020] 12 MLJ 165*** at paragraph 67 (Enclosure 36, p.103)

read with paragraph 1 in the Schedule to the Courts of Judicature Act 1964. This is a separate and distinct source of power for the grant of a mandamus order.

8.3. In ***Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481***, Gopal Sri Ram JCA said, at p.540[7]:

"Turning now to the argument that the remedy of mandamus may only be granted in the limited circumstances prescribed by ss 44 and 45 of the Specific Relief Act 1950, ***it is to be noted that there are those other two pieces of legislation, to which I have referred, that confer power upon the court to issue mandamus. The first of these is O 53 of the Rules of the High Court 1980****…*

…

It is apparent from the foregoing provisions that the law has provided two avenues to a litigant who is desirous of applying for an order of mandamus. He may, quite properly, have resort to either. In our jurisprudence, particularly in the area of public law remedies, it is not uncommon to find two or more avenues being made available for the pursuit of the same remedy*."*

8.4. The said decision was cited with approval by the Federal Court in ***Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641***. In that case, a mandamus order was sought against a Minister. The Federal Court decided that a mandamus under section 44, Specific Relief Act 1950 cannot be granted against a Minister as a Minister is not a person holding a public office within the meaning of that section. However, a mandamus order can be granted pursuant to paragraph 1 in the Schedule to the Courts of Judicature Act 1964 as it is a separate provision. Abdul Hamid CJ said[8]:

[7] Enclosure 36, p.171
[8] Enclosure 36, p.202

*"[24**] It is clear that the Minister of Finance, Government of Sabah is 'member of the administration' but not a 'person holding public office'. What it means, in relation to s 44 of the SRA is that s 44 of the SRA is not applicable to the appellant, meaning that an order under s 44 of the SRA cannot be issued against the appellant.** To that extent the High Court judge, Gunn Chit Tuan J, **was right inLoh Wai Kong regarding the effect of s 44 of the SRA on the Government of Malaysia and the Minister of Home Affairs**. In my view the learned High Court judge in the instant appeal was right in following Loh Wai Kong and the Court of Appeal was wrong in its interpretation of s 44 of the SRA.*

…

*[31**] We shall now look at the provision of para 1 of the Schedule in detail. Mandamus is mentioned as one of the additional powers. It may be issued to 'any person or authority' which, in my view, includes a Minister of a government."***

8.5. If the Decision is quashed, the 2nd Respondent is obligated to disclose the Report to the Applicant under Articles 5 and 10, FC. The decision of the Court of Appeal in ***Haris Fatillah*** has been addressed at paragraph 12.5 of Enclosure 35.

V Conclusion

9. In view of the foregoing, the Applicant humbly prays that the application herein be allowed.

Dated 27th December 2022

Surendra Ananth

……..

Messrs Surendra Ananth

Solicitors for the Applicant

This **APPLICANT'S WRITTEN REPLY SUBMISSION (MERITS)** is filed by Messrs Surendra Ananth, solicitors for the Applicant abovenamed with an address of service at No.4, Dalaman Tunku, Bukit Tunku, 50480 Kuala Lumpur.

T | 03-62113883 **F** | 03-62110883 **E** | surendra@surendraananth.com