Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO 21–248 OF 2010
ZALEHA YUSOF J
12 JULY 2011

Administrative Law — Remedies — Declaration — Gender discrimination — Whether revocation of plaintiff's appointment amounted to gender discrimination — Whether declaration was proper form of relief — Specific Relief Act 1950 s 41

Constitutional Law — Fundamental liberties — Equality before the law — Gender discrimination — Defendants' act of revoking and withdrawing plaintiff's appointment as Guru Sandaran Tidak Terlatih ('GSTT') because she was pregnant — Whether defendants' act amounted to gender discrimination — Whether defendants' act constituted violation of art 8(2) of the Federal Constitution — Whether court could refer to CEDAW in clarifying terms equality and gender discrimination in art 8(2) — Whether decision not to employ pregnant women as GSTT was policy decision — Whether court should be involved in policy decision — Costs — Whether costs should be awarded — Federal Constitution art 8(1) & (2)

The plaintiff applied for and obtained employment as a Guru Sandaran Tidak Terlatih ('GSTT'). After receiving her placement memo informing her of her posting, she was asked to attend a briefing on the terms of her service of employment. At this briefing, the plaintiff was questioned as to whether she was pregnant. When the plaintiff admitted that she was three months pregnant, her placement memo was withdrawn. The plaintiff demanded that her employment as GSTT be restored but received no written reply. The plaintiff thus filed the present originating summons application against the education officers of the education office that was in charge of employing her ('the first and second defendants'), the state director of the education department of Selangor at the material time ('the third defendant'), the Ministry of Education and the Government of Malaysia. The gist of the plaintiff's complaint was that the GSTT post was revoked and withdrawn by the defendants on the sole ground that she was pregnant. The plaintiff argued that this act of the defendants was tantamount to gender discrimination and thus against art 8(2) of the Federal Constitution ('the Constitution'). The plaintiff thus sought, inter alia, a declaration that the defendants' act of

withdrawing and/or cancelling her appointment as a GSTT was unconstitutional, unlawful and void and damages.

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

(1) The plaintiff's application to assert her rights to a legal status was in line with s 41 of the Specific Relief Act 1950 ('the SRA'). Further, the plaintiff had also satisfied the proviso to s 41 of the SRA, in that, she had not only sought declaratory orders but also damages. Hence, a declaration was a proper form of relief in this case (see paras 15–16).

(2) The word 'gender' was incorporated into art 8(2) of the Constitution in order to comply with Malaysia's obligation under the Convention on the Elimination of all Form of Discrimination against Women (CEDAW), to reflect the view that women were not discriminated. It is settled law that the CEDAW had the force of law and was binding on member states, including Malaysia. In interpreting art 8(2) of the Constitution it was the court's duty to take into account the government's commitment at an international level. As such, there was no impediment for the court to refer to CEDAW in interpreting art 8(2) of the Constitution. Applying arts 1 and 11 of CEDAW it was found that pregnancy in this case was a form of gender discrimination. It was a basic biological fact that only women had the capacity to become pregnant and thus discrimination on the basis of pregnancy was a form of gender discrimination. Hence it was found that the plaintiff should have been entitled to be employed as GSTT even if she was pregnant (see paras 20, 24, 28 & 32).

(3) Although the defendants argued that the discrimination against pregnant women was justified by the principle of reasonable classification, it was found that this principle was only applicable to art 8(1) of the Constitution and did not apply to art 8(2) of the Constitution (see para 33).

(4) There was no merit in the defendants' argument that the decision not to employ a pregnant woman as a GSTT was a policy consideration, as this argument was raised as an afterthought (see para 34).

(5) The defendants' act of revoking and withdrawing the placement memo because the plaintiff was pregnant constituted a violation of art 8(2) of the Constitution. It was the contravention of the plaintiff's rights by the defendants as agents of the executive. However, there was no order as to costs because this was a public interest case (see paras 38–39).

