

A **Teo Hoon Seong & Ors v Suruhanjaya Pilihan Raya**

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL
REVIEW NO R2–25–265–10 OF 2011

B ROHANA YUSUF J
6 JANUARY 2012

C *Election — Election Commission ('EC') — Duties, of — EC rejected application
by Malaysians residing/working abroad to be registered as absent voters —
Applicants not within categories of persons who may be so registered under Elections
(Registration of Electors) Regulations 2002 — Applicants not challenging validity
of law yet applied for judicial review — Suggestion that EC could register them as
D separate category of absent voters — Whether EC had power to do so — Whether
applicants urging court to order EC to breach the law — Whether judicial review
application abuse of process*

E The applicants were Malaysian citizens residing and working in the United
Kingdom and had applied to the Election Commission ('EC') to be registered
as absent voters. The EC rejected their application on the ground they did not
fall within the categories of persons qualified to be registered as absent voters as
listed under reg 2 ('reg 2') of the Elections (Registration of Electors)
Regulations 2002. Although the applicants made it clear they were not
F challenging the validity of the law or suggesting that the EC's decision was not
in compliance with the law, they, nevertheless, applied to the High Court for
judicial review of the EC's decision. They sought (i) a declaration that they had
the right to be registered as absent voters (ii) an order of certiorari to quash the
EC's decision refusing to register them as absent voters (iii) an order of
G mandamus directing the EC to register them as absent voters and (iv)
alternatively, an order of mandamus directing the EC to make necessary
regulations and take all necessary action to enable the applicants to be
registered as absent voters and/or postal voters for the purpose of the next
general election. The applicants claimed that in rejecting their application for
H registration, the EC had given a restrictive interpretation to art 119(1) and (4)
of the Federal Constitution and that reg 2, by limiting the categories of persons
qualified to be registered as absent voters, had caused the EC's decision to be in
breach of art 119 read together with art 8. Alternatively, it was argued that reg
2 discriminated against Malaysian citizens residing abroad. The applicants
I contended that as the EC had power to make regulations, it could include the
applicants as another category of absent voters under reg 2.

Held, dismissing the application with no order as to costs:

- (1) The applicants did not come under any of the categories of voters listed

- under reg 2 who could be considered as absent voters. The EC had rightly rejected their application to be registered as absent voters in accordance with reg 2 (see paras 9 & 14). A
- (2) Since the applicants were not challenging the validity of reg 2, they were challenging a perfectly valid decision of the EC under reg 2 (see paras 10 & 11). B
- (3) The EC could not, in the exercise of its administrative power, use its regulation-making power to change the rule; it was legally bound to follow the regulations it had made. It could not at its whim and fancy exercise its legislative power to change the rule by inserting the applicants as another category of absent voters (see para 14). C
- (4) The legislative power of the EC could only be exercised in accordance with the Elections Act 1958 ('Act'). It could only make rules with the approval of the Yang Di-Pertuan Agong, laid before the Dewan Rakyat as required under s 17 of the Act. The power could not be exercised simply upon the applicants' application to the EC (see para 14). D
- (5) The court's duty was to interpret the law and not to order Parliament or any bodies, including the EC, to enact any law as that would be usurping the function of the legislature or of any such bodies (see para 16). E
- (6) The applicants' judicial review application was an attempt to circuitously urge the court to make an order for the EC to breach the existing law. The application was ludicrous and bordered on abuse of process of court (see paras 15 & 22). F

