DI HADAPAN

Y.A. TUAN ABANG ISKANDAR BIN ABANG HASHIM

HAKIM MAHKAMAH TINGGI MALAYA, KUALA LUMPUR

ALASAN PENGHAKIMAN

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)
SEMAKAN KEHAKIMAN NO. R1-25-455-2010

Dalam perkara permohonan permit penerbitan 2010 bagi penerbitan bertajuk "Malaysiakini"
Dan

Dalam perkara surat daripada Abdul Razak bin Abdul Latif bagi pihak Ketua Setiausaha Kementerian Dalam Negeri yang bertarikh 19 Ogos 2010 (Ruj: KDN: PQ/PP/1505 (16946) ("Keputusan tersebut")
Dan

Dalam perkara seksyen 5, 6, 12(2), 13A dan 13B Akta Mesin Cetak dan Penerbitan 1984 ("Akta 301")
Dan

Dalam perkara Perkara-perkara 4(1), 5(1), 8, 10(1)(a) Perlembagaan Persekutuan
Dan

Dalam perkara perenggan 1 Jadual kepada Akta Mahkamah Kehakiman 1964 dan A.53 Kaedah-kaedah Mahkamah Tinggi 1980

ANTARA

MKINI DOTCOM SDN BHD
(Nombor Syarikat 489718-U) **... PEMOHON**

DAN

1. **KETUA SETIAUSAHA KEMENTERIAN DALAM NEGERI**

2. **MENTERI DALAM NEGERI**

3. **KERAJAAN MALAYSIA** **... RESPONDEN-RESPONDEN**

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GROUNDS OF JUDGMENT

1. This has been an application by the applicant for various prayers as set out in enclosure 1 but basically this application is essentially aimed at quashing the decision of the second respondent that was contained in a letter dated 19th of August 2010 signed by one Abdul Razak bin Abdul Latif on behalf of the Ketua Setiausaha Kementerian Dalam Negeri [the first respondent] signifying to the applicant that its application for "satu permit penerbitan tidak dapat di dipertimbangkan", be produced in this High Court for the purpose that the same decision be quashed by this Court issuing a writ of ***certiorari*** for that purpose.

2. The application by the applicant to the respondent had been one for the applicant to be issued with a permit under the **Printing Presses and Publication Act 1984** ['the Act 301']. The applicant had considered the adverse decision of the second respondent [being the hon. Minister of Home Affairs but in this case, it was the deputy Minister of that ministry who had made the decision] as the latter's refusal to grant the applicant's application rather than a failure by the latter to consider the application at all.

3. At the start of the submissions before this Court, the applicant had decided to not pursue the challenge on the constitutionality of the provisions under section 6 of the Act 301 that had purportedly given the Minister 'absolute discretion' to issue a permit there under in the light of the fact that that same section had been amended recently whereby the Parliament had deleted the word 'absolute' from the impugned phrase under that section 6. As such, the submissions were then focused by the applicant on the administrative challenge on the impugned decision of the second respondent that had in effect rejected the applicant's application for a permit to be issued to it.

4. The factual matrix of this case is well within the knowledge of both the litigating divide. Suffice to state here that this application had been filed by the applicant as a result of its unsuccessful application to the second respondent, for a printing permit to publish a newspaper under the Act 301. In fact the rejection letter was couched

in such a way which the learned counsel Mr. Shanmuga, for the applicant, had interpreted as a letter of rejection. A further perusal of the said rejection letter had revealed that no reason whatsoever was offered for the said rejection.

5. The challenge mounted against the decision of the second respondent by the applicant to have the decision quashed has been multi-pronged, but essentially they all relate to the alleged improper exercise of the discretion by the second respondent in deciding not to issue the permit to the applicant under the 301 Act.

6. One of them has been that the failure on the part of the second respondent to provide any reason for the rejection of the application has amounted to procedural unfairness against the applicant, thus rendering the impugned decision of the second respondent liable to be quashed by way of judicial review. As a ground to nullify an impugned decision on this ground of procedural unfairness, the decision of Lord Diplock in the **Council for Civil Service Unions & Ors v Minister for the Civil Service** [1984] 3 All ER 935 [the **CCSU's case**] has been routinely cited in support. In that case, one of the grounds on which the decision of an executive exercise of his discretion may be struck down, has been if it can be shown that the decision suffers from of procedural impropriety. His lordship Lord Diplock in the **CCSU**'s case said:

"I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision."

In explaining what he meant by 'illegality', the learned lawlord had said:

"By 'illegality' as aground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."

It goes without saying that this decision of the House of Lords in the **CCSU**'s case had since been accepted by our apex Court, as could be seen in the numerous reported cases. The case of **R Rama Chandran v The Industrial Court of Malaysia & Anor** [1997] 1 MLJ 145 would be an example of one such instance where the principles enunciate by Lord Diplock were discussed and accepted by the apex Court justices.

7. In this regard, the learned SFC had responded to the 'no reason given issue' by saying that as the relevant statute was silent on the duty to assign reasons for a decision, therefore there was no duty on the part of the second respondent to so provide. He had submitted as follows:

> "There is no provision in Act 301 which stipulates the Minister's duty to give reasons in making such decision and in this regard, the Supreme Court in the case of Minister of Labour, Malaysia v Chan Meng Yuen and another appeal [1992] 2 MLJ 337 **[TAB 9 RBOA]** had held that:
>
> > *"What is clear from the decided cases, however, is that* ***the courts cannot compel the Minister to give reasons for his decision where there is no duty to do so****:* Minister of Labour, Malaysia v Sanjiv Oberoi & Anor."

8. But in the light of the more recent cases that had been decided in our Courts, the current judicial trend, even within our shores, would appear to lean in favour of an approach that would require a decision-maker to give reason or reasons, if the situation so warrant, for any decision he makes that would adversely impact on an applicant. Surely such an approach would have the desired effect of putting in check the propensity to practice arbitrariness. Lord Denning had said that such an approach would be good for better governance.

It is interesting to note here that the Act 301 does not stipulate *expressly* that the Minister should *not* give reasons or that there was no duty cast on the Minister to give any reason for his decision. Actually, the Act 301 is silent on it. In such a situation therefore it would be left to the Minister in exercising his discretion to consider whether he ought to give his reasons. The Minister should give his reasons where his decision has implications on the fundamental rights of the applicant especially as regards Article 5 on livelihood and Article 8 on equality and even Article 10 which has a livelihood aspect to it.