[Bahasa Malaysia summary

Plaintif memohon untuk dan mendapat pekerjaan sebagai Guru Sandaran Tidak Terlatih ('GSTT'). Setelah menerima memo penempatan memberitahunya tentang jawatannya, dia telah diminta menghadiri taklimat

berhubung terma-terma pekerjaan perkhidmatannya. Di taklimat ini, plaintif telah disoal sama ada dia hamil. Apabila plaintif mengakui bahawa dia hamil tiga bulan, memo penempatannya telah dibatalkan. Plaintif telah menuntut agar pekerjaannya sebagai GSTT dikembalikan tetapi tidak menerima jawapan bertulis. Oleh itu plaintif telah memfailkan permohonan saman pemula ini terhadap pegawai-pegawai pendidikan pejabat pendidikan yang bertugas mengambilnya bekerja ('defendan-defendan pertama dan kedua'), pengarah negeri jabatan pendidikan Selangor pada masa itu ('defendan ketiga'), Kementerian Pendidikan dan Kerajaan Malaysia. Asas aduan plaintif adalah bahawa jawatan GSTT itu telah dibatalkan dan ditarik balik oleh defendan-defendan atas alasan semata-mata dia hamil. Plaintif berhujah bahawa tindakan defendan-defendan ini sama seperti diskriminasi gender dan oleh itu bertentangan perkara 8(2) Perlembagaan Persekutuan ('Perlembagaan'). Plaintif dengan itu memohon, antara lain, deklarasi agar tindakan defendan-defendan menarik balik dan/atau membatalkan pelantikannya sebagai GSTT tidak berperlembagaan, tidak sah dan terbatal dan ganti rugi.

Diputuskan, membenarkan permohonan tanpa perintah untuk kos:

(1) Permohonan plaintif untuk menggunakan haknya sebagai status sah sejajar dengan s 41 Akta Spesifik Relief 1950 ('ASF'). Bahkan, plaintif juga memenuhi proviso s 41 ASR, di mana, dia bukan sahaja memohon perintah-perintah deklarasi tetapi juga ganti rugi. Justeru itu, deklarasi merupakan bentuk relief yang sesuai dalam kes ini (lihat perenggan 15–16).

(2) Perkataan 'gender' yang digunakan dalam perkara 8(2) Perlembagaan bagi tujuan memenuhi obligasi Malaysia di bawah Konvensyen berhubugan Pelenyapan semua Bentuk Diskriminasi terhadap Wanita ('CEDAW'), untuk menggambarkan pandangan bahawa wanita tidak didiskriminasikan. Adalah undang-undang tetap bahawa CEDAW mempunyai kuasa undang-undang dan mengikat ke atas ahli negeri, termasuklah Malaysia. Dalam mentafsirkan perkara 8(2) Perlembagaan adalah kewajipan mahkamah untuk mengambilkira komitmen kerajaan di peringkat antarabangsa. Oleh itu, tiada halangan untuk mahkamah merujuk kepada CEDAW untuk mentafsir perkara 8(2) Perlembagaan. Dengan menggunapakai perkara-perkara 1 dan 11 CEDAW adalah didapati bahawa kehamilan dalam kes ini membentuk diskriminasi gender. Adalah lumrah asas biologikal bahawa hanya wanita mempunyai keupayaan menjadi hamil dan oleh itu diskriminasi atas dasar kehamilan membentuk diskriminasi gender. Justeru itu adalah diputuskan bahawa plaintif patut diberi hak bekerja sebagai GSTT walaupun dia hamil (lihat perenggan 20, 24, 28 & 32).

(3) Walaupun defendan-defendan berhujah bahawa diskriminasi terhadap

wanita hamil dijustifikasikan oleh prinsip klasifikasi munasabah, adalah didapati bahawa prinsip ini hanya terpakai kepada perkara 8(1) Perlembagaan dan tidak terpakai kepada perkara 8(2) Perlembagaan (lihat perenggan 33).

(4) Tiada merit dalam hujah defendan-defendan bahawa keputusan untuk mengambil wanita hamil bekerja sebagai GSTT merupakan pertimbangan polisi, kerana hujah ini telah ditimbulkan sebagai satu yang telah difikirkan kemudian (lihat perenggan 34).

(5) Tindakan defendan-defendan membatalkan dan menarik balik memo penempatan itu kerana plaintif hamil membentuk pelanggaran perkara 8(2) Perlembagaan. Ia merupakan pelanggaran hak-hak plaintif oleh defendan-defendan sebagai ejen badan eksekutif. Walau bagaimanapun, tiada perintah untuk kos kerana ia merupakan satu kes kepentingan awam (lihat perenggan 38–39).]

Notes

For cases on declaration, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 613–695.

For cases on equality before the law, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2340–2361.

