Dato' Dr Abd Isa bin Ismail
v
Dato' Abu Hasan bin Sarif & Anor

High Court, Kuala Lumpur – Application for Judicial Review No R4-25-304-2009 Alizatul Khair Osman Khairuddin J

April 14, 2010

Constitutional law *– State Legislative Assembly – Casual vacancy – First respondent absent from two meetings of State Assembly without leave – Whether seat vacated by virtue of Article 51 of the Laws of the Constitution of Kedah ("the Constitution") – Whether writ of quo warranto may be issued against first respondent – Whether right to establish casual vacancy of State Legislative Assembly seat vests in Speaker or Election Commission – Correct interpretation of "two consecutive meetings" in Article 51 of the Constitution – Elections Act 1958, s 12(3) – Federal Constitution, Article 132(1), (3), (3)(b) – Interpretation Acts 1948 and 1967, s 3 – Laws of the Constitution of Kedah, Articles 51, 53(5),*

Statute *– Interpretation – "Two consecutive meetings" – Meaning of – Laws of the Constitution of Kedah, Article 51*

The Kota Siputeh assemblyman ("the first respondent") was absent from two meetings of the Kedah State Legislative Assembly ("the assembly") i.e. the fifth meeting of the first session and the first meeting of the second session without leave and only tendered his medical certificates and reasons for his absence at a later date. The Speaker of the Kedah State Legislative Assembly ("the applicant") refused to accept the first respondent's medical certificates and reasons for his absence at the said meetings and wrote to the Election Commission, Malaysia ("the second respondent") informing it that there was a vacancy in the Kota Siputeh state seat. The second respondent replied by stating that the state seat had not been vacated and that the first respondent was still the state assemblyman as the two meetings that were not attended by him, were not two consecutive meetings within the definition of Article 51 of the Laws of the Constitution of Kedah ("the Constitution"). The second respondent further stated that the medical certificates tendered by the first respondent were acceptable as failure to submit the said medical certificates on or before the date of the meeting did not render the same void.

The applicant sought an order of certiorari and mandamus to quash the second respondent's decision and to compel it to issue a writ of election and to hold a by-election in respect of the Kota Siputeh state seat. As against the first respondent, the applicant applied inter alia for a writ of *quo warranto* and declarations that the first respondent was no longer the Kota Siputeh assemblyman and that the Kota Siputeh state seat was vacant. The applicant also sought an injunction to

prevent the first respondent from carrying out his responsibilities, function and duties as the Kota Siputeh assemblyman.

Issues

1. The correct interpretation of the phrase "two consecutive meetings" in Article 51 of the Constitution.
2. Whether the Election Commission or the Speaker is the rightful entity which establishes if there is a casual vacancy under Article 51 of the Constitution.
3. Whether the second respondent had committed an error of jurisdiction and had acted irrationally and ultra vires its powers.
4. Whether on the facts, a writ of *quo warranto* ought to be granted against the first respondent.

Held, granting relief sought by applicant, application for writ of *quo warranto* dismissed

1. The phrase "two consecutive meetings" in Article 51 of the Constitution should be given its plain and ordinary meaning i.e. two consecutive meetings, meaning one following the other in uninterrupted succession whether in the same (i.e. one) session or in two separate sessions. [*see p 312 para 52 line 15 - p para 54 line 34*]
2. (a) Bearing in mind that the word "establish" appears in Article 53(5) of the Constitution and based on the decision in *Jamaluddin Mohd Radzi & Ors v Sivakumar Varatharaju Naidu (Suruhanjaya Pilihan Raya – Intervener)* [2009] 5 AMR 761and whilst Article 51 sets out the conditions under which a seat becomes vacant, by virtue of Article 53(5) read together with s 12(3) of the Elections Act 1958, it is the duty of the Election Commission to establish or determine whether a casual vacancy has in fact occurred. In other words, Article 51 does not oust the power of the second respondent to establish a casual vacancy under Article 53(5) and for the purpose of carrying out its duty thereunder, it merely has to satisfy itself that the three pre-conditions in Article 51 have as a matter of fact been fulfilled. [*see p 320 para 93 lines 15-24*]

   (b) The constitutional duty imposed on the second respondent under Article 53(5) does not however extend to the second respondent encroaching or arrogating to itself the powers of the applicant under Article 51. [*see p 323 para 114 line 40 - p 324 para 114 line 6*]
3. On the facts, all three pre-conditions under Article 51 of the Constitution had been fulfilled, resulting in the first respondent's seat being vacant. In the circumstances, the second respondent had committed an error of jurisdiction when it decided that there was no vacancy in the Kota Siputeh state seat and that the first respondent was still the assemblyman of Kota Siputeh. Further, the second respondent had acted irrationally and ultra vires its

power by accepting the medical certificates and reasons advance by the first respondent when it had no power to do so as such power lies in the hand of the applicant pursuant to Article 51. In addition, the second respondent had also acted irrationally and ultra vires its power by deciding that the matter must be referred by the applicant to the Rights and Privileges Committee before Article 51 of the Constitution can be invoked, since the subject matter in question was not a matter of rights and privileges of the member of the Kedah Legislative Assembly. [*see p 323 para 114 lines 37-39; p 324 para 114 lines 12-24*]

4. An essential element to be determined before a writ of *quo warranto* could be issued is that the office in question must be a public office. It is clear from the definition of "public office" and "public services" in s 3 of the Interpretation Acts 1948 and 1967 and based on the provisions of Article 132(3) of the Federal Constitution that for a person to hold public office, he must do so in the public services as set out under Article 132(1) of the Federal Constitution. The office of a member of the Legislative Assembly of a State is however excluded from public service by virtue of Article 132(3)(b) of the Federal Constitution. Accordingly, the writ of *quo warranto* cannot be issued against the first respondent. [*see p 325 para 117 lines 18-20; p 325 para 121 line 28 - p 326 para 122 line 5*]

Cases referred to by the court

AG v the Commonwealth, ex-relatione McKinlay v Commonwealth of Australia (1975) 135 CLR 1 HC (*ref*)
Council of Civil Service Unions v Minister for Civil Service [1985] AC 374, HL (*ref*)
Dewan Undangan Negeri Kelantan & Anor v Nordin b Salleh & Anor [1992] 1 MLJ 697, SC (*ref*)
Fan Yew Teng v Government of Malaysia [1976] 2 MLJ 262, HC (*ref*)
Jamaluddin b Mohd Radzi & 2 Ors v Sivakumar a/l Varatharaju Naidu; Suruhanjaya Pilihan Raya (Intervener) [2009] AMR 761; [2009] 4 CLJ 347, FC (*foll*)
Lim Cho Hock v Speaker, Perak State Legislative Assembly [1979] 2 MLJ 85, HC (*ref*)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 AMR 3529; [1999] 3 MLJ 1, FC (*ref*)
Merdeka University Bhd v Government of Malaysia [1981] 2 MLJ 356, HC (*foll*)
MT Khan v Government of Andhra Pradesh [2004] 2 SCC 267, HC (*foll*)
Ram Singh Saini v HN Bhargava [1975] AIR 1852, SC (*ref*)
Thankamma v Speaker, TC Assembly 1952 AIR 166, HC (*dist*)

Legislation referred to by the court

India
Constitution of India, Article 190, 190(3)

Malaysia
Constitution of the State of Penang, Article 19(5)
Constitution of the State of Sabah, Article 21(5)
Constitution of the State of Sarawak, Article 21(5)
Elections Act 1958, s 12(3)
Federal Constitution, Articles 54(1), 132(1), (3)(b), 160

Interpretation Acts 1948 and 1967, s 3
Laws of the Constitution of Johore, Article 23(3)
Laws of the Constitution of Kedah, Articles 2, 39(1), 51, 53(2), 53(5)
Laws of the Constitution of Kelantan, Article 46(5)
Laws of the Constitution of Negeri Sembilan, Article 56(5)
Laws of the Constitution of Pahang, Article 26(3)
Laws of the Constitution of Selangor, Article 70(5)
Laws of the Constitution of Terengganu, Article 44(5)
The Constitution of the State of Malacca, Article 19(5)
The Laws of the Constitution of the State of Perak, Articles 35, 36(5), 63
The Laws of the Constitution of Perlis, Article 55(5)
Standing Rules and Orders of the Legislative Assembly, Order 12(1)(a), (b)

