IN THE HIGH COURT OF MALAYA AT SEREMBAN
IN NEGERI SEMBILAN DARUL KHUSUS, MALAYSIA
JUDICIAL REVIEW APPLICATION NO.: 13-1-2011

BETWEEN

1. **MUHAMAD JUZAILI B. MOHD KHAMIS**
2. **SHUKUR B. JANI**
3. **WAN FAIROL B. WAN ISMAIL**
4. **ADAM SHAZRUL B. MOHD YUSOFF** ... **APPLICANTS**

AND

1. **KERAJAAN NEGERI SEMBILAN**
2. **JABATAN HEL EHWAL AGAMA ISLAM N. SEMBILAN**
3. **PENGARAH, JABATAN HAL EHWAL AGAMA ISLAM, NEGERI SEMBILAN**
4. **KETUA PEGAWAI PENGUATKUASA AGAMA ISLAM NEGERI SEMBILAN**
5. **KETUA PENDAKWA SYARIE NEGERI SEMBILAN**

... **RESPONDENT**

DECISION (ENCL. 5)
(LEAVE APPLICATION FOR JUDICIAL REVIEW)

[1] This is the applicants' application for leave made pursuant to O. 53 r. 3 (2) of the RHC 1980 for judicial review. In their application for Judicial Review, the applicants seek the following relief:

(a) a declaration that s. 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 ("the said Enactment') is inconsistent with the various fundamental liberties' provisions found in Part 2 of the Federal Constitution and is therefore null and void;

(b) alternatively, a declaration that s. 66 of the said Enactment is not applicable to them;

(c) an order of Prohibition under Paragraph 1 of the Schedule to the Courts of Judicature Act 1964 be issued against the 4th and 5th respondents from investigating and prosecuting them for an offence under s. 66 of the said Enactment.

[2] S. 66 of the said Enactment provides as follows:

'S. 66 – Any male person who, in any public place wears a woman attire or poses as a woman shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.'

[3] All the 4 applicants herein claimed that they are male to female transsexuals in that although they were biologically born as males, they have through their respective formative year from child to adult, become psychologically female. Three of the applicants have been arrested, detained and subsequently charged in the Syariah Court for the offence under s. 66 of the said Enactment by the Negeri Sembilan's Department of Islamic Affairs. The State Government of

Negeri Sembilan is named as the 1st respondent in this judicial review application. The 2nd respondent is the said Department of Islamic Affairs and the 3rd respondent is the Director of the same. The 4th respondent is the Chief Syariah Enforcement Office of Negeri Sembilan and the 5th respondent is the Chief Syariah Prosecutor for the State.

[4] A leave application to commence judicial review proceeding must be made *ex-parte* to the Judge in Chambers and must be supported by a statement setting out the particulars of the applicants and the relief sought together with grounds on which it is sought – see O. 53 r. 3 (2) of the RHC 1980. Although it is an *ex-parte* application, meaning there is no necessity to serve the leave application on the respondents, O. 53 r. 3 (3) requires the applicants to give notice and serve the relevant papers to the Attorney-General's Chambers. The applicants in our present case have fulfilled these prerequisites. Perhaps this is an opportune time for me to state very briefly the rationale behind these prerequisites to obtain leave and to notify and serve the cause papers on the AG's Chambers.

[5] The primary purpose for the need to obtain leave is to filter out clearly ill-founded, frivolous and vexatious legal challenge to the decision made or act carried out by public authorities. In other words, it is to protect those entrusted with the enforcement of public duties against groundless and unmeritorious harassment – see **Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865** and **O'Reilly v. Mackman [1982] 2 All ER 1124**. And as judicial review is primarily within the realm of public law and invariably involves the element of public interest, it is only logical that

the AG's Chambers be notified and served with the cause papers. The AG is the guardian of public interest and upon being notified of the impending judicial review application, it is then up to the AG to decide whether or not to appear at the hearing of the leave application. If the AG or his representative elects to appear, then the court is obliged to hear him or his representative even though the leave application is an *ex-parte* application. However, it has to be borne in mind that the appearance of the AG at the leave application stage is in his capacity as the guardian of public interest and not necessarily to represent the respondents – see the judgment of *Faiza Tamby Chik, J* **in Kanawagi a/l Seperumaniam v. Dato' Abdul Hamid b. Mohamad [2004] 5 MLJ 495**.

[6] In our present case, the AG has decided to appear at this leave application stage and is being represented by the learned SFC.

