DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM

DALAM NEGERI SELANGOR DARUL EHSAN

SAMAN PEMULA NO: MT-21-248-2010

Dalam perkara Aturan 7, Aturan 15 Kaedah 16 dan Aturan 28 Kaedah-Kaedah Mahkamah Tinggi 1980

DAN

Dalam perkara seksyen 41 Akta Spesifik Relif 1950

DAN

Dalam perkara Artikel-Artikel 4, 5 dan 8 Perlembagaan Persekutuan

DAN

Dalam perkara Konvensyen Untuk Menghapuskan Diskriminasi Dalam Semua Bentuk Terhadap Wanita 1979/81 *("convention on the Elimination of All Forms of Discrimination Against Women 1979/81")* dan Akta Pekerjaan 1955

DAN

Dalam perkara penarikan balik dan/atau pembatalan lantikan Noorfadilla Binti Ahmad Saikin sebagai Guru Sandaran Tidak Terlatih

DAN

Dalam perkara permohonan untuk, antara lainnya, deklarasi dan gantirugi

ANTARA

NOORFADILLA BINTI AHMAD SAIKIN **... PLAINTIF**

DAN

1. **CHAYED BIN BASIRUN**
2. **ISMAIL BIN MUSA**
3. **DR HAJI ZAHRI BIN AZIZ**
4. **KETUA PENGARAH PELAJARAN MALAYSIA,**

   KEMENTERIAN PELAJARAN MALAYSIA
5. **MENTERI PELAJARAN MALAYSIA,**

   KEMENTERIAN PELAJARAN MALAYSIA
6. **KERAJAAN MALAYSIA** **...DEFENDAN-DEFENDAN**

DEFENDANTS FURTHER WRITTEN SUBMISSION

May it please Yang Arif,

The Applicants through the application of Originating Summons had sought several reliefs, mainly:

(1) Declaration on legal rights, status and character of a pregnant woman i.e. the Plaintiff (as on12.1.2009) and that the Plaintiff deserved to be appointed as "Guru Sandaran Tidak Terlatih"/GSTT;

(2) Declaration that the act done on 12.1.2009 by the Defendants in reclaim and/or cancel the appointment of Plaintiff as "Guru Sandaran Tidak Terlatih"/ GSTT is unconstitutional, tidak sah dan batal; and

(3) Declaration that under paragraph 4.2.2 Surat Pekeliling Perkhidmatan Kementerian Pelajaran Malaysia Bil. No. 1 Tahun 2007 dated 27.2.2007 that states;

4.2 Kemudahan-Kemudahan yang tidak layak diperolehi oleh GST dan GSTT

....

4.2.2 Cuti Bersalin

....

Is unconstitutional, tidak sah dan terbatal

(4) General Damages;

(5) Interest on the general damages as at 8% from this date until the date of full payment or on the rate that the Court deems fit for the Defendants to pay to the Plaintiff;

(6) An inquiry and assessment of the general damages will be held to determine the general damages to be paid by the Defendants to the Plaintiff;

(7) Cost to be paid by the Defendants to the Plaintiff; and

(8) orders and/or any consequential reliefs or other reliefs that is deem fit by this Court.

SALIENT FACTS

1. When further considering the application of the Plaintiff on her rights, and further referring the 3 Affidavit In Reply by the Defendants. The facts of the case will show whether the Plaintiff in this case have her locus in pursuing her rights in this case.

2. The facts of the case are as stated below:

2009	• All the school in Selangor in shortage of teachers • Minister of Education supply warrant to took up the Guru Sandaran tidak Terlatih (GSTT) to cured the problems • Jabatan Pelajaran Selangor had asked the Pejabat pelajaran Daerah Negeri Selangor to conduct interviews for the persons who is akin to take the responsibility for being the GSTT • The appointment will be made by the Jabatan Pelajaran Selangor (this appears inside the Affidavit in Reply of !st Defendant at paragraph 6, in the Affidavit In reply of 2nd and 3rd Defendant at paragraph 7 and also in Affidavit In Reply of 4th, 5th and 6th Defendant at paragraph 7)
30-31/12/2008	• Pejabat Pelajaran Daerah Hulu Langat had held the interviews for the GSTT for the first preliminary stage • Only 260 persons are succeed at this 1st preliminary stage
12/01/2009	• All 260 persons **been called via SMS to attend** at Pejabat Pelajaran Daerah Hulu Langat to collect Memo Penempatan to the school that they will be attached. • **In-house briefing** and in the briefing the candidates were told that "Pejabat Pelajaran daerah Hulu Langat tidak mengambil GSTT yang sedang mengandung atas sebab kepentingan pengajaran dan pembelajaran di sekolah…" "Tujuan Guru Sandaran Tidak terlatih (GSTT) ialah untuk mengatasi masalah kekurangan furu di sekolah yang melibatkan masalah pengajaran dan pembelajaran di sekolah" (This was stated inside the Affidavit In Reply of 1st Defendant at paragraph 15 and Affidavit In Reply of 2nd and 3rd Defendant at paragraph 16) • Pejabat Pelajaran Daerah Hulu Langat had withdrew back the Memo of attachment from the candidates that found pregnant after the briefing which at this juncture this particular attendant to the Pejabat Pelajaran Daerah Hulu Langat is still at the first preliminary stage • The candidates that had fulfill this 1st Priliminary stage still have to go to the Jabatan Pelajaran Negeri to be

