A **PEGUAM NEGARA MALAYSIA v. NURUL IZZAH ANWAR & ORS**

COURT OF APPEAL, PUTRAJAYA
UMI KALTHUM ABDUL MAJID JCA
IDRUS HARUN JCA
HASNAH MOHAMMED HASHIM JCA
B [CIVIL APPEAL NO: W-01(IM)-19-01-2017]
22 MARCH 2017

CIVIL PROCEDURE: *Appeal – Leave – Review of division of States of Malaya into Federal and State constituencies and proposed provisional recommendations –*
C *Electors of parliamentary constituency objected against proposed recommendations – Electors commenced judicial review proceedings for order of certiorari to quash review notice and proposed recommendations – Leave and stay of notice of review granted – Appeal against granting of leave and stay of notice – Whether leave ought to be granted – Whether there was arguable case in favour of granting leave –*
D *Whether there were merits in appeal warranting intervention*

CIVIL PROCEDURE: *Locus standi – Attorney General – Public interest – Review of division of States of Malaya into Federal and State constituencies and proposed provisional recommendations – Electors of parliamentary constituency objected against proposed recommendations – Electors commenced judicial review*
E *proceedings for order of certiorari to quash review notice and proposed recommendations – Leave and stay of notice of review granted by High Court – Appeal by Attorney General – Attorney General did not represent Election Commission during leave stage – Whether Attorney General had locus standi to appeal against High Court's decision to grant leave – Whether Attorney General was*
F *aggrieved party – Rules of Court 2012, O. 53 r. 3(3)*

ELECTION: *Election Commission – Enquiry regarding constituency – Review of division of States of Malaya into Federal and State constituencies and proposed provisional recommendations – Electors of parliamentary constituency objected against proposed recommendations – Electors commenced judicial review*
G *proceedings for order of certiorari to quash review notice and proposed recommendations – Leave and stay of notice of review granted – Whether local enquiry lawful – Whether Election Commission lawfully constituted during local enquiry – Whether notice given before enquiry day adequate to prepare for hearing – Whether local enquiry was quasi-judicial – Whether application frivolous and*
H *abuse of court process – Federal Constitution, Thirteenth Schedule s. 4 and art. 115(2) – Commissions of Enquiry Act 1950, s. 18*

Pursuant to s. 4 of the Thirteenth Schedule to the Federal Constitution ('the FC) which was gazetted ('the notice'), the Election Commission ('the EC') notified that it had reviewed the division of the States of Malaya
I into the Federal and State constituencies in accordance with art. 113(2) of the FC and proposed provisional recommendations consequent to the said review ('the proposed recommendations'). Eligible parties were also

apprised to the effect that they could make representations objecting to the proposed recommendations in accordance with s. 5 of the said Thirteenth Schedule. Following the publication of the notice, a body of 120 electors of parliamentary constituency Lembah Pantai, including the 11 respondents in this case, submitted representations against the proposed recommendations. The EC held a local enquiry and a week after that, the respondents filed this application, seeking leave to commence judicial review proceedings seeking to be granted an order of *certiorari* to quash the notice and the proposed recommendations for the Federal Constituencies in Kuala Lumpur, as reviewed by the EC in 2016 and for a declaration that the local enquiry carried out by the EC was unlawful.

Leave and a stay of the notice and process/proceedings/procedure of delimitation of all constituencies in Kuala Lumpur until final disposal of the judicial review were granted. The judge was of the opinion that the application was not frivolous and the grounds put forward by the respondents made out an arguable case; the merits of which ought to be heard at a hearing of the substantive application. The judge did not dispute that the EC did not make any decision but merely at this stage in the enquiry, proposed recommendations. Nevertheless, the judge held that the work undertaken by the EC 'goes towards that final decision by Parliament and is thus part of the decision-making process'. Therefore, His Lordship said that should there be any flaw in the decision-making process, including the process by which recommendations were drawn up or proposals for recommendations were made, that process should be susceptible to review in court on an application of an aggrieved party. Hence, the present appeal against the said decision.

The respondents filed a notice of motion seeking an order to strike out the appellant's notice of appeal. The respondents submitted that (i) since the appellant's objections during the leave stage substantially pertained to the notice and the proposed recommendations with all the grounds in the appellant's appeal were in connection with the same and on the contrary, the underlying action was consequently limited only to the local enquiry, this appeal was acamedic as it merely concerned the notice and the proposed recommendations, not the enquiry; (ii) the appellant had no *locus standi* to appeal against the High Court's decision to grant leave as the appellant was not a party to the underlying proceedings. The appellant did not represent the EC at the leave stage as he represented the public and the role of the appellant was merely to apprise the court of any particular feature of the case that would disqualify any leave being granted. Once leave was granted, the EC became a party to the proceedings. As such, the appellant was not an aggrieved party who was entitled to appeal against the granting of leave; and (iii) the appeal was an abuse of process as the appellant did not similarly object during the leave stage in connection with another judicial review filed by the Government of Selangor ('Selangor Government case') in which the issues raised were identical to the issues raised in this case.

