DALAM MAHKAMAH RAYUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO. W-01(IM)-636-TAHUN 2010

ANTARA

1. MUHAMMAD HILMAN BIN IDHAM
[redacted]

2. WOON KING CHAI
[redacted]

3. MUHAMMAD ISMAIL BIN AMUNUDDIN
[redacted]

4. AZLIN SHAFINA BINTI MOHAMAD ADZA
[redacted] ..... PERAYU-PERAYU

DAN

1. KERAJAAN MALAYSIA

2. MENTERI PENGAJIAN TINGGI

3. UNIVERSITI KEBANGSAAN MALAYSIA ..... RESPONDEN - RESPONDEN

CORAM:

Low Hop Bing, JCA
Mohd Hishamudin bin Mohd Yunus, JCA
Linton Albert, JCA

JUDGMENT

I begin by setting out the facts which are brief and straightforward. The Appellants are undergraduates of University Kebangsaan Malaysia, the Third Respondent. Their presence in the Parliamentary Constituency of Hulu Selangor during the campaign period for the by-election in April 2010 brought about disastrous consequences to them because as a result of that the Third Respondent instituted disciplinary proceedings against them. For an ordinary citizen similarly circumstanced, nothing would have come out of it, other than, perhaps being lauded for expressing faith in our democracy which is the bedrock of the Federal Constitution. As final year political science students the prospect of expulsion was even more disastrous but they were in clear breach of an equally clear prohibition against expressing or doing anything which may reasonably be construed as expressing support for, or sympathy with, or in opposition to any political party under section 15(5)(a) of the Universities and University Colleges Act 1971(UUCA). For completeness it is reproduced and it is as follows:-

> "(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".

Faced with the grim prospect of expulsion the Appellants asked for a declaration that section 15(5)(a) of the UUCA contravened Article 10(1)(a) of the Federal Constitution and was therefore invalid and consequently, the disciplinary proceedings instituted by the Third Respondent against the Appellants was also invalid. The relevant part of the Federal Constitution relied on by the Appellants is as follows:-

"(10) **Freedom of speech, assembly and association.**

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

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

(b) .....

(c) ..... ".

The learned High Court Judge disagreed with the Appellants and accordingly dismissed their application. Hence this appeal.

It is universally accepted that freedom of expression is not and cannot be absolute. The Federal Constitution recognizes this and specifically sets out the restrictions. The restrictions to the freedom of expression that are relevant to the determination of this appeal are set out in Article 10(2)(a) which reads in part as follows:-

"(2) Parliament may by law impose -

(a)on the rights conferred by paragraph (a) Clause (1), such restrictions as it deems necessary or expedient in the interest of ..... public order or morality .....

.....".

It was contended for the Respondents and accepted by the learned High Court Judge that section 15(5)(a) of the UUCA falls squarely within the ambit of the restrictions spelled out under Article 10(2)(a) of the Federal Constitution and the Appellants' argument that section 15(5)(a) of the UUCA contravened Article 10(1)(a) of the Federal Constitution was therefore, misconceived. Hence the validity of the disciplinary proceedings premised, as it was, on a valid legislative enactment, could not be challenged. The approach taken by the learned High Court Judge was one that was unrestrictively literal giving unbridled

effect to the plain meaning of the words used in Article 10(2)(a) of the Federal Constitution and section 15(5)(a) of the UUCA and disregarding all notions of reasonableness or proportionality. Based on this hypothesis there is no difficulty in concluding that section 15(5)(a) of the UUCA relates to the purpose for which it was enacted, which was the establishment, maintenance and administration of universities and university colleges because the discipline and conduct of the students affect the maintenance and administration of universities and university colleges and given their plain and literal meaning the discipline and conduct of the students are also part of public morality. It was thus held by the learned High Court Judge applying the plain and literal meaning of the words, that the prohibition imposed under section 15(5)(a) of the UUCA comes within the restrictions envisaged and set out under Article 10(2)(a) of the Federal Constitution and hence there was no violation of the Appellants' fundamental right to freedom of expression guaranteed under Article 10(1)(a). The learned High Court Judge relied on the Supreme Court case of **PUBLIC PROSECUTOR v. PUNG CHEN CHOON [1994] 1 LNS 206.** It is useful to reproduce the relevant parts of the judgment of Edgar Joseph Jr SCJ at pp 211-212 relied on by the learned High Court Judge:

"With regard to India, the Indian Constitution requires that the restrictions, even if within the limits prescribed, must be 'reasonable' ---- and so that court would be under a duty to decide on its reasonableness. But, with regard to Malaysia, when infringement of the Right of freedom of speech and expression is alleged, the scope of the court's inquiry is limited to the question whether the impugned law comes within the orbit of the permitted restrictions. So, for example, if the impugned law, in pith and substance, is a law relating to the subjects enumerated under the permitted restrictions found in cl 10(2)(a), the question whether it is reasonable does not arise; the law would be valid".