	then be appointed as GSTT (perlantikan)
17/2/2009	• The Plaintiff through her husband had made an email of complaint to the Kementerian Pelajaran and had been answered by the Kementerian Pelajaran on the day itself giving the reasons why the withdrawal happened to the Plaintiff as based on the Pekeliling Perkhidmatan Bil.1/2007 (This is stated at paragraph 19 of the Affidavit In Support of the Plaintiff and been ekshibited as Ekshibit NAS-2 and NAS-3)
6/5/2010	• Plaintiff then filed this suit.
	• In the Affidavit in reply of the 2nd and 3rd Defendant at paragraph 26 had clearly stated and deposed that the Plaintiff still can apply refresh for the GSTT after delivered if ever she comply with the conditions and criteria that had been set up by the 4th Defendant "Saya juga ingin menegaskan bahawa calon GSTT yang hamil boleh membuat permohonan semula GSTT selepas bersalin bagi pengambilan GSTT di masa akan datang dengan syarat mereka memenuhi keperluan dan kriteria yang telah ditetapkan oleh Defendan Keempat" • Same as been deposed by the 4th Defendant at paragraph 14 "Saya juga menegaskan bahawa Plaintif berpeluang dan boleh memohon semula GSTT selepas bersalin pada masa akan datang dengan syarat, beliau memenuhi keperluan dan kriteria yang telah ditetapkan Kementerian Pelajaran Malaysia"

3. By the chronology of the facts above, the Plaintiff in this suit do not have any locus in applying from this court as at the first instance as a judicial notice she do not have any rights. Why do the Defendants submit this, from the facts on 12/1/2009 the Plaintiff only been asked to attend to the Pejabat Pelajaran Daerah Hulu Langat via SMS and had join in the in house briefing and been given a Memo which had been taken back by the consequences that it been withdrew by the facts that the Plaintiff is pregnant at that particular time and had been brief that pregnant woman are not suppose to be appoint based on the reasons;

"Pejabat Pelajaran daerah Hulu Langat tidak mengambil GSTT yang sedang mengandung atas sebab kepentingan pengajaran dan pembelajaran di sekolah..."

"Tujuan Guru Sandaran Tidak terlatih (GSTT) ialah untuk mengatasi masalah kekurangan furu di sekolah yang melibatkan masalah pengajaran dan pembelajaran di sekolah"

4. Then the Plaintiff had been cleared by the email dated 17/2/2009 that by the Pekeliling Perkhidmatan Bil.1/2007, and the reasons given before at the briefing session, the Plaintiff therefore could not join in the GSTT.

5. No such written offer been made for the Plaintiff. A verbal offer is only aas good as the paper it's written on. The verbal offer is only 'fishing' to see if the seller thinks an offer might be well-received, and worth writing. A verbal offer is not enforceable and since it is not written down, it is often loaded with misunderstanding, since things are not spelled-out.

FURTHER ISSUE TO BE DISPUTED

1. By the Affidavits filed in for all the Defendants, it is impliedly to say, all the action taken are based on the *Pekeliling Perkhidmatan Bil.1/2007* and also by the action taken had the *'Policy Consideration'* appears to be made.

2. In arguing the *'Policy Consideration'* made along the way for this case and also by the *ratio* taken out from the other cases cited. Parties in grievances cannot in action try to interfere with the *'Public Authority Body'* in doing their administrative function.

SUBMISSION

Policy Consideration

In **R. Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147**, at page 149 **[TAB 1, DBOA 2]**;

"Needless to say, if it appears to be the case, this wider power is enjoyed by our courts, the decision whether to exercise it, and if so, in what manner, are matters which call for the utmost care and circumspection, strict regard being had to the subject matter, the nature of the impugned decision and other relevant discretionary factors. A flexible test

whose content will be governed by all the circumstances of the particular case will have to be applied.