A On the complaint that the local enquiry was unlawful, the issues that arose were (i) whether the EC was lawfully constituted during the local enquiry; (ii) whether the seven-days' notice given before the enquiry day was adequate to prepare for the hearing; and (iii) whether the local enquiry was *quasi*-judicial in nature and the respondents were denied a fair hearing by the acts B of the EC in (a) failing to inform them of the reasons and the effect of the proposed recommendations; (b) only allowing three persons from amongst the objectors to speak on behalf of the group and only 20 of the objectors were allowed to enter the enquiry hall; (c) denying them their right to legal representation which is provided for by virtue of s. 18 of the Commissions C of Enquiry Act 1950 ('the Act'); (d) failing to make available the two officers of the Federal Government who had advised the EC on the topography of and the distribution of the population in the constituency pursuant to art. 115(2) or to inform them of the advice given by these officers in formulating the proposed recommendations so as to ascertain the reasons behind the proposed recommendations; and (e) the local enquiry was not D conducted before an impartial and independent tribunal.

Held (allowing appeal and setting aside order of High Court in granting leave and stay of notice and process/proceedings/procedure of delimitation of all constituencies in Federal Territory of Kuala Lumpur)
Per Idrus Harun JCA delivering the judgment of the court:
E

(1) The appellant, in appealing against the whole decision of the High Court to allow leave, had clearly raised the principal issues concerning the local enquiry in the memorandum of appeal. In any event, the issues concerning the enquiry was also ventilated by the appellant F before the High Court. Accordingly, the memorandum of appeal was not confined to the issues relating to the notice and the proposed recommendations. The issue of local enquiry was very much a live issue in the court below and before this court. The respondents' contention on this issue was a fallacy and a red herring. It was abundantly clear that the issue required this court's determination. G (para 10)

(2) The appellant had *locus standi* and a special right to appeal in the public interest. The appellant was undeniably a party at the leave application. His presence was required by law without being made a party to the H proceedings. The relevant provision is found in O. 53 r. 3(3) of the Rules of Court 2012 which makes it mandatory for the applicant to give notice of the application to the Attorney General's Chambers. A failure to comply with the mandatory requirement to serve the cause papers on the Attorney General would result in the application being I dismissed. It also makes the Attorney General the party representing the public interest at the point when the leave application is heard. Hence, when he appears before the court at that stage, the court has to recognise his presence and has no jurisdiction not to hear him. The

putative party, the EC, was not a party at that particular point. The appellant's position as guardian of public interest at this stage would necessarily include the right to appeal against an order granting leave. (para 12)

(3) There was no exact similarity between the Selangor State Government case and the present application. There were issues raised in the Selangor State Government case which were not raised and were in fact not an issue in the application in the instant appeal. Nothing material turned upon the issues raised in the notice of motion and the respondents' contentions. The notice of motion was wholly unmeritous and accordingly dismissed with no order as to costs. (paras 19 & 22)

(4) There were specific provisions in the FC which allow the EC to function lawfully in the event of vacancies in their numbers. These provisions are found in (i) art. 160(1) read with s. 33C of the Eleventh Schedule to the FC; dan (ii) art. 114(7) of the same. These provisions unambiguously evinced a legislative intention that the EC is allowed to exist even if it consists of less than seven members and continue to function lawfully in the event of vacancies in the membership. Thus, the powers and proceedings of the EC are clearly not affected by any vacancy in their numbers. This legal position has not been convincingly refuted by the respondents. The respondents' allegation that seven members must be present at the local enquiry was wholly misconceived in law. (para 25)

(5) The respondents were notified of the enquiry on 31 October 2016 that the same would be held on 8 November 2016. The first time this complaint was made was during the leave application before the High Court. There was absolutely no evidence that the objectors had applied for the enquiry to be adjourned on the ground that there was insufficient time to prepare for the enquiry. The respondents should have raised this issue at the earliest possible moment. (para 26)

(6) The enquiry conducted under the Act resembles a court proceeding. However, the local enquiry conducted in accordance with the Thirteenth Schedule to the FC is another kettle of fish. The local enquiry by the EC was not *quasi*-judicial in nature. The scheme of the Thirteenth Schedule, in particular ss. 4 to 9 of the Act, shows that the local enquiry is a totally different species from the usual enquiries held under the Act. Under the said scheme, the EC does not adjudicate any matter. The EC sits at the local enquiry to hear objections against the provisional recommendations. (para 29)

(7) There is no provision in the FC which requires the EC to inform the reasons behind the provisional recommendations. All that the scheme requires is for the EC to state the effects of the recommendations which had already been done in the notice and the proposed recommendations when it was opened for inspection. (para 40)