Cases referred to

Beatrice Fernandez v Sistem Penerbangan Malaysia & Anor [2005] 2 CLJ 713 (folld)

Brooks v Canada Safeway Ltd (1989) 59 DLR (4th) 321, SC (refd)

CCSU v Minister of Civil Service [1994] 3 All ER 935 (refd)

Datuk Syed Kechik v Government of Malaysia and Sabah [1979] 2 MLJ 101, FC (refd)

Kumpulan Perangsang Selangor Berhad v Zaid bin Haji Mohd Noh [1997] 1 MLJ 789, SC (refd)

Minister for Immigration and Ethnic Affairs v Teoh (1995) 128 ALR 353, HC (refd)

Mohd Ezam Mohd Noor v Ketua Polis Negara and Other appeal [2002] 4 MLJ 449, FC (refd)

Public Prosecutor v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116, HC (refd)

R Rama Chandran v the Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

Teh Guan Teik v Inspector General of Police & Anor [1998] 3 MLJ 137; [1998] 3 CLJ 153, FC (refd)

Vishaka v State of Rajasthan AIR 1997 SC 3011, SC (refd)

YAB Dato' Dr Zambry Abd Kadir & Ors v YB Sivakumar Varatharaju Naidu (Attorney General Malaysia, Intervener) [2009] 4 MLJ 24; [2009] 4 CLJ 253, FC (refd)

Legislation referred to

Federal Constitution arts 8, 8(1), (2), 160
Specific Relief Act 1950 ss 41, 42

Edmund Bon (Honey Tan Lay Eau and PDK Chan Yen Hui) (Chooi & Co) with him (Edmund Bon also mentioned on behalf of Endrew Khoo on behalf Suhakam) for the plaintiff.

Aida Adhha bt Abu Bakar (Senior Federal Counsel, Attorney General's Chambers) for the defendants.

Zaleha Yusof J:

[1] Enclosure (1) of this originating summons is the plaintiff's application for, inter alia, the following declarations:

(a) that with regard to the legal rights, status and character of a pregnant woman, namely the plaintiff (as of 12 January 2009), that the plaintiff was qualified and entitled to be appointed a 'Guru Sandaran Tidak Terlatih' ('GSTT'); and

(b) that the action of the defendants on 12 January 2009 to withdraw and/or cancel the plaintiff's appointment as a GSTT is unconstitutional, unlawful and void.

FACTS

[2] The first and second defendants were at the material time Education Officers of the Education Office of the Hulu Langat District (PP DHL), in charge of employing persons interested in the GSTT position for the Hulu Langat District. The third defendant was then the State Director of the Education Department of Selangor. The Ministry of Education (the Ministry) tried to overcome the problem of shortage of teachers in Malaysia by employing untrained teachers, also known as GSTT. The Ministry had previously issued a letter of approval (also known as a warrant) to all State Directors of Education, authorising them to elect and employ GSST. The letter of approval/warrant states that the employment of GSST is subject to the terms of 'Pekeliling Perkhidmatan Kementerian Pelajaran Malaysia Bil 1/2007' dated 27 February 2007 ('the circular'). The circular states, inter alia, as follows:

3. Taraf GST and GSTT

3.1 GST dan GSTT adalah bertaraf bukan kakitangan kerajaan. Oleh yang demikian mereka tidak layak mendapat apa jua faedah atau kemudahan seperti yang diterima oleh guru-guru tetap kecuali kemudahan-kemudahan seperti yang tersebut di perenggan 4 di bawah.

A 4. Elaun dan Kemudahan yang layak diterima oleh GST dan GSTT

…

4.1.1 Elaun bulanan berdasarkan tangga elaun yang diluluskan oleh Jawatankuasa Kabinet Gaji dan telah dilaksanakan melalui …

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

…

4.2.2 Cuti Bersalin

C …

6.2 Tempoh Perkhidmatan Guru-Guru Sandaran

…

6.2 Perkhidmatan GSST adalah juga berdasarkan sebulan ke sebulan dan
D akan tamat pada 31 Disember tahun berkenaan atau ditamatkan pada bila-bila masa apabila perkhidmatan mereka tidak dikehendaki lagi oleh Jabatan Pelajaran Negeri / Jabatan / Bahagian berkenaan mengikut yang mana lebih berkaitan dengan kepentingan perkhidmatan.