9. Strong support for this proposition, this Court would gather could be derived from the unanimous decision of the Court of Appeal, in the case of **Datuk Justine Jinggut v Pendaftar Pertubuhan** [2012] 3 MLJ 212. In that case, the appellate Court had occasion, in the course of its decision pertaining to the duty on the decision maker to provide reasons for his or her decision, referred to the speech by learned justice Lord Denning LJ in the case of **Breen v Amalgamated Engineering Union** [1971] 2 QB 175 where the learned judge and eminent jurist had said:

> "....if a man seeks a *privilege* to which he has no particular claim - such as an appointment to some post or other- then he can be turned away without a word. He need not be heard. No explanation need be given.....but...if he is a man

who has *some* right or interest or some legitimate expectation, of whom it would not be fair to deprive him without a hearing, or reasons given, then these should be afforded him, *according as the case may demand.*" [italicized words for emphasis by me]

So, from the above-quoted speech, it is clear that if what a person is seeking what is essentially a privilege, then he can be turned away without being afforded the reason(s) as to why his request was turned down. But if the applicant had some right or interest over the matter of his application, then it would be contrary to procedural fairness on the part of the decision-maker, to just dismiss the matter without hearing or without giving the aggrieved party any reason why he was not granted of his right or interest. The case of **Rohana bte Ariffin & anor v Universiti Sains Malaysia** [1989] 1 MLJ 487, is an authority for the proposition that it was common ground that a body, statutory or administrative, *must as a general rule*, give reasons for its decision. In that case, the Court there had concluded as follows:

"Having regard to all the circumstances in the present case, a reasoned decision can be an additional constituent of the concept of fairness. Neither the disciplinary authority nor the university council gave reasons for their decision and the applicants are entitled to succeed on this ground."

That **Rohana**'s case [supra] has been described by the learned justices in the Court of Appeal in **Datuk Justin Jinggut**'s case [supra] as the *cause célèbre* on the point on the duty to provide reasons. Learned justice Zainon Ali JCA [as she then was], speaking for the Court of Appeal in that case of **Datuk Justin Jinggut** [supra] went on to express their view which appears at page 228 in the report, as follows:

> "[53] The giving of reasons, is to our mind, all the more compelling *when a fundamental liberty guaranteed by the Federal Constitution is adversely affected* in consequence of a decision taken by a public decision-maker, as happened in the instant appeal where articles 8 and 10 appear to have been offended. The furnishing of reasons enables an objective assessment of whether the decision is fair. Hence it forms an integral part of procedural fairness." [italicized words for emphasis by me].

Citing the English case of **Padfield and Others v Minister of Agriculture Fisheries and Food and Others** [1968] 1 All England Reports 694 [per Lord Denning] and the Malaysian case of **Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal** [1996] 1 MLJ 481 [per learned justice Gopal Sri Ram JCA [as he then was], the Court of Appeal in the **Datuk Justin Jinggut**'s case [supra] reiterated the concept of procedural fairness that pertained to

the duty to supply reasons for an adverse decision by its maker or, put conversely, the right of the aggrieved applicant whose right that is guaranteed under the law has been denied, be provided with the reasons as to why he was denied the enjoyment of the use of such right, by the decision maker. Therefore, in the words of the Court of Appeal justices in the **Datuk Justin Jinggut**'s case [supra], *"Thus if no reason is given by the respondent, it is open for this Court to conclude that he had no good reason in as much as it is open for us to conclude that the respondent had not exercised his discretion in accordance with the law."*

10. But the learned SFC had further urged upon this Court to find that the matter of issuing a permit by the hon. Minister under Act 301 is but a privilege, not a right. Indeed the learned SFC had submitted that there was a conceptual distinction that must be drawn between the freedom of speech and expressions and the permit to print and publish a newspaper. He then said that while the former was a matter of 'rights', the latter was a matter of 'privilege'. This submission by the learned SFC can be seen at paragraph 16 in enclosure 25. As such, it was his view that the 2 could not be put in the same equation. Having seen what Lord Denning in the **Breen**'s case had told us, it would be quite obvious where the learned SFC was coming from and why he had urged this Court to recognize the difference between the two and that a printing permit is a mere privilege. Indeed the legal implications obtaining in each situation, as was lucidly described by

Lord Denning LJ in that **Breen**'s case, are far-reaching.

11. The learned Senior Federal Counsel, Encik Mohd Noor Hisham, acting for all the respondents had cited the case of **Minister of Home Affairs v Persatuan Aliran Kesedaran Negara** [1990] 1 CLJ (Rep) 186, to support his proposition.

12. As alluded to above, the applicant in the case before this Court had asserted that it had a right, not a mere privilege. That right, it was said had flowed from Article 10 of our Federal Constitution that guarantees, with certain recognized limitations, the freedom of speech and expression, which includes the freedom of press.

13. Having considered the submissions by both learned and able counsel, a permit that is envisaged under that Act 301, to my mind, relates to freedom of expression, a vital fundamental liberty that can truly claim its genesis under article 10 of our Federal Constitution. Its umbilical cord to the Federal Constitution cannot and ought not to be unhinged, as to do that would render the safeguards on freedom of speech under the Federal Constitution vulnerable and may end up as illusory and a mere mirage, devoid of any real meaning. The Supreme Court of India, in numerous cases that had appeared before it had alluded to the significance of the freedom of expression that must include the freedom of press, which has found sanctuary under article 19 of the Indian Constitution [which is equivalent to our very

own article 10 in our Federal Constitution]. By way of illustration, in the case of **Sakal Papers & Others v Union of India** 1962 AIR 305, the Indian Supreme Court had ruled that the Newspaper (Price and Page) Act 1956 had breached the article 19 (1)(a) of the Indian Constitution by regulating the number of pages a newspaper could have according to the price charged. The relevant portion of that decision has been as follows:

> "The right to propagate one's ideas is inherent in the conception of freedom of speech and expression. *For the purpose of propagating his ideas every citizen has a right to publish them, to disseminate them and circulate them and to circulate them. He is entitled to do so either by word of mouth or by writing.*" [italics by me for emphasis]

Again, in yet another case of **Indian Express Newspapers v Union of India** 1985 1 SCC 641, the Indian Supreme Court had ruled: "Newspapers industry enjoys two of the fundamental rights , namely the freedom of free speech and expression guaranteed under Article 19(1)(a) and the freedom to engage in any profession, occupation, trade, industry or business guaranteed under Article 19(1)(g) of the Constitution, the first because it is concerned with the field of expression and communication and the second because communication has become an occupation or profession and because there is an invasion of trade, business and industry into that

field where freedom of expression being exercised." It went on to state as follows:

> "The public interest in freedom of discussion [of which freedom of the press is one aspect] stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves. .... Freedom of expression has four broad social purposes to serve:
>
> (i) it helps an individual to attain self-fulfillment,
>
> (ii) it assists in the discovery of the truth,
>
> (iii) it strengthens the capacity of an individual in participating in decision-making; and
>
> (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change."

