DALAM MAHKAMAH PERSEKUTUAN MALAYSIA

(BIDANGKUASA RAYUAN)

PERMOHONAN SIVIL NO. 08 - 690 - 11/2013

ANTARA

TITULAR ROMAN CATHOLIC ARCHBISHOP OF KUALA LUMPUR … PEMOHON

DAN

1. **MENTERI DALAM NEGERI**
2. **KERAJAAN MALAYSIA**
3. **MAJLIS AGAMA ISLAM & ADAT MELAYU TERENGGANU**
4. **MAJLIS AGAMA ISLAM WILAYAH PERSEKUTUAN**
5. **MAJLIS AGAMA ISLAM NEGERI MELAKA**
6. **MAJLIS AGAMA ISLAM NEGERI JOHOR**
7. **MAJLIS AGAMA ISLAM NEGERI KEDAH**
8. **MALAYSIA CHINESE MUSLIM ASSOCIATES**
9. **MAJLIS AGAMA ISLAM NEGERI SELANGOR … RESPONDEN-RESPONDEN**

[Mahkamah Rayuan Malaysia Di Putrajaya
(Bidangkuasa Rayuan)
Rayuan Sivil No. W – 01 – 1 - 2010

Antara

1. Menteri Dalam Negeri
2. Kerajaan Malaysia
3. Majlis Agama Islam & Adat Melayu Terengganu
4. Majlis Agama Islam Wilayah Persekutuan
5. Majlis Agama Islam Negeri Melaka
6. Majlis Agama Islam Negeri Johor
7. Majlis Agama Islam Negeri Kedah
8. Malaysia Chinese Muslim Associates
9. Majlis Agama Islam Negeri Selangor ... Perayu-Perayu

Dan

Titular Roman Catholic Archbishop of Kuala Lumpur… Responden]

[Dalam Mahkamah Tinggi Malaya Di Kuala Lumpur
(Bidangkuasa Rayuan & Kuasa-Kuasa Khas)
Permohonan Untuk Kesemakan Kehakiman No. R1 – 25 – 28 – 2009

Dalam perkara keputusan Responden-Responden bertarikh 7.1.2009 yang menyatakan bahawa Permit Penerbitan Pemohon untuk tempoh 1.1.2009 hingga 31.12.2009 adalah tertakluk kepada syarat bahawa Pemohon dilarang menggunakan istilah/perkataan "Allah" dalam Herald – The Catholic Weekly" sehingga Mahkamah memutuskan perkara tersebut.

Dan

Dalam perkara Permohonan untuk Perintah Certiori di bawah Aturan 53, Kaedah 2 (1) Kaedah-Kaedah Mahkamah Tinggi, 1980

Dan

Dalam perkara Permohonan untuk Deklarasi di bawah Aturan 53, Kaedah-Kaedah 2 (2) Kaedah-Kaedah Mahkamah Tinggi, 1980

Dan

Dalam perkara Roman Catholic Bishop (Incorporation) Act 1957

Antara

Titular Roman Catholic Archbishop
Of Kuala Lumpur … Pemohon

Dan

1. Menteri Dalam Negeri … Responden Pertama
2. Kerajaan Malaysia … Responden Kedua]

Coram: Arifin Bin Zakaria, CJ
Md. Raus Bin Sharif, PCA
Zulkefli Bin Ahmad Makinudin, CJM
Richard Malanjum, CJSS
Suriyadi Bin Halim Omar, FCJ
Zainun Bt. Ali, FCJ
Jeffrey Tan Kok Wha, FCJ

JUDGMENT OF RICHARD MALANJUM (CJSS)

Introduction

1. This is an application (Encl. 2[a]) by the Applicant for leave to appeal to this Court pursuant to section 96(a) and (b) of the Courts of Judicature Act 1964 ('the CJA').

2. The Applicant is dissatisfied with the decision of the Court of Appeal rendered on 14.10. 2013 reversing the judgment of the High Court given in his favour on 31.12. 2009.

3. The Applicant had by way of an Application for Judicial Review No. R1-25-28-2009 dated 16.2.2009 ('the Application for Judicial Review') applied to the High Court for leave pursuant to Order 53 rule 3 (1) of the **Rules of the High Court 1980** ('RHC'). The relief sought for were, inter alia, an Order of Certiorari, declarations, for stay of the decision, costs and any other relief.

4. On 24.4.2009 the High Court granted leave. The Attorney General Chambers did not raise any objection.

Judgment At Leave Stage

5. Generally in an application for leave to appeal under section 96 of the CJA it is rare for this Court to provide a comprehensive written judgment. The rationale for not doing so is obvious. It is merely an application for leave to appeal. The parties are not expected to argue on the merits of the case.

6. The foregoing view was clearly expressed in **Datuk Syed Kechik Syed Mohamed & Anor v The Board Of Trustees of The Sabah Foundation & Ors (1999) 1 CLJ 325**. Mr. Justice

Edgar Joseph Jr. FCJ had this to say in respect of section 96(a) at pages 330-331; 332:

> *'It is not the practice of this Court, nor as we understand it, the practice of the House of Lords, when sitting in its judicial capacity hearing applications for leave to appeal, to give explicit reasons for granting or refusing leave, save in circumstances where their Lordships considered that they had no jurisdiction to entertain the application.*
>
> *……..*
>
> *The only reason why we thought it desirable that we should give a judgment in writing in this case is because it affords us the opportunity to offer guidance, without in any way attempting to establish a rigid framework into which all new situations must be forced, when considering applications for leave to appeal from the judgments of the Court of Appeal to this Court in civil matters …'*
>
> *……*

At the hearing of the application for leave, so far as it is possible to do so, the argument should be brief, succinct and concentrated.' (Emphasis added).

7. Thus, an explicit written judgment by this Court may be given even at the leave stage. However, it is usually given when jurisdiction is declined as for instance when the final appellate court is the Court of Appeal. (See: **Koperasi Jimat Cermat dan Pinjaman Keretapi Bhd v. Kumar Gurusamy [2011] 3 CLJ 241**) or this Court is of the view that there is a need to provide guidance on the exercise of its discretion under section 96. (See: **Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications [2011] 1 MLJ 25**).

8. In this present application there is no issue on lack of jurisdiction. Nevertheless, in view of the issues and the legal implications involved in this case, it is appropriate and as a guide, that a reasoned judgment should be issued even at this leave stage. Not so much on the merits of the issues involved but rather on the questions posed vis-à-vis the requirements of section 96.

Furthermore, this Court was adjourned in order to deliberate after hearing the submissions of the parties.