E **[3]** It is clear from the above that the employment of a GSTT is temporary in nature, on a month to month basis and a GSTT is paid a monthly allowance and may resign at any time.

F **[4]** The plaintiff had applied to PPDHL to be employed as a GSTT. The plaintiff had received a call requesting her to attend an interview at PPDHL on 2 January 2009. On the day the plaintiff attended the interview she was asked to fill up certain forms before the interview. During the interview, questions posed to the plaintiff included questions pertaining to her general knowledge,
G personal details, problem solving skills and residential address. Before and during the said interview, the plaintiff was not asked whether she was pregnant or not. On 11 January 2009, the plaintiff received a text message from a PPDHL officer. The text message is reproduced as follows:

H As'kum wbt … Berhubung permohonan GSTT, tuan/puan.cik diminta hadir ke Blok B, Pejabat Pelajaran Daerah Hulu Langat pada hari Isnin 12 Januari 08 mulai dari pukul 8.00 pagi hingga 9.00 pagi untuk mendapatkan Memo Penempatan ke sekolah-sekolah. Sila berpakaian sesuai untuk ke sekolah. Walaubagaimanapun, bagi yang ada kelapangan pada hari ini, boleh juga berbuat demikian mulai dari pukul 11.00 pagi hingga 4.30 petang.

I Tahniah dan terima kasih.

[5] On 12 January 2009 at 8am the plaintiff was present at PPDHL as instructed. The plaintiff was given a 'Memo Penempatan' (placement memo)

where it was stated that the plaintiff will be posted to 'Sekolah Menengah Kebangsaan Tinggi Kajang'. It is pertinent to note that the date the plaintiff was to have reported to the said school had passed, ie, 5 January 2009. This means that as of 12 January 2009, there was still a need for the plaintiff to fill the vacancy.

[6] The plaintiff and a few others were then given a briefing on the terms of service of employment such as the requirement to give one month's notice for resignation. The plaintiff was also asked to report for duty immediately.

[7] Subsequently, a PPDHL officer asked if anyone was pregnant. The plaintiff and two others admitted that they were pregnant. (The plaintiff at that time was three months pregnant.) The officer then withdrew the placement memo of the plaintiff.

[8] Later, the plaintiff, through her husband wrote a number of e-mails to the Ministry requesting for an explanation. On 17 February 2010 the Ministry, ie, on behalf of the fourth and fifth defendants replied. The Ministry relied on the circular to say that a pregnant woman cannot be employed to the GSTT post because:

(a) the period between the time of delivery to full health is too long (two months);

(b) a pregnant woman as a GSTT may not frequently be able to attend to her job due to various health reasons;

(c) when she gives birth she needs to be replaced by new teacher who will require further briefings; and

(d) a GSTT post cannot be filled with 'replacement' teachers.

[9] The Ministry added that the purpose of employing GSTT is to help overcome the shortage of teachers and not to add to the problem.

[10] On 19 February 2009, the plaintiff through her solicitors wrote a letter to the defendants demanding that her employment as GSTT be restored immediately. There was no written reply to this letter until today.

[11] Despite attempts, the parties have not been able to resolve this dispute.

[12] On 7 May 2010 the plaintiff filed this originating summons against the defendants.

ISSUE

[13] The main issue here is whether the action/directive of the defendants in

refusing to allow pregnant women to be employed as GSST is gender discrimination in violation of art 8(2) of the Federal Constitution.

[14] There are, however, other issues which have been raised by the defendants in their further submission ie on the locus of the plaintiff to bring this action and on whether declaration is a proper remedy. I feel these other issues can be dealt with together before I deal with the main issue.

OPINION

[15] It is the defendants' contention that there is no binding contract between the parties; therefore the plaintiff has not acquired a legal right as against the defendants to grant her the locus standi to make this application. To me, I agree with the plaintiff's argument that whether there is a binding contract or not is not relevant as in the instant case, the plaintiff is claiming that her right to be employed has been affected by the defendants' decision which the plaintiff claims to be contrary to art 8(2) of the Federal Constitution. So, it is clear that what the plaintiff is seeking is to assert her right to a legal status which is in line with s 41 of the Specific Relief Act 1950 (Act 137). Hence, declaration is a proper form of relief. Refer to the Supreme Court's decision in *Teh Guan Teik v Inspector General of Police & Anor* [1998] 3 MLJ 137; [1998] 3 CLJ 153 and the Federal Court's decision in *YAB Dato' Dr Zambry Abd Kadir & Ors v YB Sivakumar Varatharaju Naidu (Attorney General Malaysia, Intervener)* [2009] 4 MLJ 24; [2009] 4 CLJ 253.