14. Indeed our very own Federal Court has recognized this freedom of the press to propagate, disseminate and circulate views and information as part of article 10(1)(a) of our Federal Constitution. The learned appeal judges in the apex Court case of **Public Prosecutor v Pung Chen Choon** [1994] 1 MLJ 566 in answering certain questions posed before them in respect of the constitutionality

of section 8A(2) of the Act 301 had said: "Section 8A(2) does nothing to restrict freedom of the press either directly or indirectly. On the contrary, by providing for the rebuttal of the presumption of malice upon proof by the accused that he had taken reasonable measures to verify the truth of the news concerned before its publication, *it promotes and ensures that freedom of the press is neither abused nor exploited.*" [italics by me for emphasis] Earlier, learned appeal judge Edgar Joseph Jr, FJ speaking for the 5-member panel Federal Court had said, "Nevertheless, a consistent current of judicial opinion in India has established the proposition that art 19(1)(a) *includes within its ambit the freedom of the press.* (See, eg ***Bennet Coleman v Union of India, Express Newspapers Pte Ltd & Anor v Union of India, Sakal Papers Pte Ltd & Ors v Union of India)*** *With this proposition we agree and indeed before us no attempt had been made by the senior federal counsel to argue to the contrary.*" [Italics for emphasis by me] It is worth noting that in deserving cases, even our apex Court would draw support from decisions emanating from foreign jurisdictions in the course of interpreting our locally minted legislations, including the Federal Constitution, the *Grun norm.*

15. Indeed, having said that, our Federal Constitution itself recognizes that there cannot be complete or absolute freedom of speech or expression. At the same time, however, there cannot be any wanton limitations placed on the important fundamental liberty recognized under article 10 of the Federal Constitution. Thus it has

been put into the very article 10 itself the necessary parameters within which limits that freedom that it seeks to enshrine, may be circumscribed according to law. And in this regard, the three express grounds of limitation are considerations founded upon (1) national security, (2) public morality and (3) public order. In terms of the right to publish newspapers as contained under the Act 301, it is regulated by way of the exercise by the Minister of Home Affairs of his discretion under section 6(1)(a) and section 12(2) under the same Act by the issue of permits to applicants for the same. The question now before this Court has been, is the issue of a permit by the Minister a matter which is a mere privilege which the Minister can decide to grant or withhold at his will, in the manner as described by the learned law lord Lord Denning LJ in the **Breen**'s case [supra] in that the applicant "can be turned away without a word." If indeed, the matter of a permit under section 6 of the Act 301 is a mere privilege without more, then the Minister would be well justified to treat any application for a permit in any way he may deem fit. No reason whatsoever, for instance, would need to be given and no grievance suffered because of it, would ever see the light of day in Court on the pretext of challenging the decision of the Minister.

16. This Court would now revert to the **Aliran** case [supra]. The learned SFC had referred to this case in the course in support of his submissions on the issue of 'absolute discretion' that was conferred on the Minister of Home Affairs under the Act 301. Looking at the

judgement of the Supreme Court in that **Aliran** case, it is noted that that although the Supreme Court referred to the power given to the Minister as being absolute discretion, their lordships went on to say that any decision by the Minister in exercise of that discretion is still open to challenge. The following excerpt from the reported decision of their lordships would demonstrate the true nature of the discretion that was conferred on the Minister by the Act 301;

> *"The High Court may intervene and set aside an administrative decision made by a Minister in the exercise of his discretion if it can be shown to the satisfaction of the Court that the Minister had* ***acted without any authority*** *or had* ***acted ultra vires his authority****. Also if he had* ***acted in bad faith*** *or* ***contrary to the rules of natural justice or with any element of prejudice or bias*** *against the person affected by his decision."*

Their lordships then summarized the extent of the High Court's power of intervention into the Minister's exercise of discretion in the following words:

> *Section 12(2) of the Printing Presses and Publications Act 1984 gives the Minister of Home Affairs "absolute discretion to refuse an application for a licence or permit".* ***So unless it can be clearly established that***

the Minister of Home Affairs had in anyway exercised his discretion wrongfully, unfairly, dishonestly or in bad faith the High Court cannot question the discretion of the Minister of Home Affairs."

17. So, from the decision of the apex Court in the **Aliran**'s case, it is rather clear, at least to my mind, that the discretion is not 'absolute' in the sense that it cannot be questioned or that its exercise was above reproach. Indeed their lordships had adverted to the need for the aggrieved applicant to show proof that in deciding against him, the hon. Minister has acted without [1] any authority thus unlawfully or illegally, or [2] had acted *ultra vires*, or [3] or he had acted in bad faith, or [4] contrary to the rules of natural justice, or [5] that he had shown element of prejudice or bias against him. From the above, it would appear, that the mere fact that there exist at least 5 exceptions that could render the impugned decision of the hon. Minister invalid, clearly would point irresistibly to a conclusion that the so-called 'absolute discretion' is actually not one discretion which the Minister can exercise with impunity.

18. With respect, I do not believe that this **Aliran's** case [supra] can be cited as an authority to say that section 6 and section 12 of the Act 301 have transformed a right recognized in our Constitution that is subject to proper exercise of discretion by the Minister, to one

that is but a mere privilege. As earlier noted, our article 10 is substantially similar, if not *in pari materia* with article 19 of the Indian Constitution that was referred to in the decided cases before the Indian Supreme Court referred to by me in the preceding paragraphs of this judgement. The learned appeal justices in the **Pung Chen Choon** case [supra] had also recognized that fact. Premised on that, it is beyond doubt that the freedom of speech and expression, in Malaysia has its roots in article 10 of our Federal Constitution and further, to my mind that includes the freedom of press to print and publish. Clearly therefore, it is a right founded upon strong constitutional footing, though it must be noted that it is not an absolute right. But that circumscribed existence in itself does not, and ought not, derogate it to the status of a mere privilege.

19. As such, this Court, with respect, could not subscribe to the notion that a fundamental right that resides in the lofty abode in article 10 of the Federal Constitution can be legitimately relegated to the status of a privilege whose dispensation to interested citizens is dependent on the decision of the hon. Minister without him having to assign any reason, should he decide to refuse granting such a permit. Indeed the learned former Chief Justice of Malaya Raja Azlan Shah [as his Highness then was] had an occasion to state, in the celebrated case of **Pengarah Tanah Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd** [1979] 1 MLJ 135 that 'absolute discretion' is a contradiction in terms. Repeating the words of Lord

Denning MR in the **Pyx Granite Co. Ltd v Ministry of Housing and Local Government** [1958] 1 All ER 625 his lordship Raja Azlan Shah FJ [as his lordship then was] went on to say: "Every legal power must have legal limits, otherwise there is dictatorship.....In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene." To my mind, that exercise of discretion is only absolute and immune from any curial intervention by the Courts, if the same discretion has been properly and lawfully exercised in a decision-making process and not arbitrarily or capriciously.

20. From the above considerations, this Court finds that the exercise by the hon. Minister of his discretion under sections 6 and 12 of the Act 301 cannot escape judicial scrutiny and as such, if an aggrieved party can satisfy the Court that such discretion has been exercised, say as being contrary to natural justice thus suffering from procedural impropriety, that impugned decision of the hon. Minister may indeed be amenable to the crucibles of judicial review.