Singapore
Constitution of the Republic of Singapore, Article 46

Other references

Black's Law Dictionary, 7th edn
Black's Law Dictionary, 9th edn, p 47
Erskine May's Treatise on the Law, Privileges, Proceedings and Usages of Parliament, 23rd edn, chapters 5, 13, pp 27, 75, 273, 274, 275
NS Bindra's Interpretation of Statutes, p 1285, 10th edn
Shorter Oxford English Dictionary on Historical Principles, vol 1
Subhash C Kasyap's Parliamentary Procedure "The Law, Privileges, Practice and Precedent", p 1752

Sulaiman Abdullah, Edmund Bon Tai Soon, Zulqarnain b Lukman and *Joanne Leong* (Chooi & Company) for appellant
Mohd Hafarizam b Harun and *Shahir b Ab Razak* (Hafarizam Wan & Aisha Mubarak) for first respondent
Kamaludin b Md Said, Suzana bt Atan and *Mohd Azhar b Mohd Yusof*, SFC for second respondent
Anas b Mohd Zaki, State Legal Adviser, watching brief for Kedah State Government

Judgment received: June 17 2010

Alizatul Khair Osman Khairuddin J

[1] This is an application for judicial review by the Speaker of the Kedah State Legislative Assembly, YB Dato' Dr Abd Isa bin Ismail against the first respondent, the State Assemblyman ("ADUN") for the Kota Siputeh constituency of Kedah and the second respondent, the election commission.

[2] The applicant is seeking the following orders against the first respondent:

(i) a writ of *quo warranto* to ask the first respondent to show cause and give confirmation how and under what basis/or authority that first respondent is still the State Assemblyman for Kota Siputeh;

(ii) a declaration that first respondent is no longer the Kota Seputeh Assemblyman;

(iii) a declaration that the Legislative Assembly of the State of Kedah for the constituency of Kota Siputeh (N3) is vacant; and

(iv) a mandatory injunction preventing the first respondent and/or his agents or from carrying out the responsibilities, function and duties as Kota Siputeh Assemblyman.

[3] Against the second respondent the applicant is seeking the following reliefs:

(1) An order of certiorari against the second respondent to quash the second respondent's decision and/or action as per its letter dated September 1, 2009 that:

(i) the Kota Siputeh state seat is not vacant;

(ii) the first respondent is still the Kota Siputeh Assemblyman; and

(iii) no by-election would be held by virtue of (i) and (ii) above.

(2) An order of mandamus to compel the second respondent to issue a writ of election and to hold by-election to the Kota Siputeh state seat.

[4] Over and above the aforesaid reliefs, the applicant is also seeking damages, costs and other consequential reliefs against the respondents.

Leave application

[5] On October 20, 2009, I had granted leave to the applicant to file this application there being no serious objections from the Attorney-General to the application. The only objection raised was in respect of prayer (4) which is a grant of mandatory injunction against the second respondent. However, I was of the view that this issue can be ventilated at the hearing of the substantive application itself and need not be dealt with at this stage.

Substantive application

[6] This application arose from the decision of the second respondent contained in their letter of September 1, 2009 ("said decision") addressed to the applicant in response to the latter's letter dated August 17, 2009 informing the former through the state election officer that the Kota Siputeh (N3) seat had become vacant by virtue of Article 51 of the State Constitution due to the non-attendance at the state assembly by the first respondent for two consecutive meetings i.e. on April 19, 2009 and August 9, 2009.

[7] The said decision reads as follow:

Mesyuarat yang tidak dihadiri oleh YB ADUN Kota Siputeh bukanlah dua mesyuarat berturut-turut di dalam satu penggal persidangan dalam erti kata Perkara 51 Undang-

Undang Tubuh Kerajaan Kedah Darul Aman. Sebaliknya ia adalah dua mesyuarat berturut-turut untuk dua penggal yang berbeza (Tempoh masa antara penggal persidangan pertama dan penggal persidangan kedua ialah selama 3 bulan 20 hari). *Surat cuti sakit yang dikemukakan oleh YB ADUN Kota Siputeh diterima oleh SPR sebagai penjelasan mengenai ketidakhadiran beliau dalam mesyuarat dewan.* YB ADUN Kota Siputeh itu menghantar surat cuti sakit kepada YB Speaker lebih awal (selewat-lewatnya pada Ogos 9, 2009) tidak menjadikan surat cuti sakit itu terbatal. *SPR berpendapat bahawa sebelum Perkara 51 Undang-Undang Tubuh Kerajaan Kedah Darul Aman digunakan, ia hendaklah terlebih dahulu dirujuk kepada Jawatankuasa Hak dan Kebebasan Dewan. SPR memutuskan bahawa tiada berlaku apa-apa kekosongan pada kerusi ADUN N3 Kota Siputeh.*" (Emphasis added.)

Background facts

[8] The relevant facts are as follows:

(1) The Legislative Assembly of the State of Kedah ("Kedah Legislative Assembly") was dissolved on February 13, 2008 which led to the 12th general election of the Kedah Legislative Assembly on March 8, 2008 ("12th General Election").

(2) After the 12th General Election, political parties under the Pakatan Rakyat coalition succeeded in obtaining the majority of the 36 seats which were contested during the said 12th General Election and consequently formed the current Kedah State Government,

(3) His Royal Highness the Sultan of Kedah ("HRH") thereafter summoned the meeting of the Kedah Legislative Assembly on May 5, 2008 at 9.00 a.m. This is the *first meeting (of the first session)* of the 12th Kedah Legislative Assembly.

(Exhibit All-5 in the affidavit in support of the applicant affirmed on September 28, 2009, encl (3).)

(4) Subsequently, HRH summoned the Kedah Legislative Assembly for another meeting on May 20, 2008 at 9.00 am. This is the *second meeting (of the first session)* of the 12th Kedah Legislative Assembly.

(Exhibit All-6 in the affidavit in support of the applicant affirmed on September 28, 2009, encl (3).)

(5) *The second meeting (of the first session)* was subsequently adjourned *sine die*.

(Exhibit All-7 in the affidavit in support of the applicant affirmed on September 28, 2009, encl (3).)

(6) Another meeting was summoned by HRH on August 25, 2008 at 9.00 a.m. This is the *third meeting (of the first session)*.

(Exhibit All-8 in the affidavit in support of the applicant affirmed on September 28, 2009, encl (3).)

(7) The *third meeting (of the first session)* was subsequently adjourned *sine die*.

(Exhibit All-9 in the affidavit in support of the applicant affirmed on September 28, 2009, encl (3).)

(8) The Kedah Legislative Assembly was summoned for a *fourth meeting (of the first session)* on November 18, 2008 at 9.00 a.m. by HRH.

(Exhibit All-10 in the affidavit in support of the applicant affirmed on September 28, 2009, encl (3).)

(9) The *fourth meeting (of the first session)* was subsequently adjourned *sine die*.

(Exhibit All-13 in the affidavit in support of the applicant affirmed on September 28, 2009, encl (3).)

(10) The *fifth meeting (of the first session)* was held on April 19, 2009 at 9.00 a.m.

(Exhibit All-14 in the affidavit in support of the applicant affirmed on September 28, 2009, encl (3).)

The first respondent was absent from the said meeting without leave of the applicant

(11) The *fifth meeting (of the first session)* was subsequently adjourned *sine die*

(Exhibit All-11-15 in the affidavit in support of the applicant affirmed on September 28, 2009, encl (3).)

(12) HRH had summoned for another meeting on *August 9, 2009* at 9.00 a.m. as the date and time for the *first meeting (of the second session)* of the Kedah Legislative Assembly.

(Exhibit All-11-16 in the affidavit in support of the applicant affirmed on September 28, 2009, encl (3).)

The first respondent was also absent from this meeting without leave of the applicant

(13) Subsequently, the applicant was informed by one En Zaidi b Ahmad ("Zaidi") who is the "Pembantu Tadbir (Kesetiausahaan)" of the Kedah Legislative Assembly Office that the latter had contacted the first respondent on August 12, 2009 (approximately around 3.00 p.m.) to inquire into the first respondent's absence from the Kedah Legislative Assembly for two consecutive meetings without leave of the applicant.