(8) Under s. 5(a) of the Thirteenth Schedule, it is only where the EC receives a representation objecting to the proposed recommendations from a body of 100 or more persons whose names are shown on the current rolls of the constituencies in question that the EC must hold a local enquiry in respect of those constituencies. Thus, so far as it concerns the local enquiry, the right to be heard as envisaged under this section is obviously the right of a group of 100 or more persons, not the right of an individual voter. Therefore, for the purpose of exercising its powers in conducting the enquiry, it does not mean that each and every one of these voters must be heard by the EC. It is indeed within the powers of the EC, applying s. 8 of the Act, ss. 5 and 6 of the Thirteenth Schedule read together with s. 30 of the Eleventh Schedule to the FC, to determine any number of persons from the group of 120 objectors to represent them and to be in the hall during the enquiry. Once this was done, it would suffice and this group of 120 objectors was adequately and properly given or accorded a fair hearing. The complaint was wholly frivolous. (para 33)

(9) The respondents raised a point on the issue of the failure on the part of the EC to call two officers of the Federal Government with special knowledge of the topography. This issue was a non-starter. The assistance obtained from the two officers who advised on the topography and the distribution of the population is now part and parcel of the EC's provisional recommendations. The objections the respondents made against the provisional recommendations challenges against the advice that made up the said recommendations. There was certainly no substance in the contention that the enquiry was unlawful on the ground that the EC failed to make available the two officers in question. (para 41)

(10) The conduct of the Chairman of the EC in making certain remarks gave rise to a complaint of apparent bias. The alleged remarks by the Chairman in all probabilities could not be said to infect his mind with bias and were not sufficient grounds to give rise to apparent bias on the part of the Chairman or the EC when conducting the local enquiry and subsequently publishing the notice and the proposed recommendations. These alleged remarks were made by the Chairman and could not be attributed to, or equated with the remarks or the action of the EC which conducted the enquiry. Under the law, the

notice and the proposed recommendations were prepared by the EC not the Chairman. The respondents were not able to show that the element of apparent bias was reflected in the proposed recommendations or such remarks or actions of the Chairman had given rise to the perception of a real danger of bias in the manner the enquiry was conducted by the EC. The allegation of apparent bias was *a non sequitur*, an invalid argument which was characterised by a disconnect between the premises and the alleged conclusion by the respondents of the alleged perceived bias. (paras 42 & 43)

(11) Leave ought not to have been granted as it could not be conclusively said that the application was not frivolous. The respondents failed to show that if leave was granted, an arguable case in favour of granting the reliefs sought at the substantive hearing might be the result. The grounds relied on by the respondents in challenging the validity of the enquiry were clearly untenable. There were merits in this appeal that warranted intervention. (para 45)

Bahasa Malaysia *Headnotes*

Berikutan s. 4 Jadual Ketiga Belas Perlembagaan Persekutuan ('Perlembagaan') yang diwartakan ('notis'), Suruhanjaya Pilihan Raya ('SPR') memaklumkan telah menyemak pembahagian Negeri-negeri Malaya kepada kawasan pilihan raya Persekutuan dan Negeri, selaras dengan per. 113(2) Perlembagaan dan mengusulkan cadangan sementara susulan semakan tersebut ('cadangan yang disarankan'). Pihak-pihak yang berkelayakan dimaklumkan tentang ini dan mereka boleh membuat bantahan untuk menentang cadangan yang disarankan bawah s. 5 Jadual Ketiga Belas. Susulan penerbitan notis tersebut, satu badan yang terdiri daripada 120 pengundi kawasan pilihan raya Parlimen Lembah Pantai, termasuk 11 responden dalam kes ini, mengemukakan bantahan terhadap cadangan yang disarankan. Suruhanjaya Pilihan Raya mengadakan inkuiri tempatan dan seminggu selepas itu, responden memfailkan permohonan ini, memohon kebenaran memulakan prosiding semakan kehakiman untuk mendapatkan satu perintah *certiorari* membatalkan notis dan cadangan yang disarankan bagi kawasan-kawasan pilihan raya Persekutuan di Kuala Lumpur, seperti yang disemak oleh SPR pada 2016 dan bagi satu pengisytiharan bahawa inkuiri tempatan yang dijalankan oleh SPR tidak sah.

Kebenaran dan penggantungan notis dan proses/prosiding/tatacara penyempadan kesemua kawasan pilihan raya di Kuala Lumpur hingga pelupusan muktamad semakan kehakiman dibenarkan. Hakim berpendapat bahawa permohonan tersebut tidak remeh dan alasan-alasan yang dikemukakan oleh responden membentuk satu kes yang boleh dipertikaikan; yang meritnya boleh dibicarakan semasa perbicaraan permohonan substantif. Hakim tidak mempertikaikan bahawa SPR tidak membuat apa-apa keputusan tetapi di peringkat inkuiri, sekadar mengemukakan cadangan. Walau

bagaimanapun, hakim memutuskan kerja-kerja yang dilakukan oleh SPR menjurus ke arah keputusan muktamad Parlimen dan dengan itu membentuk sebahagian proses membuat keputusan. Oleh itu, beliau berpendapat jika terdapat apa-apa kecacatan pada proses membuat keputusan, termasuk proses dalam mana cadangan dibuat atau saranan bagi cadangan dibuat, proses ini rentan pada semakan di mahkamah apabila permohonan dibuat oleh pihak yang terkilan. Maka timbul rayuan ini terhadap keputusan tersebut.