Background

9. The Applicant had been the publisher of the Herald - The Catholic Weekly ('the Herald') for the past 14 years prior to the filing of the Application for Judicial Review.

10. The Applicant received by way of facsimile a letter dated 7.1.2009 ('the said letter') signed by one Che Din bin Yusoh on behalf of the Secretary General of the Ministry of Home Affairs. The said letter approved the publication permit to the Applicant to continue publishing the Herald subject to certain conditions, namely:

> *'(i) Permohonan penerbitan dalam Bahasa Melayu adalah dibenarkan, namun demikian, penggunaan kalimah 'ALLAH' adalah dilarang sehingga mahkamah membuat keputusan mengenai perkara tersebut.*

(ii) *Di halaman hadapan penerbitan ini, tertera perkataan 'TERHAD' yang membawa maksud penerbitan ini adalah terhad untuk edaran di gereja dan kepada penganut Kristian sahaja.'*

The said letter also cancelled an earlier letter from the Ministry of Home Affairs dated 30.12.2008 to the Applicant on the same subject.

11. It was condition (i) above ('the impugned decision') that triggered the Applicant to file the Application for Judicial Review. Basically the critical issue in contention relates to the exercise of power by the 1st Respondent to prohibit the Applicant as opposed to the right of the Applicant to use the word 'Allah' in the Bahasa Malaysia section of the Herald.

The High Court Judgment

12. Having heard the Application for Judicial Review after leave was given the High Court granted the relief sought for by the Applicant.

13. Basically the learned judge held:

a. that section 13A of the Printing Presses and Publication Act 1984 ('the Act') did not oust the judicial review to correct any error of law committed in the exercise of any discretion under the Act or the Printing Presses and Publications (Licenses and Permits) Rules 1984 ('the 1984 Rules');

b. that the 1st Respondent took into account irrelevant matters instead of relevant matters 'in the exercise of his discretion to impose further conditions in the publication permit'. Further, based on the uncontroverted historical evidence averred by the Applicant the 1st Respondent had no factual basis to impose the additional conditions in the permit;

c. that the conditions imposed were illegal, null and void for the following reasons:

i. although Article 3(1) of the Federal Constitution ('the FC') provides that Islam is the official religion of the

Federation of Malaysia ('the Federation'), other religions may be practised in peace and harmony in any part of the Federation;

ii. it must be considered whether the use of the word 'Allah' is a practice of the Christian religion; and

iii. based on the evidence the use of the word 'Allah' is an essential part of the worship and instruction in the faith of the Malay speaking community of the Catholic Church and is integral to the practice and propagation of their faith;

d. that to prohibit the use of the word 'Allah' in the Herald is unconstitutional:

i. since it contravenes the provisions of Articles 3(1), 11(1) and 11(3) of the FC;

ii. an unreasonable restriction on the freedom of speech and expression under Article 10(1)(c) of the FC;

iii. an unreasonable administrative act offending the first limb of Article 8(1) of the FC which demands fairness in any form of State action.

e. that based on merits the action of the Respondents was illogical, irrational and inconsistent since the use of word 'Allah' was already permitted for worship and in the Bible. Further, the reasons given by the 1st Respondent in the various directives defied all logic and were unreasonable;

f. that section 9 of the various State Enactments which made it an offence to use certain words and expressions could be interpreted in two ways:

i. to read it in conjunction with Article 11(4) of the FC; and

ii. to apply the doctrine of proportionality, that is to test whether the '*legislative state action, which includes executive and administrative acts of the State, was disproportionate to the object it sought to achieve*'.

Thus, applying the test to the factual matrix of this case it ought to be taken into account the constitutional and fundamental rights of those persons professing the Christian faith and the fact that a large section of people in the Catholics church whose medium of instruction is Bahasa Malaysia and use the word ‘Allah’ for their God.

g. that the Respondents did not have materials to support their contention that the usage of the word ‘Allah’ by the Herald could cause a threat to national security;

h. that ‘*the court has to determine whether the impugned decision was in fact based on the ground of national security*’; and

i. that the subject matter referred to in the proceedings was justiciable contrary to the objections raised by the Respondents.

The Decision Of The Court Of Appeal

14. The learned judges of the Court of Appeal in rendering their respective judgments unanimously reversed the judgment of the High Court. Their respective judgments may be referred to in this Judgment as and when necessary. But for now it may be convenient just to reproduce the written summary of their decision as provided by the presiding Judge, Mr. Justice Apandi Ali JCA (as he then was). It stated thus:

> *'[1] Basically this is an appeal against the decision of the High Court arising from an application for judicial review of the imposition of a condition in the publication permit of the Herald – The Catholic Weekly. The impugned condition was the prohibition of the name "Allah" in the said publication. In the course of allowing the judicial review the learned High Court judge also allowed certain declaratory relief orders pertaining to the respondent's constitutional right to use the name "Allah".*
>
> *[2] The law on judicial review in this country is trite law; namely judicial review is not concerned with the merits of*

a decision but with the manner the decision was made; and that there are 3 categories upon which an administrative decision may be reviewed, i.e. 1. Illegality; 2. Irrationality and 3. Procedural impropriety. When the decision involved an exercise of a discretion, the determinable issues depend on the facts of the case.

[3] Applying the law to the facts and circumstances of the case and bearing in mind the principles to be taken in dealing with judicial review as laid down in the often-quoted case of Council of Civil Service Union & Ors v. Minister for the Civil Service [1985] 1 AC 374; [1984] 4 All E.R 935, it is our considered finding that the Minister has not acted in any manner or way that merit judicial interference on his impugned decision.

[4] On the constitutionality of the action of the 1st appellant to impose the impugned condition prohibiting the usage of the word "Allah" in the Herald, it is our judgment that there is no infringement of the any of the constitutional rights, as claimed by the respondent.

[5] It is our common finding that the usage of the name "Allah" is not an integral part of the faith and practice of Christianity. From such finding, we find no reason why the respondent is so adamant to use the name "Allah" in their weekly publication. Such usage, if allowed, will inevitably cause confusion within the community.

[6] In the circumstances and the facts of the case we are also mindful of the Latin maxims of "salus populi suprema lax" (the safety of the people is the supreme law) and "salus republicae suprema lax" (the safety of the state is the supreme law) do co-exist and relevant to the doctrine that the welfare of an individual or group must yield to that of the community. It is also our reading that this is how the element of "in peace and harmony" in Article 3(1) is to be read with the freedom of religion in Article 11(1) of the Federal Constitution.