21. The decision of the hon. Minister must relate to promoting the objectives of statute which confers on him that discretion. By saying that, this Court is not saying that all applications for a permit under section 6 of the Act must be approved. In that regard, this Court, with respect, is of the considered view that the law confers on the hon. Minister a discretion and that discretion relates to the granting or

otherwise of a printing permit. In regulating the freedom of expression by way of printing permit the Minister would be empowered to even deny a permit if in the exercise of discretion, he is of the view that a permit ought not to be granted. Discretion comes with it the right to approve and the right to reject a printing permit, but whatever the ultimate decision of the Minister may be, such decision must be backed up by cogent and valid reasons. That much the law expects of the Minister in the exercise of his power of discretion. As Lord Chief Justice Bingham said in his acclaimed book entitled '**The Rule of Law**' [2011] in citing the House of Lords decision in the **Padfield**'s case [supra], and I quote: *"In a matter of this kind it is not possible to draw hard and fast line, but if the Minister , by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the law.*" Anything short of that may render a decision amenable to judicial review. Having said that, it must be not lost sight of always, that the decision-maker in the application for a permit resides with the Minister.

22. How then if one may ask, does the Court feature in a suit brought by an applicant aggrieved by the Minister's decision? The function of the Court in a judicial process is not, however concerned with the merit of the decision, but only with regard to determining whether that decision under review, has been a result of the Minister

having subject his decision-making to due legal process. [see Suffian LP in **Sri Lempah** case (supra)]. The Minister may approve or reject an application for a printing permit under Act 301 at his discretion, but *how* he arrives at a decision that has aggrieved an applicant may become a matter with which the Courts may become concerned with, by way of a judicial review application by an aggrieved party.

23. His decision is open to be reviewed for his decision-making process. His decision is open to scrutiny from the **Wednesbury**'s case perspective [see the speech of Lord Greene in the case of **Associated Provincial Picture Houses, Limited v Wednesbury Corporation** [1948] 1 KB 223 as well as the **CCSU**'s case formulation of the litmus test as laid down by Lord Diplock. If, as a result of the exercise, the Minister has been found to have arrived at his decision *properly*, then the mere fact that the Court may *not* agree with his ultimate decision, is no valid ground for the Court to interfere with his decision. Such a decision of the Minister is immune. It would not be incorrect to say that such exercise of discretion by the Minister would be absolute. But in order to achieve that, his decision-making process in achieving that decision, must have been impeccable. If it cannot withstand that test, the Court cannot allow it to stand. The court will have it quashed by it issuing an order of *certiorari*.[see generally the decision of learned justice Gopal Sri Ram FCJ in the case **of Darma Suria Risman Saleh v MDN, Malaysia & Ors** [2011] 1 CLJ 30.]

24. Let us now look at the material circumstances in this application before this Court. In Enclosure 15 in his affidavit-in-reply the second respondent had averred: "*Saya selanjutnya menyatakan bahawa penerbitan suratkhabar bukanlah satu hak yang dijamin dalam hak kebebasan bersuara tetapi hanyalah suatu keistimewaan.*" In essence that would translate to mean that the second respondent had expressed his view that the matter of publication permit or license was not guaranteed right but just a mere privilege. This was repeated in paragraph 14 of the same affidavit. This Court had found that the matter of printing permit is a right that emanates from Article 10 of the Federal Constitution and that it was not a mere privilege. This Court found support for this finding in the Federal Court case of **Public Prosecutor v Pung Chen Choon** [supra]. In the circumstances of this application, the second respondent had misconceived and miscontrued the extent of his powers to issue a license or permit under the Act 301 when he viewed it as a privilege rather than as a right. The second respondent, with respect, had misconstrued the nature of the printing permit provisions and had subsequently acted contrary to the extent of his power. That makes his decision *ultra vires* or otherwise tainted with illegality. Such a situation had seriously compromised his decision, rendering it a flawed one. In this regard this Court would refer to what the learned justice Mahadev Shanker JCA had said in the case of **Anwar Abdul Rahim v Bayer (M) Sdn Bhd** [1998] 2 CLJ 197 in the following term: "But an error of law would be disclosed if the decision maker asks himself the wrong questions, takes into account irrelevant

considerations, or omits to take into account relevant consideration, *or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.*" [italics for emphasis by me]

25. His misconception as to the extent of his power had also led him to believe that there was no need for him to provide reasons for his rejection of the applicant's application. This had been shown in his affidavit His failure to give reasons for his decision not to grant the permit to the applicant amounts to procedural impropriety. There is an economic aspect to this application to publish a newspaper and it would affect the livelihood of the applicant's employees if the applicant was not issued with the permit. On that ground, Article 5 [on livelihood] of the Federal Constitution comes into play. As this right to a permit is rooted in Article 10 of the Federal Constitution a fundamental liberty has been denied to the applicant and because of that reason[s] ought to have been afforded to the applicant telling the latter why its application had been denied. In the case of **Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & Other Appeals [1997]** 1 CLJ 671 the Court of Appeal said: "As a general rule, procedural fairness, which includes the giving of reasons for decision, must be extended to all cases where fundamental liberty guaranteed by the Federal Constitution is adversely affected in consequence of a decision taken by a public decision maker. In this case, the Minister when refusing to refer to representations in exercise of his discretion

under s. 20(3) of the Industrial Act is reasonably expected to give reasons for his decision. This is because the decision he makes has an impact upon the fundamental right conferred by the Federal Constitution.

26. The Minister may not be procedurally compelled to furnish his reasons. But if he gives no reasons or inadequate reasons, then it is open for a court to conclude that he had no good reasons for making the decision he did."

27. In the **Breen**'s case [supra] Lord Denning citing the **Padfield v Minister of Agriculture, Fisheries and Food** [1968] 1 AC 997 case had said, "Again taking Padfield's case. The dairy farmers had no right to have their complaint referred to the committee of investigation, but they had a legitimate expectation that it would be. The House made it clear that if the Minister rejected their request without reason, the court might infer that he had no good reason: and that if he gave bad reason, it might vitiate his decision." In the **Hong Leong Equipment** case [supra] the Court went on to say that the following:

> "....national security, public safety or public interests are considerations that may exclude procedural fairness in a particular case. The burden of showing that reasons for a

decision ought not to be given lies, of course, upon the public decision-taker. And his mere *ipse dixit* upon the question is inconclusive. There must be some basis or material for suggesting that question of public safety, public interest or national security or one or more of these are involved."