[16] Section 41 of the Act 137 however provides that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration, omits to do so. If we look at encl (1), the plaintiff is not only seeking for declaratory orders but also for damages. As such to me, it is clear that the plaintiff has also satisfied the proviso of s 41 of Act 137.

[17] I must state that at this stage, I have not given a decision as to whether to grant the order sought by the plaintiff yet. All I am saying is that a declaration is a proper remedy for this sort of cases.

[18] Now back to the main issue; art 8(2) of the Federal Constitution provides, inter alia, that there shall be no discrimination on the ground only of gender in the appointment of any office or employment under a public authority. The word 'gender' was added to art 8(2) by the Constitution (Amendment) (No 2) Act 2001 (Act A 1130), which came into force on 28 September 2001; to comply with Malaysia's obligation under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

This is clearly illustrated in the Minister's speech in the *Hansard* for second and third Reading of the Bill to amend the Constitution on 1 August 2001 at p 69 as follows:

> (Datuk Seri Utama Dr. Rais bin Yatim): Tuan Yang Di-Pertua, Yang Berhormat bagi Kepong, saya suka menyatakan telah mengambil dua aspek penting. Salah satu daripadanya ialah dari segi bahasa yang satu lagi dari segi peristilahan diskriminasi. Secara am izinkan saya menjawab bahawa pandangan Yang Berhormat berkaitan dengan penggunaan bahasa yang betul dan juga cara olahan sintaksis ataupun susunan bahasa itu perlu mengikut susunan yang diterima dan tidak lagi seperti yang dikritik oleh sesetengah pihak perlu diterima dengan baik dan saya ingat atas pantun burung murai dan sebagainya itu dalam pada demikian beliau menanyakan adakah diskriminasi yang disifatkan CEDAW itu merupakan sesuatu yang telah dikemaskinikan.
>
> Saya maklum tentang konvensyen tersebut dan Malaysia sebagai salah satu daripada anggota konvensyen CEDAW pada tahun 1995 memang akur kepada keputusan tersebut dan memasukkan perkataan 'jantina' dalam Perkara 8 (2) ini adalah sedekat-dekat mungkin bagi kita memberi penjelasan dan kesempurnaan kepada tuntutan CEDAW itu.

Further at p 70, the Minister said:

> Tentang CEDAW sebentar tadi, biar saya bacakan sedikit petikan daripada The Convention on the Elimination of all forms of Discrimination Against Women. Atau secara ringkasnya The CEDAW Convention. Dia kata di sini, 'Malaysia has become a party in 1995'. Keadaan sedemikian juga Artikel menyatakan bahawa pihak-pihak yang berkenaan mempunyai tanggungjawab supaya menampilkan pandangan serta konsep bahawa wanita tidak didiskriminasikan. Atas tujuan itu kita telah berjaya pada hari ini dan yang Menteri Pembangunan Wanita dan Keluarga telah tiga kali menyebut peruntukan ini supaya kerajaan mengambil perhatian sekiranya pihak pembangkang merasa bahawa dengan keikhlasan Perdana Menteri mewujudkan kementerian ini ada faedahnya. Sekurang-kurangnya perkataan terima kasih dan penghargaan itu harus kita kemukakan kepada beliau. [Tepuk]

[19] The gist of the plaintiff's complaint is that the GSTT post was revoked and withdrawn by the defendants on the sole ground that the plaintiff was pregnant. The question here is whether this action of the defendants tantamounts to gender discrimination and therefore against art 8(2) of the Federal Constitution?

[20] As has been stated earlier, the word 'gender' was incorporated into art 8(2) of the Federal Constitution in order to comply with Malaysia's obligation under the CEDAW. It is to reflect the view that women are not discriminated. Article 1 of CEDAW defines 'discrimination against women' as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or

exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

[21] Further, article 11(1)(b) of CEDAW provides that state parties shall take all appropriate measure to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular the right to the same employment opportunity, including the application of the same criteria for selection in matters of employment. In article 11(2)(a) of CEDAW, it provides that State parties shall take appropriate measure to prohibit, subject to the imposition of sanctions, dismissal on the grounds, inter alia, of pregnancy.