[7] On the evidence before us too we are satisfied that sufficient material have been considered by the Minister in discharging his function and statutory power under the Printing Presses And Publications Act 1984. Although the

test under the written law is subjective, there are sufficient evidence to show that such subjective decision was derived by considering all facts and circumstances in an objective manner. Thus, there is no plausible reason for the High Court to interfere with the Minister's decision.

[8] The detailed explanations and reasons for our findings can be seen in the full text of three separate written judgments, which shall be made available to all parties immediately, at the conclusion of today's proceedings. My learned brothers, Abdul Aziz bin Abdul Rahim, JCA and Mohd. Zawawi bin Salleh, JCA have read and approved my judgment. In addition to my judgment, both of my learned brothers have respectively written separate supporting judgments, of which I agree with their methodological analysis and findings.

[9] In the light of our findings, we are unanimous in our decision to allow the appeal by the appellants. Appeal is therefore allowed.

All orders given on 31/12/2009 by the High Court pursuant to the Judicial Review application are hereby set aside. As agreed between all parties there will be no order as to costs.'

The Application (Encl. 2[a])

15. In seeking for leave the Applicant submitted a set of proposed questions in three parts. They are as follows:

'Part A: The Administrative Law Questions

1. *Where the decision of a Minister is challenged on grounds of illegality or irrationality and/or Wednesbury unreasonableness, whether it would be incumbent on the Minister to place before the Court the facts and the grounds on which he had acted?*

2. *Whether the decision of a Minister is reviewable where such decision is based on ground of alleged national security and whether it is a subjective discretion? Is the mere assertion by the Minister of a*

threat to public order, or the likelihood of it, sufficient to preclude inquiry by the Court?

3. *Whether in judicial review proceedings a Court is precluded from enquiring into the grounds upon which a public decision maker based his decision?*

4. *Where the decision of the Minister affects or concerns fundamental rights, whether the Court is obliged to engage in a heightened or close scrutiny of the vires and reasonableness of the decision?*

5. *Whether the characterization of the Minister's discretion as an absolute discretion precludes judicial review of the decision?*

6. *Whether the decision by the Minister to prohibit the use of the word 'Allah' is inherently illogical and irrational in circumstances where the ban is restricted to a single publication of the restricted group while its other publications may legitimately carry the word?*

7. *Whether the use of a religious publication by a religious group within its private place of worship and for instruction amongst its members can rationally come within the ambit of a ministerial order relating to public order or national security?*

8. *Can the Executive/State which has permitted the use of the word `Allah' in the Al Kitab prohibit its use in the Bahasa Malaysia section of the Herald — a weekly newspaper of the Catholic Church (`the Herald'), and whether the decision is inherently irrational?*

9. *Whether it is legitimate or reasonable to conclude that the use of the word 'Allah' in the Herald which carries a restriction 'for Christians only' and 'for circulation in church' can cause confusion amongst those in the Muslim community?*

10. *Whether the claims of confusion of certain persons of a religious group could itself constitute threat to public order and national security?*

Part B: The Constitutional Law Questions

1. *Whether Article 3(1) of the Federal Constitution is merely declaratory and could not by itself impose any qualitative restriction upon the fundamental liberties guaranteed by Articles 10, 11(1), 11(3) and 12 of the Federal Constitution?*

2. *Whether in the construction of Article 3(1) it is obligatory for the Court to take into account the historical constitutional preparatory documents, namely, the Reid Commission Report 1957, the White Paper 1957, and the Cobbold Commission Report 1962 (North Borneo and Sarawak) that the declaration in Article 3(1) is not to affect freedom of religion and the position of Malaya or Malaysia as a secular state?*

3. *Whether it is appropriate to read Article 3(1) to the exclusion of Article 3(4) which carries the guarantee of non-derogation from the other provisions of the Constitution?*

4. *Whether it is a permissible reading of a written constitution to give precedence or priority to the articles of the constitution in the order in which they appear so that the Articles of the Federal Constitution that appear in Part I are now deemed to rank higher in importance to the Articles in Part II and so forth?*

5. *Whether on a true reading of Article 3(1) the words 'other religions may be practised in peace and harmony' functions as a guarantee to the non-Muslim religions and as a protection of their rights?*

6. *Whether on a proper construction of the Federal Constitution, and a reading of the preparatory documents, namely, the Reid Commission Report (1957), the White Paper (1957) and the Cobbold*

Commission Report (1962), it could legitimately be said that Article 3(1) takes precedence over the fundamental liberties provisions of Part II, namely, Articles 8, 10, 11(1), 11(3) and 12 of the Federal Constitution?

7. *Whether the right of a religious group to manage its own affairs in Article 11(3) necessarily includes the right to decide on the choice of words to use in its liturgy, religious books and publications, and whether it is a legitimate basis to restrict this freedom on the ground that it may cause confusion in the minds of members of a another religious group?*

8. *Whether the avoidance of confusion of a particular religious group amounts to a public order issue to deny another religious group its constitutional rights under Articles 8, 10, 11(1), 11(3) and 12 of the Federal Constitution?*

9. *Whether it is reasonable or legitimate to conclude that the use of the word 'Allah' for generations in the*

Al-Kitab (the Bahasa Malaysia/Indonesian translation of the Bible) and in the liturgy and worship services of the Malay speaking members of the Christian community in Malaysia, is not an integral or essential part of the practice of the faith by the community?

10. *Whether the appropriate test to determine if the practice of a religious community should be prohibited is whether there are justifiable reasons for the state to intervene and not the 'essential and integral part of the religion' test currently applied under Article 11(3)?*

11. *Whether the standards of reasonableness and proportionality which have to be satisfied by any restriction on freedom of speech in Article 10 and Article 8 is met by the present arbitrary restriction on the use of the word 'Allah' imposed by the Minister of Home Affairs?*

12. *Whether it is an infringement of Articles 10 and 11 of the Federal Constitution by the Minister of Home Affairs to invoke his executive powers to prohibit the use of a word by one religious community merely on the unhappiness and threatened actions of another religious community?*

13. *Whether the Latin maxim `salus populi est suprema lex' (the welfare of the people is the supreme law) can be invoked without regard to the terms of the Federal Constitution and the checks and balances found therein?*

Part C: General

1. *Whether it is appropriate for a court of law whose judicial function is the determination of legal-cum-juristic questions to embark suo moto on a determination of theological questions and of the tenets of comparative religions, and make pronouncements thereto?*

2. *Whether it is legitimate for the Court of Appeal to use the platform of 'taking judicial notice' to enter into the non-legal thicket of theological questions or the tenets of comparative religions?*

3. *Whether the Court is entitled suo moto to embark upon a search for supportive or evidential material which does not form part of the appeal record to arrive at its decision?*

4. *Whether the Court can rely on information gathered from internet research without first having determined the authoritative value of the source of that information or rely on internet research as evidence to determine what constitute the essential and integral part of the faith and practice of the Christians?*

5. *Whether the use of research independently carried out by a Judge and used as material on which the judgment was based without it first been offered for*

comment to the parties to the proceedings is in breach of the principles of natural justice?'