28. Reverting to the application immediately before this Court, the second respondent not only did not give any reason, but he went on to say that he had no obligation under the law to give reasons. This could be seen in Enclosure 15 paragraphs 19.2, 19.3, 21.1 and 21.4.3. They are now reproduced as follows:

"paragraph 19.2: Saya dan/atau Responden Kedua tidak mempunyai tanggungjawab di sisi undang-undang untuk bertemu sendiri dengan Pemohon dalam memberikan keputusan tersebut;

paragraph 19.3: Saya tidak mempunyai tanggungjawab di sisi undang-undang untuk memberikan alasan-alasan bagi keputusan tersebut kepada Pemohon;

dan

paragraph: 21.1: Merujuk kepada perenggan 9 Pernyataan, saya sesungguhnya menyatakan bahawa saya tidak mempunyai tanggungjawab di sisi undang-undang untuk memberikan alasan-alasan bagi keputusan tersebut kepada Pemohon dan saya telah bertindak secara munasabah dalam membuat keputusan tersebut dengan mengambil pertimbangan yang relevan dan tidak mengambilkira pertimbangan yang tidak relevan;

paragraph: 21.4.3: Saya tidak mempunyai tanggungjawab di sisi undang-undang untuk memberikan alasan-alasan bagi keputusan tersebut kepada Pemohon."

29. Both those two cases mentioned above, were cited with approval by the latest Court of Appeal decision in the **Dato Justin Jinggut**'s case [supra] reflecting the most current judicial thinking on the issue on the need to assign or to give reason[s] for a decision by a public official performing a discretionary function conferred on him by Parliament. It is noted that Act 301 does not expressly exclude the

Minister from giving reasons for his decision. In cases where fundamental liberties are in play, as in this case before this Court, the need or duty to give reasons for refusing or rejecting an application, as the decided cases have shown, with respect, has become an imperative, and no longer an option. The Parliament confers on public officials the discretion to decide on a matter because the public official has the experience and expertise to exercise it with care and wisdom and in the case where the statute is silent on the giving of reason[s] for a decision, *then depending on the circumstances surrounding the application such as those involving constitutional rights of livelihood and other freedoms*, then on the balance, justice would be served, in favour of the decision-maker supplying the reason[s] for his decision. With respect, the case of **Sanjiv Oberoi** [supra] ought to be read in that light, having due regard to the current trend which our Courts have since approached the duty to give reasons with regards to rejecting an application having *nexus* with Constitutional fundamental liberty provisions, like the present application. Even way back in time, the Federal Court case of **Pahang South Union Omnibus Co. Bhd. v The Minister of Labour & Manpower & Anor** [1981] CLJ (Rep) 74 had cited with approval the English Court of Appeal decision in **General Electric Co. Ltd. v Price Commission** [1975] ICR 1 which had listed down the various grounds on which a decision by a public official maybe quashed for being a deficient decision. Indeed one of those grounds has been that there was *a failure to give reasons where it is reasonably expected to do so.*

30. The justification in not supplying any reason for a decision ought to be founded not on what the statute does not expressly say, but rather in the implications, bearing in mind that the applicant's fundamental rights, however limited, that may adversely befall an applicant whose right may be affected by the failure to assign reasons. Therefore, a failure to give reason(s) in those latter circumstances would clothe the Court with the authority to conclude that there were indeed no good reasons for the impugned decision.

31. On those grounds as alluded to above, *certiorari* ought to be, and is hereby issued by this Court to quash the impugned decision.

32. Apart from the ground on failure of the Deputy Minister to assign any reason for his decision, the applicant had also raised other grounds in challenging the adverse decision which this Court will now deal with accordingly.

33. **The other grounds of challenge.**

a. **That the second respondent had taken into account *irrelevant considerations* when he came to the decision not to grant the printing permit.**

34. As alluded to above, the Federal Court case of **Pahang South Union Omnibus Co. Bhd. v The Minister of Labour & Manpower & Anor.** [1981] CLJ (Rep) 74 cited with approval the English Court of Appeal decision in **General Electric Co. Ltd. v Price Commission** [1975] ICR 1 and outlined a concise exposition on the supervisory role of the Court in discharging a judicial review function. The Federal Court affirmed that a High Court, in judicial review proceedings, is empowered to quash a decision if the decision maker:-

(i) does not act fairly;
(ii) acts contrary to law;
(iii) has taken into account irrelevant considerations or failed to take into account relevant considerations;
(iv) reaches a decision with no evidence;
(v) makes an unreasonable finding;
(vi) acts *ultra vires*;
(vii) acts in bad faith or with an ulterior object; or
(viii) failed to give reasons where it is reasonably expected to do so.

35. This Court had dealt with the last-mentioned ground namely that the second respondent here had failed to give reasons for his refusal to issue the printing permit to the applicant where it was reasonably expected to do so. He had also misconstrued the extent

of his powers when he regarded the matter of permit under the Act 301 as a mere privilege.

36. It is clear that the second respondent had the necessary discretion as conferred on him by law, but it is the manner in which he had exercised that discretion in the instant case that was being challenged by the learned counsel on behalf of the aggrieved applicant.

37. In this application, the other ground that was raised has been that the second respondent had *taken into account irrelevant considerations* when he arrived at the impugned decision. As a decision maker, the 2nd respondent had the discretion to decide on the outcome of an application made by the applicant under Act 301. However, in doing so, the 2nd respondent was obliged to take into account relevant considerations as the basis for his decision. He could not take into account irrelevant considerations. Failure to do the right thing would render his ultimate decision *ultra vires.* That is trite law and would need no amplification by this Court. In this case, the second respondent had stated in paragraph 29 of Enclosure 15, being his affidavit-in-reply, the considerations that he had taken into account in not approving the applicant's application for a license under the Act 301.

38. From these considerations, the learned counsel, Mr. Shanmuga had taken issue with 2 of those stated considerations. The first of these considerations had related to a purported government policy which was **not** in the public domain, in that the amount of newspapers in Malaysia cannot reach an amount where:-

(a) There is difficulty in regulating newspaper publications;
(b) There is competition among publishers in order to gain profit;
(c) There will be confusion among the public on the true version of the news owing to a variety of reports.

39. Secondly, an allegation that the existing news reports on applicant's on-line news contain sentiments, that is not neutral and is inclined towards inciting controversy.

40. Having perused through the affidavit of the second respondent, this Court, with respect agreed with the applicant that both those considerations as identified by the applicant's learned counsel have not been supported by evidence. In the case of **Air Liquide Malaysia Sdn Bhd v Lembaga Pembangunan Industri Pembinaan Malaysia** [2011] 9 MLJ 133 it was held that a decision maker "which has made a finding of primary fact wholly unsupported by evidence, will be held to have erred in point of law" and the consequence of that would indeed be dire against the decision-

maker. As was decided by the Court of Appeal in the Court of Appeal in the case of **Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union** [Civil Appeal number W-04-14-94] the learned justice Gopal Sri Ram in his decision had cited Lord Browne Wilkinson in the case of **Page v Hull University Visitor** [1993] 1 All ER 97 who had said this: *"The fundamental principle is that the Courts will intervene to ensure that the powers of the public decision making bodies are exercised lawfully."* Having considered Lord Browne-Wilkinson's speech in the **Page**'s case [supra] in the light of our very own local jurisprudence on the issue at hand, justice Gopal Sri Ram went on postulate the following principle which until now has not been judicially challenged in any way as to its soundness. This is what the learned judge had said in his judgement: *"In my judgement, the true principle maybe stated as follows. An inferior tribunal or any other decision making authority, whether exercising a quasi-judicial function or a purely administrative function, has no jurisdiction to commit an error of law."*

41. As a right that finds its genesis in Article 10 of the Federal Constitution, it could only be reasonably restricted to an applicant, as a Malaysian, on the grounds stated in that clause in the said Article namely in the interest of the security of Malaysia, public order or morality when prescribed by Act 301. See the case of **Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia** [2006] 6MLJ 213. A perusal of the contents of what was considered by the second

respondent has shown none of the considerations related to safeguarding the security of Malaysia, public order or morality as mentioned in Article 10. It is noted that the purported policy that the second respondent had purportedly sought to enforce as a ground to refuse the application was also never made public. In the case of **B v Secretary of State for Work and Pensions** [2005] 1 WLR 3796 it was held that if such a policy had been formulated and was regularly used by officials, it is the antithesis of good government to keep it in a departmental drawer.