Responden-responden memfailkan notis usul untuk membatalkan notis rayuan perayu. Responden menghujahkan bahawa (i) oleh kerana bantahan perayu semasa peringkat kebenaran sebahagian besarnya berkaitan notis dan cadangan yang disarankan dengan alasan-alasan dalam rayuan perayu berkaitan dengannya dan sebaliknya, tindakan tersirat hanya terhad pada inkuiri tempatan, rayuan ini bersifat akademik kerana cuma berkenaan notis dan cadangan yang disarankan, bukan inkuiri; (ii) perayu tidak mempunyai *locus standi* untuk merayu terhadap keputusan Mahkamah Tinggi untuk memberi kebenaran kerana perayu bukan pihak dalam prosiding tersirat tersebut. Perayu tidak mewakili SPR di peringkat kebenaran kerana beliau mewakili awam dan peranan perayu sekadar memaklumkan mahkamah akan apa-apa sifat kes yang menghilangkan kelayakan pemberian kebenaran. Apabila kebenaran diberi, SPR menjadi pihak dalam prosiding. Oleh itu, perayu bukan pihak terkilan yang layak merayu terhadap pemberian kebenaran; dan (iii) rayuan adalah satu salah guna proses mahkamah kerana perayu tidak membantah pada peringkat kebenaran dalam semakan kehakiman yang difailkan oleh Kerajaan Negeri Selangor ('kes Kerajaan Negeri Selangor') yang isu-isunya serupa dengan kes ini.

Bagi aduan bahawa inkuiri tempatan tidak sah, isu-isu berbangkit adalah (i) sama ada SPR dibentuk dengan sah semasa inkuiri tempatan; (ii) sama ada notis tujuh hari yang diberi sebelum hari inkuiri memadai untuk membuat persediaan bagi perbicaraan; dan (iii) sama ada inkuiri tempatan bersifat separa jenayah dan responden-responden dinafikan perbicaraan adil berdasarkan tindakan-tindakan SPR dalam (a) gagal memaklumkan mereka akan sebab-sebab dan kesan cadangan yang disarankan; (b) hanya membenarkan tiga orang pembantah untuk bersuara bagi pihak kumpulan dan hanya 20 pembantah yang dibenarkan memasuki dewan inkuiri; (c) menafikan hak mereka mendapat perwakilan guaman yang diperuntukkan oleh s. 18 Akta Suruhanjaya Siasatan 1950 ('Akta'); (d) gagal mengemukakan dua orang Pegawai Kerajaan Persekutuan yang menasihati SPR tentang topografi dan pengagihan populasi dalam kawasan pilihan raya bawah per. 115(2) atau memaklumkan mereka akan nasihat yang diberi oleh pegawai-pegawai ini dalam merangka cadangan yang disarankan untuk mengenal pasti sebab-sebab sebalik cadangan yang disarankan; dan (e) inkuiri tidak dijalankan di tribunal yang bebas dan saksama.

Diputuskan (membenarkan rayuan dan mengetepikan perintah Mahkamah Tinggi dalam memberi kebenaran dan memerintahkan penggantungan notis dan proses/prosiding/tatacara penyempadan kesemua kawasan pilihan raya Wilayah Persekutuan Kuala Lumpur)
Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

(1) Perayu, dalam rayuannya terhadap keseluruhan keputusan Mahkamah Tinggi dalam memberi kebenaran, telah dengan jelasnya membangkitkan isu-isu utama berkenaan inkuiri tempatan dalam memorandum rayuan. Dalam apa-apa jua keadaan, isu-isu tentang inkuiri telah disuarakan oleh perayu di Mahkamah Tinggi. Sewajarnya, memorandum rayuan tidak terbatas pada isu notis dan cadangan yang disarankan. Isu inkuiri tempatan adalah isu hidup di mahkamah bawahan dan mahkamah ini. Hujahan-hujahan responden-responden berkenaan isu ini satu salah tanggapan dan terpesong.

(2) Perayu mempunyai *locus standi* dan hak istimewa untuk merayu dalam kepentingan awam. Tidak dinafikan perayu adalah pihak dalam permohonan kebenaran. Kehadiran beliau dikehendaki oleh undang-undang walaupun tidak dijadikan pihak dalam prosiding. Peruntukan relevan adalah A. 53 k. 3(3) Kaedah-Kaedah Mahkamah 2012 yang mewajibkan pemohon memberi notis permohonan kepada Jabatan Peguam Negara. Kegagalan mematuhi syarat wajib untuk mengemukakan kertas-kertas kausa kepada Peguam Negara mengakibatkan permohonan ditolak. Ini juga menjadikan Peguam Negara pihak yang mewakili kepentingan awam semasa permohonan kebenaran dibicarakan. Oleh itu, apabila beliau hadir di mahkamah pada peringkat tersebut, mahkamah harus memperakui kehadiran beliau dan tidak berbidang kuasa untuk tidak mendengarnya. Pihak anggapan iaitu SPR bukanlah pihak ketika itu. Kedudukan perayu sebagai pemelihara kepentingan awam pada peringkat ini pastinya termasuk hak untuk merayu terhadap perintah memberi kebenaran.