With the greatest of respect, in my judgment, the correct approach would be that which was laid down in the Federal Court Case of **SIVARASA RASIAH v. BADAN PEGUAM MALAYSIA [2010]2 MLJ 333,** not least because it was a decision of our apex Court after **PUNG CHEN CHOON (supra).** In **DALIP BHAGWAN SINGH v. PUBLIC PROSECUTOR [1997] 4 CLJ 645** the Federal Court held that where two decisions of the Federal Court conflict on a point of law the later

decision prevails over the earlier decision. There is no reason not to apply that principle where, as here, the earlier decision is that of the Supreme Court. Returning now to SIVARASA RASIAH (supra) Gopal Sri Ram FCJ, delivering the judgment of the Federal Court set out the approach to be taken in determining the constitutionality of a legislative enactment like section 15(5)(a) of the UUCA which purports to limit the freedom of expression under Article 10(1)(a) of the Federal Constitution at pp 340 – 342:

> "The other principle of constitutional interpretation that is relevant to the present appeal is this. Provisos or restrictions that limit or derogate from a guaranteed right must be read restrictively. Take art 10(2)(c). It says that 'Parliament may by law impose ..... (c) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality'. Now although the article says 'restrictions', the word 'reasonable' should be read into the provision to qualify the width of the proviso. The reasons for reading the derogation as 'such reasonable restrictions' appear

in the judgment of the Court of Appeal in Dr. Mohd Nasir bin Hashim v. Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213; [2007] 1 CLJ 19 which reasons are now adopted as part of this judgment. The contrary view expressed by the High Court in Nordin bin Salleh & Anor v. Dewan Undangan Negeri Kelantan & Ors. [1992] 1 CLJ 343: [1992] 1CLJ 463 is clearly an error and is hereby disapproved. 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.

The second observation has to do with the test that should be applied in determining whether a constitutionally guaranteed right has been violated. The test is that laid down by an unusually strong Supreme Court in the case of Dewan Undangan Negeri Kelantan & Anor v. Nordin bin Salleh & Anor [1992] 1 MLJ 697, as per the following extract from the headnote to the report:

> In testing the validity of the state action with regard to fundamental rights, what the court must consider is whether it directly affects the fundamental rights or its inevitable effect or consequence on the fundamental rights is such that it makes their exercise ineffective or illusory.

The third and final observation is in respect of the sustained submission made on the appellant's behalf that the fundamental rights guaranteed under Part II is part of the basic structure of the Constitution and that Parliament cannot enact laws (including Acts amending the Constitution) that violate the basic structure.....

It was submitted during argument that reliance on the *Vacher's* case was misplaced because the remarks were there made in the context of a country whose Parliament is supreme. The argument has merit. As Suffian LP said in Ah Thian v. Government of Malaysia [1976] 2 MLJ 112:

> The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State Legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.

This earlier view was obviously overlooked by the former Federal Court when it followed *Vacher's* case. Indeed it is, for reasons that will become apparent from the discussions later in this judgment, that the courts are very much concerned with issues of whether a law is fair and just when it is tested against art 8(10). Further, it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional. Whether a particular feature is part of the basic structure must be worked out on a case by case basis. Suffice to say that the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal Constitution. See **Keshavananda Bharati v. State of Kerala AIR 1973 SC 1461".**

The appropriate response to the pleas made by the Appellants to assert their fundamental right to freedom of expression must be the one stated by Budd J in **EDUCATIONAL COMPANY OF IRELAND LTD V. FITZPATRICK (NO. 2)(1961) I.R. 345** at p. **365:**

"The Court will therefore assist and uphold a citizen's constitutional rights. Obedience to the law is required of every citizen, and it follows that if one citizen has a right under the

Constitution there exists a correlative duty on the part of the other citizens to respect that right and not to interfere with it".

