DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)
[RAYUAN SIVIL NO: W-02(IM)-3019-12/2011]

ANTARA

TAN SRI ABDUL KHALID IBRAHIM ... PERAYU

DAN

BANK ISLAM MALAYSIA BERHAD ... RESPONDEN

(Dalam perkara Guaman Sivil No D4-22A-216-2007
Dalam Mahkamah Tinggi di Kuala Lumpur

Antara

Bank Islam Malaysia Berhad … Plaintiff

Dan

Tan Sri Abdul Khalid bin Ibrahim … Defendan)

CORAM:

LOW HOP BING, JCA
ZAHARAH BINTI IBRAHIM, JCA
AZIAH BINTI ALI, JCA

LOW HOP BING JCA
DELIVERING THE JUDGMENT OF THE COURT

I. APPEAL

[1] The Appellant/Plaintiff ("Khalid") has brought this Appeal against the decision of **Zawawi Salleh J** in allowing the Respondent/Defendant's ("Bank Islam's") Application in encl. 59 ("the Application") to refer Shariah Questions to Bank Negara's Shariah Advisory Council ("SAC") for its ruling pursuant to s. 56 of the Central Bank of Malaysia Act 2009 ("the Act").
(A reference hereinafter to a section is a reference to that section in the Act).

[2] We have been informed by learned counsel that on the issues raised in this Appeal, so far there has been no reported judgment by the Court of Appeal. We now set out our view on the new vista ventilated in this Appeal which we dismissed on 14 May 2012.

II. FACTUAL BACKGROUND

[3] In 2001, Bank Islam extended an 'Al-Bai Bithaman Ajil' Islamic financing facility ("BBA Facility") to Khalid. The terms of the BBA Facility are expressly stated in Bank Islam's Letter of Offer dated 17 April 2001, a Master Revolving BBA Agreement dated 30 April 2001, a Memorandum of Charge of Shares, a Fund Administration and

Custodian Agreement and an Asset Purchase Agreement dated 30 April 2001 (collectively, "the BBA Facility Agreements").

[4] On 10 May 2007, Khalid instituted a High Court Suit against Bank Islam ("Khalid's Suit") seeking *inter alia* declarations that:-

(1) Under the Islamic Banking Act 1983, the BBA Facility Agreements were agreements which Bank Islam was not licensed to offer and/or enter into; and

(2) The BBA Facility was not in accordance with the religion of Islam and hence Bank Islam was in breach of its licence issued under s. 3 of the Islamic Banking Act 1983.

[5] On 24 May 2007, Bank Islam filed a separate High Court Suit ("Bank Islam's Suit") against Khalid for breaches of the terms of the BBA Facility, seeking recovery of monies due and owing from Khalid.

[6] Khalid's Suit and Bank Islam's Suit were consolidated ("the Consolidated Suits") *vide* Order of Court dated 15 May 2008, with Khalid as the Plaintiff, and Bank Islam as the Defendant in the Consolidated Suits.

[7] On 13 June 2011, Bank Islam made the Application to the High Court to refer to the SAC for its ruling on Shariah Questions arising in the Consolidated Suits.

[8] Khalid objected on the ground, *inter alia*, that s. 56 and s. 57 were unconstitutional.

[9] On 13 July 2011, pursuant to s. 84 of the Courts of Judicature Act 1964, the High Court referred the question concerning the constitutionality of s. 56 and s. 57 to the Federal Court for its determination, but the Federal Court declined to do so because the High Court has yet to make a ruling on whether there existed any Shariah Question in the Consolidated Suits. The Federal Court then remitted the matter to the High Court.

[10] On 18 November 2011, **Zawawi Salleh J** heard the Application. On 1 December 2011, he held that there were Shariah Questions which he identified and referred to the SAC for its ruling.

[11] Thereafter, Khalid lodged the instant Appeal.

III. PREVIOUS "REFERENCE": *FUNCTUS OFFICIO*

[12] Learned counsel Mr Malik Imtiaz Sarwar (Ms Asma Mohd Yunus and Mr Azinuddin Karim with him) argued for Khalid that **Zawawi Salleh J** had failed to appreciate that the Court's power to refer the Shariah Questions was "spent" or the High Court was *functus officio* in view of a previous "reference" by **Rohana Yusuf J** in *Tan Sri Khalid bin Ibrahim v. Bank Islam Malaysia Bhd and Another Suit* [2009] 6 MLJ 416 HC ("Rohana J's judgment") under

s. 16B of the (then) Central Bank of Malaysia Act 1958 ("the (then) 1958 Act").

[13] Bank Islam's learned counsel, Mr Tommy Thomas (assisted by Mr Ganesan Nethi) asserted that, in fact, **Zawawi Salleh J** had correctly appreciated that the so-called previous "reference" made by **Rohana Yusuf J** to the SAC pursuant to s. 16B of the (then) 1958 Act was a request to the SAC to ascertain if there was any existing ruling by the SAC in respect of 'Bai Bithaman Ajil' Islamic financing contracts ("BBA contracts"). It was not a reference to the SAC for a ruling on a Shariah Question.