For example, **where policy considerations are involved in administrative decisions and courts do not possess knowledge of the policy considerations which underlie such decisions, courts ought not to review the reasoning of the administrative body, with a view to substituting their own opinion on the basis of what they consider to be fair and reasonable on the merits, for to do so would amount to a usurpation of the power on the parts of the courts**"

In the case of **C.C.S.U. v Minister of Civil Service [1994] 3 All ER 935 [TAB 2, DBOA 2];**, at page 411 per Lord Diplock;

"Such decision will generally involve the application of government policy. The reasons for the decision – maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way it has to be adduced tend to exclude from the attention of the court competing policy considerations which, if the executive discretion is to be wisely exercised, need to be weighed against one another a balancing exercise which judges by their upbringing and experience are ill – qualified to perform."

At page 414 – 415, Lord Roskill says;

"It is not for the court to determine whether a particular policy or particular decisions taken in fulfillment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case case.."

In having to look into the case of **Fawcett Properties Ltd v. Buckingham County Council [1959] Ch 543[TAB 3, DBOA 2];**. In an application to declare conditions imposed as ultra vires, Pearce LJ held at page 575;

"The council are, by the terms of section 14 of the Town and Country Planning Act, 1947, entitled to grant permission subject to such condition as they think fit'. ***The Wednesbury case makes it clear that the court will not interfere with that discretion unless it is shown that the authority did not take into account the right considerations, that is, that they disregarded something which they should have taken into account.*** *The onus of showing this is on the person seeking to upset the condition imposed by the authority."*

By the case of **Workon Sdn Bhd v The Director of Lands & Surveys, Sabah [1999]4 MLJ 177[TAB 4, DBOA 2];**, per Richard Malanjum;

"It is settled law that mandamus lies to secure the performance of a public duty in which an applicant has sufficient legal interest to the performance. The duty to be performed must be of a public nature such as duty imposed by statute, custom, common law and even contract. Thus, where a statute imposes a duty, the performance or non – performance of which is not really a matter of discretion, an order of mandamus may be issued. But if a power or discretion only, as distinct from a duty, exists, an order of mandamus will not be granted by the court except to secure a performance of a duty to exercise the discretion as maybe necessary, or a duty to exercise a genuine discretion or discretion based on proper legal principles."

[to submit that in the present case, the statutory provision gives only a power and not a duty, further it is a discretionary power. No duty imposed to simply appointed such officer in any department]

The decision of the Defendants, based on the collective decision of the Minister policy Decision and it is not a decision which should be reviewed by this court on the merits of the application. To do so would amount to reviewing the wisdom of the policy decision of the Minister. This was propounded in the case of **Kumpulan Perangsang Selangor Bhd v. Zaid bin Hj. Mohd Noh [1997] 1 MLJ 789[TAB 5, DBOA 2];** , Justice Sri Ram at page 799 said;

"Of course, there may be cases in which — for reasons of public policy, national interest, public safety or national security — it may be wholly inappropriate for the courts to attempt any substitution of views. Unlike the executive, the judiciary is not armed with all the information relevant to such matters and one could well

understand a High Court, in the exercise of its discretionary power, declining to enter into the merits of a decision involving these considerations. Each case must be considered on its own facts and it would be quite unwise to attempt the formulation of an all-embracing rule."

CONCLUSION

1. We repeat our submissions filed in before and by our further submission the Plaintiff do not have her locus and also her as of right under Article 5 and 8 of the Federal Constitution in getting the post of GSTT. Based on the Judicial Notice of Article 8 of the Federal Constitution, at sub(3) stated there:

Equality

8(3) There shall be no discrimination in favour of any person on the ground that **he is subject of the Ruler of any State**.

2. The Plaintiff here is subject to the Ruler of the Federal. Ruler of the Federal had appointed the "Public Authority" as per stated at Article 160. That "Public Authority" is duty bound by the Laws made by the Cabinet as in this particular case, the Minister also comprise a "Cabinet".

2 In view of all our submissions before and above, we pray that this application by the Plaintiff to be dismissed with costs.

Dated 29th April, 2011.

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Senior Federal Counsel

Attorney General's Chambers

This Written Submission is filed by the Senior Federal Counsel on behalf of the Intervener whose address for service is at Bahagian Guaman, Jabatan Peguam Negara

Malaysia, Aras 3, Blok C3, Parcel C, Pusat Pentadbiran Kerajaan Persekutuan, 62502 PUTRAJAYA.