[22] According to the depository notification dated 28 July 2010 by Malaysia, the only reservation on CEDAW now is confined to articles 9(2), 16(1)(a), 16(1) (f) and 16(1)(g). It also makes a declaration that in relation to article 11 of the Convention, Malaysia interprets the provision of this article as a reference to the prohibition of discrimination on the basis of equality between men and women only. Mr Andrew Khoo learned counsel from Suhakam explains, that this is because there are some countries promoting what is called a third gender. Hence, the declaration does not detract at all from Malaysia's whole obligation on article 11 of CEDAW.

[23] But the question now, can this court refer to CEDAW in clarifying the term 'equality' and gender discrimination under art 8(2) of the Federal Constitution? In *Mohd Ezam Mohd Noor v Ketua Polis Negara and other appeal* [2002] 4 MLJ 449 at p 514, Siti Norma FCJ when discussed the application of Universal Declaration of Human Rights 1948 said as follows:

> In my opinion, the status and the weight to be given to the 1948 Declaration by our courts have not changed. It must be borne in mind that the 1948 declaration is a resolution of the general assembly of the United Nations and not a convention subject to the usual ratification and accession requirements for treaties. …Since such principles are only declaratory in nature, they do not, I consider, have the force of law or binding on member states. If the United Nations wanted those principles to be more than declaratory, they could have embodied them in a convention or a treaty, to which member states can ratify or accede to and those principles will then have the force of law.

[24] CEDAW is not a mere declaration. It is a convention. Hence, following the decision of the Federal Court in *Mohamad Ezam*'s case, it has the force of law and binding on members states, including Malaysia. More so that Malaysia has pledged its continued commitments to ensure that Malaysian practices are compatible with the provision and principles of CEDAW as evidenced in the

letter from the Permanent Mission of Malaysia to the Permanent Missions of the Members States of the United Nations dated 9 March 2010.

[25] In 1988, there was a high level judicial colloquium on the Domestic Application of International Human Rights Norms ('the colloquium') in Bangalore, India. The Chief Justice of Malaysia at that time was one of the participants of the colloquium. One of the outcomes of the colloquium was the Bangalore principles. It set out values and principles that judges should adhere to in carrying out their duties. Of particular relevance here is:

> Value 5: Equality
>
> Principle: Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.
>
> Application:
>
> 5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ('irrelevant grounds').
>
> 5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.
>
> 5.3 A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

The convenor of the colloquium summarised the discussions, inter alia, as follows:

> 7 It is within the property nature of judicial process and well established judicial functions for national courts to have regard to international obligations which a country undertakes — whether or not they have been incorporated into domestic law — for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

[26] Hence, it has become the obligation of this court to have regard to Malaysia's obligation under CEDAW in defining equality and gender discrimination under art 8(2) of the Federal Constitution.

[27] In 2005, more commitments were made by Malaysia in the Putrajaya Declaration and Programme of Action on the Advancement of Women in Member Countries of the Non-Aligned Movement. Among them were as follows:

> 4. Recognise the need for full and accelerated implementation of the United

Nations Convention on the Elimination of All Forms of Discrimination against Women by States parties to the Convention:

…

16 (m). Strengthen the incentive role of the public sector as employer to develop an environment that effectively affirms and empowers women;

16 (n). Facilitate the creation of sustainable jobs and livelihood opportunities to improve women's position in the labour market and ensure favourable working conditions for all women, including migrant women, consistent with all their human rights;

…

43. Gender mainstreaming in all legislation, policies, and programmes in an essential process to women's empowerment and their full participation in all spheres of society. It facilitates the integration of women's differing experience and needs into the development process, as well into the society and helps to change the negative social norms that discriminate against women. NAM member states recognise that effective gender mainstreaming is critical to the empowerment of women and to the achievement of gender equality.

44. We hereby commit ourselves to:

(a) Take all necessary measures, including in the area of law, policy, programme and activities to eliminate discrimination against women within public and private sectors;

(b) Implement affirmative actions, where needed, to accelerate de facto equality rights of women in all spheres;

(c) Raise awareness about women's right to equality and the importance of women's participation and representation in all spheres and at all levels in order to eliminate obstacles to women's equality.