[14] The essence of the question raised in the aforesaid submissions may be formulated as follows:-

> "Upon a proper perusal of **Rohana J's judgment**, was the High Court *functus officio* and hence the power of the High Court to make a reference to the SAC was 'spent' in view of a previous 'reference'?".

[15] Upon a careful reading of **Rohana J's judgment**, we have no difficulty in holding that the so-called previous "reference" under s. 16B of the (then) 1958 Act was merely a request for information as to whether there was any existing ruling by the SAC pertaining to BBA contracts. At p. 426 A-B thereof, **Rohana Yusuf J** has rightly said, "I had caused an enquiry to be made to the SAC as to whether a ruling has been made on the status of the BBA agreement". That

being the case, it is abundantly clear to us that there was no reference whatsoever to the SAC for a ruling on Shariah Questions. The SAC was not asked to answer any specific question.

[16] In the circumstances, we find no error on the part of **Zawawi Salleh J** in classifying the request as an enquiry to be made to the SAC as to whether a ruling has been made on the status of the BBA agreement. It is certainly not a reference to the SAC for its determination on a specific Shariah Question. As there was no previous reference to the SAC for a ruling, the High Court could not be said to be *functus officio* or to have "spent" the power to make a reference. **Zawawi Salleh J** is able to make the reference which has now become the subject matter of the instant Appeal. Our answer to the above question is therefore in the negative.

IV. CONSTITUTIONALITY OF S. 56 AND S. 57

[17] Khalid's second point was that **Zawawi Salleh J** erred in failing to appreciate that s. 56 and s. 57 are unconstitutional, being in contravention of Part IX and Articles 8 and 74 of the Federal Constitution, in that the SAC is "usurping" the functions of the Courts in ascertaining Islamic law. (A reference hereinafter to a Part and an Article is a reference to that Part and Article in the Federal Constitution).

[18] In response, Bank Islam relied on Article 74(1), Part IX and Article 121 to support the contention that s. 56 and s. 57 are constitutional.

[19] These submissions touching on the constitutionality or otherwise of s. 56 and s. 57 attract the application of the principles of constitutional interpretation. I have the privilege of embarking on a discussion of these principles in eg, *PP v. Mohd Noor Bin Jaafar* [2005] 6 MLJ 745 HC; *Dato' Hari Menon @ Dato' T Puraharan a/l CP Ramakrishnan (Suing as Legal Representative of DYMM Tuanku Jaafar Ibni Almarhum Tuanku Abdul Rahman, Yang DiPertuan Besar Negeri Sembilan Darul Khusus) v. Texas Encore LLC & Ors* [2005] 4 MLJ 506 HC; and *Pantai Bayu Emas Sdn Bhd & Ors v. Southern Bank Bhd* [2008] 6 MLJ 649 CA. Other authorities which incorporated these principles include *Dato' Menteri Othman bin Baginda & Anor v. Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 FC; *Faridah Begum bte Abdullah v. Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'ayatuddin Al Mu'adzam Shah* [1996] 1 MLJ 617 SC; and *Sukma Darmawan Madja v. Ketua Pengarah Malaysia & Anor* [1999] 1 MLJ 266 CA. As these principles have been succinctly stated therein, we respectfully adopt and apply them in our interpretation of the aforesaid provisions of the Federal Constitution.

[20] We take the view that the constitutionality of s. 56 and s. 57 is to be tested by reference to the legislative powers of Parliament to enact these sections. Article 74(1) empowers Parliament to make laws with respect to any of the matters enumerated in the Federal List (List 1), or the Concurrent List (List 3), of the Ninth Schedule to the Federal Constitution. Item 4(k) of List 1 clearly provides that Parliament is empowered to make laws in respect of:-

> "4. Civil and criminal law and procedure and the administration of justice, including:-
>
> ...
>
> (k) ascertainment of Islamic law and other personal laws for purposes of federal law".

[21] Banking is a matter within the Federal List and the Islamic Banking Act 1983 as well as the Central Bank of Malaysia Act 2009 are clearly federal laws. Thus, s. 56 and s. 57 are within Parliament's power to enact. (I am grateful to my learned sister **Zaharah binti Ibrahim JCA** for her suggestion to include this paragraph as an integral part of our judgment herein).

[22] s. 56 and s. 57 are applicable without discrimination to all parties who are in the same circumstances and so cannot be said to have contravened Article 8 governing fundamental liberties generally and equality before the law as well as equal protection of the law specifically.

[23] On the issue as to whether there is any usurpation by the SAC of the powers and jurisdiction of the Courts, we need only to examine Part IX which provides for the Judiciary and the functions, powers and jurisdiction of the Courts. Under this Part, Article 121(1) vests the judicial powers of the Federation in the Courts in such manner as may be conferred by or under federal law. So long as Parliament in its wisdom enacts laws for this subject matter, our Courts shall be competent to perform the functions, or to exercise the powers and jurisdiction conferred thereunder.