42. As regards the issue of "Difficulty in regulating newspaper publications" as a consideration working against the applicant, this Court would agree with the applicant that it was not the fault of the applicant that the respondents would have to face such predicament. The duty to relieve that enforcement burden would be for respondents to employ sufficient resources to deal with this internal problem and not instead prohibit the applicant's Article 10 rights on account of it. That would be part and parcel of regulation and its incidental costs. This factor was an irrelevant consideration that the second respondent had taken into account in refusing the applicant's application for a printing license or permit under the Act 301.

43. As regards the issue concerning "Competition among publishers in order to gain profit", again that would always feature as a natural occurrence in the economy of any democratic State where

the success or failure of a business venture such as a newspaper business is determined by the market forces, in the sense that which newspapers are deserving of purchase and otherwise. This Court would respectfully agree with the learned counsel of the applicant that there is nothing in Act 301 or the Federal Constitution that empowers the Minister to regulate the market relating to newspaper publications.

44. So, with respect, clearly the second respondent had taken into account irrelevant considerations when he took into account those factors in deciding against the applicant.

45. Again, the possibility that "Confusion among the public on the true version of the news" that may be caused by too many versions of the news because of the existence of many newspapers, is again another irrelevant consideration that had been taken into consideration. It is indeed difficult to see the nexus between that consideration with the intention of **Article 10(1)(a)** of the Federal Constitution that also guarantees all Malaysians the right to receive information as enunciated in the Federal Court case of **Sivarasa Rasiah v Badan Peguam Malaysia & Anor** [2010] 3 CLJ 507. At the risk of being repetitive, this Court reiterates what the Indian Supreme Court justices in the case of **Indian Express Newspapers v The Union of India** [1985] 1 SCC 641 had succinctly observed, at para 68 of the judgement and I quote, "The public interest in freedom of discussion [of which freedom of the press is one aspect] stems from

the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves....Freedom of expression has four broad social purposes to serve:

(i) it helps an individual to attain self fulfillment,
(ii) it assists in the discovery of the truth,
(iii) it strengthens the capacity of an individual in participating in decision making, and
(iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change."

In a vibrant democratic society like ours, nothing could be nearer to the truth. It will greatly improve the discerning process among its citizens.

46. It could be seen clearly in the affidavit of the applicant that contrary to what was considered by the second respondent, the applicant had received numerous international awards and accolades on the quality of its reports and its standard of journalism [*Encl 5, Para 8*]. Neither had the applicant been taken criminal prosecutions against. With regard to the allegation of the applicant "Inciting controversy" this court would agree with the learned counsel for the applicant that merely inciting controversy would by no means amount

to a threat to public order, national security or morality, as any effective investigative journalism would result in controversy if it exposes the wrongdoings of any public authority. There is no reasonable nexus to be found there.

47. As such, the second respondent had, with respect, erred in law when he had taken into account the above considerations as a basis to not consider the application by the applicant in the latter's favour, thereby causing him to act ***ultra vires*** section 6(1)(a) and 12(2) of Act 301. Such decision so arrived at by the second respondent had amounted to him exercising the law wrongly thus justifying this Court to quash it by an issue of *certiorari.*

48. It was also contended that the second respondent had also, in coming to the impugned decision, *failed to take into account relevant considerations*. He was alleged to have failed to take into account the following **relevant** considerations*, inter alia*:-

[1] That the right to freedom of speech and expression under Article 10, which includes freedom of the press. See the case of **Pung Cheng Choon v PP** [supra] and the case of **Regina (Fuller and others) v Chief Constable of Dorset Police** [2003] QB 480.

[2] The numerous international awards, accolades and achievements by the Applicant showing that the Applicant is a credible news provider operating on high journalistic standards and ethics.

[3] The lack of any criminal prosecutions showing that the Applicant has never been a threat to public order, the security of Malaysia or responsible for immorality.

49. It is clear that the second respondent did not consider the above factors when before coming to his decision. This Court agrees with the applicant that the second respondent ought to have considered the same as they were relevant considerations to be considered in his decision-making process. In failing to so consider factors which were relevant to be considered in his decision-making process, this Court, with respect would agree with the applicant's contention that the second respondent had acted ***ultra vires*** section 6(1)(a) and 12(2) of Act 301. The impugned decision was therefore a result of an unlawful exercise of power by the second respondent of his discretion.

50. As such, upon due consideration of the submissions by both parties, on the issues on the contention that the second respondent had not exercised his discretion properly by not taking into consideration relevant factors and taking into consideration irrelevant

factors, it is clear in the mind of this Court that the applicant had successfully established those grounds to justify the quashing by this Court of the impugned decision of the second respondent. On those grounds too, the decision ought to be and is hereby quashed by this Court issuing the *certiorari* that was applied for.

51. The other ground that was raised in this application has been that when the second respondent made that impugned decision against the applicant, it was made for an *improper purpose*. It was stressed before this Court by the learned counsel for the applicant that statutes are interpreted by reference to their purpose, and statutory powers must be exercised for the purpose for which they were conferred. Public authorities are required to promote, and not to frustrate, the legislative purpose. Persons aggrieved by such decisions are entitled to the protection of the Court whose duty it is to construe the statute as a whole in determining the true intent of the statute. Indeed the case of **Padfield v Minister of Agriculture, Fisheries and Food** [1968] 1 AC 997 has been echoed within the four walls of our courtrooms as supporting that proposition. This Court has no issue with that statement of the law. I think that legal proposition is trite.

52. It is to be noted that Act 301 is made pursuant to Article 10(2)(a) of the Federal Constitution and it is an express fact showing a limitation to the right to speech and expression. Given that it is a

limitation to a fundamental liberty, it must be read restrictively. This was decided by the Federal Court in the case of **Sivarasa Rasiah** [supra]. Now, the Preamble of the said Act 301 has stated that it is:-

> "An Act to *regulate* the use of printing presses and the printing, importation, production, reproduction, publishing and distribution of publications and for matters connected therewith." [Emphasis added]

53. The learned counsel had picked on the word 'regulate' therein and had then referred to the *Stroud's Judicial Dictionary of Words and Phrases, 6th Edition* which defines '*Regulate'* as "a power to 'regulate and govern' seems to imply continued existence of that which is to be regulated or governed."

