IN THE COURT OF APPEAL OF MALAYSIA

(APPELLATE JURISDICTION)

THE PALACE OF JUSTICE

PUTRAJAYA

CIVIL APPEAL NO. W-01(IM)-636-2010

Appellants

(1) MUHAMMAD HILMAN BIN IDHAM

(2) WOON KING CHAI

(3) MUHAMMAD ISMAIL BIN AMINUDDIN

(4) AZLIN SHAFINA BINTI MOHAMAD ADZA

v.

Respondents

(1) KERAJAAN MALAYSIA

(2) MENTERI PENGAJIAN TINGGI

(3) UNIVERSITI KEBANGSAAN MALAYSIA

[In the matter of the High Court of Malaya, Kuala Lumpur, Appellate and Special Powers Division Originating Summons No. R1-24-47-2010

Plaintiffs

(1) Muhammad Hilman bin Idham

(2) Woon King Chai

(3) Muhammad Ismail bin Aminuddin

(4) Azlin Shafina binti Mohamad Adza

v.

Defendants

(1) Kerajaan Malaysia

(2) Menteri Pengajian Tinggi

(3) Universiti Kebangsaan Malaysia]

CORAM:

LOW HOP BING, JCA

MOHD HISHAMUDIN YUNUS, JCA

LINTON ALBERT, JCA

JUDGMENT OF MOHD HISHAMUDIN YUNUS, JCA

This is the appellants' appeal against the decision of the High Court Judge of Kuala Lumpur (of the Appellate & Special Powers Division) of 28 September 2010 dismissing their originating summons application.

By an originating summons the appellants have sought a declaration that section 15(5)(a) of the Universities and University Colleges Act 1971 ("UUCA") contravenes article 10(1)(a) of the Federal Constitution. The appellants have also sought a consequential declaration that the pending disciplinary proceedings, brought against them by the 3rd respondent for alleged disciplinary breaches connected with s.15(5)(a) UUCA, are not valid in law.

The appellants' appeal against the decision of the learned High Court Judge is on the following grounds:

(a) that the Learned Judge had erred in law and/or in fact in holding that the question of reasonableness did not arise when in fact it was an important consideration to be addressed;

(b) that the Learned Judge had erred in law and/or in fact in concluding that s.15(5)(a) of the UUCA was reasonably necessary and not disproportionate;

The facts of the case are not in dispute. The appellants are political science undergraduate students of the 3rd respondent, that is, Universiti Kebangsaan Malaysia ('the University') (the 3rd defendant in the originating summons). They were present in the parliamentary constituency of Hulu Selangor in the campaign period for the parliamentary by-election of 24 April 2010 to observe a parliamentary by-election.

On or about 13 May 2010, each appellant received a notice from the Vice Chancellor of the University requiring their attendance before a disciplinary tribunal on 3 June 2010. Before the disciplinary tribunal they were charged for purported breaches of disciplinary offences under s.15(5)(a) of the UUCA. The provision reads:

> **15. <u>Student or students' organization, body or group associating with societies, etc.</u>**
>
> **(5) No student of the University and no organization, body or group of students of the University which is established by, under or in accordance with the Constitution, shall express or do anything which may reasonably be construed as expressing support for or sympathy with or opposition to-**
>
> **(a) any political party, whether in or outside Malaysia;**

The allegations in the charges include, amongst others, having in their possession paraphernalia supportive of or sympathetic with or opposed to a contesting political party in the said by-election.

The constitutional provisions

Clause (1) (a) of Article 10 of the Federal Constitution provides –

Freedom of speech, assembly and association

10. (1) Subject to Clauses (2), (3) and (4) –

(a) every citizen has the right to freedom of speech and expression;

(b) ...

(c) ...

(2) Parliament may by law impose –

(a) On the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of Court, defamation, or incitement to any offence".

The issue

It is not disputed that the impugned provision of the UUCA is a restriction on the students right to freedom of speech, and, therefore, prima facie, violates the constitutional guarantee of Clause (1)(a) of Article 10. It is also not disputed that unless such a provision can be saved by the permissible restrictions as provided for by Clause (2) (a) of Article 10, the provision is unconstitutional.

However, it is the contention of the counsel for the respondents that the restriction on freedom of speech is permitted by Clause (2)(a) of Article 10 of the Federal Constitution. It is submitted by the respondents that the restriction is necessary or expedient in the interest of 'public order or morality'.

The appellants, on the other hand, contend that any restriction on the freedom of speech must be for one of the purposes as specified by Clause (2)(a) of Article 10. In addition, the restriction must also be reasonable. The appellants argue that there is nothing in the UUCA or in the Minister's speech, in moving the Bill in Parliament, as reported in the Hansard, to suggest or indicate that section 15(5)(a)

of the UUCA was meant to protect public interest or public morality. It is further contended by the appellants that the restriction as imposed by section 15(5)(a) of the UUCA is, in any case, unreasonable.