[24] Next, the statutory duty and function of the SAC is to ascertain Islamic financial matters or business only. It does not hear evidence nor decide cases. S. 56 and s. 57 merit reproduction as follows:-

> **"56. Reference to Shariah Advisory Council for ruling from court or arbitrator**
>
> (1) Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be shall:-
>
> (a) take into consideration any published rulings of the Shariah Advisory Council; or
>
> (b) refer such question to the Shariah Advisory Council for its ruling.

(2) Any request for advice or a ruling of the Shariah Advisory Council under this Act or any other law shall be submitted to the secretariat.

57. Effect of Shariah rulings

Any ruling made by the Shariah Advisory Council pursuant to a reference made under this Part shall be binding on the Islamic financial institutions under Section 55 and the court or arbitrator making a reference under Section 56".

[25] S. 56 and s. 57 contain clear and unambiguous provisions to the effect that whenever there is any Shariah Question arising in any proceedings relating to Islamic financial business before eg, any Court, it is mandatory for the Court to invoke s. 56 and refer it to the SAC, a statutory expert, for a ruling. The duty of the SAC is confined exclusively to the ascertainment of the Islamic Law on financial matters or business. The judicial function is within the domain of the Court ie, to decide on the issues which the parties have pleaded. The fact that the Court is bound by the ruling of the SAC under s. 57 does not detract from the judicial functions and duties of the Court in providing a resolution to the dispute(s) which the parties have submitted to the jurisdiction of the Court. In applying the SAC ruling to the particular facts of the case before the Court, the judicial functions of the Court to hear and determine a dispute remain inviolate. The SAC, like any other expert, does not perform any judicial function in the determination of the ultimate outcome of the litigation before the Court, and so cannot be said to usurp the judicial

functions of the Court. Hence, s. 56 and s. 57 are valid and constitutional.

V. DO S. 56 AND S. 57 HAVE RETROSPECTIVE EFFECT?

[26] Khalid's third and final point is that the learned Judge had erred in holding that s. 56 and s. 57 have retrospective effect.

[27] Bank Islam responded that no error was occasioned by the High Court.

[28] The question here is whether s. 56 and s. 57 have retrospective effect.

[29] In our view, s. 56 and s. 57 would not and cannot have retrospective effect if there has been a deprivation of Khalid's pre-existing rights. However, there is no such deprivation in the instant Appeal; s. 56 and s. 57 merely introduce and apply a procedure as far as Shariah Questions are concerned. Under the (then) 1958 Act, which was in force until 24 November 2009, the SAC's statutory duties and powers to make rulings as a statute-appointed expert, by ascertaining Islamic law for the purpose of Islamic financial matters or business on Shariah Questions, were already in existence. The word used in the (then) s. 16B was "may". With effect from 25 November 2009, the discretionary power of the Court (to refer any Shariah Question to the SAC when such a question is before the Court) was amended to make the reference mandatory, and consequently the

SAC's ruling made pursuant to a reference is now binding on the Court by virtue of the word "shall" expressly enacted in s. 56 and s. 57.

[30] In the circumstances, we hold that **Zawawi Salleh J** is correct in taking the position that s. 56 and s. 57 have retrospective effect.

[31] As a matter of fact, the aforesaid three grounds have actually been ventilated and dealt with by **Zawawi Salleh J** in *Mohd Alias bin Ibrahim v. RHB Bank Bhd & Anor* [2011] 3 MLJ 26 HC, wherein the learned Judge had also correctly stated the law. We hereby affirm his well-considered grounds expressed therein.

VI. CONCLUSION

[32] It is plain to us that Khalid's Appeal is devoid of merits. We dismiss this Appeal with costs in the cause as agreed by the parties herein. Deposit to be refunded to Khalid as the Appellant.

(DATUK WIRA LOW HOP BING)
Judge
Court of Appeal Malaysia
PUTRAJAYA

DATED: 14 MAY 2012

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Case(s) referred to:

Tan Sri Khalid bin Ibrahim v. Bank Islam Malaysia Bhd and Another Suit [2009] 6 MLJ 416 HC

Mohd Alias bin Ibrahim v. RHB Bank Bhd & Anor [2011] 3 MLJ 26 HC

PP v. Mohd Noor Bin Jaafar [2005] 6 MLJ 745 HC

Dato' Hari Menon @ Dato' T Puraharan a/l CP Ramakrishnan (Suing as Legal Representative of DYMM Tuanku Jaafar Ibni Almarhum Tuanku Abdul Rahman, Yang DiPertuan Besar Negeri Sembilan Darul Khusus) v. Texas Encore LLC & Ors [2005] 4 MLJ 506 HC

Pantai Bayu Emas Sdn Bhd & Ors v. Southern Bank Bhd [2008] 6 MLJ 649 CA

Dato' Menteri Othman bin Baginda & Anor v. Dato' Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29 FC

Faridah Begum bte Abdullah v. Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'ayatuddin Al Mu'adzam Shah [1996] 1 MLJ 617 SC

Sukma Darmawan Madja v. Ketua Pengarah Malaysia & Anor [1999] 1 MUJ 266 CA