(3) Tiada persamaan tepat antara kes Kerajaan Negeri Selangor dengan permohonan ini. Isu-isu yang dibangkitkan dalam kes Kerajaan Negeri Selangor tidak dibangkitkan bahkan bukan isu dalam permohonan dalam rayuan ini. Tiada apa-apa material yang berbangkit daripada isu-isu yang ditimbulkan dalam notis usul dan hujahan-hujahan responden-responden. Notis usul keseluruhannya tidak bermerit dan dengan itu ditolak tanpa perintah terhadap kos.

(4) Terdapat peruntukan-peruntukan khusus dalam Perlembagaan yang membenarkan SPR berfungsi dengan sah jika tidak cukup bilangannya. Peruntukan-peruntukan ini terdapat dalam (i) per. 160(1) dibaca bersama-sama dengan s. 33C Jadual Kesebelas Perlembagaan; dan (ii) per. 114(7) Perlembagaan. Peruntukan-peruntukan ini, secara tersirat, membuktikan niat badan perundangan agar SPR dibenarkan

wujud jika pun ahlinya kurang daripada tujuh orang dan terus berfungsi dengan sah jika kurang ahlinya. Oleh itu, kuasa-kuasa dan prosiding dalam SPR jelas tidak terkesan dengan kekurangan bilangan ahlinya. Kedudukan perundangan ini tidak disangkal dengan meyakinkan oleh responden-responden. Hujahan responden-responden bahawa tujuh orang ahli mesti hadir semasa inkuiri tempatan satu salah tanggapan sepenuhnya bawah undang-undang.

(5) Responden-responden dimaklumkan tentang inkuiri pada 31 Oktober 2016 bahawa inkuiri akan diadakan pada 8 November 2016. Kali pertama aduan ini dibuat adalah ketika permohonan kebenaran dibuat di Mahkamah Tinggi. Tiada keterangan sama sekali untuk menunjukkan pembantah-pembantah memohon agar inkuiri ditangguhkan atas alasan tidak cukup masa membuat persediaan bagi inkuiri. Responden-responden sewajarnya membangkitkan isu ini seawal mungkin.

(6) Inkuiri yang dijalankan bahawa Akta menyerupai prosiding mahkamah. Walau bagaimanapun, inkuiri tempatan yang dijalankan selaras dengan Jadual Ketiga Belas adalah satu alternatif. Inkuiri tempatan oleh SPR tidak bersifat separa jenayah. Skim dalam Jadual Ketiga Belas, khususnya ss. 4 hingga 7, menunjukkan inkuiri tempatan adalah jenis yang berlainan daripada inkuiri-inkuiri yang biasanya dijalankan bawah Akta. Bawah skim ini, SPR tidak menghakimi apa-apa hal perkara. SPR berada di inkuiri tempatan untuk mendengar bantahan terhadap cadangan-cadangan sementara.

(7) Tiada peruntukan dalam Perlembagaan yang mengkehendaki SPR memaklumkan sebab-sebab sebalik cadangan sementara. Yang dikehendaki oleh skim ialah agar EC menyatakan kesan-kesan cadangan yang dilakukan dalam notis dan cadangan yang disarankan ketika ini terbuka bagi siasatan.

(8) Bawah s. 5(a) Jadual Ketiga Belas, hanya apabila SPR menerima bantahan terhadap cadangan yang disarankan daripada badan yang terdiri daripada 100 atau lebih nama ditunjukkan dalam daftar kawasan pilihan raya semasa yang dipertikaikan barulah SPR mesti mengadakan inkuiri tempatan bagi kawasan-kawasan tersebut. Maka, selagi berkenaan inkuiri tempatan, hak untuk didengar, seperti yang dibayangkan bawah seksyen ini jelas milik satu kumpulan yang terdiri daripada 100 atau lebih orang, bukan hak satu pengundi perseorangan. Dengan itu, bagi tujuan penjalanan kuasanya dalam menjalankan inkuiri, setiap pengundi tidak semestinya perlu didengar oleh SPR. Sememangnya dalam rangkuman kuasa SPR, mengguna pakai s. 8 Akta, ss. 5 dan 6 Jadual Ketiga Belas dibaca bersama-sama dengan s. 30 Jadual Kesebelas Perlembagaan, untuk mengenal pasti bilangan orang daripada kumpulan yang terdiri daripada 120 orang pembantah

itu untuk mewakili mereka dan hadir di dalam dewan semasa inkuiri. Adalah mencukupi apabila ini dilakukan dan kumpulan yang terdiri daripada 120 pembantah ini telah diberikan perbicaraan yang secukupnya dan adil. Aduan ini remeh sama sekali.

