IN THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPLICATION NO.: 08-690-11/2013

BETWEEN

TITULAR ROMAN CATHOLIC ARCHBISHOP
OF KUALA LUMPUR … APPLICANT

AND

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

[IN THE COURT OF APPEAL OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO.: W-01-1-2010

BETWEEN

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

AND

TITULAR ROMAN CATHOLIC ARCHBISHOP

OF KUALA LUMPUR … RESPONDENT

IN THE HIGH COURT OF MALAYA IN KUALA LUMPUR

APPLICATION FOR JUDICIAL REVIEW NO.: R1-25-28-2009

BETWEEN

TITULAR ROMAN CATHOLIC ARCHBISHOP
OF KUALA LUMPUR … APPLICANT

AND

1. MENTERI DALAM NEGERI
2. KERAJAAN MALAYSIA … RESPONDENTS]

CORAM:

ARIFIN ZAKARIA (CJ)
RAUS SHARIF (PCA)
ZULKEFLI AHMAD MAKINUDIN (CJM)
RICHARD MALANJUM (CJSS)
SURIYADI HALIM OMAR (FJC)
ZAINUN ALI (FCJ)
JEFFREY TAN KOK WHA (FCJ)

JUDGMENT OF ARIFIN ZAKARIA (CJ)

INTRODUCTION

[1] This is an application for leave to appeal against the decision of the Court of Appeal dated 14.10.2013 in allowing the respondents' appeal against the decision of the High Court. A number of questions of law were posed by the applicant and are divided into three parts. (see Appendix)

FACTS

[2] The applicant is the publisher of "Herald – the Catholic Weekly" (the Herald). The Herald is published on behalf of the Bishops of Peninsular Malaysia pursuant to a publication permit (the permit) issued by the 1st respondent under the Printing Presses and Publications Act 1984 (the Act).

[3] The 1st respondent is the Minister charged with the responsibility of regulating the publishing and distribution of publications under the Act (the Minister).

[4] The 2nd respondent is the Government of Malaysia.

[5] The 3rd to 7th and the 9th Respondents are the Islamic Councils of the States of Terengganu, Wilayah Persekutuan, Melaka, Johor, Kedah and Selangor. The 8th respondent is the Malaysian Chinese Muslim Association.

[6] The applicant was granted a publication permit by the Minister vide letter dated 30.12.2008 to publish the Herald in four languages, namely Bahasa Melayu, English, Tamil and Chinese. The relevant part of the permit reads:

> *"KELULUSAN PERMOHONAN PERMIT PENERBITAN.*
>
> *…*
>
> *2. Sukacita dimaklumkan permohonan tuan telah diluluskan dengan bersyarat seperti butiran di bawah:*
>
> *i) Penerbitan dalam Bahasa Melayu tidak dibenarkan sehingga keputusan mahkamah berkaitan kes penggunaan kalimah "ALLAH" diputuskan.*
>
> *ii) Penerbitan ini hendaklah dijual di gereja sahaja.*
>
> *iii) Di muka surat depan majalah mestilah memaparkan "Bacaan ini hanya untuk penganut agama Kristian sahaja"."*

[7] Aggrieved with the conditions imposed by the Minister, the applicant then wrote to the Minister vide letter dated 2.1.2009 requesting the Minister to reconsider the decision and revoke the aforesaid conditions. The relevant part of the letter reads:

> "*We are therefore advised and verily believe that this condition constitutes a serious violation of our constitutional freedom of expression and speech. It also prohibits and/or diminishes the rights of the citizens of this country to express themselves and communicate in the national language in clear contravention of the spirit and intent of the National Language Act 1967. Further*

connecting the matter of the publication in Bahasa Malaysia with the determination of the pending judicial review proceedings is not only grossly unreasonable, irrational and illegal but also reeks of ill-will and bad faith in that this condition serves as a form of retribution or punishment on account of our filing of the pending judicial review proceedings in the High Court.

…

We therefore seek that you reconsider your decision and revoke the conditions cited in your letter under reference."

[8] In reply, the Minister vide letter dated 7.1.2009 to the applicant, after reconsidering his decision, approved the permit for publication subject to the condition that the applicant be prohibited from using the word "Allah". The letter reads:

"KELULUSAN PERMOHONAN PERMIT PENERBITAN
"HERALD – THE CATHOLIC WEEKLY"

…

2. Untuk makluman pihak tuan, Bahagian ini telah membuat pertimbangan semula ke atas kelulusan permohonan permit penerbitan bagi penerbitan dengan tajuk di atas dan keputusannya adalah seperti berikut:

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 "<u>TERHAD</u>" yang membawa maksud penerbitan ini adalah

terhad untuk edaran di gereja dan kepada penganut Kristian sahaja.

3. Sehubungan ini, kelulusan dengan bersyarat yang telah dikenakan ke atas penerbitan ini pada 30 Disember 2008 (Ruj Kami: KDN: PQ/PP 1505(8480) (101) adalah dengan sendirinya terbatal."