[7] At this leave application stage, the court only examines to see and decide whether the applicants qualify the threshold question of whether the application is amenable to judicial review. It is now settled law that if upon perusal of the cause papers, the court finds that the application for the judicial review is not frivolous and that the applicant has shown that he has an arguable case, leave would be readily granted – see **IRC v. National Federation of Self-Employed and Small Businesses Ltd. [1982] AC 617** and **Chin Mee Keong & Ors v. Pesuruhjaya Sukan [2007] 5 CLJ 363.**

[8] The subject matter of the judicial review in our present case clearly involved the element of public law as the applicants are challenging the validity of s. 66 of the said Enactment and the

legitimacy of the action by the Negeri Sembilan's Department of Islamic Affairs in detaining and charging the applicants for the offence under the said section in the Syariah Court.

[9] The AG is objecting to the granting of leave to the applicants based essentially on three grounds:

a. that there is no decision reviewable under O. 53 of the RHC;

b. the applicants' application is an abuse of the court's process; and

c. the application is frivolous and vexatious.

I have given due consideration to the submission of the learned SFC and the learned counsel for the applicants, including the many case authorities cited.

[10] O. 53 of the RHC 1980 is a specific procedural provision that governs the application for judicial review where the applicant is seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964. The current O. 53 is clearly wider in scope than the old one where prayers for declaration and a claim for damages and injunction can also be made. The pit and substance of the relief sought by the applicants involved the question of constitutionality of s. 66 of the said Enactment and the enforcement of rights conferred by Part II of the Federal Constitution. In the circumstances, I am of the considered view that this is a proper case for judicial review under O. 53 of the RHC 1980.

[11] Further, based on the circumstances of the present case, I agree with the submission of the learned counsel for the applicants that the lack of an identifiable decision is not fatal to the application for judicial review. The validity of the act of the 2nd, 3rd and 4th defendants in arresting and investigating the applicants for an offence under s. 66 of the said Enactment and the act of the 5th respondent in charging the applicants, are clearly matters amendable to judicial review, particularly so when the constitutionality of the said s. 66 itself is being challenged.

[12] The learned SFC submitted that the 2nd to 4th defendants were merely exercising their statutory function to investigate an offence under the said Enactment and such investigative process is not a decision which is reviewable under O. 53 r 4 (1) of the RHC 1980. The learned SFC referred to several case authorities to support this argument. I will refer to two of them. The first is **Ahmad Azam bin Mohamad Salleh & Ors. v. Jabatan Pembangunan Koperasi Malaysia & Ors. [2004] 4 MLJ 86** where *Raus Sharif J (as he was then)* held that where public officers were merely exercising a function to inspect or investigate under a particular Act, such investigation process is not subjected to judicial review. However, in that case, the court was dealing with the challenge to the result of an inspection carried out by Jabatan Koperasi Malaysia and the order given by the Ketua Pendaftar Koperasi for Malaysia pursuant to s. 66 of the Cooperative Societies Act 1993 on the ground that the rule of natural justice has been breached. There was no constitutional issue involved in that case. In our present case the applicants are claiming that their constitutional rights under Part II of the Federal Constitution have been infringed and that s. 66 of the said Enactment is

unconstitutional. That in my opinion is sufficient enough to bring this case within the purview of O. 53 of the RHC 1980.

[13] The next case referred to by the learned SFC is the Singapore case of **Tan Eng Chye v. The Director of Prison (No. 2) [2004] SLR 521**. Similarly, there was no constitutional issue involved in that case and therefore it is not really applicable to our present case. In any case, leave was granted in that case and the court had proceeded to hear the substantive motion for the judicial review before making its decision.

[14] The learned SFC also submitted that the applicant's application for judicial review is an abuse of the court's process based on two grounds. First, the matter for judicial review herein falls within the jurisdiction of the Syariah Court and second, it is against public policy. Suffice it to say that these issues raised by the SFC should be more appropriately dealt at the next stage, ie at the hearing of the substantive motion and not at the present stage. At the present stage, all that needs to be shown is that the application is not frivolous and vexatious.

[15] I find that the applicants clearly have a real grievance and are adversely affected by the act of the respondents in arresting, investigating and charging them for the offence under the impugned s. 66 of the said Enactment. I hereby rule that the applicants have sufficiently made out a case for which leave ought to be granted for the judicial review.

[16] Accordingly, I hereby grant the applicants the leave for judicial review, including the extension of time. I also make no order as to costs.

Dated: 4.11.2011

(**ROSNAINI BINTI SAUB**)
Judge
High Court of Malaya, Seremban