Contentions Of The Parties

16. In respect of Part A proposed questions learned counsel for the Applicant began his submission by highlighting the uncertainty in the source of power under which the 1st Respondent imposed the conditions as stipulated in the said letter including the impugned decision. The 1st Respondent was silent in his source of power while the judges of the Court of Appeal were diverged.

17. Learned counsel pointed out that Mr. Justice Abdul Aziz JCA held the power was to be found in Section 12 of the Act together with the Form B conditions while Mr. Justice Mohd Apandi Ali JCA (as he then was) relied on section 26, or the implied power under section 40 of the Interpretation Act 1967 as the source of the power.

18. Thus it was submitted that the source of the Minister's power to impose a ban on the use of a word by a religious body should be clearly settled by this Court.

19. It was further submitted that leave should be granted for the following reasons:

i. The decision of the Court of Appeal in this case could not be reconciled with an earlier decision of the same Court dealing with the same provision of the Act. In **Dato' Syed Hamid Albar v. Sisters in Islam (2012) 9 CLJ 297** the Court of Appeal affirmed the lifting on the ban of a book said to cause 'confusion' in the minds of women in the Muslim community since '*no evidence of actual prejudice to public order was produced' and that the book had been in circulation for 2 years before the ban'*;

ii. The Court of Appeal in this case applied the subjective test as the applicable test for the Act without any consideration to the post - Karam Singh decisions (see: **Karam Singh v Menteri Hal Ehwal Dalam Negeri Malaysia [1969] 2 MLJ 129**) such as **Mohd Ezam v. Ketua Polis Negara (2002) 4 MLJ 449**; **Darma Suria v. Menteri Dalam Negri (2010) 1 CLJ 300**; **Chng Suan Tze v. Minister of Home Affairs**

(1989) 1 MLJ 69 [Singapore case]) which adopted the objective test';

iii. There is a prevailing confusion in the courts below as to the applicable test in the exercise of an administrative or ministerial power especially relating to a decision of the 1st Respondent under the Act. Is it a subjective test or an objective test or a fusion of the two? The 'fusion test' as propounded in **Arumugam v. Menteri Keselamatan (2013) 5 MLJ 174** was not supported by any case authority;

iv. The Court of Appeal applied the Wednesbury reasonableness principle based on 'subjectively objective' test which is a contradiction in terms as it incorporates two concepts that cancel out each other;

v. The Court of Appeal reverted to the anachronistic concept of absolute discretion instead of adopting the current trend that all discretionary power is subject to review as decided in several cases. (See: **Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn**

Bhd [1979] 1 MLJ 135; **Menteri Sumber Manusia v. Association of Banks (1999) 2 MIJ 337**);

vi. The Court of Appeal adopted the pre-Ramachandran (**R. Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC**) concept of judicial review and failed to consider the current law that permits review in the substance as well as in the process when determining the reasonableness of a decision by a public authority. (See: **Datuk Justin Jinggut v. Pendaftar Pertubuhan (2012) 1 CLJ 825**). In view of the varying approach taken by the Court of Appeal in this case it is only appropriate that the Federal Court should re-look at the issue;

vii. The Court of Appeal in coming up with its decision relied on the mere declaration by the 1st Respondent as having acted on public order or national security thus precluded review instead of being satisfied as to the reasonableness of the action premised on the material upon which the 1st Respondent acted;

viii. There is a need to determine what is the current administrative law pertaining to the exercise of power on the ground of public order and national security in view of what was said by Abdoolcader SCJ in **JP Berthelsen v. DG Immigration (1987) 1 MLJ 134** at 138: …'*no reliance can be placed on a mere ipse dixit of the first respondent (the Director General)*' and '*in any event adequate evidence from responsible and authoritative sources would be necessary*';

ix. In administrative law there is a distinction between an unreasonable decision and a decision made in bad faith yet the Court of Appeal did not deem it significant when it held that there was no assertion by the Applicant that the 1st Respondent acted mala fide;

x. There is a need to consider the '*current developments in administrative law which recognizes that 'where fundamental rights are allegedly violated by ministerial or executive orders the courts are obliged to engage in 'a closer or heightened scrutiny' of the reasonableness of the decision*' on Wednesbury grounds (See: **Associated**

Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 KB 223) *or independent of it*';

xi. Whether the occurrences of disturbance or disorder post-High Court judgment could justify the ban as ruled by the Court of Appeal. '*Judicial review is concerned with the reasonableness of the decision at the time of the decision.'* (See: **Hong Leong Equipment Sdn Bhd v Liew Fook Chuan And Another Appeal (1996) 1 MLJ 481**);

xii. Whether proportionality is a determining factor in considering the reasonableness of the 1st Respondent's decision 'as done by the Court of Appeal in **Datuk Justin Jinggut** (supra) and **Md Hilman v. Kerajaan Malaysia (2011) 9 CLJ 50**; and

xiii. The Court of Appeal failed to maintain a proper balance between competing interests as seen in the way it handled the 'public order' and 'confusion' issue. It did not reflect the measured approach taken by our courts in previous cases where there was a determination by the courts on whether the ground proffered by the Minister could legitimately be

a 'public order' ground'. (See: **Minister for Home Affairs v. Jamaluddin (1989) 1 MLJ 418**; **Sisters in Islam v. Syed Hamid Albar (2010) 2 MLJ 377**).