[Bahasa Malaysia summary

Pemohon-pemohon adalah warganegara Malaysia yang bermastautin dan bekerja di United Kingdom dan telah memohon kepada Suruhanjaya Pilihan Raya ('SPR') untuk didaftarkan sebagai 'absent voters'. SPR menolak permohonan mereka atas alasan mereka tidak termasuk dalam kategori orang yang layak untuk didaftarkan sebagai 'absent voters' seperti yang disenaraikan di bawah peraturan 2 Peraturan-Peraturan Pilihan Raya (Pendaftaran Pengundi) 2002. Walaupun pemohon-pemohon menjelaskan mereka tidak mencabar kesahihan undang-undang atau mencadangkan bahawa keputusan SPR tidak mematuhi undang-undang, mereka, walau bagaimanapun, memohon kepada Mahkamah Tinggi bagi semakan kehakiman keputusan SPR. Mereka memohon (i) suatu perisytiharan bahawa mereka mempunyai hak untuk didaftarkan sebagai 'absent voters' (ii) suatu perintah certiorari untuk membatalkan keputusan SPR enggan untuk mendaftarkan mereka sebagai 'absent voters' (iii) suatu perintah mandamus mengarahkan SPR untuk mendaftarkan mereka sebagai 'absent voters' dan (iv) sebagai alternatif, suatu perintah mandamus mengarahkan SPR untuk membuat peraturan-peraturan yang perlu dan mengambil segala tindakan yang perlu untuk membolehkan G
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- A** pemohon untuk didaftarkan sebagai 'absent voters' dan/atau pengundi pos bagi tujuan pilihan raya umum akan datang. Pemohon-pemohon mendakwa bahawa dalam menolak permohonan mereka untuk pendaftaran, SPR telah memberi tafsiran yang terhad kepada perkara 119(1) dan (4) Perlembagaan Persekutuan dan bahawa peraturan 2, dengan mengehadkan kategori orang
- B** yang layak untuk didaftarkan sebagai 'absent voters', telah menyebabkan keputusan SPR melanggar perkara 119 dibaca bersama-sama dengan perkara 8. Secara alternatifnya, ia telah berhujah bahawa peraturan 2 mendiskriminasi rakyat Malaysia yang menetap di luar negeri. Pemohon menghujahkan bahawa SPR mempunyai kuasa untuk membuat peraturan-peraturan, ia boleh
- C** memasukkan pemohon sebagai kategori lain 'absent voters' di bawah peraturan 2.

Diputuskan, menolak permohonan dengan tiada perintah terhadap kos:

- D** (1) Pemohon tidak termasuk di bawah mana-mana kategori pengundi yang disenaraikan di bawah peraturan 2 yang boleh dianggap sebagai 'absent voters'. SPR telah dengan betul menolak permohonan mereka untuk didaftarkan sebagai 'absent voters' selaras dengan peraturan 2 (lihat perenggan 9 & 14).
- E** (2) Walaupun pemohon tidak mencabar kesahihan peraturan 2, mereka telah mencabar keputusan yang secara sempurnanya sah SPR di bawah peraturan 2 (lihat perenggan 10 & 11).
- F** (3) SPR tidak boleh, dalam menjalankan kuasa pentadbirannya, menggunakan kuasanya untuk membuat peraturan untuk menukar peraturan; ia terikat di sisi undang-undang mengikut peraturan-peraturan yang telah dibuat. Ia tidak boleh sesuka hati menjalankan kuasa perundangannya untuk menukar peraturan dengan memasukkan pemohon dalam kategori 'absent voters' yang lain (lihat perenggan 14).
- G** (4) Kuasa perundangan SPR hanya boleh dilaksanakan mengikut Akta Pilihan Raya 1958 ('Akta'). Ia hanya boleh membuat kaedah-kaedah dengan kelulusan Yang Di-Pertuan Agong, yang dibentangkan di hadapan Dewan Rakyat sebagaimana yang dikehendaki di bawah s 17 Akta. Kuasa tersebut tidak dapat dilaksanakan hanya atas permohonan pemohon kepada SPR (lihat perenggan 14).
- H** (5) Tanggungjawab mahkamah adalah untuk mentafsirkan undang-undang dan tidak memerintahkan Parlimen atau mana-mana badan, termasuk SPR, untuk menggubal mana-mana undang-undang seperti yang akan merampas fungsi badan perundangan atau mana-mana badan tersebut (lihat perenggan 16).
- I** (6) Permohonan semakan kehakiman pemohon adalah satu cubaan untuk menggesa mahkamah membuat suatu perintah bagi SPR untuk

melanggar undang-undang sedia ada. Permohonan tersebut adalah mustahil dan boleh menjadi penyalahgunaan proses mahkamah (lihat perenggan 15 & 22).]

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Notes

For a case on duties, of Election Commission, see 6 *Mallal's Digest* (4th Ed, 2010 Reissue) para 2062.

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Cases referred to

PP v Datuk Harun bin Haji Idris and Ors [1976] 2 MLJ 116, FC (refd)

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Legislation referred to

Elections Act 1958 ss 5, 15, 17

Elections (Registration of Electors) Regulations 2002 reg 2

Federal Constitution arts 114, 119(1), (4)

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Edmund Bon (Edward Saw with him) (Chooi & Co) for the applicants.