I am allowing the appeal with costs.

My grounds

It is now settled law that Parliament can no longer impose a restriction on freedom of speech, in any manner it deems fit, for the purpose of protecting the interests spelt out in Clause 2(a) of Article 10. Any restriction imposed on freedom of speech by Parliament must be a *reasonable* restriction, and the Court, if called upon to rule (such as in the present case), has the power to examine whether the restriction so imposed is reasonable or otherwise (besides determining as to whether or not the restriction falls within the exceptions as spelt out by Clause (2)(a) of Article 10); and – in the event it were to hold that the restriction is unreasonable – to declare the impugned law imposing the restriction as being unconstitutional and accordingly null and void. This is now the law as ruled by the

Federal Court recently in ***Sivarasa Rasiah v Badan Peguam Malaysia & Anor*** [2010] 2 MLJ 333. In this case, Gopal Sri Ram (FCJ), in delivering the unanimous decision of the Federal Court (the other two members of the panel being Richard Malanjum CJ(SS) and Zulkifli Ahmad Makinudin FCJ (as he then was)), said (at p. 340):

> Now although the article says 'restrictions', the word 'reasonable' should be read into the provision to qualify the width of the proviso. ...The correct position is that when reliance is placed by the state to justify a statute under one or more of the provisions of art 10 (2), the question for determination is whether the restriction that the particular statute imposes is reasonably necessary and expedient for one or more of the purposes specified in that article.

In this regard I feel that I should add that the Federal Court also went further to hold that the fundamental rights guaranteed by Part II of the Federal Constitution form part of the basic structure of the Federal Constitution, thereby giving recognition for the first time, albeit in a limited fashion, to the doctrine of basic structure of the Constitution as enunciated by the Supreme Court of India almost 40 years ago in the landmark case of ***Kesavananda v. State of Kerala*** AIR 1973 SC

1461. This is a remarkable departure from the position taken by the Federal Court 33 years ago in ***Loh Kool Choon v. Government of Malaysia*** [1977] 2 MLJ 187. In that case the Federal Court was urged to adopt the doctrine, but the Court then refused to do so.

In so deciding the way it did in ***Sivarasa Rasiah***, the Federal Court reversed the decision of the Court of Appeal (the Court of Appeal judgment is reported in ***Sivarasa Rasiah v Badan Peguam Malaysia*** [2006] 1 MLJ 727). The Court of Appeal had ruled that whether an impugned statutory provision is reasonable or not in relation to the purpose in question is not a matter for the Court to decide but for Parliament. In so deciding, the Court of Appeal had relied on the Supreme Court case of ***Public Prosecutor v Pung Chen Choon*** [1994] 1 MLJ 566. Hence the Federal Court in ***Sivarasa Rasiah*** can be said to have departed from the position that it held in ***Pung Chen Choon***; meaning that ***Pung Chen Choon*** is now no longer good law.

On the principles of interpretation that should be adopted by the Courts in interpreting the Federal Constitution, in particular, those

provisions touching on fundamental liberties, the Federal Court ruled (at pages 349-350) –

> In three recent decisions this court has held that the provisions of the Constitution, in particular, the fundamental liberties under Part II, must be generously interpreted and that a prismatic approach to interpretation must be adopted.
>
> ...
>
> Provisos or restrictions that limit or derogate from a guaranteed right must be read restrictively.

Now, reverting to the facts of the present case and the issue before this Court, in my judgment, I fail to see in what manner that section 15(5)(a) of the UUCA) relates to public order or public morality. I also do not find the restriction to be reasonable. I am at a loss to understand in what manner a student, who expresses support for, or opposition against, a political party, could harm or bring about an adverse effect on public order or public morality? Are not political parties legal entities carrying out legitimate political activities? Are not

political leaders, including Ministers and members of the federal and state legislatures, members of political parties? I read intensely the affidavits of the respondents and the written submissions of the learned counsel for the respondents, searching for a clear explanation on the nexus between the exercise of the right of a university student to express support for (or opposition against) a political party and public order or public morality: but with respect, not surprisingly, I find none.

The impugned provision is irrational. Most university students are of the age of majority. They can enter into contracts. They can sue and be sued. They can marry, becomes parents and undertake parental responsibilities. They can vote in general elections if they are 21 years old. They can become directors of company. They can be office bearers of societies. Yet – and herein lies the irony – they are told that legally they cannot say anything that can be construed as supporting or opposing a political party.