HIGH COURT

[9] Dissatisfied with the decision of the Minister, the applicant then filed an application for judicial review under O.53 r.3 (1) of the Rules of the High Court 1980 (the RHC), challenging the decision of the Minister in which the following reliefs were sought:

"(a) the Applicant be granted leave pursuant to Order 53 Rule 3(1) of the Rules of the High Court 1980 to apply for an Order of Certiorari to quash the decision of the Respondents dated 7.1.2009 that the Applicant's Publication Permit for the period 1.1.2009 until 31.12.2009 is subject to the condition that the Applicant is prohibited from using the word "Allah" in "Herald – The Catholic Weekly" pending the Court's determination of the matter;

(b) Jointly or in the alternative, that the applicant be granted leave pursuant to Order 53 Rule 3(1) of the Rules of the High Court 1980 to apply for the following Declarations:-

(i) that the decision of the Respondents dated 7.1.2009 that the Applicant's Publication Permit for the period 1.1.2009 until 31.12.2009 is subject to the condition

that the Applicant is prohibited from using the word "Allah" in "Herald – The Catholic Weekly" pending the Courts determination of the matter is illegal and null and void;

(ii) *that pursuant to Article 3(1) of the Federal Constitution the Applicant has the constitutional right to use the word "Allah " in "Herald – The Catholic Weekly" in the exercise of the Applicant's right that religion other than Islam may be practised in peace and harmony in any part of the Federation;*

(iii) *that Article 3(1) of the Federal Constitution which states that Islam is the religion of the Federation does not empower and/or authorise the Respondents to prohibit the Applicant from using the word "Allah" in "Herald – The Catholic Weekly";*

(iv) *that pursuant to Article 10 of the Federal Constitution the Applicant has the constitutional rights to use the word "Allah" in "Herald – The Catholic Weekly" in the exercise of the Applicant's right to freedom of speech and expression;*

(v) *that pursuant to Article 11 of the Federal Constitution the Applicant has the constitutional right to use the word "Allah" in "Herald – The Catholic Weekly" in the exercise of the Applicant's freedom of religion which includes the right to manage its own religious affairs;*

(vi) *that pursuant to Article 11 and Article 12 of the Federal Constitution the Applicant has the constitutional right to use the word "Allah: in 'Herald – The Catholic Weekly"*

in the exercise of the Applicant's right in respect of instruction and education of the Catholic congregation in the Christian religion;

(vii) *that the Printing Presses and Publications Act 1984 does not empower and/or authorise the Respondents to prohibit the Applicant from using the word "Allah" in "Herald – The Catholic Weekly";*

(viii) *that the decision of the Respondents dated 7.1.2009 that the Applicant's Publication Permit for the period 1.1.2009 until 31.12.2009 is subject to the condition that the Applicant is prohibited from using the word "Allah" in "Herald – The Catholic Weekly" pending the Court's determination of the matter is ultra vires the Printing Presses and Publication Act 1984; and*

(ix) *that the word "Allah" is not exclusive to the religion of Islam.*

(c) *An order for stay of the decision of the Respondents dated 7.1.2009 that the Applicant's Publication Permit for the period 1.1.2009 until 31.12.2009 is subject to the condition that the Applicant is prohibited from using the word "Allah" in "Herald – The Catholic Weekly" pending the Court's determination of the matter and/or any or all actions or proceedings arising from the said decision pending determination of this Application or further order;*

(d) *Costs in the cause; and*

(e) *Any further and/or other relief that this Honourable Court may deem fit to grant.*

[10] The grounds in support of the application are as follows:

"…The Respondents in making the decision dated 7.1.2009:-

i) acted in breach of the rules of natural justice, procedural and substantive fairness and the duty to act fairly;

ii) asked the wrong questions in the decision making process;

iii) took into account irrelevant considerations;

iv) omitted to take into account relevant considerations;

v) acted in violation of the Applicant's legal rights in line with the spirit, letter and intent of Articles 3,10, 11 and 12 of the Federal Constitution;

vi) were irrational and unreasonable within the ambit of the principles laid down in Associated Provincial Picture Houses Limited v. Wednesbury Corporation (1948) 1 KB 223;

vii) acted irrationally and unreasonably by prohibiting the Applicant from using the word "Allah" or directly quoting the word "Allah" from the Al-Kitab;

viii) acted illegally, misconstrued and misapplied the relevant provisions of the Printing Presses and Publications Act 1984;

ix) acted ultra vires the printing Presses and Publications Act 1984;

x) imposed conditions on the applicant which are oppressive and onerous; and

xi) acted mala fide."

[11] In the meantime the 3rd to the 9th respondents filed applications under O.53 r.8 of the RHC to be heard in opposition.