20. In rebuttal the learned Senior Federal Counsel ('the SFC') appearing for the 1st and 2nd Respondents submitted as follows:

i. That the Applicant was only challenging the condition (i), that is, on the use of the word 'Allah' in the Bahasa Malaysia section of the Herald;

ii. That '*upon reading the judgments of the three judges of the Court of Appeal, the obvious conclusion is that the appeal concerns with and only with a judicial review of a Minister's decision which was based on public security and public order consideration*';

iii. That '*the cardinal principle governing the approach by the courts when reviewing the decision of a public authority is that judicial review is only concerned with the decision making process and not on the decision itself*';

iv. That '*the Court of Appeal in allowing the Respondents' appeal had looked at the facts of the case and available evidence and found that the Minister's decision to impose the conditions are on grounds of national security and public order*'. As such that the principle in relation to reviewing matters of national security and public order applies in this circumstance and this principle is already a settled law;

v. That accordingly the proposed questions (1), (3), (5), (6), (8) and (10) do not meet the requirements of Section 96 of the CJA and the guiding principles in **Terengganu Forest** case (supra). The proposed questions do not raise any issue on national security and public order;

vi. That the proposed question 2 '*calls for this court to deliberate on a set of facts peculiar to this case*';

vii. That only the Government can decide on matter of national security having access to the necessary information. (See:

Council of Civil Service Unions & Ors v Minister of Civil Service [1985] AC 374);

viii. That in **Kerajaan Malaysia & Ors v Nasharuddin Nasir [2004] 1 CLJ 81** it was held that on issue of national security the subjective test applied on the satisfaction of the Minister;

ix. The law on review over matters of national security and public order was settled in the case of **Mohamad Ezam bin Mohd Noor v Ketua Polis Negara (and 4 other appeals) [2002] 4 MLJ 449**. Thus the proposed question 4 is unnecessary; and

x. That the issue in proposed questions 7 and 9 was not an issue before the Court of Appeal since condition (ii) in the said letter was not challenged.

21. In their common submission the 3rd to 9th Respondents basically submitted the following points:

i. That being the respective heads of the religion of Islam absolute discretionary power rests upon the Yang Di Pertuan Agong in the non-Ruler States and upon the Rulers in order to protect the religion, including the power to impose restrictions on the propagation of other religions to Muslims. The exercise of such power is non-justiciable;

ii. That the impugned decision was made on national interest and public order;

iii. That the right given to the Applicant was subject to national security;

iv. That under the **Interpretation Act 1967** the power to give licence includes the power to add conditions;

v. That there was no allegation of mala fide in the 1st Respondent's action; and

vi. That the 1st Respondent did not act irrationally, unreasonably or illegally.

22. The additional points submitted by the 8th Respondent were these:

i. That the onus was on the Applicant to prove that the meaning of the word ‘God’ is ‘Allah’;

ii. That the decision of the 1st Respondent was consonant with Articles 3 and 11 of the FC; and

iii. That Article 3(1) of the FC imposes upon the Government an obligation to protect the religion of Islam so that there is no confusion in the use of the word ‘Allah’ by the Christian religion.

23. As for the 9th Respondent it was submitted thus:

i. That the word ‘Allah’ is not an integral part of the Christian religion in the same way as it is for Islam. For the former it is merely a translation issue while for the latter it is the God for Muslims;

ii. That Article 11 (1) of the FC must be read together with Articles 3(1), 3(5), 11(4) and 11(5) '*in order to strike a balance and harmony especially in the circumstances where the subject matter has a profound effect to the religion of Islam*'. As such the prohibition on the use of the word 'Allah' by the Herald is not unconstitutional;

iii. That Article 11(5) of the FC does not authorize any act contrary to any general law relating to public order, public health or morality. Further, '*the practice of other religions must be in harmony with the position of Islam' being the dominant religion of the Federation as provided for under Article 11(4)*';

iv. That the features which give rise to the constitutional identity of the FC are Islam, Malay Rulers and Malay elements; and

v. That there is no evidence to indicate that the use of the word 'Allah' is '*essential part of worship and instruction in the faith of the Malay (Bahasa Malaysia) speaking community in the Catholic Church in Malaysia*'.

Analysis And Findings

The Law

24. In considering Encl. 2[a] it is important to bear in mind the basic guiding legal principles involved in leave application, the relevant administrative law principles in judicial review application and to a certain extent constitutional interpretation principles.

For Leave Application

25. Section 96 (a) and (b) of CJA reads:

> *'96. Conditions of appeal*
>
> *Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court —*
>
> *(a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its*

original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or

(b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.'

26. In **Kredin Sdn Bhd v OCBC Bank (M) Bhd [1998] 3 MLJ 78** it was held that *'in a civil cause or matter, leave to appeal from the Court of Appeal to the Federal Court is a matter of discretion and not of right'*. However, it is also important to note the other observations by Edgar Joseph Jr. FCJ, namely:

a. That based on the opening words in section 96 it is clear that the conditions upon which leave to appeal may be granted is subject to the '*rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal*';

b. That the applicable rule is the **Rules of the Federal Court 1995**;

c. That *'there is no Rule requiring the application for leave to set forth shortly the facts and points of law, and to conclude with a summary of reasons for leave being granted'*;

d. That section 96 provides a discretionary power in order to prevent frivolous and needless appeals and *'to avoid overburdening the Court of last resort with a spate of appeals if it is as of right*.'

27. Section 96(a) of CJA also came under scrutiny in this Court quite recently. In **Terengganu Forest Products Sdn Bhd** [supra]) Zaki Azmi CJ said that it was necessary in order *'to resolve inconsistencies in the judgments'* of **Datuk Syed Kechik** case (supra) and **Joceline Tan Poh Choo & Ors v V Muthusamy [2008] 6 MLJ 621**. And the learned Chief Justice preferring the decision in the former case went on to state the following:

a. That leave '*is granted if there are reasonable prospects of success'*;

b. That the test is '*whether the appeal -- if leave were given -- would lead to a just and reasonably prompt resolution of the real issue between the parties';*

c. That *'leave will not be given if the decision would be purely academic'*;

d. That to *'obtain leave it must be shown that it falls under either of the two limbs of s 96(a) but they can also fall under both limbs'. Otherwise the purpose of s 96 is not to allow for correction of ordinary errors committed by the lower courts as would in an appeal as of right, particularly where the relevant laws are well settled*';

e. That mere *'allegation of injustice by itself should not be a sufficient reason for leave to be granted. But once leave is granted on any one or more grounds discussed in this judgment this court can of course hear any allegation of injustice*'; and

f. That '*Leave to appeal against interpretation of statutes will not be given unless it is shown that such interpretation is of public importance'*.

28. Indeed in **Datuk Syed Kechik** case (supra) Edgar Joseph Jr. FCJ opined:

a. That *'the circumstances for granting leave applications in the Federal Court appear to be limited to the two situations stated'* in section 96(a)*;*

b. That the *'paramount consideration is, of course, that the judgment of the Court of Appeal must in the language of s. 96(a) raise a question of general principle not previously decided by the Federal Court or a question of importance on which further argument and a decision of the Federal Court would be to public advantage **but** these criteria are, in our view, not exclusive'*; (Emphasis added).

c. That an *'assessment of the prospects of success should leave be given is, of course, an important factor which the Federal Court would have to take into account*'; and

d. That *'an application for leave should be dismissed not so much on the case – although that may have a bearing on the result of the application – as on the degree of public importance and on the necessity of the legal issue being finally resolved by the Federal Court.*' (Emphasis added).