The observations expressed by Gokulakhrisnan, C.J. in **VEDPRAKASH V. THE STATE [1987] AIR Gujerat 253** at para **24** reinforce the proposition that in considering the constitutionality of legislative enactments restricting a fundamental right those legislative enactments must measure up to the test of reasonableness which include notions of proportionality:

> "Our democratic Constitution inhibits blanket and arbitrary deprivation of a person's liberty by authority. It guarantees that no one shall be deprived of his personal liberty except in accordance with procedure established by law. It further permits the State, in the larger interests of the Society to so restrict that fundamental right in a reasonable but delicate balance is maintained on a legal fulcrum between individual liberty and social security. The slightest deviation from, or displacement or infraction or violation of the legal procedure symbolised on that fulcrum upsets the balance, introduces error and aberration and vitiates its working. The symbolic balance, therefore, has to be worked out with utmost care and attention".

I do not think it is either necessary or useful to lay down inflexible propositions to assess the reasonableness of legislative enactments which purport to violate rights guaranteed by the Federal Constitution because each must be determined on its own peculiar facts and

circumstances. But where the legislative enactment is self-explanatory in its manifest absurdity as section 15(5)(a) of the UUCA undoubtedly is, it is not necessary to embark on a judicial scrutiny to determine its reasonableness because it is in itself not reasonable. What better illustration can there be of the utter absurdity of section 15(5)(a) than the facts of this case where students of universities and university colleges face disciplinary proceedings with the grim prospect of expulsion simply because of their presence at a parliamentary by-election. A legislative enactment that prohibits such participation in a vital aspect of democracy cannot by any standard be said to be reasonable. In my judgment, therefore, because of its unreasonableness, section 15(5)(a) of the UUCA does not come within the restrictions permitted under Article 10(2)(a) of the Federal Constitution and is accordingly in violation of Article 10(1)(a) and consequently void by virtue of Article 4(1) of the Federal Constitution which states:

> "4.(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

Quite apart from what was laid down in SIVARASA RASIAH (supra) it is absolutely necessary to read the word "reasonable" into and before the word "restrictions" in Article 10(2)(a) of the Federal Constitution to avoid the absurdity that it would otherwise produce. A rigid application of the plain and literal meaning of the words of Article 10(2)(a) of the Federal Constitution would make nonsense of the

freedom of expression under Article 10(1)(a) by rendering it nugatory because every legislative enactment which takes away the freedom of expression under Article 10(1)(a) can conceivably be justified as being within the restrictions set out under Article 10(2)(a). Article 10(1)(a) would thus be subsumed under Article 10(2)(a), a result that is manifestly absurd. In **FEDERAL STEAM NAVIGATION CO. LTD V. DEPARTMENT OF TRADE AND INDUSTY [1974] 2 All E.R. 97** Lord Salmon made this observation in relation to statutory interpretation at p. 114:

> "On the other hand, there are ample precedents of the highest authority for reading the word 'or' for 'and' or substituting the word 'and' for 'or' when otherwise, as here, the statute would be unintelligible and absurd".

Similarly, reading the word "reasonable" into Article 10(2)(a) as aforesaid would avoid the absurdily that it could otherwise produce.

Finally, the Respondents have also sought to rely on section15(4) of the UUCA to mitigate the effects of section 15(5)(a), Section 15(4) UUCA states:

> "The Vice-Chancellor may, on the application of a student of the University, exempt the student from the provisions of paragraph (1)(a), subject to such terms and conditions as he thinks fit."

With respect, it is impossible to suppose section 15(4) of the UUCA to be anything other than a derisory appendage to section 15(5)(a) and therefore patently inconsequential. In my view, the Respondents' reliance on section 15(4) is wholly misconceived.

Notwithstanding the presumption of constitutionality of a legislative enactment and the rule that the Court must endeavour to sustain its validity, in the circumstances aforesaid, the validity of Section 15(5)(a) of the UUCA is nevertheless patently unsustainable.

For the reasons aforesaid, the appeal is allowed with costs. The orders made by the High Court are set aside. The declarations prayed for in the Appellants' originating summons dated 1.6.2000 are accordingly allowed.

Order accordingly.

LINTON ALBERT, JCA

Dated: 31 – 10 – 11

Counsel:

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