Amarjeet Singh (Mohd Azhar bin Mohd Yusoff with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Rohana Yusuf J:

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[1] The applicants are Malaysian citizen residing and working in United Kingdom. They applied to the Election Commission ('EC') to be registered as *absent voters*. The applications were rejected by the EC on the ground that they are not qualified to be *absent voters* under the Elections (Registration of Electors) Regulations 2002. They are now applying for judicial review of this decision of the EC.

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[2] The applicants in this application are seeking for the following reliefs:

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(a) *a declaration* that the applicants as Malaysian citizens residing overseas have the right to be registered as *absent voters*;

(b) an order of *certiorari* to quash the decision of the Election Commission (EC) in the letter dated 9 September 2011 refusing to register the applicants as *absent voters*;

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(c) an order of *mandamus* directing EC to register the applicants as *absent voters*; and

(d) *alternatively*, an order of *mandamus* directing the EC to make the necessary regulations and to take all the necessary actions to enable the applicants to be registered as *absent voters* and/or postal voters for the purpose of the next general election within 14 days from the date of the order herein.

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- A [3] The application is premised on the ground that the EC has erred in excluding the applicants as *absent voters* because:
- (a) the EC in rejecting the applicants to be *absent voters* had caused a restrictive interpretation of art 119(1) and (4) of the Federal Constitution. Regulation 2 had unlawfully limited the definition of *absent voters* causing the EC's decision to be in breach of art 119 read together with art 8; and
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- (b) alternatively it was argued that reg 2 which lists out the categories of *absent voters* is discriminatory against Malaysian citizen residing overseas.
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- [4] Before I proceed to look into the merits of the arguments of the applicants, at the outset it was made clear by the applicants that they are not challenging the validity of the law but merely questioning the validity of the decision of the EC on the grounds stated above. It is also not suggested anywhere in this application that the EC's decision does not comply with the law.
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- [5] The EC is an entity constitutionally constituted under art 114 of the Federal Constitution. In relation to election matters the EC is exercising power granted by law both under the Federal Constitution as well as the federal laws in particular the Elections Act.
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- [6] Article 119(1) deals with qualification of voters. Article 119(4) defines *absent voters* to mean, in relation to any constituency, any citizen who is registered as an *absent voter* in respect of that constituency in accordance with provisions of *laws relating to election*.
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- [7] Article 119 envisages Parliament to enact laws relating to election which the Parliament did, and enacted the Elections Act. This Act empowers the EC under s 5 to exercise control and supervision over conduct of election and registration of electoral rolls. For this purpose, the EC with the approval of Yang Di-Pertuan Agong is empowered to regulate registration of electors, by regulation making power granted under s 15. Under this section the EC prescribed facilities for voting by post and list out categories of persons entitled to vote by post under the Elections (Registration of Electors) Regulations 2002 ('Regulations 2002'). Regulations 2002 is a regulation made by the EC with the approval of Yang Di-Pertuan Agong, and was laid before Dewan Rakyat (as required under s 17 of the Elections Act.)
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- [8] The categories of voters who can be considered as absent voters are listed under reg 2 and they are as follows:
- (a) a serving member of any regular naval, military or air force of Malaysia, the Commonwealth or other country;

- (b) the spouse of a serving member of any force referred to in para (a), who elects to become an *absent voters*; A
- (c) in the public service of the Government of Malaysia or any State or in the service of any local authority or statutory authority exercising powers vested in it by Federal or State law, who is on duty outside the boundaries of Peninsular Malaysia or Sabah or Sarawak, B
- (d) the spouse of a person in the public service of the Government of Malaysia or any State or in the service of any local authority or statutory authority exercising powers vested in it by Federal or State law, who is living with her or his husband or wife outside the boundaries of Peninsular Malaysia or Sabah or Sarawak at the date of application for registration as a Parliamentary or State elector; C
- (e) engaged in full time studies at any university, training college or any higher educational institution outside the boundaries of Peninsular Malaysia or Sabah or Sarawak; or
- (f) the spouse of a person engaged in full time studies at any university, training college or any higher educational institution outside the boundaries of Peninsular Malaysia or Sabah or Sarawak who is living with her or his husband or wife at the date of application for registration as a Parliamentary or State elector. D

[9] The applicants clearly do not come under any of these categories. Thus, when the applicants apply to the EC to be registered as *absent voters* their applications were rejected by the EC in accordance reg 2. E