Decision of the High Court

[12] On 31.12.2009, the High Court allowed the applicant's application for judicial review and made, *inter alia*, the following orders:

(i) An order of Certiorari quashing the decision of the Minister dated 7.1.2009 that the applicant's publication permit for the period 1.1.2009 until 31.12.2009 is subject to the condition that the applicant is prohibited from using the word "Allah" in the Herald, pending the court's determination of the matter.

(ii) Jointly, the High Court granted the following declarations:

(a) that the decision of the Minister dated 7.1.2009 that the applicant's publication permit for the period 1.1.2009 until 31.12.2009 is subject to the condition that the applicant is prohibited from using the word "Allah" in the Herald pending the court's determination of the matter is illegal, null and void;

(b) that pursuant to Art. 3(1) of the Federal Constitution, the applicant has the constitutional right to use the word "Allah" in the Herald in the exercise of the applicant's right that religions other than Islam may be practiced in peace and harmony in any part of the Federation;

(c) that Art. 3(1) of the Federal Constitution which states that Islam is the religion of the Federation does not empower and/or authorize the Minister to prohibit the applicant from using the word “Allah” in the Herald;

(d) that pursuant to Art. 10 of the Federal Constitution, the applicant has the constitutional right to use the word “Allah” in the Herald in the exercise of the applicant’s right to freedom of speech and expression;

(e) that pursuant to Art. 11 of the Federal Constitution, the applicant has the constitutional right to use the word “Allah” in the Herald in the exercise of the applicant’s freedom of religion which includes the right to manage its own religious affairs; and

(f) that pursuant to Art. 11 and Art. 12 of the Federal Constitution, the applicant has the constitutional right to use the word “Allah” in the Herald in the exercise of the applicant’s right in respect of instruction and education of the Catholic congregation in the Christian religion.

[13] The High Court also dismissed the 3rd to the 9th respondents’ application to be heard in opposition.

COURT OF APPEAL

[14] Aggrieved, the 1st and the 2nd respondents appealed to the Court of Appeal against the decision of the High Court dated 31.12.2009.

[15] The 3rd to the 9th respondents also appealed to the Court of Appeal against the decision of the High Court which dismissed their applications to be heard in opposition.

[16] On 23.5.2013, the Court of Appeal, by consent of parties, allowed the 3rd to the 9th respondents' appeal against the decision of the High Court dismissing their applications to be heard in opposition. They were accordingly joined as parties to the appeal.

[17] On 8.7.2013, the applicant filed an application to strike out the respondents' appeal on the grounds that the appeals had been rendered academic by reason of the "10-point solutions" contained in the Rt. Hon. Prime Minister of Malaysia's letter dated 11.4.2011. The Court of Appeal on 22.8.2013, dismissed the applicant's striking out application.

[18] On 14.10.2013, the Court of Appeal allowed the respondents' appeal and the orders of the High Court were accordingly set aside.

FINDINGS OF THIS COURT

The leave application

[19] A total of 28 leave questions were posed by the applicant which were divided into three parts under the headings of administrative law questions, constitutional law questions and general questions. For leave to be granted, the burden lies on the applicant to satisfy this Court that the questions posed pass the threshold set out in s.96 of the Courts of Judicature Act 1964 (the CJA). For ease of reference, we set out below the relevant part of the said section:

> *"96. 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."*

[20] The leading authority on s.96 (a) of the CJA currently is the case of **Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor and other applications [2011] 1 CLJ 51**. This Court in **Terengganu Forest (supra)** sought to straighten out the conflicting views in the earlier decisions of this Court in **Datuk Syed Kechik Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors [1999] 1 CLJ 325** and **Joceline Tan Poh Choo & Ors v. Muthusamy [2009] 1 CLJ 650.**

[21] In **Terengganu Forest (supra)**, this Court set out the threshold that an applicant needs to satisfy the Court before leave could be granted under s.96 (a) of the CJA. The relevant part of the judgment reads:

> *"[23] It is also clear from the section that the cause or matter must have been decided by the High Court in its original jurisdiction. The legal issue posed to this court may have arisen from the decision of the High Court in the exercise of its original jurisdiction or in the Court of Appeal in the course of its giving its judgment or making its order under the first limb and must be questions of general principles. Under the first limb, that decision by the Court of Appeal must however have raised a question of law which is of general principle not previously decided by this court. If it has been so decided then that decision becomes a binding precedent in which case there is no need for leave to be given on that question. Alternatively the applicant must show that the decision would be to public advantage. In my opinion the fact that it would be*

of public advantage must necessarily involve further arguments before this court. Also, because it is to be decided by this court the words 'further argument and a decision of the Federal Court' used in that subsection are, to me, superfluous. There must necessarily be further arguments and the Federal Court must also make a decision. What is important is that the decision answering the question would be to the public advantage. In England, they use the term 'a point of law of general public importance' (s 1 of the Administration of Justice Act 1960). What is important to the public must also necessarily be an advantage to be decided by this court."