In my opinion such a provision as section 15(5)(a) of the UUCA impedes the healthy development of the critical mind and original

thinking of students – objectives that seats of higher learning should strive to achieve. Universities should be the breeding ground of reformers and thinkers, and not institutions to produce students trained as robots. Clearly the provision is not only counter-productive but repressive in nature.

In ***Sweezy v. New Hampshire*** 354 U. S. 234 (1957) Chief Justice Warren Burger of the United States Supreme Court said (at p. 250):

> Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

In the present case it is the contention of the learned Senior Federal Counsel for the first and second respondents that the Minister's speech in Parliament in moving the bill as reported in Hansard explains the rationale for the provision. The relevant parts of the speech as reported in Hansard (DR. 10.12.2008) are set out extensively in the written submission of the learned Senior Federal

Counsel. I have examined the speech closely. Those parts are as follow:

Pindaan kepada AUKU tidak akan lengkap tanpa perubahan kepada aspek pengurusan kebajikan dan hak asasi pelajar. Perkara ini merupakan hasrat dan harapan setiap pelajar di universiti Negara ini. Pelajar merupakan stakeholder utama kepada sesebuah universiti. Mereka juga merupakan bakal pewaris kepada kepimpinan negara. Justeru, kebajikan dan hak asasi pelajar hendaklah sentiasa dipelihara dan mengikut Perlembagaan Persekutuan dan amalan terbaik (best practices) antara bangsa.

Justeru rang undang-undang ini akan memberi penekanan khusus kepada aspek kebajikan dan hak asasi pelajar tersebut. Antara perkara yang akan dilihat semula merangkumi:

(i) kebebasan berpersatuan;

(ii) kebebasan bersuara;

(iii) pemansuhan peruntukan berkaitan kesalahan dan hukuman jenayah;

(iv) pemansuhan peruntukan berkaitan penggantungan atau pembuangan secara automatik;

(v) hak asasi pelajar kepada pendidikan;

(vi) *tatacara pengendalian kes tatatertib;*

(vii) *penggantungan atau pembubaran pertubuhan pelajar;*

(viii) *hak pelajar pasca siswazah;*

(ix) *perwakilan dalam jawatankuasa kebajikan pelajar; dan*

(x) *penglibatan pelajar dalam Senat.*

Seperti yang dimaklumi AUKU sedia ada memperuntukkan bahawa mana-mana pelajar yang hendak menganggotai mana-mana persatuan atau organisasi di luar universiti hendaklah mendapat kebenaran pihak universiti terlebih dahulu atau dengan izin, ***prior permission.*** *Peruntukan ini dilihat oleh sesetengah pihak sebagai agak negative dan tidak memberi kebaikan kepada pelajar dalam peningkatan cirri-ciri kepimpinan dan sahsiah diri.*

Justeru rang undang-undang yang dicadangkan ini akan membenarkan pelajar untuk bersekutu dengan atau menjadi ahli sesuatu pertubuhan, persatuan atau organisasi sama ada di dalam atau luar negara.

Seperti yang dimaklumi AUKU sedia ada memperuntukkan bahawa mana-mana pelajar yang hendak menganggotai mana-mana persatuan atau organisasi di luar universiti hendaklah mendapat kebenaran pihak universiti terlebih dahulu. Peruntukkan ini dilihat oleh setengah pihak

sebagai agak negative dan tidak memberi kebaikan kepada pelajar dalam peningkatan cirri-ciri kepimpinan dan sahsiah diri. Justeru rang undang-undang yang dicadangkan ini akan membenarkan pelajar untuk bersekutu dengan, atau menjadi ahli sesuatu pertubuhan, persatuan atau organisasi sama ada di dalam atau luar negara.

Walaubagaimanapun, pelajar adalah dilarang untuk terlibat dengan entiti-entiti berikut:

(i) parti politik sama ada di dalam atau luar negara;

(ii) pertubuhan yang menyalahi undang-undang sama ada di dalam atau luar negara;

(iii) pertubuhan, badan atau kumpulan yang dikenal pasti oleh Menteri sebagai tidak sesuai demi kepentingan dan kesentosaan pelajar atau universiti.

Dalam menyediakan senarai pertubuhan yang tidak sesuai tersebut Menteri akan berunding dengan Lembaga Pengarah Universiti terlebih dahulu dan senarai yang akan disediakan adalah untuk kegunaan semua universiti. Meskipun terdapat larangan ke atas pelajar untuk berpolitik, rang undang-undang ini masih memberikan sedikit pengecualian. Kuasa untuk memberi pengecualian ini akan dilaksanakan oleh Naib Canselor. Dalam menjalankan kuasa tersebut Naib Canselor atas permohonan

pelajar boleh memberi kebenaran untuk terlibat dalam parti politik. Ini akan membolehkan seseorang ahli politik yang bergiat dalam mana-mana parti politik mendaftar sebagai pelajar di universiti tanpa perlu melepaskan kerjaya politiknya. Rang undang-undang yang dicadangkan ini juga akan memberi kebebasan kepada pelajar untuk bersuara dalam hal yang berkaitan dengan perkara akademik yang diikuti dan dilakukannya. Pelajar adalah dibenarkan untuk memberi pendapat dalam seminar, symposium dan sebagainya dengan syarat seminar atau symposium tersebut tidak dianjur atau diberi peruntukan kewangan oleh entiti-entiti berikut:

(i) parti politik sama ada di dalam atau luar negara;

(ii) pertubuhan yang menyalahi undang-undang sama ada di dalam atau luar negara;

(iii) pertubuhan, badan atau kumpulan yang dikenal pasti oleh Menteri sebagai tidak sesuai demi kepentingan dan kesentosaan pelajar atau universiti.

Fasal 8 bertujuan untuk menggantikan Seksyen 15 Akta 30 untuk memberikan kepada pelajar dan pertubuhan pelajar kebebasan berpersatuan tertakluk kepada sekatan berhubung dengan parti politik, pertubuhan yang menyalahi undang-undang dan pertubuhan, badan atau kumpulan orang yang dikenal pasti oleh menteri sebagai tidak sesuai

demi kepentingan dan kesentosaan pelajar atau universiti itu. Sebagai tambahan, Naib Canselor boleh atas permohonan seseorang pelajar mengecualikan pelajar itu daripada sekatan yang disebut dalam perenggan 1(a) yang dicadangkan. Fasal 9 bertujuan meminda seksyen 15A Akta iaitu penalty jenayah dalam sub seksyen 2 digantikan dengan tindakan tatatertib.

Having read the above, I must say that I am unable to find any explanation as to the link between prohibiting university students from expressing support for or opposition against a political party and the maintenance of public order or public morality. Indeed, in the speech, there is not even any mention of public disorder as a result of students expressing their view in support for or in opposition to political parties. On the contrary, the Minister spoke about the preservation of the fundamental rights of the students as provided for by the Federal Constitution and in accordance with 'international best practices'; for he said –

Mereka juga merupakan bakal pewaris kepada kepimpinan negara. Justeru, kebajikan dan hak asasi pelajar hendaklah sentiasa dipelihara

dan mengikut Perlembagaan Persekutuan dan amalan terbaik (best practices) antara bangsa.

In fact the Minister even conceded that students are matured enough in exercising their fundamental rights when he said (at p. 76 DR. 10.12.2008) –

Selain daripada itu, kementerian juga sedar bahawa masyarakat pelajar pada masa ini lebih matang dalam menangani erti kebebasan dan kepelbagaian.

With respect I find that what the Minister said in Parliament about preserving the freedom of speech of students and what section 15(5)(a) provides to be irreconcilable or contradictory.

Conclusion

I propose to conclude by saying this. Freedom of expression is one of the most fundamental rights that individuals enjoy. It is fundamental to the existence of democracy and the respect of human dignity. This basic right is recognized in numerous human rights documents such as Article 19 of the Universal Declaration of Human Rights and Article

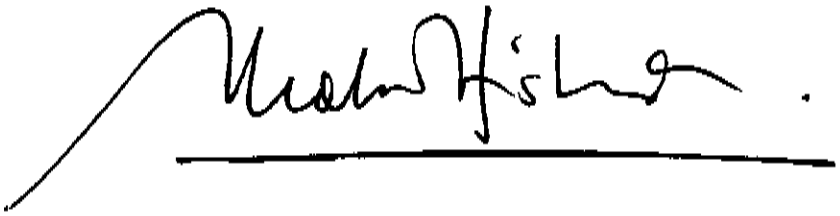
19 of the International Covenant on Civil and Political Rights. Free speech is accorded pre-eminent status in the constitutions of many countries.

The words of wisdom of Brandeis J of the United States Supreme Court in ***Whitney v California*** 274 US 357 (1927) (at p. 375) is a salutary reminder –

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary ... They believe that freedom to think as you will and to speak as you think are means indispensible to the discovery and spread of political truth, ... that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government.

I, therefore, grant the declarations prayed for.

[Appeal allowed with costs.]



(Dato' Mohd Hishamudin Mohd Yunus)
Judge, Court of Appeal
Palace of Justice
Putrajaya

Date of decision and delivery of judgment:

Encik Malik Imtiaz Sarwar and Miss Jenine Gill (*Messrs Kandiah Partnership*) for the appellants

Encik Noor Hisham bin Ismail, Senior Federal Counsel (*Attorney-General Chambers*) for the first and second respondents

Dato' Sri Muhammad Shafee Abdullah and Miss Sarah Abishigam (*Messrs Shafee & Co*) for the third respondent