29. As regards section 96(b) there is hardly any judgment of this Court that dealt with it. But it should be given the same approach as section 96(a), inter alia, to consider '*the degree of public importance and on the necessity of the legal issue being finally resolved by the Federal Court.*' Its application is not impeded by any other rules other than as discussed in **Kredin Sdn Bhd** (supra).

30. Thus, based on the above guidelines or criteria but which are not exclusive, it may be said that there are some critical factors which should not be overlooked when considering an application for leave under section 96, namely:

a. That the issues involved are of sufficient importance and novelty that clarification of the law is in public interest; or

b. That '*the degree of public importance and on the necessity of the legal issue being finally resolved by*' this Court; or

c. That there may be two or more different judgments of the Court of Appeal which are in direct conflict against each other. As such a decision of the Federal Court is necessary to determine which of the conflicting judgments should be subsequently followed or otherwise.

31. It is interesting to note the approach by the courts in some other common law jurisdictions on the issue of leave application. In summary, it seems the common requirements in the granting of leave to appeal are that it is in the interest of justice and the question is one of general importance in which further argument and a decision of the court would be of public advantage.

32. In **Ex parte Gilchrist, In re Armstrong (1886) 17 Q.B.D. 521** at 528 Lord Esher, M.R., said: *'Merely to say that they are satisfied*

their decision is right is not, I venture to suggest, a sufficient reason for refusing leave to appeal, when the question involved is one of principle and they have decided it for the first time. If that was carried to its legitimate conclusion, they ought to refuse leave to appeal in every case'.

33. And in **Buckle v Holmes (1926) 2 KB 125** Banks LJ at page 127 said this:

> *'We gave leave to appeal in this case, not because we thought there was any real doubt about the law, but because the question was one of general importance and one upon which further argument and a decision of this Court would be to the public advantage.'* (Emphasis added).

34. The New Zealand High Court was more elaborate in its requirements as shown in the case of **Ramsay v Accident Compensation Corporation [2004] NZAR 1**. It was held that the *'purpose of special leave was to ensure sensible use of scarce judicial time. Ultimately it was a matter of discretion for the Court but normally an applicant had to show that a principle*

or considerable amount was at stake, a reasonable prospect of success (or an error of law capable of bona fide, serious argument) and that leave was required in the interests of justice. Special leave was significant, not granted as a matter of course. Further, a 'question of law included whether a statutory provision was properly construed or applied to the facts; a mixed question of law and fact; a decision supported by no evidence or evidence inconsistent with and contradictory of the decision or where the only reasonable conclusion contradicted the decision; a conclusion not reasonably open to the Judge; and whether evidence was relevant to the particular issue'.

For Judicial Review Application

35. As regards the relevant administrative law principles applicable in judicial review application, the traditional governing principle was that it did not allow the court to make findings of fact on matters within the province of a Minister or to substitute the discretion of a Minister with the court's discretion. *'Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of*

preventing the abuse of power, be itself guilty of usurping power' per Lord Brightman in **North Wales Police v Evans [1982] 3 All ER 141**. Nevertheless the court may quash a decision by a Minister if he failed to interpret or apply the law correctly, if he failed to take into account matters which he was required by law to consider or took into account matter which he was not required by law to consider or where his decision was so irrational or perverse that no reasonable Minister could have made it. (See: **Associated Provincial Picture Houses Ltd v. Wednesbury Corporation** [supra].

36. In our jurisprudence the current governing principle is that an *'inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law… If an inferior tribunal or other public decision-taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded, where resort is had to an unfair procedure where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision'. … It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error*

of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law'. (See: **Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union (1995) 2 MLJ 317** at page 342 per Gopal Sri Ram JCA (as he then was); **Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369**). There have also been some positive developments in our administrative law thus expanding the traditional principle. (See: **R. Rama Chandran v The Industrial Court of Malaysia & Anor** (supra); **Datuk Justin Jinggut v. Pendaftar Pertubuhan** [supra]).

Part A Proposed Questions

37. Now, having perused the proposed questions in Part A and having considered the submissions of all the parties the issue is whether the points raised by the Applicant have satisfied the requirements of section 96 (a).

38. On the materials before this Court there is merit in the submission on the source of power of the 1st Respondent in stipulating the conditions in the said letter including the impugned decision. The said letter did not state the provision of the law under which those conditions including the impugned decision were made. In fact the said letter merely stated that the application for the publication permit was approved subject to the conditions stipulated therein. As such it is an important point to be considered by this Court in order to clear the uncertainty since even the judges of the Court of Appeal were diverged. It goes to the root of whether the 1st Respondent has the absolute discretion to make the impugned decision impervious of judicial review. If he had not exercised his power under an appropriate provision of the law then the impugned decision and the decision of the Court of Appeal upholding it could be called into question. Further, whatever the source of power Articles 8, 10, 11 and 12 of the FC are to be superimposed on and to be read into the 1st Respondent's powers under the Act. Accordingly, leave should be granted on this point under the proposed question 5 of Part A or alternatively this Court is not constrained to formulate a

question on the point when granting leave. (See: **Terengganu Forest Products Sdn Bhd** [supra]).

39. Next, there are divergent views not only between the parties in this case but also in the decisions of the Court of Appeal on the scope and nature of power of the 1st Respondent under the Act.

40. In **Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri) v Sis Forum (Malaysia) (2012) 9 CLJ 297** the Court of Appeal when considering section 7 (1) of the Act opined that although the power to ban the book entitled "Muslim Women and the Challenges of Islamic Extremism" ('the Book') was at the absolute discretion of the Minister, such exercise of discretion was dependent upon him being satisfied '*as to these precedent objective facts*', namely, that the Book or any part of it was:

i. in any manner prejudicial to or likely to be prejudicial to public order, morality, security; or

ii. likely to alarm public opinion; or

iii. likely to be contrary to any law; or

iv. likely to be prejudicial to public interest or national interest.