(14) After the said telephone conversation and at approximately 5.00 p.m., the first respondent faxed a letter dated August 10, 2009 together with a medical certificate dated August 9, 2009 to the State Legislative

Assembly's office and state executive meeting council ("Pejabat Dewan Undangan Negeri dan Majlis Mesyuarat Keajaan Negeri Kedah").

(15) On August 16, 2009, the first respondent met the applicant in the latter's office and the first respondent submitted his original letter dated August 10, 2009 and the medical certificate dated August 9, 2009.

(16) The applicant did not accept the first respondent's medical certificate and his reasons for being absent on August 9, 2009 for the following reasons:

(a) if first respondent is unable to attend any meeting the said member must obtain leave from the applicant as Speaker of the Kedah Legislative Assembly. Once leave is granted the applicant will inform the Kedah Legislative Assembly of his absence for further action;

(b) the first respondent did not contact or make any attempt to contact the applicant or the Secretary of the Kedah Legislative Assembly on August 9, 2009 or anytime immediately thereafter about his absence until he was contacted by En Zaidi on August 12, 2009;

(c) if the first respondent had indeed contacted the opposition leader of the Kedah Legislative Assembly, YB Dato' Seri Diraja Mahdzir b Khalid ("opposition leader") on August 9, 2009 to inform the latter about his absence, it is perplexing that the first respondent would have informed the applicant about his absence on August 9, 2009;

(d) the letter dated August 10, 2009 and the medical certificate dated August 9, 2009 are back dated documents and it is an afterthought; and

(e) the applicant has reason to believe that on August 10, 2009, the first respondent had organised and attended a programme at Kampung Kolam Tok Arang making contributions to the victims of a natural disaster at the said kampung. The programme was reported in a local newspaper called Sinar Harian (Kubang Pasu).

(17) Pursuant thereto, the applicant wrote a letter dated August 17, 2009 to the Election Office of the State of Kedah, informing them that there is a vacancy in the Kota Siputeh state seat.

(18) The second respondent's reply on September 7, 2009 adverted to above, resulted in the present application. The second respondent's reply can be summarised as follows:

(a) that the first respondent is still the Kota Siputeh Assemblyman and that there is no vacancy in the said state seat;

(b) the meetings which were not attended by the first respondent were not two consecutive meetings within the meaning of Article 51 of the Kedah Constitution. The two consecutive absences must occur

within one "penggal persidangan" (within one session). In the present case, the two consecutive meetings which were not attended by the first respondent are two meetings in different sessions;

(c) the second respondent accepted the medical certificate submitted by the first respondent as being the explanation for his absence at the August 9, 2009 meeting. The second respondent further held that the failure on the part of the first respondent to submit his medical certificate earlier or on August 9, 2009 did not render the medical certificate void; and

(d) before Article 51 of the Kedah Constitution can be invoked, the matter has to be referred to the rights and privileges committee of the 12th Legislative Assembly.

(Exhibit All-22 and Exhibit All-23 in the affidavit in support of the applicant affirmed on September 28, 2009, encl (3).)

Issues

[9] The two main issues that arise from the factual matrix of this case as set out above are as follows:

(A) What is the correct interpretation of Article 51 of the Kedah State Constitution ("Article 51").

(B) Who establishes whether there is a vacancy under Article 51.

[10] The answer to these two questions in particular (A) would determine whether or not a vacancy has occurred for the constituency of Kota Siputeh (N3) – due to the absence of the first respondent at the meetings on April 19, 2009 and August 9, 2009.

(A) What is the correct interpretation of Article 51

[11] Article 51 states as follows:

> If any member of the Legislative Assembly *is absent* from the Assembly *without leave* of the Speaker *for 2 consecutive meetings* his seat shall become vacant. (Emphasis added.)

[12] The nub of the issue here is, what is the correct interpretation of the phrase "two consecutive meetings" in Article 51.

[13] In setting out his argument on this issue counsel for the applicant submitted that three pre-conditions must be satisfied before a seat becomes vacant under Article 51. The three pre-conditions are:

(i) a member of the Legislative Assembly must be absent from the assembly;

(ii) he must be absent for two consecutive meetings; and

(iii) his absence from the assembly is without leave.

First pre-condition

[14] The first pre-condition is not really in issue. Both the first and second respondents do not dispute that the first respondent was absent from the state assembly meetings on *April 19, 2009* and *August 9, 2009*. The dispute is whether these two absences constitute being absent from the assembly for two consecutive meetings. The second respondent is of the view that the absence of the first respondent from these two meetings do not constitute absence for two consecutive meetings within the meaning of Article 51. The applicant contends otherwise which brings us to the second pre-condition and the meaning to be ascribed to the phrase *"two consecutive meetings" in this Article.*

Second pre-condition

[15] The second respondent's contention (which is supported by the first respondent) in a nutshell is that the phrase *"two consecutive meetings"* in Article 51 refers to two consecutive meetings in the same session. This can be inferred from their written submission wherein they stated, and I quote, as follows:

> It is submitted that Article 51 of the UTKK (Undang-Undang Tubuh Kerajaan Kedah) gives rise to the following issue:
>
> > "Whether *the fifth meeting of the first session on April 19, 2009* and the *first meeting of the second session on August 9, 2009 fall within the constitutional meaning* of "consecutive meetings" under Article 51 of the UTKK." (Words in parentheses and emphasis added).

[16] It is not immediately clear what the second respondent meant when they referred to the "constitutional meaning of the phrase consecutive meetings". The second respondent in their submission had conceded that the phrase "consecutive meetings" is not defined in the Kedah State Constitution.

[17] The second respondent however sought to define the phrase "consecutive meetings" by reference to the other provisions in the Kedah State Constitution, namely the definition of the words "meeting" and "session" in Article 2 read together with the definition of the word "sitting" in Order 12(1)(a) and (b) of the Standing Rules and Orders of the Legislative Assembly.

[18] Thus, according to the second respondent following from the abovesaid definitions and based on the facts of the case, the meeting in which the first respondent was first absent on April 19, 2009 was the *fifth meeting of the first session* of the Legislative Assembly whilst the second meeting in which the first respondent absented himself on August 9, 2009 was the *first meeting of the second session.*

[19] In their view the assembly had been prorogued when HRH issued the proclamation in which the meeting on August 9, 2009 is described as the *first*

meeting of the second session. The effect of the proclamation is to terminate the first session of the assembly and to commence the second session.

[20] Hence, in the second respondent's view the first meeting of the *second session* on August 9, 2009 *cannot be considered as a "consecutive meeting" to the fifth meeting* (on April 19, 2009) which was the last meeting of the first session based on the following grounds:

(a) each session of the assembly has its own meetings;

(b) a session of the assembly terminates upon it being prorogued;

(c) the first session of the assembly was prorogued by HRH as a result of the proclamation of the second session by HRH; and

(d) the second session begins with a fresh meeting as each session has its own meetings.

[21] In other words although the first respondent was absent for two meetings, one following the other, he cannot be said to be absent for two consecutive meetings because the two meetings in which he was absent were in two different sessions. Therefore according to the second respondent, the phrase "two consecutive meetings" in Article 51 must be construed to mean *two consecutive meetings in the same session*.

The application's contention

[22] The gist of the applicant's argument is that the words of Article 51 of the Kedah Constitution are plain and unambiguous; therefore the phrase "two consecutive meetings" must be given its plain and ordinary meaning and must not be interpreted in a manner which can distort the true meaning of the said phrase. The plain and ordinary meaning of the phrase "two consecutive meetings" in Article 51 according to the applicant is found in the definition of the word "consecutive" in the *Shorter Oxford English Dictionary on Historical Principles, Vol 1* which is as follows:

> Following continuously: following each its predecessor in uninterrupted succession.

[23] Following this definition the applicant's argument is that the phrase "two consecutive meetings" appearing in the Kedah State Constitution can only mean one meeting following the earlier meeting in uninterrupted succession.

[24] Applying the above definition to the facts of this case, the applicant's contention is that the first respondent was absent from the Legislative Assembly for two consecutive meetings.