[22] The criteria under s.96 (a) of the CJA may be summarized as follows:

(a) that the leave to appeal must be against the decision of the Court of Appeal;

(b) that the cause or matter was decided by the High Court in exercising its original jurisdiction; and

(c) the question must be a question of law of general principle not previously decided by the Court i.e. it must be an issue of law of general principle to be decided for the first time (the first limb of s.96 (a) of the CJA); or

(d) alternatively, it is a question of importance upon which further argument and decision of this Court would be to public advantage (this is akin to revisiting the questions of law already decided by this Court if it thinks that it is to public advantage to do so - the second limb of s.96 (a)) of the CJA.

PART A: ADMINISTRATIVE LAW QUESTIONS

[23] The questions of law posed in Part A relate to the test in judicial review application: whether it is the objective or the subjective test to be applied. Learned counsel for the applicant contended that the Court of Appeal in the present case appeared to have taken a step backward from the prevailing objective to that of the subjective test as applied in **Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129** and **Kerajaan Malaysia & Ors. v. Nasharuddin Nasir [2004] 1 CLJ 81**. He submitted that the current test in judicial review cases is the objective test as propounded in **R. Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145**. He further submitted that the old approach adopted by the court that judicial review is only concerned with the decision making process and not with the substance of the decision itself had long been discarded by the court, and should not therefore be followed. He referred us to a plethora of authorities in support of his contention. (See **Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629; Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors [2010] 1 CLJ 300; Mohamad Ezam bin Mohd Noor v. Ketua Polis Negara & other appeals [2002] 4 MLJ 449;** and the Singapore case **Chng Suan Tze v. The Minister of Home Affairs & Ors and other appeals [1989] 1 MLJ 69.**)

[24] Learned counsel for the applicant further contended that in the present case, Apandi Ali JCA (as he then was) in the leading judgment of the Court of Appeal adopted the fusion of the two tests as propounded in **Arumugam a/l Kalimuthu v. Menteri Keselamatan Dalam Negeri & Ors [2013] 5 MLJ 174**, also a decision of the Court of Appeal. Similarly, learned counsel for the applicant contended that Abdul Aziz Rahim JCA, while endorsing **Arumugam a/l Kalimuthu (supra)** had applied the subjective test. In the circumstances, he urged this Court to grant leave in order to resolve the prevailing confusion. The leave if granted would finally decide whether the test applicable as regards the Minister's discretion under the Act is the objective or the subjective test.

[25] Learned Senior Federal Counsel in reply submitted that in a judicial review involving the Minister's discretion under the Act, the proper test is the subjective test and the court is only concerned with the decision making process rather than with the substance of the decision.

[26] The power of the Minister to grant a permit to print and publish a newspaper in Malaysia is contained in s.6 of the Act, while s.12 of the Act gives the Minister the discretion to impose any condition on the permit as he deems fit. In the exercise of the said discretion, the Minister in the present case prohibited the use of the word "Allah" in the Herald. It is not disputed that the nature of the conditions that may be imposed by the Minister falls within his discretion. The issue before us is whether the imposition of such conditions in the

exercise of his discretion under the Act is subject to judicial scrutiny or otherwise.

[27] Having considered the issue at hand, I agree with learned counsel for the applicant that the law on judicial review has advanced from the subjective to that of the objective test. Hence, in **Merdeka University Berhad v. Government of Malaysia [1982] 2 MLJ 243 (FC)**, Suffian LP observed:

> *"It will be noted that section 6 used the formula 'If the Yang di-Pertuan Agong is satisfied etc.' In the past such a subjective formula would have barred the courts from going behind His Majesty's reasons for his decision to reject the plaintiff's application; but, as stated by the learned Judge, administrative law has since so far advanced such that today such a subjective formula no longer excludes judicial review if objective facts have to be ascertained before arriving at such satisfaction and the test of unreasonableness is not whether a particular person considers a particular course unreasonable, but whether it could be said that no reasonable person could consider that course reasonable - see the cases cited by the learned Judge at page 360."*

(See also **Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135 (FC); JP Berthelsen v. Director - General of Immigration, Malaysia & Ors [1987] 1 MLJ 134 (SC); Minister of Home Affairs v. Persatuan Aliran Kesedaran Negara [1990] 1 MLJ 351 (SC); Tan Tek Seng**

v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261 (COA); Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 (COA); R. Rama Chandran (supra); Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337 (FC); Dr. Mohd Nasir Bin Hashim v. Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213 (COA).)

As laid down by the above authorities it is therefore trite that the test applicable in judicial review is the objective test.