41. In dismissing the appeal the Court of Appeal held that *'the learned judge conducting the judicial review examined s. 7(1) and apprised himself of the precedent objective facts before the absolute discretion arose to be exercised. Then taking into consideration the fact not disputed that the Book had been in circulation for two years before the order to prohibit it was made, and that there was no evidence shown of prejudice to public order during that period, the learned judge questioned the exercise of the discretion and quashed the order to prohibit the Book. It was clearly an examination confined to the decision-making process as to whether it was illegal, or irrational in the particular circumstances.*'

42. Obviously the Court of Appeal did not simply accept the claim of absolute discretion by the Minister to be beyond the tentacles of judicial review and that he could exercise it with such impunity. Indeed no discretion can be absolute. (See: **Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd** [supra]).

43. Accordingly, the 1st Respondent in exercising his power under the Act must act in accordance with law that includes the FC, the

supreme law of the Federation. Thus, any exercise of power must be justified both under the Act and under the FC.

44. But in **Arumugam Kalimuthu v Menteri Keselamatan Dalam Negeri & Ors (2013) 1 LNS 296** the Court of Appeal was confronted again with section 7(1) of the Act. In coming to its decision the Court of Appeal made reference to **Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri) v Sis Forum (Malaysia)** (supra) but did not follow or make any attempt to distinguish it.

45. In dealing with the power of the 1st Respondent under the said provision the Court of Appeal said this at pages 296-297:

> *'It is our considered view that the legal issue here is not as simplistic as proposed by the appellant. It is not a clear case of objective test or subjective test. It is a fusion of both! It depends on the wordings of the enabling law that conferred such powers to the Minister.*

…….

The wordings in Section 7(1): "if the Minister is satisfied" and "he may in his absolute discretion by order" are clear manifestations of the power being vested personally in the Minister and corollary to that vesting, any exercise of such power is to the subjective satisfaction of the Minister. Here the test for such satisfaction is subjective. It is without doubt a subjective discretionary power of the Minister'.

46. Surely such divergence of views requires this Court to clear the confusion as to the correct test applicable in the exercise of power by the 1st Respondent under the Act. Is the test objective, subjective or a fusion of the two? No doubt in the two cases mentioned the Court of Appeal was dealing with section 7(1) of the Act whereas in the present case the Court of Appeal was dealing with conditions attached to the publication permit. Notwithstanding, the common issue is to determine which test to apply in the exercise of power by the 1st Respondent under the Act. Moreover in the present case the phrase 'subjectively objective' test was also used in considering the impugned decision. This is another point that requires the determination by this Court.

47. Hence, leave should be granted on proposed questions 1, 2, 3, 5, 9 and 10 of Part A.

48. Had the Court of Appeal in this case followed the decision in **Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri) v Sis Forum (Malaysia)** (supra) it would have considered whether the 1st Respondent had apprised himself '*of the precedent objective facts*' before imposing the conditions in the said letter including the impugned decision.

49. And taking into consideration the undisputed fact that the Herald had been in circulation for the past fourteen years before the imposition of the impugned decision and '*that there was no evidence shown of prejudice to public order during that period*' and the use of the word 'Allah' was not prohibited in other publications such as the Al' Kitab and the Sikh Holy Book, there is a serious issue in the exercise of his discretion by the 1st Respondent. The threat or fear of public disorder must not be fanciful or too remote. Should the test of public order be on the basis of a 'clear and present danger'? (See: **Schenck v United States [1919] 249 US 47; Whitney v California 274 US 357**).

Or to adopt the view of the Court of Appeal in this case. The proposed questions 6, 7 and 8 of Part A cover this issue and leave should therefore be granted as well.

50. There is also the issue of what is the current trend of approach when it comes to national security and public order. Public order and national security are not synonymous. Yet in this case the Court of Appeal appeared to have used the two terms interchangeably. There is therefore a need by this Court to determine whether to distinguish them or to link them together. Further, learned SFC submitted that it is still the subjective test as decided in **Karam Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia** (supra). But learned counsel for the Applicant argued that the approach has changed as indicated in the subsequent decisions of this Court in cases such as **Mohd Ezam v. Ketua Polis Negara** (supra); **Darma Suria v. Menteri Dalam Negri** (supra); **Chng Suan Tze v. Minister of Home Affairs** (supra); **JP Berthelsen v. DG Immigration** (supra). Surely this is an opportunity for this Court to determine once and for all the direction of the law that deals with exercise of discretionary power by the Executive. Is this Court to push the horizons of law forward or to restrict or retrogress them?

51. Incidentally, it is interesting to note that the earlier cases such as **Karam Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia** (supra) were considering the Internal Security Act 1960 (now repealed) while in this case it is the Act. It has been said that when dealing with a different statute special attention must be directed to the provisions of that statute. (See: **Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & 3 Ors v Liau Nyun Fui [1991] 1 CLJ 458**). Further, decisions under a different statute are not generally precedents for the construction of another statute. (See: **London and North Eastern Railway Company v Berriman (1946) 1 A.C 278**). To assert therefore that the decisions in those security cases must be followed when dealing with issues under the Act is indeed contentious.

52. There is also the issue of whether the Court of Appeal should have considered that '*where fundamental rights are allegedly violated by ministerial or executive orders the courts are obliged to engage in 'a closer or heightened scrutiny' of the reasonableness of the decision*' on Wednesbury grounds. Indeed it is a legal principle that *'statutes which encroach on the rights of a subject whether as regards person or property are*

subject to a strict construction in the same way as penal statutes. It is also settled rule that such statutes should be construed, if possible, so as to respect such rights'. (See: **Walsh v Secretary of State for India [1863] 11 ER 1068; Hough v Windus [1883-1884] 12 QBD 224**).

53. There was much reliance by the learned SFC on the case of **Council of Civil Service Unions & Ors v Minister of Civil Service** (supra) when submitting that on matter of national security the Executive has the final say.

54. With respect, while the case referred to, gave the Minister considerable leeway in matters of national security, there was no abdication by the courts and no assertion that matters of security were totally non-justiciable. In fact there was a clear assertion that although the Minister was the better judge of security considerations, that did not exclude the power of the courts to determine whether security was indeed involved. The Minister's exercise of power was not entirely subjective. The Minister must offer evidence to convince the courts that security considerations were indeed in play. Hence, the test for the exercise of power must be objective and not subjective.

55. In fact it should be noted that the *'common law of judicial review in England and Wales has not stood still in recent years. Starting from the received checklist of justiciable errors set out by Lord Diplock in the CCSU case [1985] AC 374, the courts (as Lord Diplock himself anticipated they would) have developed an issue-sensitive scale of intervention to enable them to perform their constitutional function in an increasingly complex polity. They continue to abstain from merits review – in effect, retaking the decision on the facts – but in appropriate classes of case they will today look very closely at the process by which facts have been ascertained and at the logic of the inferences drawn from them. Beyond this, courts of judicial review have been competent since the decision in Anisminic [1969] 2 AC 147 to correct any error of law whether or not it goes to jurisdiction…'*. (See: **Q' & Ors, R (on the application of) v Secretary of State for the Home Department [2003] EWCA Civ 364** at para 112).