54. Premised on that interpretation, it was submitted by learned counsel for the applicant that '*Regulate'* therefore does not mean a *prohibition* of a citizen's right under Article 10(1)(a) to speech and expression. To him, '*Regulate'* in its plain and ordinary meaning means merely a *restriction* or *limitation* of a citizen's right to speech and expression.

55. He then referred to the High Court case of **Persatuan Aliran Kesedaran Negara v Minister of Home Affairs** [1988] 1 MLJ 440 which, as was contended by him, interpreted the powers under *Act 301* as follows:-

> "*In my view the granting of a permit to print and publish a magazine under the 1984 Act should be made as a matter of course provided of course*, if all the requirements for such a permit have been complied with. The 1984 Act is a regulating Act and generally intended to police publications available to the public by requiring a permit to print and publish so that the authorities know who the printers and publishers are and the desirability of such publications being exposed to the general public. At the granting of permit stage the consideration for the exercise of the Minister's discretion is *limited to protecting the public interest or national interest in respect of public order, morality and security as is shown in sections 4 and 7 of the 1984 Act*. But these considerations must be obvious from the application itself or from other information made available to the Minister. In the present case the Minister relied entirely on the information supplied by the applicant. Except in obvious cases, *the discretion to refuse to grant a permit cannot be exercised in*

anticipation that the applicant is likely to publish material which may offend against any law. Should such undesirable material be published, then the Minister has the power to revoke the permit under section 6(2) of the 1984 Act. The printer and publisher is open to prosecution under the Official Secrets Act, the Sedition Act, the Penal Code and to suits for defamation. Both the government and the public are well protected by these laws."

56. This decision by the High Court was overturned by the then Supreme Court ([1990] 1 CLJ 186 (Rep)) but according to the learned counsel for the applicant, the apex Court did not find fault with the learned trial Court's pronouncement on the law by the learned High Court Judge with regard to the power on issuing of a license or permit on the Minister. As was argued by the learned counsel, the Supreme Court only found "*the reasons given by the learned Judge in quashing the decision of the Minister of Home Affairs* [were] *somewhat general and are not cogent enough to justify interference with the discretion of the Minister of Home Affairs.*"

57. The learned Senior Federal Counsel had, on the other hand, disagreed with that interpretation and with respect, this Court would agree with him in that regard. The word 'regulate', depending on the context in which it is employed, could be interpreted to include the

power to completely deny an applicant the license he was seeking from the Minister. Indeed Article 10 of the Federal Constitution has expressly indicated situations under which the right may be denied completely. Indeed, even in the Stroud's definition referred to by learned counsel, it was couched by the phrase "seems to imply" which, to my mind, is hardly conclusive on the true construction to be given to the word 'regulate'. To the mind of this Court, the word 'regulate' in the Preamble to Act 301 includes the power of the Minister to deny a printing permit provided of course there is a valid ground or grounds for him to do so. Definitely, it is not intended by Parliament in legislating Act 301 that the discretion of the Minister is circumscribed to only set conditions to the permit.

58. But having said that, in this application, the application was not refused on consideration of national security, public morality or public order. If indeed it was so premised, then from a perusal of the affidavit by the second respondent, there was no evidence that was advanced by the second respondent justifying such a conclusion, namely that the applicant or the newspaper was in any way a threat to security, public order or morality. The case of **Hong Leong Equipment Sdn. Bhd. v Liew Fook Chuan & other appeals** [1997] 1 CLJ 665 which was subsequently confirmed in the Federal Court case of **Mohamad Ezam Bin Mohd Noor v Ketua Polis Negara & Other Appeals** [2002] 4 CLJ 309 has been an established authority supporting the proposition that in the lack of affirmative evidence, the

mere *ipse dixit* of the Minister is insufficient to establish what is but a mere averment without more.

59. Again, the case of **Padfield** [supra] has determined that an improper motive would be established when it is shown that the decision-maker was motivated by some aim regarded as illegitimate by the law. It has been applicant's submission, that the inference that can be drawn from the evidence adduced before this Court that the second respondent had exercised his statutory power for improper motives, namely:-

a. To enable the component parties of Barisan Nasional (UMNO and MCA) which own newspaper companies to reap substantial profit from a monopoly of the marketplace i.e. by obliterating competition;

b. To stifle the free flow of information, ideas and news in Malaysia, and to control the news the citizenry can and should hear i.e. by barring publications by independent news publishers;

c. To stifle dissent and criticisms against the Government and its cabinet members, and to prevent the exposure of mistakes and errors committed by the administration of Government i.e. by granting permits to publishers who would paint the Government in favorable light.

60. The applicant had cited the case of is **R v London Borough of Ealing, ex p Times Newspapers Ltd** [1987] IRLR 129 in support of its argument. A particular portion of the learned judge's judgement was quoted in the written submission by the learned counsel on behalf of the applicant as follows:

> " ... I am of the opinion that the ban imposed by the respondents was for an ulterior object. It was inspired by political views which moved the respondents to interfere in an industrial dispute and for that purpose to use their powers under this Act. Parliament, I am sure, did not contemplate such action as that to be within the power it conferred..."

Thus, it was submitted, that with such a political consideration being part of the second respondent's decision-making process, the decision is an abuse of power under *Act 301* and is *ultra vires* the said Act.

61. Now, having considered the above submissions in its totality, suffice to say here that upon a consideration of the affidavit affirmed on behalf of the applicant in support of this ground of improper motive, it is this Court's finding that the applicant had failed to

establish this ground for quashing the impugned decision of the second respondent. To my mind, the threshold that is needed to be satisfied in order to prove the constituent element of the decision having been 'motivated by some aim regarded as *illegitimate by the law*' is a rather heavy burden within the applicable onus on the balance of probabilities. It is similar to the quantum of proof placed by the law on the party who alleges *mala fide*. The **Padfield** case even referred to element of illegitimacy, thus illegality. While the learned judge in the **Time** case [supra] may be well justified on the facts before him to come to his conclusion, however, *on the available evidence*, this Court is not satisfied that such a burden had been discharged successfully by the applicant. With respect therefore, this alleged ground of improper motive having actuated and shaped the second respondent's decision cannot be sustained.