[28] In considering the issue of whether the Court of Appeal had applied the correct test or not, I am of the view that it is pertinent to consider the whole body of the judgments of the learned Judges of the Court of Appeal and not just by looking at the terms used in the judgments. After all, it is the substance of the judgments rather than the terms alluded to that should be used as the yardstick. In the present case, even though Apandi Ali JCA had used the term "subjectively objective" in his judgment, he however referred to the case of **Darma Suria (supra)**, which clearly propounded the objective test. He stated:

> *"[28] On the issue of the exercise of discretion in imposing the condition of prohibiting the usage of the word 'Allah' by the respondent in the Malay versions of the Herald, I could not agree more than what was decided by this court in Arumugam a/l Kalimuthu v. Menteri Keselamatan Dalam Negeri & Ors [2013] 5 MLJ 174; [2013] 4 AMR 289.*

[29] That case dealt with issues of irrationality and illegality. It was held in Arumugam's case that the issue of irrationality is intertwined with the discretionary power of the Minister. And it dwelt with the objective balancing of the statutory and constitutional framework and the sensitivities of the community. Without repeating the principles discussed and decided therein, it is pertinent to state the appraisal of the facts by the Minister in the appeal before us has been correctly done, namely by way of it being subjectively objective. This is in line with the rationale in the Federal Court decision in Darma Suria Risman v. Menteri Dalam Negeri, Malaysia & 3 Ors [2010] 1 CLJ 300."

In **Darma Suria (supra)**, this Court held that if state action affects fundamental rights, the court will not only look into the procedural fairness but also substantive fairness. There must exist a minimum standard of fairness, both substantive and procedural. (See **R v. Secretary of State for the Home Department, ex p. Peirson [1968] AC 539, 591E.**)

[29] As a matter of fact, Apandi Ali JCA had also applied the principle of reasonableness as established in the case of **Associated Provincial Picture Houses, Limited v. Wednesbury Corporation [1948] 1 KB 223** and **Council of Civil Service Unions and others v. Minister for the Civil Service [1985] 1 AC 374** in determining the validity of the Minister's decision. This is found in his judgment where he stated:

"[4] … A judicial review is not to be treated as an appeal. Corollary to that, the court can quash an administrative decision without substituting for its own. In short, the court is not performing an appellate function. On this trite law, it will be suffice to refer to the celebrated case of Associated Provincial Picture Houses v Wednesbury Corp [1948] 1 KB 223, where Lord Greene MR, summed up as follows:

> *'The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them.'*

[5] The above Wednesbury case was cited with approval, and followed by our Supreme Court case Minister of Labour, Malaysia v Lie Seng Fatt [1990] 2 MLJ 9.

…

[23] Imposition of a condition in a licence or permit is an exercise of the discretion of the Minister. Such discretion must not be unfettered or arbitrary. Such exercise of discretion must be reasonable. What is reasonable depends on the facts and circumstances of the case. What is a justifiable circumstances depends on the necessity of the occasion."

He further stated at para. 47 as follows:

> *"[47] 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 Unions & Ors v. Minister for the Civil Service [1985] 1 AC 374; [1984] 4 All E.R. 935, it is my considered finding that the Minister has not acted in any manner or way that merit judicial interference on his impugned decision."*

[30] The following passage of his judgment shows that the learned Judge had also applied the proportionality principle where he stated:

> *"[42] It is my judgment that, based on the facts and circumstances of the case, the usage of the word 'Allah' particularly in the Malay version of the Herald, is without doubt, do have the potential to disrupt the even tempo of the life of the Malaysian community. Such publication will surely have an adverse effect upon the sanctity as envisaged under Article 3(1) and the right for other religions to be practiced in peace and harmony in any part of the Federation. Any such disruption of the even tempo is contrary to the hope and desire of peaceful and harmonious co-existence of other religions other than Islam in this country.*

[43] Based on the reasons given by the Minister in his Affidavit In Reply, it is clear that he was concerned with national security and public order.

[44] ***When such exercise of discretion by the Minister becomes a subject of a judicial review, it is the duty of the court to execute a balancing exercise between the requirement of national security and public order with that of the interest and freedom of the respondent. As a general principle, as decided by case law, the courts will give great weight to the views of the executive on matters of national security.*** *It is suffice to refer to what Lord Woolf C.J. said in A, X and Y v. Secretary of State for the Home Department [2004] QB 335, which reads as follows:*

> *'Decisions as to what is required in the interest of national security are self-evidently within the category of decisions in relation to which the court is required to show considerable deference when it comes to judging those actions.'"*

[Emphasis added]

[31] Similarly in the judgment of Abdul Aziz Rahim JCA, even though he spoke of the subjective test, he considered at length the reasons furnished by the Minister in arriving at his decision. He came to the conclusion that having regard to the circumstances of the case, the Minister had exercised his discretion reasonably.

[32] From the concluding paragraph of his judgment, it is apparent that the learned Judge had in fact applied the objective test, where he said:

> *"[42] … I would answer the first issue in the affirmative that is the Minister's decision of 7.1.2009 is valid and lawful in that it has passed the test of Wednesbury principle of reasonableness in Associated Provincial Picture Houses Limited v Wednesbury Corporation [1948] 1 KB 223 and that it has not contravened the principles of illegality, procedural impropriety, proportionality and irrationality as enunciated in Council of Civil Service Unions & Ors v Minister For The Civil Service [1985] 1 AC 374."*

[33] Premised on the above, I hold that the Court of Appeal had indeed applied the objective test in arriving at its decision. Had it applied the subjective test, as suggested by learned counsel for the applicant, it would not have been necessary for the Court of Appeal to consider the substance of the Minister's decision.