[25] This is because the first time the first respondent was absent without leave from the Legislative Assembly meeting was on April 19, 2009. Thereafter another meeting was convened on August 9, 2009. The first respondent was again absent from this meeting and he had failed yet again to obtain

leave of the speaker. Consequently as the August 9, 2009 meeting was held immediately after April 19, 2009 meeting in "uninterrupted succession", the two meetings (wherein the first respondent was absent) were in effect "two consecutive meetings" irrespective of whether the two meetings were in the same session or in separate sessions.

[26] The second respondent and applicant's argument above gives rise to the following sub-issues:

(i) Whether the second respondent was right in construing the phrase "two consecutive meetings" to mean two consecutive meetings in the same session;

(ii) And if so, whether in law the two meetings in question i.e. on April 19, 2009 and August 9, 2009 were convened in one session as contended by the applicant or in two separate sessions as argued by the second respondent. I will deal with the second sub-issue first *on the assumption* that the second respondent was right in their construction of the said phrase as stated in (i) above.

[27] In order to determine this issue it is necessary to refer to the definitions of "meeting", "session" and "sitting".

[28] Firstly, the word "*meeting*" is defined in Article 2 of the Kedah State Constitution to mean:

> ... any sitting or sittings of the Legislative Assembly commencing when the Assembly first meets after being summoned at any time and terminating when the Assembly is adjourned *sine die* or at the conclusion of a session without adjournment.
>
> "*Session*" in Article 2 of the Kedah State Constitution means – "the sittings of the Legislative Assembly *commencing when the Assembly first meets after being constituted or after its prorogation* or dissolution at any time and *terminating when the Assembly is prorogued* or is dissolved without having been prorogued".
>
> "Sitting" as acknowledged by both parties is not defined in the Kedah State Constitution. In the absence of such a definition reference is made to the definition of "sitting" in *Standing Order 96* of the Standing Rules and Orders of the Legislative Assembly of the State (Standing Orders) (not Standing Order 12 as alleged by the 2nd Respondent) which reads as follows –
>
> > "... a period during which the Assembly is sitting continuously (apart from any suspension) without adjournment, and includes any period during when the Assembly is in committee."

[29] Secondly, it is not in dispute:

(a) that the meeting which was held on April 19, 2009 wherein the first respondent was absent for the first time without leave of the speaker (i.e. the applicant) was the *fifth meeting (of the first session)*;

[38] How does the Ruler or HRH in this case exercise his power to prorogue? In the same manner that he does in exercising his power to dissolve the assembly i.e. by issuing a proclamation. The practice of issuing a proclamation to dissolve or prorogue the Legislative Assembly is not provided for in the Kedah State Constitution but is based on parliamentary practice in the United Kingdom whereby "Parliament is usually dissolved by proclamation". Similarly with prorogation. (see p 273, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usages of Parliament*, (supra)).

[39] As can be seen at exh All-3 in encl (3) (supra), the Kedah Legislative Assembly was dissolved on February 13, 2008 pursuant to the proclamation issued by HRH to that effect.

[40] No such proclamation was issued to prorogue the assembly at the end of the fifth meeting of the first session on April 9, 2009. Dato' Kamaluddin Said, Senior Federal Counsel ("SFC") acting for the second respondent while conceding that there was no proclamation to expressly prorogue the Legislative Assembly argued that the assembly is deemed to be prorogued when HRH issued the said proclamation calling for the first meeting of the second session.

[41] With respect I am unable to agree with his submission. As stated earlier the power to prorogue is a discretionary power of HRH under Article 53(2) acting on the advice of the state executive council under Article 39(1); therefore the exercise of such power cannot to my mind be inferred, implied or deemed but must be expressediy exercised by HRH in accordance with the provisions of Article 53(2) read together with Article 39(1).

[42] Therefore in the absence of any evidence that HRH has expressedly exercised his power to prorogue under Article 53(2), I would agree with counsel for the applicant that it was as a matter of administrative expediency that the meeting on August 9, 2009 is described as the first meeting of the second session in the said proclamation. In law, however, based on the definition of "session" in Article 2, the meaning of prorogation as expounded in *Erskine May's Treatise* (supra), and the provisions of Article 53(2) (read together with Article 39(1)) as set out above, there was no second session.

[43] Furthermore as can be observed from the various proclamations issued it appears to be the practice in Kedah that a proclamation is issued by HRH to summon each and every meeting of the Legislative Assembly commencing from the date it was first constituted on May 5, 2008 (exh All-4, encl (3)) until the last meeting on August 9, 2009 (exh All-14, encl (3)). As such it would be erroneous to assume that the issuance of a proclamation describing the meeting on August 9, 2009 as the first meeting of the second session is *ipso facto* evidence that the Legislative Assembly has been prorogued.

(b) that at the end of the fifth meeting (of the first session), the Legislative Assembly was adjourned *sine die;*

(c) the meeting convened on August 9, 2009 wherein the first respondent was absent for the second time and again without the leave of the speaker (i.e. the applicant) was termed the *first meeting of the second session* in the proclamation issued on July 1, 2009 (exh A11-16, supra) ("said proclamation").

(Emphasis added.)

[30] It is also not in dispute that both meetings fall within the definition of the word "meeting" in Article 2.

[31] What is in dispute is whether the first meeting summoned by HRH in the said proclamation on August 9, 2009 is in law correctly described as the first meeting of the second session.

[32] It is clear from the definition of the word "session" in Article 2 that a "*session*" commences when the assembly first meets after being *constituted* or after its *prorogation* or *dissolution* at anytime. Again it is not in dispute that the meeting convened on August 9, 2009 is not the first time that the assembly met after being constituted or after its dissolution. The only question is whether this was the first meeting of the assembly after it was prorogued.

[33] To answer this question, one needs to ascertain whether the first session was in law prorogued.

[34] The term prorogation is not defined in the Kedah State Constitution. In the absence of any such definition reference is made to *Erskine May's Treatise on the Law, Privileges, Proceedings and Usages of Parliament*, 23rd edn, Ch 13, pp 274 to 275. According to the learned author, prorogation is essentially a situation where a Ruler decides to discontinue the session of a legislative body without dissolving it.

[35] As opined by Erskine May at p 27 of his Treatise – "The effect of a prorogation is at once to suspend all business, including committee proceedings until Parliament shall be summoned again, and to end the sittings of Parliament."

[36] The decision to prorogue, according to *Erskine May* is an exercise of discretion on the part of the Ruler (which in the United Kingdom is called a prerogative act of the Crown). This is reflected in *Article 53(2)* of the Kedah State Constitution (said "Article") which provides as follows:

> The Ruler may prorogue or dissolve the Legislative Assembly.

[37] In exercising his discretion under this Article, the Ruler acts on the advice of the state executive council by virtue of Article 39(1) of the Kedah State Constitution.

[44] In the premises, I would agree with counsel for the applicant that the meeting on August 9, 2009 although described as the first meeting of the second session in the said proclamation is in law the sixth meeting of the first session.

[45] This is so because at the end of the fifth meeting (of the first session) on April 19, 2009, the Legislative Assembly was adjourned *sine die* by the applicant (refer exh All-14, encl (3)) and not prorogued as shown above.

[46] Adjourned *sine die* according to *Black's Law Dictionary*, 9th edn, p 47 means to end a deliberative assembly's session without setting a time to reconvene. The distinguishing feature between an "adjournment *sine die*" and a "prorogation" is that in the former, the period between the prorogation of a legislation body and its reassembly in a new session is called a "*recess*". The period between the adjournment of a legislative body and resumption of its sitting is called an "adjournment". The Legislative Assembly was merely at an adjournment stage after April 19, 2009 meeting until the following meeting on August 9, 2009.

[47] Accordingly even though the meeting on April 19, 2009 was termed the *fifth meeting (of the first session)* and the meeting on August 9, 2009 was termed the *first meeting (of the second session)* in law under the Kedah State Constitution, both meetings were held in a single session because after the meeting on April 19, 2009 the Legislative Assembly was never prorogued by HRH. It was merely adjourned until its resumption on August 9. 2009.

[48] On the assumption that the second respondent was correct *in construing "two consecutive meetings"* in Article 51 to mean two consecutive meetings in the same session, I would hold that the absence of the first respondent from the assembly on the April 19, 2009 and on August 9, 2009 constitutes absence for two consecutive meetings in the same session i.e. the first session as the meeting on August 9, 2009 follows from the meeting on April 19, 2009 in one uninterrupted succession.