62. At the risk of being repetitive, this power to allow a permit to be issued to the applicant under Act 301 resides with the second respondent. The law in Act 301 says that. But if in exercise of his discretion, it has been shown that he had not acted as he should, or ought to have, then as has been illustrated above, the law also says that his decision is bad. It is bad not because he made a *wrong* decision on its merits, it is wrong because in coming to that decision, he had not observed proper decision making process thus vitiating his ultimate decision and rendering it amenable to judicial review. The decision-making process undertaken will reveal whether the

discretion has been exercise in good faith. As Lord Tom Bingham, Chief Justice of England and Wales has written in his widely acclaimed book entitled "**The Rule of Law**" [2011] as follows: "First is the requirement that statutory powers should be exercised in good faith- that is, honestly. It is presumed that Parliament intends no less. It has been described as the first principle of judicial review that a discretion must be exercised in good faith." It too must be exercised according to law, by taking into account relevant considerations and at the same time ignoring those which are not relevant, in deciding whether or not the application ought to be allowed. It is the finding of this Court that the second respondent's decision in this case is so vitiated on the grounds as alluded to by me above.

63. In the final analysis, this Court is, with respect, in agreement with the contention by learned Counsel for the applicant that the second respondent's decision is one that is fraught with the infirmities such that it has been a perverse decision, which a reasonable person similarly circumstanced as the second respondent, would not have decided the manner in which he did. The second respondent had misconstrued the extent of his powers when he treated the power under the Act 301 in relation to the issuing of a printing permit as one that is a privilege, as opposed to it being a right, that has its origin entrenched in Article 10 of the Federal Constitution. The decision by the second respondent is defective for want of procedural fairness for affording no reason for his rejection of the application in as much as it

has been littered with illegality, unreasonableness and in defiance of logic, from the **CCSU**'s case [supra] litmus test.

64. As such, in the upshot, an order of *certiorari* is hereby issued to quash the impugned decision of the second respondent that was communicated by the 1st respondent on 19th August 2010 and that the applicant's application is ordered to be remitted back to the hon. Minister, being the nominated decision-maker, for it to be considered according to law and to make another, *lawful,* decision. [See 'The Rule of Law' by Lord Tom Bingham (2011) page 61]. This course was employed in the **Sri Lempah** case [supra] where his lordship Raja Azlan Shah FJ [as his Highness then was], having ruled the decision of the Land Committee in that case *ultra vires,* had further ruled that since the Land Committee was the designated decision-maker, he had remitted to the case back to it "for a fresh reconsideration and conclusion according to law." To this, both learned justices Suffian LP and Chang Min Tat FJ had concurred.

65. To my mind, it would be rather appropriate to conclude, by this Court quoting two great judges of their generation. First, I advert to what the learned Federal Court judge Raja Azlan Shah FJ [as his Highness then was] had said in the very opening paragraph of his judgement in the case of **Loh Kooi Choon v Government of Malaysia** [1977] 2 MLJ 187 at page 188, as follows:

> "I should add that right now no feature of our system of government has caused so much discussion, received so much criticism, and been so frequently misunderstood, than the duties assigned to the courts and the functions which they discharge in guarding the Constitution."

So as not to be misunderstood, his lordship then found the need to make clear the functions of the courts in the context of the nature of the dispute that was brought before the courts. And secondly, in the context of this case involving judicial review, again, Lord Chief Justice Bingham's acute observation must be shared, where he had described the role of the judge in a judicial review exercise as that of "an auditor of legality: no more, but not less." [see '**The Rule of Law**' (2011)] Coming from a former Lord Chief Justice of England and Wales, the country where the **Magna Carta** [*circa* 1215] was born which for the first time embodied and recognized in law the rights of men and which henceforth had become the basis for English citizen's rights, such observation must be weighty indeed.

66. Finally, the 3 named respondents are ordered to collectively pay costs of RM8,000 to the applicant.

Order accordingly.

SIGNED

[ABANG ISKANDAR BIN ABANG HASHIM]

Judge
High Court in Malaya
KUALA LUMPUR

Dated: 10th January 2013.

Salinan Diakui Sah

ZAITON BINTI YAACOB
Setiausaha Kepada
Y.A Dato' Seri Zakaria bin Sam
Hakim Mahkamah Tinggi (RKKK1), K. Lumpur

Parties appearing:

For the Applicant:

Mr. K. Shanmuga together with Mr. Edmund Bon from Messrs Kanesalingam & Co, Advocates and Solicitors

For the Respondent

SFC En. Noor Hisham bin Ismail from Jabatan Peguam Negara Malaysia

Statute referred to:

1. Printing Presses and Publication Act 1984 (Act 301).
2. Federal Court of Malaysia

Cases referred to:

1. Council for Civil Service Unions & Ors v Minister for the Civil Service [1984] 3 All ER 935

2. R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145

3. Datuk Justine Jinggut v Pendaftar Pertubuhan, Malaysia [2012] 3 MLJ 212

4. Breen v Amalgamated Engineering Union [1971] 2 QB 175

5. Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487

6. Padfield and Others v Minister of Agriculture Fisheries and Food and Others [1968] 1 AC 997

7. Minister of Labour, Malaysia v Chan Meng Yuen and another appeal [1992] 2 MLJ 337

8. Sakal Papers and 7 Others v Union of India 1962 AIR 305

9. Indian Express Newspapers Pte Ltd & Anor v Union of India [1985] 1 SCC 641

10. Pengarah Tanah Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn. Bhd [1979] 1 MLJ 135

11. Pyx Granite Co. Ltd v Ministry of Housing and Local Government [1958] 1 All ER 625

12. Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 KB 223

13. Darma Suria Risman Saleh v MDN, Malaysia & Ors [2011] 1 CLJ 30

14. Public Prosecutior v Pung Chen Choon [1994] 1 MLJ 566

15. Anwar Abdul Rahim v Bayer (M) Sdn. Bhd. [1998] 2 CLJ 197

16. Hong Leong Equipment Sdn. Bhd v Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665

17. Pahang South Union Omnibus Co. Bhd v The Minister of Labour & Manpower & Anor [1981] CLJ (Rep) 74

18. General Electric Co. Ltd v Price Commission [1975] ICR 1

19. Air Liquide Malaysia Sdn. Bhd v Lembaga Pembangunan Industri Pembinaan Malaysia [2011] 9 MLJ 133

20. Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union [Civil Appeal number W-04-14-94]

21. Page v Hull University Visitor [1993] 1 All ER 97

22. Dr. Mohd. Nasir Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213

23. B v Secretary of State for Work and Pensions 1 WLR 3796

24. Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 3 CLJ 507

25. Regina (Fuller and Others) v Chief Constable of Dorset Police [2003] QB 480

26. Persatuan Aliran Kesedaran Negara v Minister of Home Affairs [1988] 1 MLJ 440

27. Minister of Home Affairs v Persatuan Aliran Kesedaran Negara [1990] 1 CLJ (Rep) 186

28. Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665

29. Mohamad Ezam bin Mohd. Noor v Ketua Polis Negara & Other Appeals [2002] 4 CLJ 309

30. R. v London Borough of Ealing, exp. Times Newspapers Ltd. [1987] I RLR 129

31. Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187

Materials referred to:

1. Tom Bingham, "The Rule of Law" [2011] Allen Lane an imprint of Penguin Books.