[10] Regulation 2 is a valid unchallenged provision of the law, since the applicants are not challenging its validity. The EC meanwhile maintained its position as averred in the affidavit deposed on behalf of the EC, that its decision in rejecting the applicants are in compliance with reg 2. F

[11] Having examined the application and the grounds of this application I must say that this application is rather odd. It is essentially a challenge of a decision by a body that simply complies with the law. In other words, it is a challenge of a perfectly valid decision of the EC under reg 2. If reg 2 is not challenged and is thereby accepted as valid law, then I am unable to understand, let alone appreciate, how a decision made pursuant to such law can be subject to a judicial review. Another way of looking at it is, is the EC empowered in the face of reg 2 to include these applicants as *absent voters*? If the EC were to do so, its decision would be ultra vires reg 2. G H

[12] Learned counsel went into long discourse on the point that the decision of EC though an administrative action or executive orders, must not be discriminatory and must not offend art 8 as applied by the Federal Court decision in *Public Prosecutor v Datuk Harun bin Haji Idris and Ors* [1976] 2 MLJ 116. This is in indeed an accepted principle of law. I

- A [13] Learned counsel for the applicants further contended that the EC is the same body that makes this reg 2. He contended that the categories listed under the reg 2 is not exhaustive, hence the EC can include the applicants as another category of *absent voters*.
- B [14] In my considered view such argument is naive and ignorant of the facts that *regulation making power* and *administrative decision of EC* are two different powers enjoyed by the EC. The EC cannot in exercise of its administrative power uses its regulation making power to change the rule. The EC in the exercise of its administrative power is legally bound to follow the regulations that it had made. In the exercise of its administrative power the EC cannot at its whims and fancies exercise Its legislative power to change the rule by inserting the applicants as another category of *absent voters*. This is because, the legislative power of the EC may only be exercised in accordance with the Election Act namely, It may only make rules with the approval of Yang Di-Pertuan Agong, and laid before Dewan Rakyat (as required under s 17 of the Elections Act.) It cannot be simply exercised upon the application of the applicants to them as in this case. In deciding the application of the applicants to be registered as *absent voters* the EC must adhere to reg 2. Since the applicants do not belong to any of these categories the EC had rightly rejected them as *absent voters*.
- E [15] The present judicial review application therefore must be seen to be an attempt to circuitously urge this court to make an order for the EC to breach the existing law. This surely cannot be the function of a judicial review court or any court for that matter, to compel anyone to breach the law. On the contrary the role of the judicial review court is to ensure that public authorities complies with rules and regulation in their decision making process and in the decision itself.
- F [16] The alternative prayer sought for an order of *mandamus* directing the EC to make the necessary regulations and to take all the necessary actions to enable the applicants to be registered as *absent voters* or postal voters for the purpose of the next general election. Perhaps the applicants need to be reminded that the court's duty is to interpret the law and not to order the Parliament or any bodies including the EC to enact any law. It is never the duty of the court to order any laws to be made. An order of such nature amounts to a usurpation of the function of the legislature or any such bodies. Such is the democratic process that this nation enjoys.
- G [17] Going back now to the prayers sought by the applicants in this application, as stated in the application.
- H [18] Firstly, the court cannot make a declaration that the applicants being
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Malaysian citizens residing overseas are entitled to be registered as *absent voters* because it would amount to a breach of reg 2. To make such declaration would also be inconsistent with the earlier stand that the function of the court is not to order anyone to breach law. A

[19] The court cannot make an order of *certiorari* to quash the decision of the EC (in the letter dated 9 September 2011 refusing to register the applicants as *absent voters*.) because the decision of the EC is in accordance with the law. B

[20] The court also cannot make an order of *mandamus* directing EC to register the applicants as *absent voters* because this would tantamount to the court ordering the EC to act against the provisions of the laws that are valid, enforceable and remains unchallenged. C

[21] The court cannot allow the alternative order of mandamus to direct the EC to make the necessary regulations and to take all the necessary actions to enable the applicants to be registered as *absent voters* because the court cannot order laws to be made. The court's function will have to remain as a body to interpret laws brought before it. Besides as contended by learned senior federal counsel, the applicants have not fulfilled the necessary requirement for mandamus to be issued. D E

[22] Premised on all the above reasons the application of the applicants must therefore fail. The application in my view is ludicrous and bordering on abuse of court process. Thus, I hereby dismiss the application of the applicants. I make no order as to costs. F

Application dismissed with no order as to costs.

Reported by Ashok Kumar G

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