[49] Reverting to the first sub-issue whether the second respondent was right in construing "two consecutive meetings" in Article 51 to mean two consecutive meetings in one session, I cannot find any support for such a construction. The SFC referred to several authorities which set out the guiding principles in interpreting a constitution.

[50] One of the authorities referred to is the case of *Dewan Undangan Negeri Kelantan & Anor v Nordin b Salleh & Anor* [1992] 1 MLJ 697 in which the Federal Court quoted, inter alia, Barwick CJ who was speaking for the High Court of Australia in *AG v The Commonwealth, ex-relatione McKinlay v Commonwealth of Australia* (1975) 135 CLR 1 at p 17, who said thus:

> ... the only true guide and the only course which can produce stability in constitutional law is to read the language of the Constitution itself, no doubt generously and not pedantically, but as a whole and to find its meaning by legal reasoning.

[51] That the above passage is an established canon of constitutional construction is not in dispute. However, I do not see how a reference to the definitions of "meeting" and "session" in Article 2 and "sitting" in Order 96, if that is what is meant by reading the language of the constitution as a whole, would assist the second respondent in construing the words "two consecutive meetings". The second respondent is not contending that giving the phrase two consecutive meetings its plain and ordinary meaning would lead to an anamolous result or an absurdity or is otherwise inconsistent with the intention of the Kedah State Constitution. Even if it is so contended by the second respondent, there is no basis for such a contention and certainly none has been postulated before this court.

[52] In my view the phrase "two consecutive meetings" in Article 51 should be given its plain and ordinary meaning. As stated in *NS Bindra's Interpretation of Statutes*, p 1285, 10th edn, relying on the case of *MT Khan v Government of Andhra Pradesh* [2004] 2 SCC 267:

> The question of interpretation of a Constitution would arise only in the event of the expression contained therein being vague, indefinite and ambiguous as well as capable of being given more than one meaning.

[53] More pertinently Eusoffe Abdoolcader J (as he then was) in the celebrated case of *Merdeka University Bhd v Government of Malaysia* [1981] 2 MLJ 356 opined thus:

> The Constitution is not to be construed in any narrow or pedantic sense but *this does not mean that the court is at liberty to stretch or pervert the language of Constitution* in the interests of any legal or constitutional theory or even for the purpose of supplying omission or correcting supposed errors. (Emphasis added.)

[54] Applying the aforesaid principles of law to the present case hold that the phrase "two consecutive meetings" in Article 51 should be given its plain and ordinary meaning i.e. two consecutive meetings, meaning one following the other in an uninterrupted succession whether in the same (i.e. one) session or in two separate sessions.

[55] In any event even if I am wrong in my judgment on this issue, it is of little consequence because as shown earlier it has been clearly established that first respondent was absent for two consecutive meetings in the same session, the second session not having in law been convened.

Third pre-condition

[56] The issue here is whether on the facts of the case, the first respondent was absent for two consecutive meetings *without the leave* of the speaker.

[57] It is not really in dispute that the first respondent did not obtain the leave of the speaker for both absences. The only issue raised by both respondents is whether the speaker should have granted leave to the first respondent on the ground that he was sick as apparent from his medical certificate ("MC") (All of encl (3)).

[58] The first respondent had, on August 12, 2009 faxed his letter dated August 10, 2009 together with his MC to Zaidi after the latter had notified him earlier (on the same day) about his failure to attend the meeting of the assembly on August 9, 2009. Subsequently the first respondent officially met the applicant on August 16, 2009 stating the reason for his absence and enclosing the original copy of his letter dated August 10, 2009 and the MC which was for two days from August 9, 10, 2009. The first respondent raised several allegations against the applicant in relation to this issue viz:

(i) the applicant failed to inform first respondent whether he accepted or rejected first respondent's explanation for his absence but instead acted unilaterally, in excess of his powers and with mala fide in informing the Kedah State Elections Director that the Kota Siputeh seat (N3) had fell vacant;

(ii) the first respondent had the legitimate expectation to be informed by the applicant of "such an important matter";

(iii) the applicant did not act "with utmost sincerity, honesty and impartiality" in dealing with this matter as expected of a speaker when dealing with issues affecting members of the legislative assembly (as compared to India and England).

[59] In relation to the abovesaid allegations in particular, that the applicant had acted mala fide in excess of his powers in the circumstances set out therein, it must be pointed out that the first respondent is not challenging the applicant's action or decision as such. Therefore it is not relevant to the issue at hand. However as the second respondent has more or less raised the same allegation(s) (as in (i) and (iii) above) in their letter of September 1, 2009 ("the said letter"); I will elaborate further on these issues later in my judgment.

[60] As to the first respondent's allegation that he had been denied his legitimate expectation of being informed of the applicant's decision to accept or respect his offer of explanation for his absence on August 9, 2009, this is clearly without merit as the applicant had on the day following the first respondent's meeting with the applicant, vide letter dated August 17, 2009 notified the first respondent that his seat had fallen vacant pursuant to Article 51 due

to his absence from the assembly for two consecutive meetings without the leave of the speaker. (Refer exh All-3, first respondent's own office in reply, encl (15)).

[61] Thus as far as the third condition is concerned, it cannot as a matter of fact be disputed that no leave had been obtained by the first respondent from the applicant in respect of his absence on August 9, 2009.

[62] In the circumstances it would appear that all three pre-conditions under Article 51 have been fulfilled.

[63] That being the case it is therefore the contention of the applicant that as all three pre-conditions in Article 51 had been fulfilled the first respondent's seat had *by operation of law* fallen vacant.

[64] This brings us to the second issue that falls to be determined in the present case.

(B) Who establishes whether there is a vacancy under Article 51

[65] To reiterate what the applicant has stated earlier, their position is that once it has been established that all three pre-conditions have been fulfilled then the first respondent's seat in the Legislative Assembly became vacant by operation of law.

[66] Upon the seat becoming vacant, the applicant as speaker is duty bound according to counsel, to inform the second respondent of the vacancy which he did in this instance vide his letter dated August 17, 2009 (exh All-20, encl (3)).

[67] As stated earlier, it is the second respondent's reply to this letter contained in their letter of September 1, 2009 which has led the applicant to file this present application.

[68] To re-capitulate, in their said letter of September 1, 2009, the second respondent replied to the following effect:

> 18. Setelah meneliti dokumen dan mengkaji fakta yang dikemukakan kepada SPR serta kedudukan undang-undang yang berkaitan, pada menjalankan kuasa di bawah Fasal (5) Perkara 53 Undang-Undang Tubuh Kerajaan Kedah, SPR memutuskan seperti yang berikut:
>
> "Mesyuarat yang tidak dihadiri oleh YB ADUN Kota Siputeh bukanlah dua mesyuarat berturut-turut di dalam satu penggal presiding dalam erti kata Perkara 51 Undang-Undang Tubuh Kerajaan Kedah Darul Aman. Sebaliknya ia adalah dua mesyuarat berturut-turut untuk dua penggal yang berbeza (Tempoh masa antara penggal presiding pertama dan penggal presiding kedua ialah selama 3 bulan 20 hari). Surat cuti sakit yang dikemukakan oleh YB ADUN Kota Siputeh diterima oleh SPR sebagai penjelasan mengenai

> ketidakhadiran beliau dalam mesyuarat Dewan pada 9 Ogos 2009. SPR juga mendapati bahawa kegagalan YB ADUN Kota Siputeh itu menghantar Surat Cuti Sakit kepada YB Speaker lebih awal (selewat-lewatnya pada 9 Ogos 2009) tidak menjadikan Surat Cuti Sakit itu terbatal. SPR berpendapat bahawa sebelum Perkara 51 Undang-Undang Tubuh Kerajaan Kedah Darul Aman digunakan, ia hendaklah terlebih dahulu dirujuk kepada Jawatankuasa Hak dan Kebebasan Dewan. SPR memutuskan bahawa tiada berlaku apa-apa kekosongan pada kerusi ADUN N3 Kota Siputeh."