56. And in this connection it may be timely to recall the advice of Raja Azlan Shah J. (as His Majesty then was) when he said that the *'winds of change must be heeded in the corridors of the courts if we in the law are to keep abreast of the times'*. (See:

Chandrasekaran & Ors v Public Prosecutor [1971] 1 MLJ 153).

57. As such there is therefore a need for this Court to clarify which direction our administrative law should take and in the process to determine the decision of the Court of Appeal in this case. Leave should therefore be given. The proposed questions 2, 3, 4 and 5 of Part A cover this point.

Part B Proposed Questions

58. There is a dispute whether the proposed questions in Part B are necessary. The learned SFC seemed to think that their determination would not reverse the decision of the Court of Appeal since it was dealing with judicial review action. Learned counsel for the Applicant submitted otherwise. It was also highlighted that the learned judges of the Court of Appeal dealt with the issues covered by those proposed questions.

59. With respect, having read the judgments of the learned judges of the Court of Appeal, it is quite clear that in upholding the

impugned decision they also relied on their interpretations of the relevant Articles in the FC.

60. As submitted by learned counsel for the Applicant the interpretations by the learned judges of the Court of Appeal to some of the key Articles in the FC have the following consequences or implications, namely:

i. That Article 3(1) takes precedence over the other Articles including those dealing with fundamental rights and liberties since it comes before the others;

ii. That in interpreting Article 3(1) the significance of Articles 3(4), 11(1) and 11(4) have been derogated or overlooked. The effect of the interpretation by the Court of Appeal is that other religions may be practiced in peace so long as it is in harmony with Islamic precepts and doctrines;

iii. That the interpretation of Article 3(1) is contrary to the documentary evidence on the formation of the Federation being a secular State. The case of **Che Omar Bin Che**

Soh v Public Prosecutor [1988] 2 MLJ 55 was cited in support.

iv. That the Court of Appeal made the essential and integral part of the religion test exclusive without due consideration to the other provisions in Article 11 which allow other religions to profess, practice and manage their own affairs. Reference was also made to the case of **Meor Atiqulrahman bin Ishak (an infant, by his guardian ad litem, Syed Ahmad Johari bin Syed Mohd) & Ors v Fatimah bte Sihi & Ors [2006] 4 MLJ 605**; and

v. That the impugned decision as upheld by the Court of Appeal has curtailed the rights of the Bahasa Malaysia speaking Christians from Sabah and Sarawak thus contrary to Article 11(1) and (3) of the FC.

61. There are merits in the foregoing submissions by learned counsel for the Applicant. This case only involved the Bahasa Malaysia section of the Herald. Yet the decision of the Court of Appeal seems to sanction a sweeping, general prohibition against the use of the word 'Allah' by all non-Muslims in all forms

on all occasions. Most of the groups affected such as the Sikh community were not parties in this case.

62. Further, on the test of essential and integral part of religion, there is no reason why the rights under Article 11 of FC should be confined to those that are essential and integral or at the core of the religion. On matters of freedom of religion the protection should be all encompassing and not restricted or compartmentalized.

63. Hence, unless further determined by this Court the interpretations of the relevant Articles in the supreme law of the Federation by the Court of Appeal have to be accepted as correct, the law and binding upon the courts below and upon the citizenry of the Federation.

64. It is disquieting in this case to note that in determining the ranking of importance of the various Articles in the FC the Court of Appeal seems to have adopted the 'first-come basis' approach. It can lead to an interpretation that the Judiciary ranks inferior to the Legislature and the Executive as in the FC it comes after the two branches. Surely the drafters and the founding

Fathers of the Federation would not have anticipated such an approach. Further, the basic structure of the FC is sacrosanct. The various documents, being the initial foundation in the formation of the Federation, must not be cast aside as mere historical artifacts. (See: **Datuk Hj Mohammad Tufail bin Mahmud & Ors v Dato Ting Check Sii [2009] 4 MLJ 165 FC**).

65. As such it is only appropriate that leave should be granted on those proposed questions so that this Court has the opportunity to consider whether the relevant Articles in the FC have been correctly interpreted and thus justified the upholding of the impugned decision.

66. Leave to appeal on the proposed questions in Part B should therefore be allowed as they have met the requirement of section 96(b) of the Act.

Part C Proposed Questions

67. In opposing leave on the proposed questions in Part C learned SFC submitted as well that their determination would not reverse the decision of the Court of Appeal and thus not within section 96 of CJA.

68. Learned counsel for the Applicant submitted that the proposed questions in Part C come within section 96(a). They involve novel points and further argument on them is important and of public advantage. They deal with the appropriateness of the learned judges of the Court of Appeal in conducting their own research via the Internet and relying on the information and points obtained therefrom to substantiate their judgments. The parties were not given any prior opportunity to submit on those materials obtained. The case of **Pacific Forest Industries Sdn. Bhd and Anor v Lin Wen-Chih & Anor (2009) 6 MLJ 293** was cited in support of the argument.

69. There is merit in the submission of learned counsel for the Applicant. Firstly, accepting the submission of learned SFC would set a precedent binding on the lower courts yet untested

before this Court. Secondly, the Court of Appeal relied upon the materials gathered suo moto from the Internet in upholding the impugned decision. As such the determination of the proposed questions in Part C would have a bearing on the fate of decision of the Court of Appeal.

70. Accordingly, leave should be granted on those proposed questions in Part C.

Conclusion

71. For the above reasons the Applicant has satisfied the requirements of section 96 (a) and (b) of CJA. It deserves to be reemphasized that in addition to those requirements one factor must also be given serious consideration, namely, the degree of public importance of those legal issues raised by the Applicant and on the necessity of them to be finally resolved by the Federal Court. Accordingly, leave to appeal should be granted on all the proposed questions in Part A, B and C as prayed for in Enclosure 2[a]. Some of them might overlap but such technical matter should be addressed at the outset of the hearing proper of the appeal. Order in terms to the other orders sought for in

Enclosure 2(a) is also granted. There should be no order as to costs.

Signed.
(RICHARD MALANJUM)
Chief Judge, Sabah and Sarawak

Dated: 23rd June 2014

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