[34] Since it is my finding that the Court of Appeal in the instant case had applied the correct test, hence it is not open for us to interfere with the finding of the Court of Appeal. In this regard, I wish to add that even if this Court does not agree with the findings of the Court of Appeal that is not sufficient reason for us to grant leave. As rightly stated by Zaki Tun Azmi, CJ in **Terengganu Forest (supra):**

"[31] Section 96(a) does not mention achieving justice or to correct injustice or to correct a grave error of law or facts as grounds for granting leave to appeal. Every applicant would inevitably claim he has suffered injustice but the allegation of injustice by itself should not be a sufficient reason for leave to be granted."

[35] For the above reasons, I hold that the questions of law posed in Part A failed to pass the threshold under s.96 (a) of the CJA.

PART B: CONSTITUTIONAL LAW QUESTIONS

Constitutionality of the State Enactments

[36] Learned counsel for the applicant contended that the scope and effect of Arts. 3, 8, 10, 11 and 12 of the Federal Constitution were considered by both the High Court and the Court of Appeal, forming the subject matter of the declaratory orders, issued by the High Court which were subsequently set aside by the Court of Appeal. That being the case, he contended that the constitutional questions posed by the applicant in Part B fall squarely within s.96 (b) of the CJA and for that reasons, leave ought to be granted.

[37] The Minister in his affidavit stated that he had taken into consideration s.9 of the various State Enactments (the impugned provision) which seeks to control and restrict the propagation of non-Islamic religious doctrines and belief amongst Muslims. The impugned provision was enacted pursuant to clause (4) of Art.11 and Para.1, List II (State List), Ninth Schedule of the Federal Constitution. To better appreciate the issue, let us consider s.9 of **the Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactment 1988 (Selangor Enactment No. 1/1988)**. The said section reads:

> *"9. (1) A person commits an offence if he –*
>
> *(a) in any published writing; or*
>
> *(b) in any public speech or statement; or*

(c) in any speech or statement addressed to any gathering of persons; or

(d) in any speech or statement which is published or broadcast and which at the time of its making he knew or ought reasonably to have known would be published or broadcast.

uses any of the words listed in Part I of the Schedule, or any of its derivatives or variations, to express or describe any fact, belief, idea, concept, act, activity, matter, or thing of or pertaining to any non-Islamic religion.

(2) A person who is not a Muslim commits an offence if he, in the circumstances laid down in subsection (1), uses any of the expressions listed in Part II of the Schedule, except by way of quotation or reference.

(3) A person who commits an offence under subsections (1) or (2) shall, on conviction, be liable to a fine not exceeding one thousand ringgit.

(4) The Ruler in Council may, by order published in the Gazette, amend the Schedule."

One of the words listed in Part I of the Schedule is the word "Allah". Similar provisions are found in other State Enactments.

[38] In the High Court, the applicant challenged the validity or constitutionality of the impugned provision. The learned High Court Judge upheld the challenge and she considered the issue at some length. In her judgment, she stated:

> *"[52] Mr Royan drew to the court's attention (i) that art. 11(4) which is the restriction does not state that state law can forbid or prohibit but 'may control or restrict'; does not provide for state law or any other law to control or restrict the propagation of any religious doctrine or belief among persons professing a religion other than Islam; the word 'propagate' means 'to spread from person to person,... to disseminate... (... belief or practise, etc)' citing Rev Stainislaus v State of Madhya Pradesh & Ors [1977] AIR 908 (SC) at p. 911 left column. Mr. Royan submits ex facie, s. 9 of the state Enactments make it an offence for a person who is not a Muslim to use the word 'Allah' except by way of quotation or reference; so it appears that a Christian would be committing an offence if he uses the word 'Allah' to a group of non-Muslims or to a non-Muslim individual. Mr. Royan then argues that that cannot be the case because art. 11(4)states one may 'control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam'. I am persuaded such an interpretation would be ludicrous as the interpretation does not accord with the object and ambit of art 11(4) of the Federal Constitution.*

[53] I find there is merit in Mr Royan's submission that unless we want to say that s. 9 is invalid or unconstitutional to that extent (which I will revert to later), the correct way of approaching s. 9 is it ought to be read with art. 11(4). If s. 9 is so read in conjunction with art. 11(4), the result will be that a non-Muslim could be committing an offence if he uses the word "Allah" to a Muslim but there would be no offence if it was used to a non-Muslim. Indeed art. 11(1) reinforces this position as it states 'Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it'. Clause 4 restricts a person's right only to propagate his religious doctrine or belief to persons professing the religion of Islam. So long as he does not propagate his religion to persons not professing the religion of Islam, he commits no offence. It is significant to note that art. 11(1) gives freedom for a person to profess and practise his religion and the restriction is on the right to propagate.