(9) Responden-responden membangkitkan hujahan tentang isu kegagalan SPR memanggil dua orang Pegawai Kerajaan Persekutuan dengan pengetahuan khas tentang topografi. Isu ini langsung tidak boleh diterima. Bantuan yang diperoleh daripada dua orang pegawai yang memberi nasihat tentang topografi dan pengagihan populasi kini lumrah cadangan yang disarankan oleh SPR. Bantahan oleh responden-responden yang dibuat terhadap cadangan sementara mencabar nasihat yang membentuk cadangan-cadangan tersebut. Tentunya tiada asas dalam hujahan bahawa inkuiri tidak sah atas alasan SPR gagal mengemukakan dua orang pegawai tersebut.

(10) Tindakan Pengerusi yang membuat beberapa komen membangkitkan aduan tentang prejudis yang nyata. Komen-komen oleh Pengerusi ini, besar kemungkinan, tidak boleh dikatakan telah mencemar minda Pengerusi dengan prejudis dan bukan alasan yang cukup untuk membangkitkan prejudis nyata oleh Pengerusi atau SPR apabila menjalankan inkuiri tempatan dan seterusnya menerbitkan notis dan cadangan yang disarankan. Komen-komen ini dibuat oleh Pengerusi dan tidak boleh dikaitkan atau disamakan dengan komen-komen atau tindakan SPR menjalankan inkuiri. Bawah undang-undang, notis dan cadangan yang disarankan disediakan oleh SPR dan bukan Pengerusi. Responden-responden tidak berjaya menunjukkan bahawa elemen prejudis nyata dicerminkan dalam cadangan yang disarankan atau bahawa komen-komen atau tindakan Pengerusi membangkitkan tanggapan bahaya besar dalam cara inkuiri dijalankan oleh SPR. Dakwaan prejudis nyata adalah *non sequitur*, satu hujahan yang tidak sah yang dikategorikan sebagai pemutusan antara dalihan dengan kesimpulan yang didakwa oleh responden-responden dalam prejudis nyata.

(11) Kebenaran tidak sepatutnya diberi kerana tidak boleh dinyatakan secara muktamad bahawa permohonan tersebut tidak remeh. Responden-responden gagal menunjukkan bahawa sekiranya kebenaran diberi, satu kes yang boleh dipertikaikan yang berpihak pada pemberian kebenaran relif-relif yang dipohon pada perbicaraan substantif akan tercapai. Alasan-alasan yang dijadikan sandaran oleh responden-responden dalam mencabar kesahan inkuiri jelas tidak dapat dipertahankan. Terdapat merit dalam rayuan yang mewajarkan campur tangan.

Case(s) referred to:

*Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals [2012] 1 CLJ 805 FC **(refd)***

*Beta Tegap Sdn Bhd v. Majlis Perbandaran Sepang; Peguam Negara Malaysia (Intervener) [2014] 4 CLJ 551 HC **(refd)***

*Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC **(refd)***

*Chow Hong Lit lwn. YB Menteri Sumber Manusia Malaysia & Satu Lagi [1998] 5 CLJ 169 HC **(refd)***

*Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia [2013] 2 CLJ 1009 FC **(refd)***

*Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors [1995] 2 CLJ 900 CA **(refd)***

*Kanawagi Seperumaniam v. Dato' Abdul Hamid Mohamad [2004] 5 MLJ 495 **(refd)***

*OJSC Oil Company Yugraneft v. Roman Arkadievich Abramovich [2008] EWHC 2613 (Comm) **(refd)***

*Pengerusi Suruhanjaya Pilihanraya Malaysia v. See Chee How & Anor [2015] 8 CLJ 367 CA **(refd)***

*R v. Secretary of State for the Home Department, ex parte Rukshanda Begum [1990] COD 107 **(refd)***

*Ridge v. Baldwin [1964] AC 40 **(refd)***

*Su Yu Min v. Ketua Polis Negeri & Ors [2005] 3 CLJ 875 HC **(refd)***

*Tan Sri Joseph Kurup v. Danny Anthony Andipai; Attorney General, Malaysia (Intervener) [2009] 3 CLJ 523 FC **(refd)***

*Teng Chang Khim v. Suruhanjaya Pilihanraya, Malaysia [1994] 3 CLJ 122 HC **(refd)***

*Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd [1995] 3 CLJ 627 SC **(refd)***

*Wong Kie Chie v. Kathryn Ma Wai Fong & Anor & Other Appeals [2017] 1 LNS 131 CA **(refd)***

*WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Berhad [2012] 4 CLJ 478 FC **(refd)***

*Zulpadli Mohammad & Ors v. Bank Pertanian Malaysia Bhd [2011] 1 LNS 1853 CA **(refd)***

Legislation referred to:

Commissions of Enquiry Act 1950, ss. 2(1), 8, 9, 13, 14, 18

Federal Constitution, arts. 43A(2), 113(2), 114(1), (7), 115(2), 160(1), Eleventh Schedule ss. 30, 33C, Thirteenth Schedule ss. 2, 4(a), 5(a), 6, 7, 8, 9, 12

Rules of Court 2012, O. 53 rr. 3(2), (3), 9

For the appellant - Amarjeet Singh Serjit Singh, Suzanna Atan, Shamsul Bolhassan, Azizan Md Rashad & Nik Azrin Zairin Nik Abdullah; SFCs

For the respondents - Malik Imtiaz Sarwar, Alliff Benjamin, Surendra Ananth & Chan Wei June; M/s Thomas Philip

[Editor's note: Appeal from High Court, Kuala Lumpur; Application for Judicial Review No: WA-25-209-11-2016 (overruled).]