[69] The main thrust of the applicant's submission with regard to the reply by the second respondent is that in arriving at its decision as such, the second respondent had committed an error of jurisdiction. Therefore it is substantively ultra vires and an illegality.

[70] The second respondent's assertion is premised on the wording of Article 51 which in their view is clear and unambiguous. Once the pre-conditions are fulfilled then by operation of law the state seat of Kota Siputeh becomes automatically vacant. No other institution including the second respondent is empowered to interfere in the operation of the Article.

[71] In addition only the speaker (i.e. the applicant) is empowered to exercise the discretionary power conferred upon it under Article 51. It goes without saying therefore that no other institution is authorised to assume or usurp that power. There is also no room under Article 51 for such power to be delegated. The second respondent has in this instance in making the decision as per the letter dated September 1, 2009 acted under a misconception of law in assuming it has the power and jurisdiction to determine and decide on matters which fall within the purview of Article 51.

[72] In this regard, the applicant sought to distinguish the recent case of *Jamaluddin b Mohd Radzi & 2 Ors v Sivakumar a/l Varatharaju Naidu; Suruhanjaya Pilihan Raya (Intervener)* [2009] AMR 761; [2009] 4 CLJ 347 ("*Jamaluddin*'s case") whereby the Federal Court held in determining the issue whether the elections commission is the rightful entity which establishes if there is a casual vacancy of the State Legislative Assembly inter alia, as follows:

> On a plain reading of Article 36(5) of the Perak Constitution read together with s 12(3) of the Elections Act 1958 it is the Election Commission that establishes the casual vacancy and not the Speaker.

[73] Counsel for the applicant, Tuan Haji Sulaiman Abdullah ("Tuan Hj Sulaiman") argued that in *Jamaluddin*'s case the learned Federal Court judge Nik Hashim FCJ, in arriving at the aforesaid decision was largely influenced by the wordings of Article 46 of the Constitution of the Republic of Singapore and Article 190 of the Constitution of India relating to the resignation of a Member of Parliament (in the case of Singapore) and a Member of the State Legislature (in the case of India), when compared with the relevant Article in the Perak State Constitution (i.e. Article 36(5)). After examining Article 46 and

Article 190 of the Constitution of the Republic of Singapore and the Constitution of India respectively the learned Federal Court judge surmised as follows:

> These two articles of the Constitution of Singapore and India clearly state that a seat becomes vacant when a Member of Parliament and House of the Legislature of a State respectively writes to the Speaker informing him of the resignation. In contrast, Article 35 of the Perak Constitution merely states that a member of the State Legislative Assembly may resign his membership by writing under his hand addressed to the Speaker.

[74] The learned Federal Court judge went on to emphasise that the phrase "shall become vacant" is also not part of Article 35 or Article 36(5) of the Perak State Constitution thus distinguishing the position in Perak from that of India and Singapore.

[75] Thus, reasoned counsel for the applicant, it is evident from the above passage that it is because of the absence of the phrase "shall become vacant" that led the Federal Court to hold that the election commission had the power to establish a casual vacancy for matters arising from Article 35 of the Perak Constitution. In effect, according to counsel, it tantamounts to the Federal Court saying that the election commission has no power to determine whether there is any casual vacancy in the state seat if the phrase "shall become vacant" appears in Article 35 of the Perak Constitution.

[76] Thus, as Article 51 contains the phrase "shall become vacant" therefore it is abundantly dear according to counsel, that in relation to matters falling within the purview of Article 51, the second respondent has no jurisdiction whatsoever, as once the pre-conditions have occurred, then the seat becomes automatically vacant. The corollary would be that the second respondent has no power to establish casual vacancy if a seat falls vacant pursuant to the provisions of Article 51. In other words the second respondent's power to establish casual vacancy has been ousted by the clear wording of Article 51.

The first and second respondents' contention

[77] The second respondent relied on *Jamaluddin*'s case to argue that the power to establish a casual vacancy under the Kedah State Constitution rests on the second respondent by virtue of Article 53(5) of the Kedah State Constitution ("Article 53(5)") read together with s 12(3) of the Elections Act 1958. The second respondent was further of the view that as Article 53(5) is constructed in similar if not the same terms as Article 36(5) of the Perak State Constitution the second respondent is under a constitutional duty to establish whether there was a casual vacancy based on the Federal Court's decision in *Jamaluddin*'s case, notwithstanding the applicant's contention that under Article 51 a seat falls vacant by operation of law upon the occurrence of the pre-conditions stipulated therein.

[78] Counsel for the first respondent, Dato' Mohd Hafarizam in support of the second respondent's position on this issue argued at length that Article 51 is, in counsel's words "not a standalone article" for purposes of determining whether a casual vacancy has arisen or not. Learned counsel is of the view that as Article 53(5) imposes a duty on the second respondent to establish casual vacancy the second respondent cannot act as a mere rubber stamp and accept that a casual vacancy has occurred under Article 51 upon being informal as such by the applicant. In fact it is counsel's view where, as in this case there are allegations that there was a failure to attend two consecutive meetings it is the duty of the election commission (i.e. the second respondent) by virtue of Article 53(5), "to establish i.e. to ascertain beyond a reasonable doubt "whether there is a casual vacancy." Learned counsel referred to the case of *Thankamma v Speaker, TC Assembly;* 1952 AIR 166 (*"Thankamma"*) which he opined would by way of analogy apply to the present case. That case dealt with Article 190(3) of the Indian Constitution which provides that if a member resigns his seat and his resignation is accepted by the speaker, his seat shall therefore become vacant.

> ... This provision necessarily indicates that the letter of resignation must proceed from the member and that the resignation must relate to a membership held by the person who sends the same. The mere receipt by the Speaker of a letter of resignation purporting to be from a member will not cause that member's seat to become vacant. It is open to the honourable Speaker to enquire whether that is a genuine letter or a forged letter, or one obtained by fraud or force is only a void document. The position taken, that the honourable Speaker has no right to enquire into any matter relating to resignation cannot therefore be sustained. What is contemplated in the section is a resignation with the full consent of the writer of his or her own volition and not any letter of resignation. From the facts placed before me and the allegations not controverted by the opposite parties, I take it that the following facts are to be established.

[79] Relying on the above judgment, it is learned counsel's contention that the second respondent must be entitled to look at other contemporaneous documents and evidence in order to establish whether there is a vacancy.

[80] As with the first respondent, counsel for the second respondent relied on *Jamaluddin's* case to submit that on a true interpretation of Article 51 "read harmoniously" with Article 53(5), the speaker has no role to play in establishing any vacancy and that on a plain reading of Article 53(5) it is the election commission that establishes a casual vacancy and not the speaker.

[81] In order to answer the question posed in the second issue:

> Who establishes whether there is a casual vacancy under the Kedah State Constitution,

it is necessary, firstly, to refer to Article 53(5) and s 12(3) of the Elections Act 1958. Article 53(5) stipulates that:

A casual vacancy shall be filled within sixty days from the date on which it is *established by the Election Commission that there is a vacancy*. (Emphasis added.)

[82] Section 12(3) of the Election Act 1958 provides that:

In relation to a vacancy, which is to be filled at a by-election, a writ shall be issued not earlier than four days and not later than ten days from the date on which *it is established* by the Election Commission that there is a vacancy. (Emphasis added.)

[83] For the sake of completeness, "casual vacancy" is defined under Article 160 of the Federal Constitution to mean "a vacancy arising in the House of Representative or a Legislative Assembly otherwise than by dissolution of Parliament or of the Assembly". As stated earlier although this issue had been decided by the Federal Court in *Jamaluddin*'s case, the applicant sought to distinguish the facts of that case from the present case to argue that the decision in that case is not binding on this court.

[84] In *Jamaluddin*'s case the issue revolved around the alleged resignation of the three state assemblymen in question i.e. Jamaluddin Mohd Radzi, Mohd Osman Mohd Johar and Hee Yit Fong (the appellants), who had won the Perak State seats of N39 Behrang, N14 Changkat Jering and N31 Jelapang respectively in the 12th General Election. All three state assemblymen had purportedly resigned from their political parties in the Pakatan Rakyat coalition government and had given their support to the Barisan Nasional as independents causing the collapse of the Pakatan State Government.