…

[57] … ***On the other hand the object of art. 11(4) and the state Enactments is to protect or restrict propagation to persons of the Islamic faith. Seen in this context by no stretch of imagination can one say that s. 9 of the state Enactments may well be proportionate to the object it seeks to achieve and the measure is therefore arbitrary and unconstitutional. Following this it shows the first respondent has therefore taken an irrelevant consideration****."* (**Emphasis added**)

She further held:

> *"[80] With regard to the contention that the publication permit is governed by the existence of the state Enactments pertaining to the control and restriction of the propagation of non-Islamic religions among Muslims,* ***it is open to the applicant in these proceedings to challenge by way of collateral attack the constitutionality of the said Enactments on the ground that s. 9 infringe the applicant's fundamental liberties under arts. 3, 10, 11 and 12 of the Federal Constitution****."* **(Emphasis added)**

[39] The net effect of the finding of the learned High Court Judge is that the impugned provision is invalid, null and void, and unconstitutional as it exceeds the object of Art.11(4) of the Federal Constitution. The respective States' Legislature thus have no power to enact the impugned provision. The issue is, could the High Court Judge entertain such a challenge in light of specific procedure in clauses (3) and (4) of Art.4 of the Federal Constitution. Clauses (3) and (4) of Art.4 provide:

> *"4(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or -*

(a) if the law was made by Parliament, in proceedings between the Federation and one or more States;

(b) If the law was made by the Legislature of a State, in proceedings between the Federation and that State.

(4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause."

[40] Clauses (3) and (4) of Art.4 of the Federal Constitution came for consideration of this Court in **Ah Thian v. Government of Malaysia [1976] 2 MLJ 112 (FC)**, where Suffian LP held as follows:

"Under our Constitution written law may be invalid on one of these grounds:

(1) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter which (sic) *respect to which the State legislature has no power to make law, article 74; or*

(2) in the case of both Federal and State written law, because it is inconsistent with the Constitution, see article 4(1); or

(3) in the case of State written law, because it is inconsistent with Federal law, article 75.

The court has power to declare any Federal or State law invalid on any of the above three grounds.

The court's power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions, and may be exercised by any court in the land and in any proceeding whether it be started by Government or by an individual.

But the power to declare any law invalid on ground (1) is subject to three restrictions prescribed by the Constitution.

First, clause (3) of article 4 provides that the validity of any law made by Parliament or by a State legislature may not be questioned on the ground that it makes provision with respect to any matter with respect to which the relevant legislature has no power to make law, except in three types of proceedings as follows:-

(a) in proceedings for a declaration that the law is invalid on that ground; or

(b) if the law was made by Parliament, in proceedings between the Federation and one or more states; or

(c) if the law was made by a State legislature, in proceedings between the Federation and that State.

It will be noted that proceedings of types (b) and (c) are brought by Government, and there is no need for any one to ask specifically for a declaration that the law is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. The point can be raised in the course of submission in the ordinary way. Proceedings of type (a) may however be brought by an individual against another individual or against Government or by Government against an individual, but whoever brings the proceedings must specifically ask for a declaration that the law impugned is invalid on that ground.

Secondly, clause (4) of article 4 provides that proceedings of the type mentioned in (a) above may not be commenced by an individual without leave of a Judge of the Federal Court and the Federation is entitled to be a party to such proceedings, and so is any State that would or might be a party to proceedings brought for the same purpose under type (b) or (c) above. This is to ensure that no adverse ruling is made without giving the relevant government an opportunity to argue to the contrary.

Thirdly, clause (1) of article 128 provides that only the Federal Court has jurisdiction to determine whether a law made by Parliament or by a State legislature is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. This jurisdiction is exclusive to the Federal Court, no other court has it. This is to ensure that a law may be declared invalid on this very serious

ground only after full consideration by the highest court in land."

The present case may be classified as the proceedings of type (a) as illustrated by Suffian LP in **Ah Thian (supra)**. Therefore, the party seeking to challenge the validity or constitutionality of the impugned provision must specifically ask for a declaration that the law is invalid, and such a proceeding may only be commenced with leave of a Judge of the Federal Court. Further, the respective State must be made party so as to give the State an opportunity to defend the validity or constitutionality of the impugned provision. And Art.128 of the Federal Constitution provides that the Federal Court shall have the exclusive jurisdiction in such matter.