[28] To me, in interpreting art 8(2) of the Federal Constitution, it is the court's duty to take into account the government commitment and obligation at international level especially under an international convention, like CEDAW, to which Malaysia is a party. The court has no choice but to refer to CEDAW in clarifying the term 'equality' and gender discrimination under art 8(2) of the Federal Constitution.

[29] In Australia in the case of *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353 Mason CJ, speaking for himself and Deane J said:

> It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. (*Chow Hung Ching v The King* (1948) 77 CLR 449; *Bradley v The Commonwealth* (1973) 128 CLR 557; *Simsek v Macphee Koowarta v Bjelke-Peterson* (1982) 148 CLR 636; 40 ALR 61; *Kioa v West* (1985) 159 CLR 550; *Dietrich v The Queen* (1992) 177 CLR 292; *JH Rayner Ltd v*

Department of Trade (1990) 2 AC 418]. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the executive in the exercise of its prerogative power whereas the making and the alteration of the law fall within the province of Parliament, not the executive. [*Simsek v Macphee* (1982) 148 CLR, at pp 641– 642]. So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law. In this case, it is common ground that the provisions of the Convention have not been incorporated in this way. It is not suggested that the declaration made pursuant to s 47(1) of the Human Rights and Equal Opportunity Commission Act has this effect.

But the fact that the convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party (*Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1), at least in those cases in which the legislation is enacted after, or, in contemplation of, entry into, or ratification of, the relevant international instrument, That is because Parliament, prima facie, intends to give effect to Australia's obligation under international law.

It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law (*Polites v The Commonwealth* (1945) 70 CLR 60).

Apart from influencing the construction of a statute or subordinate legislation, an international convention may play a part in the development by the courts of the common law. The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law …

But the courts should act in this fashion with due circumspection when the Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law. Judicial development of the common law must not be seen as a back door means of importing an unincorporated convention into Australian law. A cautious approach to the development of the common law by reference to international conventions would be consistent with the approach which the court have hitherto adopted to the development of the common law by reference to statutory policy and statutory materials (*Lamb v Cotogno* (1987) 164 CLR 1 at pp 11–12). Much will depend upon the nature of relevant provision, the extent to which it has been accepted by the international community, the purpose which it is intended to serve and its relationship to the existing principles of our domestic law.

[30] It is also pertinent that in India in the case of *Vishaka v State of Rajasthan* AIR 1997 SC 3011, the court when interpreting the Indian Constitution had emphasised the obligation of the Indian Government in two other international statements:

(a) the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, where the principles of the independence of the judiciary were accepted by the Chief Justice of India, and

(b) Fourth World Conference on Women in Beijing where the Government of India had made an official commitment.

[31] In *Vishaka*'s case, *Teoh*'s case was applied. It must also be noted that Malaysia is also a party to the Beijing Statement and Fourth World Conference on Women in Beijing.

[32] Article 26 of the Vienna Convention on the Law of Treaties 1969 provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith. CEDAW is without doubt a treaty in force and Malaysia's commitment to CEDAW is strengthen when art 8(2) of the Federal Constitution was amended to incorporate the provision of CEDAW which is not part of the reservation, ie to include non-discrimination based on gender. As such, I am of the opinion that there is no impediment for the court to refer to CEDAW in interpreting art 8(2) of the Federal Constitution. Hence, applying articles 1 and 11 of CEDAW I hold that pregnancy in this case was a form of gender discrimination. The plaintiff should have been entitled to be employed as a GSTT even if she was pregnant. Further, the plaintiff was pregnant because of her gender. Discrimination on the basis of pregnancy is a form of gender discrimination because basic biological fact that only woman has the capacity to become pregnant. Refer to the decision of the Supreme Court of Canada in *Brooks v Canada Safeway Ltd* (1989) 59 DLR (4th) 321 where it was held as follows:

> It cannot be disputed that everyone in society benefits from procreation. The safeway plan, however, places one of the major costs of procreation entirely upon one group in society; pregnant women. Thus, in distinguishing pregnancy from all other health related reasons for nor working, the plan imposes unfair disadvantages on pregnant women. In the second part of this judgment I state that this disadvantage can be viewed as a disadvantage suffered by women generally. That argument further emphasises how a refusal to find that safeway plan discriminatory would undermine one of the purposes of anti-discrimination legislation. It would do so by sanctioning one of the most significant ways in which women have been disadvantaged in our society. It would sanction imposing a disproportionate amount of the costs of pregnancy upon women. Removal of such unfair impositions upon women and other groups in society is a key purpose of anti-discrimination legislation. Finding that the safeway plan is discriminatory furthers this purpose.