[85] In early February 2009, the respondent speaker had received resignation letters pre-signed from the three applicants and had declared their seats vacant. However the election commission in that case refused to hold by-elections on the ground that there was an ambiguity as to whether the applicants had resigned voluntarily. In view of the uncertainty surrounding the issue, the three applicants filed a suit against the respondent speaker in the Ipoh High Court seeking a declaration that they were still elected representatives. The matter was then referred directly to the Federal Court under Article 63 of the Perak State Constitution.

[86] The questions for determination before the Federal Court were as follows:

(1) Whether, on a true interpretation of Article XXXVI(5) ("Article 36(5)") of the Perak Constitution read together with s 12(3) of the Elections 1958, the election commission is the rightful entity which establishes if there is casual vacancy of the State Legislative assembly seat;

(2) When a resignation of a member of the Perak State Legislative Assembly ("the SLA") is disputed, is such resignation a resignation within the meaning as ascribed under Article 35 of the Perak Constitution.

[87] For the purposes of this case, it is question (1) which is pertinent. As stated earlier, the Federal Court had answered in the affirmative in respect of question (1). And as adverted to earlier, Tuan Haji Sulaiman was of the view that the Federal Court arrived at that conclusion after comparing Articles 46 and 190 of the Constitutions of Singapore and India respectively, with that of Article 35 of the Perak State Constitution.

[88] The Federal Court said, and I quote:

> The phrase "shall become vacant" is also not part of Article 35 or Article 36(5) of the Perak Constitution. Therefore, the position in Perak is different from that of India and Singapore in that the seat shall not become vacant merely by the fact that a resignation letter is being handed to the Speaker.

[89] Further on in their judgment the Federal Court opined that –"under Article 35 of the Perak Constitution, the speaker's role is limited to receiving the written resignation letter of the assemblyman and forwarding the same to the Election Commission which will then by its own procedure determine whether a casual vacancy has arisen or not."

[90] Tuan Haji Sulaiman suggested that based on the aforesaid passage, it would appear that the Federal Court would have arrived at a different conclusion had the words "shall become vacant" were found in Article 35 of the Perak State Constitution. That being the case, as Article 51 provides that a member of the Legislative Assembly's seat *shall become vacant* upon the member being absent for two consecutive meetings without leave of the speaker, following the Federal Court judgment as quoted above that seat shall become vacant by operation of law once the three pre-conditions stated therein have occurred. The election commission, i.e. the second respondent have no role to play in these circumstances unlike the situation in Perak where the Article in question (Article 35) does not expressly provide for a member's seat to become vacant upon the member (of the State Legislative Assembly) tendering his letter of resignation to the speaker.

[91] I have perused very carefully the judgment of the Federal Court and I am not entirely in agreement with Tuan Haji Sulaiman on this issue.

[92] In my view the Federal Court in holding that the Election Commission is the rightful entity to establish casual vacancy for the purpose of Article 36(5) of the Perak State Constitution read together with s 12(3) of the Election Commission Act 1958, did so after comparing the provisions in the other state constitutions namely the, State Constitution of Kelantan (Article 46(5)), Malacca (Article 19(5)), Pahang (Article 26(3)), Penang (Article 19(5)), Perlis (Article 55(5)), Sarawak (Article 21(5)) and Kedah (Article 53(5)) which are equipollent to Article 36(5), with the provision in the constitutions of the State of Johore (Article 23(3)), Negeri Sembilan (Article 56(5)), Selangor (Article 70(5)) and Terengganu (Article 44(5)) The

latter state constitutions provide that, "A casual vacancy shall be filled within sixty days from the date on which it occurs" The word "established by the election commission" is omitted from these state constitutions The Federal court also examined the provisions of the Sabah State Constitution and the Federal Constitution (Article 21(5) and 54(1) respectively) before arriving at the following conclusion:

> It must be noted that the word "establish" only appears in the Constitutions of Sabah, Kelantan, Malacca, Pahang, Penang, Perils, Sarawak, Kedah and Perak and the Federal Constitution. It is clear therefore that in the case of a casual vacancy of the State seats of these States, except Sabah, and of a seat in the House of Representatives, the Election Commission has been given the power to establish a casual vacancy. However, the Sabah Constitution is silent as to which entity has the responsibility for establishing the casual vacancy. The Constitutions of the States of Johore, Negeri Sembilan, Selangor and Terengganu have intentionally omitted the establishment by the Election Commission of a casual,vacancy.

[93] Bearing in mind that the word "establish" appears in Article 53(5), I am therefore of the view based on the above judgment that whilst Article 51 sets out the conditions under which a seat becomes vacant, by virtue of Article 53(5) read together with s 12(3) of the Elections Act 1958, it is the duty of the election commission to establish or determine whether a casual vacancy has in fact occurred. In other words Article 51 does not oust the power of the second respondent to establish casual vacancy under Article 53(5). For the purpose of carrying out its duty under Article 53(5) the second respondent has merely to satisfy itself that the three pre-conditions in Article 51 has as a matter of fact been fulfilled.

[94] The constitutional duty imposed on the second respondent under Article 53(5) does not in my view go so far as to empower the second respondent to encroach on the powers of the applicant (i.e. the speaker) as it appeared to have done here when it decided:

(i) firstly, to accept the medical certificate (MC) submitted by the first respondent as being a valid reason for his absence from the August 9, 2009 meeting of the Legislative Assembly, and that

(ii) failure on the part of the first respondent to submit his MC earlier or on August 9, 2009 did not render the MC void.

[95] Under Article 51, the power to grant leave is conferred on the speaker and it is therefore entirely within his discretion whether to accept or reject the MC.

[96] The election commission (i.e. the second respondent) cannot in the absence of any statutory power to that effect nor by implication arrogate to itself that power which under Article 51 is expressedly conferred on the speaker. The Federal Court, in *Jamaluddin's* case did not in my view go so far as to suggest that the election commission in carrying out its constitutional duty under

Article 36(5) (of the Perak State Constitution) is entitled by virtue of such duty to encroach upon the powers of the speaker.

[97] This is clearly borne out by the following passage of the judgment:

> Under Article 35 of the Perak Constitution, the speaker's role is limited to receiving the written resignation letter of the assemblyman and forwarding the same to the election commission which will by its own procedure determine whether a casual vacancy has arisen or not. Once the casual vacancy is established then it is the duty of the election commission to fill the vacancy by holding a by-election. *With the clear provisions of the respective powers of the election commission and the speaker, the fear of encroachment with the doctrine of separation of powers by one body into another does notarise.* (Emphasis added.)

[98] The case of *Thankamma* (supra) referred to earlier by counsel for first respondent bears little relevance to the present case as it dealt with the speaker's power in relation to letters of resignation issued by Members of the House. The court there held that the speaker upon receipt of such letters has the right to make enquires to determine whether the letter is genuine or forged.

[99] In *Jamaluddin's* case the effect of a member's letter of resignation to the speaker under Article 35 of the Perak State Constitution is not clearly defined. As such the Federal Court relied on *Thankamma's* case to hold, by way of analogy, that the election commission in carrying out its duty under Article 36(5) is entitled to inquire into any matter relating to the purported resignation. The power to grant leave of absence in the present case is, on the other hand unequivocally conferred on the speaker (i.e. the applicant) under Article 51.

[100] Therefore *Thankamma's* case has no application by way of analogy or otherwise.

[101] Counsel for the first respondent had earlier submitted that the applicant's action in refusing to accept the first respondent's MC is tainted with mala fide, politically motivated and an abuse of power. He contended that the applicant in doing so had departed from the dictates of "fair play", "equity" and "rationality" required of a speaker when exercising his duties when compared to a speaker exercising his duties in India and England.

[102] In this regard he referred to the procedure in relation to leave of absence for Members of the House in India as contained in *Subhash C Kasyap's* book, *Parliamentary Procedure "The Law, Privileges, Practice and Precedent"*, in particular following the excerpt at p 1752:

> Normally the statement of the member that he is applying for leave of absence on grounds of illness is accepted and he is not asked to furnish a medical certificate.

[103] He also referred to the procedure in the House of Commons in England as set out in *Erskine May* at p 208 to the following effect:

> In the absence of any specific orders to that effect, Members are presumed to be in attendance in Parliament. It is not now considered necessary for a Member to be given leave of absence in the ordinary course of his business, but such leave has been frequently given to official delegations from the House, especially to those commissioned to present gifts to the Parliaments of newly independent Commonwealth countries.