Reported by Najib Tamby

JUDGMENT

Idrus Harun JCA:

Introduction

[1] Before turning to the issues central to this appeal, we shall refer to a notice under s. 4 of the Thirteenth Schedule to the Federal Constitution published *vide* Gazette Notification P.U.(B)410/2016 on 15 September 2016 (the notice) as a convenient starting point in our judgment. Pursuant to the notice, the Election Commission (the EC) has notified that it has reviewed the division of the States of Malaya into Federal and State constituencies in accordance with art. 113 cl. (2) of the Federal Constitution and proposed provisional recommendations consequent to the said review (the proposed recommendations). Eligible parties are also apprised to the effect that they can make representations objecting to the proposed recommendations in accordance with s. 5 of the said Thirteenth Schedule. Following the publication of the notice, a body of 120 electors of parliamentary constituency P.121 Lembah Pantai, including the 11 respondents herein, had on 14 October 2016, submitted representations against the proposed recommendations. The EC, shortly after that, held a local enquiry on 8 November 2016, which is a mandatory requirement of s. 5 of the Thirteenth Schedule to the Federal Constitution upon the representations received against the proposed recommendations in respect of the constituency in question.

[2] One week after the local enquiry was held, the respondents filed this application in which the respondents, amongst others, sought leave to commence judicial review proceedings seeking to be granted an order of *certiorari* to quash the Notice and the proposed recommendations for the Federal constituencies in the Federal Territory of Kuala Lumpur as reviewed by the EC in 2016 and for a declaration that the local enquiry carried out by the EC was unlawful. Leave was granted on 3 January 2017. The learned judge had also granted a stay of the notice and process/proceedings/procedure of delimitation of all constituencies in the Federal Territory of Kuala Lumpur until final disposal of the judicial review. This appeal by the Attorney General is against the said decision of the learned judge in granting leave given on 3 January 2017.

The High Court's Decision

[3] We could glean from His Lordship's brief decision that leave was granted because the application was not frivolous and that the grounds put forward by the respondents made out an arguable case the merits of which ought to be heard at a hearing of the substantive application. The learned judge did not dispute that the EC did not make any decision but merely at this stage in the enquiry, proposed recommendations. Nevertheless, the learned judge held that the work undertaken by the EC "goes towards that final decision by Parliament and is thus part of the decision-making process".

Therefore, His Lordship said, should there be any flaw in the decision-making process, including the process by which recommendations were drawn up or proposals for recommendations were made, that process should be susceptible to review by the court on an application of an aggrieved party.

Grounds For Judicial Review

[4] The application for judicial review was premised principally on the contentions that the notice and the proposed recommendations:

(a) were made without power as the condition precedent to the exercise of such power by the EC under art. 113 cl. (2) of the Federal Constitution was not fulfilled and were in contravention of ss. 4(a) and 2 of the Thirteenth Schedule thereof respectively;

(b) were irrational and disproportionate as they were made without any reasonable or legal basis;

(c) were published by the EC when it was not lawfully constituted in accordance with art. 114 cl. (1) thereof; and

(d) were made with procedural impropriety.

The challenge by way of the judicial review application was also mounted on the basis that the local enquiry was illegal as the EC was not lawfully constituted in accordance with art. 114 cl. (1) of the Federal Constitution and the respondents' right to a fair hearing was allegedly violated.

Notice Of Motion

[5] This appeal was scheduled for hearing before this court on 13 February 2017. However, before that day arrived, on 7 February 2017, it emerged that the respondents had filed a notice of motion in encl. 6a seeking an order of this court to strike out the appellant's notice of appeal dated 9 January 2017. The notice of motion was set for hearing on 13 February 2017, the same date this court was scheduled to hear this appeal. As the outcome of our determination of the notice of motion would have a direct bearing on the present appeal, it behoves this court immediately to hear the notice of motion before we proceeded to hear the appeal.

[6] The respondents supported their notice of motion with an affidavit deposed by the first respondent on 7 February 2017 in which it was averred amongst others that they had by way of a letter dated 2 February 2017 (exh. NI2) informed the High Court that they were no longer pursuing their grounds of challenge on the legality of the notice and the proposed recommendations as set out in paras. 19 to 32 of their statement pursuant to O. 53 r. 3(2) of the Rules of Court 2012 (the Order 53 statement). The essence of their case would now be confined, and the respondents would only be pursuing their grounds of challenge pertaining, to the local enquiry only as described in paras. 33 and 34 of the said Order 53 statement. Since the appellant's objections during the leave stage substantially pertained to the

notice and the proposed recommendations with all the grounds in the appellant's memorandum of appeal dated 27 January 2017 were in connection with the same and on the contrary, the underlying action was consequently limited only to the local enquiry, it follows that the appeal herein was academic as it merely concerned the notice and the proposed recommendations, not the enquiry.