[33] It has been argued by the defendants that by applying the principle of reasonable classification, it is justified to discriminate pregnant women. However, with due respect, the principle of reasonable classification is only applicable to art 8(1) and does not apply to art 8(2) of the Federal Constitution. This is clearly explained in *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 as follows:

Article 8(2) contains a specific and particular application of the principle of equality before the law and equal protection of the law embodied in art 8(1). Therefore, discrimination against any citizen only on the grounds of religion, race, descent or place of birth or any of them in any law is prohibited under art 8(2) and such discrimination cannot be validated by having recourse to the principle of reasonable classification which is permitted by art 8(1) (*Srinivasa Aiyar v Saraswathi Ammal* AIR 1952 Mad 193 195 at p 195; *Kathi Raning Rawat v State of Saurashtra* AIR 1952 SC 123 at p 125).

[34] It has also been argued on behalf of the defendants that the decision not to employ a pregnant woman for GSTT is a policy consideration and the court ought not to review or question it. The defendants cite, inter alia, the cases of *R Rama Chandran v the Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147, *CCSU v Minister of Civil Service* [1994] 3 All ER 935 and *Kumpulan Perangsang Selangor Berhad v Zaid bin Haji Mohd Noh* [1997] 1 MLJ 789. I totally agree that the court should not be involved in the policy decision of the government. However, in this instant case, the argument of policy consideration, to my mind, is an afterthought, as, if it is that important, why was this not incorporated into the circular or raised during interview as submitted by learned counsel for the plaintiff? I would only accept that para 4.22 of the circular is a policy consideration and the court therefore must not review it.

[35] It is very clear that the contract for GSTT is a month to month contract and it can be terminated at any time. Even after one month of working, there is no guarantee that the person will stay even if she is not pregnant. As such I find there is no merit in the argument put forward by the defendants that employing a pregnant woman to fill up the post will defeat the purpose of GSTT to solve the problem of shortage of teachers in Malaysia. Even medical check-up for pregnant woman will not disturb the school time as it can be done in the evening or night.

[36] I also note, even the circular does not specifically prohibit a pregnant woman from applying the post. It merely states that a GSTT is not entitled to maternity leave. If that is the case, is not it indirectly saying that a pregnant women could apply only that she is not entitled to maternity leave? To me, that provision in the circular support the argument that a pregnant woman can be engaged for GSTT.

[37] It is also the defendants' submission that based on the Federal Court's decision in the case of *Beatrice Fernandez v Sistem Penerbangan Malaysia & Anor* [2005] 2 CLJ 713, art 8 of the Federal Constitution does not apply to a contractual relationship. With due respect, what was held in *Beatrice*'s case, inter alia, is as follows:

> To invoke art 8 of the Federal Constitution, the applicant must show that some law or action of the Executive discriminates against her so as to controvert her rights under the said article. Constitutional law, as a branch of public law, deals with contravention of individual rights by the Legislative or the Executive or its agencies …

[38] By virtue of art 160 of the Federal Constitution, the defendants are definitely public authorities and therefore agents of the executive. To me, the defendants' act of revoking and withdrawing the placement memo because the plaintiff was pregnant constitute a violation of art 8(2) of the Federal Constitution. It was the contravention of the plaintiff's rights by the defendants as agents of the executive. As such, the requirement of *Beatrice*'s case has been fulfilled.

CONCLUSION

[39] The Supreme Court in *Teh Guan Teik v Inspector General of Police & Anor* [1998] 3 MLJ 137; [1998] 3 CLJ 153 had quoted Lee Hun Hoe CJ in *Datuk Syed Kechik v Government of Malaysia and Sabah* [1979] 2 MLJ 101 that the court's jurisdiction to make a declaratory order is unlimited subject only to its own discretion. In my opinion, the court has a role to promote the observance of human rights in this country. On the grounds I have indicated above, the application must be allowed except for prayer 3. As this is a public interest case, I make no order as to costs.

[40] I therefore order accordingly.

Application allowed with no order as to costs.

Reported by Kohila Nesan