(See also **Yeoh Tat Thong v. Government of Malaysia & Anor [1973] 2 MLJ 86 (FC); Syarikat Banita Sdn Bhd v. Government of State of Sabah [1977] 2 MLJ 217 (FC); East Union (Malaya) Sdn Bhd v. Government of State of Johore & Government of Malaysia [1980] 2 MLJ 143 (FC); Rethana M. Rajasigamoney v. The Government of Malaysia [1984] 1 CLJ (Rep) 323 (FC);** and **Fathul Bari Mat Jahya & Anor v. Majlis Agama Islam Negeri Sembilan & Ors [2012] 1 CLJ (Sya) 233 (FC).**)

[41] The underlying reasons behind clauses (3) and (4) of Art.4 of the Federal Constitution was explained in **Abdul Karim bin Abdul Ghani v. The Legislative Assembly of the State of Sabah [1988] 1 CLJ (Rep) 1 (SC)**, where Hashim Yeop Sani SCJ observed:

"Article 4(3) and (4) of the Federal Constitution is designed to prevent the possibility of the validity of laws made by the legislature being questioned on the ground mentioned in that article incidentally. The article requires that such a law may only be questioned in proceedings for a declaration that the law is invalid. The subject must ask for a specific declaration of invalidity in order to secure that frivolous or vexatious proceedings for such declarations are not commenced. Article 4(4) requires that the leave of a Judge of the Supreme Court must first be obtained."

[42] The effect of clauses (3) and (4) of Art.4 as explained by the Supreme Court in **Abdul Karim bin Abdul Ghani (supra)** is that the validity or constitutionality of the laws could not be questioned by way of collateral attack, as was done in the present case. This is to prevent any frivolous or vexatious challenge being made on the relevant legislation. Clause (3) of Art.4 provides that the validity or constitutionality of the relevant legislation may only be questioned in proceedings for a declaration that the legislation is invalid. And Clause (4) of Art.4 stipulates that such proceedings shall not be commenced without the leave of a Judge of the Federal Court. This procedure was followed in a number of cases. (See **Fathul Bari Mat Jahya (supra); Sulaiman Takrib v. Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) & Other Cases [2009] 2 CLJ 54 (FC); Mamat Daud & Ors. v. The Government of Malaysia [1986] CLJ Rep 190 (SC).**)

[43] Premised on the above, I hold that the High Court Judge ought not to have entertained the challenge on the validity or constitutionality of the impugned provision for two reasons, namely procedural non-compliance and for want of jurisdiction. The findings of the High Court Judge that the impugned provision is unconstitutional was rightly set aside by the Court of Appeal.

[44] The constitutional questions posed in Part B of this application concern the rights as guaranteed by Arts. 3, 8, 10, 11 and 12 of the Federal Constitution. However, I must emphasize that these questions relate to the usage of the word “Allah” in the Herald. I am of the view that these questions could not be considered in isolation without taking into consideration the impugned provision. As it is my finding that a challenge on the validity and constitutionality of the impugned provision could not be made for the reasons stated earlier, therefore, it is not open to this Court to consider the questions posed in Part B.

PART C: GENERAL QUESTIONS

[45] The questions in Part C relate to theological issues arising directly from the judgments of the learned Judges of the Court of Appeal. From the facts, it is clear that the Minister’s decision was never premised on theological consideration. Therefore, the views expressed by the learned Judges of the Court of Appeal on those issues are mere obiter. For that reason, the questions in Part C in my view do not pass the threshold under s.96 (a) of the CJA.

DECISION

[46] Based on the foregoing, the application is dismissed.

[47] My learned brothers Raus Sharif (PCA), Zulkefli Ahmad Makinudin (CJM) and Suriyadi Halim Omar (FCJ) have read this judgment in draft and have expressed their agreement with it.

[48] No order as to costs.

t.t

ARIFIN ZAKARIA

CHIEF JUSTICE OF MALAYSIA

Dated : 23.6.2014

Date of hearing : 5.3.2014

Date of decision: 23.6.2014

APPENDIX

PART A: ADMINISTRATIVE LAW QUESTIONS

(i) *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?*

(ii) *Whether the decision of a Minister is reviewable where such decision is based on ground of alleged national security and whether it is 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?*

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

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

(v) *Where the characterization of the Minister's discretion as an absolute discretion precludes judicial review of the decision?*

(vi) *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?*

(vii) *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?*

(viii) *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?*

(ix) *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?*

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

PART B: CONSTITUTIONAL LAW QUESTIONS

(i) *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 Article 10, 11(1), 11(3) and 12 of the Federal Constitution?*

(ii) *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?*

(iii) *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?*

(iv) *Whether it is 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?*

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

(vi) *Whether on a proper construction of the Federal Constitution, and a reading of the preparatory documents, namely, the Reid Commissions*

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?

(vii) *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 another religious group?*

(viii) *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?*

(ix) *Whether it is reasonable or legitimate to conclude that the use of the word 'Allah' for generations in the Al-Kitab (the Bahasa Malaysia/Indonesia 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?*

(x) *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)?*

(xi) *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 arbitrary restriction on the use of the word 'Allah' imposed by the Minister of Home Affairs?*

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

(xiii) *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 QUESTIONS

(i) *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?*

(ii) *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?*

(iii) *Whether the Court in 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?*

(iv) *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?*

(v) *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?*

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