[104] In answer to counsel's submission, it must be pointed out, that the procedure in relation to leave of absence of a Member of the House in India is different from that of a member of the Legislative Assembly in Kedah as provided under Article 51. In India, all applications from members for leave of absence must be referred to the committee on absence of members from the sittings of the House. The committee considers the applications and presents its report to the House, whereupon the speaker will inform the House of the recommendation of the committee and the House will then decide whether to agree or disagree with the committee's recommendation (p 1745 of Subash C Kasyap's book, (supra)).

[105] As far as the procedure in the House of Commons is concerned the same argument would apply.

[106] Even if one were to assume that implicit in Article 51, the speaker should not unreasonably withhold leave, the applicant had, on the facts, shown that he had not acted unreasonably in rejecting the MC. Rather, based on the reasons he had given which included, inter alia, the fact, that the first respondent was photographed attending a function on August 10, 2009 (the day he was supposed to be on MC), the applicant had acted as any reasonable man in his position would have acted.

[107] In any event if it is first respondent's view that the applicant had acted unreasonably in not granting him leave of absence for the meeting on August 9, 2009 then it is for the first respondent to challenge the speaker's decision and not for the second respondent to assume for itself the power to overrule the decision of the first respondent and to accept the MC as a valid reason for the first respondent's absence, when it had no power to do so. In doing so the second respondent had acted illegally and irrationally.

[108] Secondly, the second respondent is clearly misconceived in asserting that before Article 51 is invoked it is necessary for the matter to be referred to the rights and privileges committee.

[109] Absence from a meeting is not a privilege conferred by the Constitution unto members of a Legislative Assembly. According to *Erskine May*, "parliamentary privileges" are peculiar rights enjoyed by a legislative assembly

and by its members individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.

See: *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 23rd version, chapter 5, p 75.

[110] Based on the aforesaid definition the act of being absent (from a meeting) can never be considered a privilege which can be enjoyed by members of a Legislative Assembly. In any event whether a member (of the Legislative Assembly) ought to be referred to the rights and privileges committee and any proceedings related thereto are matters which fall strictly within the purview of the Kedah Legislative Assembly and the applicant as speaker representing the House.

[111] The second respondent therefore has no power to direct the matter of the first respondent being absent from the assembly to be referred to the committee as reference to the committee is a matter of discretion and is not mandatory.

[112] The court's decisions in *Fan Yew Teng v Government of Malaysia* [1976] 2 MLJ 262 and *Lim Cho Hock v Speaker, Perak State Legislative Assembly* [1979] 2 MLJ 85 amongst others would support this view. In the latter case the applicant applied by originating summons for the determination of the question whether the seat of a member of the Legislative Assembly, who was also the speaker, had been vacated as he had not taken the oath required of a member. The court held that the Legislative Assembly's the final arbiter in any question arising as to whether a member of the Legislative Assembly had become disqualified for membership. The matters raised were for the Legislative Assembly to decide and within its inclusive jurisdiction and not for the courts to determine. In the course of his judgment, Eusoffe Abdoolcader J observed:

> Under the lex et consuetude parliament, *the Assembly has control over its proceedings, procedure and its members and may decide questions as to their qualifications and disqualification.*" (Emphasis added.)

[113] Thus the second respondent had acted illegally and irrationally when it decided that the applicant must refer the matter of the first respondent's absence to the Standing Committee on Rights and Privileges before Article 51 can be invoked.

[114] To sum up these are my findings:

(i) all the three pre-conditions of Article 51 have been fulfilled;

(ii) since all the three pre-conditions of Article 51 have been fulfilled the seat of the first respondent appears to have fallen vacant;

(iii) although the fulfillment or occurrence of the three pre-conditions under Article 51 have resulted in the first respondent's seat being

vacant, yet by virtue of Article 53(5) and the Federal Court's decision in *Jamaluddin*'s case, the duty to establish a casual vacancy rests with the second respondent (i.e. the election commission);

(iv) the duty to establish a casual vacancy under Article 53(5), however does not extend to the second respondent encroaching or arrogating to itself the powers of the applicant under Article 51;

(v) for the purpose of establishing casual vacancy under Article 51 the second respondent has merely to satisfy itself that the three pre-conditions has as a matter of fact been fulfilled.

[115] In the light of the above findings I therefore agree with the applicant's submission that the second respondent:

(i) had committed an error of jurisdiction when it decided that there is no vacancy in the Kota Siputeh state seat and that the first respondent is still the Assemblyman of Kota Siputeh;

(ii) had acted irrationally and ultra vires its powers when it had accepted the medical certificate and reason advanced by the first respondent when it had no power to do so as the power lies solely in the hands of the speaker pursuant to Article 51 of the Kedah Constitution;

(iii) had acted ultra vires its powers and irrationally when it decided the speaker (i.e. the applicant) must refer the matter to the Rights and Privileges Committee before Article 51 of the Kedah Constitution can be invoked since the subject matter in question is not a matter of rights and privileges of the Member of Kedah Legislative Assembly;

(see the cases of *CCSU v Minister for Civil Service* [1985] AC 374; *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 AMR 3529; [1999] 3 MLJ 1 where the courts have held that administrative action is subject to control by judicial review on the grounds of illegality, irrationality and procedural impropriety.)

[116] Pursuant to the above I therefore granted the reliefs sought by the applicant:

(i) As against the first respondent:

(a) a declaration that the first respondent is no longer the Kota Siputeh Assemblyman;

(b) a declaration that the seat of the Legislative Assembly of the State of Kedah for the constituency of Kota Siputeh (N 3) is vacant;

(c) a mandatory injunction preventing the first respondent and/or his agents and/or his servants from acting and/or exercising and/or carrying out the responsibilities, functions and duties as Kota Siputeh Assemblyman.

(ii) As against the second respondent:

(a) an order of certiorari to quash the second respondent's decision as per its letter dated September 1, 2009;

(b) an order of mandamus to compel the second respondent to issue a writ of election and to hold a by-election for the Kota Siputeh state seat.

[117] Although initially sought for in his application, the applicant has decided not to pursue his claim for damages nor is he asking for cost. As such no order was made for damages and costs.

[118] I had also refused to issue a writ of quo warranto sought for by the applicant against the first respondent. The applicant is seeking this writ to order the first respondent to show cause and give information on how and under what basis or power or authority that the first respondent is still a Member of the Legislative Assembly of the State of Kedah for the Constituency of Kota Siputeh (N3) and purport to act and/or exercise and/or carry out the responsibilities, functions and duties as Kota Siputeh Assemblyman.

[119] It is not disputed by both parties that an essential element that needs to be determined before a writ of quo warranto could be issued is that the office in question must be a public office.

(see *Ram Singh Saini v HN Bhargava* [1975] AIR 1852, SC.)

A writ of *quo warranto* proceeding against a public office is for determining whether he is entitled to hold the office and to discharge its functions.

[120] The *Black's Law Dictionary*, 7th edn defines "public office" as "*A position whose occupant has legal authority to exercise a government's sovereign powers*".

[121] "Public office" is defined in s 3 of the Interpretation Acts 1948 and 1967 ("the Act") to mean an "*office in any of the public services*". The Act further defines "public services" as the "public services" mentioned in Article 132(1) of the Federal Constitution, Article 132(1) categorised the type of services that would be recognized as "public services". However Article 132(3) provides that the public service shall not be taken to comprise the following:

(a) ...

(b) The office of President, Speaker, Deputy President, Deputy Speaker or *member* of either House of Parliament or *of the Legislative Assembly of a State*; or

(c) ...

(d) ...

(e) ...

(Emphasis added.)

[122] Thus, it is clear from the above for a person to hold public office he must hold office in the public services set out under Article 132(1) of the Federal Constitution. However as Article 132(3)(b) of the Federal Constitution excludes the office of a member of the Legislative Assembly of a State from public service, the writ of *quo warranto* cannot be issued against the first respondent. For,this reason I agree with counsel for the first respondent that the applicant's prayer for a writ of *quo warranto* against the first respondent ought to be dismissed.