[7] Next, it was also asserted in the affidavit in support to the effect that the appellant had no *locus standi* to appeal against the High Court's decision to grant leave as the appellant was not a party to the underlying proceedings. The reasoning assumed, as we understood it, that the appellant did not represent the EC at the leave stage, he instead represented the public and the role of the appellant was merely to apprise the court of any particular feature of the case that would disqualify any leave being granted. Once leave was granted, the EC became a party to the proceedings. As such the appellant was not an aggrieved party who was entitled to appeal against the granting of leave.

[8] Turning now to the last point that had been raised in the affidavit in support, we could discern the argument that the appeal herein was an abuse of process as the appellant did not similarly object during the leave stage on 16 December 2016 in connection with another judicial review application no. WA-25-186-10-2016 filed by the Government of Selangor (the Selangor Government case) in which the issues raised were identical to the issues raised herein (exh. NI-4). The implication which arose from the appellant's omission to raise objection in the Selangor Government case was that the appellant agreed that the matters raised herein were amenable to judicial review and consequently leave had to be granted. The appellant therefore ought to be estopped from taking an inconsistent position as it would amount to an abuse of the court process.

[9] Learned counsel for the respondents submitted that the scope of the judicial review application was severely reduced when it was consequently limited to the enquiry only. Since the appellant's objection during the leave stage mainly dealt with the notice and proposed recommendations, the grounds stated in the appellant's memorandum of appeal pertained to the notice and proposed recommendations and that part of the challenge was no longer being pursued by the respondents, everything in relation to the appeal herein now was no longer a live issue and accordingly the appeal herein had been rendered academic.

[10] We could glean from the notice of appeal that the appellant had appealed against the whole decision of the High Court to allow leave. In the memorandum of appeal, the appellant had clearly raised the principal issues concerning the local enquiry in paras. (8), (11) and (12) thereof. In any event, the issues concerning the enquiry were also ventilated by the appellant in the written submissions before the High Court. Accordingly, the memorandum of appeal is not confined mainly and solely to the issues relating to the notice

and the proposed recommendations. It is beyond question therefore that the issue of local enquiry was very much a live issue in the court below and before this court. The respondents' contention on this issue was in our view a clear fallacy and a red herring. It is abundantly clear that the issue set out in r. 3(3) of the Order 53 statement requires this court's determination.

[11] Learned counsel for the respondents had also submitted that the appellant had no *locus standi* to appeal as only an aggrieved party could appeal against a decision to grant, or not to grant, leave. He referred to O. 53 r. 9 of the Rules of Court 2012 which provides:

> An application to set aside any order made by the Judge shall not be entertained, **but the aggrieved party may appeal to the Court of Appeal**. (emphasis added)

In this application for judicial review, learned counsel argued, the appellant was not a party to the underlying proceedings and therefore did not fall within the ambit of the above rule. Citing the High Court's decision in *Chow Hong Lit lwn. YB Menteri Sumber Manusia Malaysia & Satu Lagi* [1998] 5 CLJ 169; [1998] 3 MLJ 63, learned counsel emphasised that the appellant's role during the leave stage was to take a position on the application in the interest of the public. The appellant did not represent any party. He represented the public. The appellant's role was to merely apprise the court on any feature of the case that would disqualify the granting of leave. Once leave was granted, the respondents became parties to the proceedings. As such, the appellant did not have the *locus standi* to appeal against the granting of leave. The appellant, likewise, did not have the standing to appeal against the stay order. The said order was given after leave was granted. At that point in time, the appellant was no longer part of the proceedings. The stay was a matter between the respondents and the EC.

[12] The respondents' argument on this point, we would say, was premised on the ground that the appellant had no *locus standi* to appeal as the appellant was not a party to the proceedings. In our opinion, the appellant had *locus standi* and also a special right to appeal in the public interest. The appellant was undeniably a party at the leave application. His presence was required by law without being made a party to the proceedings. The relevant provision is found in O. 53 r. 3(3) of the Rules of Court 2012 which states:

> The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavit.

This provision, in our judgment, makes it mandatory, as evident by the use of the word 'must', for the applicant to give notice of the application to, and at the same time lodge the statement and affidavit in, the Attorney General's Chambers. A failure to comply with the mandatory requirement to serve the cause papers on the Attorney General would result in the application being

dismissed. It also makes the Attorney General the party representing the public interest at the point when the leave application is heard, hence, when he appears before the court at that stage, the court has to recognise his presence and has no jurisdiction not to hear him. The putative party, the EC, is not a party at that particular point. The appellant's position as guardian of public interest at this stage would necessarily include the right to appeal against an order granting leave.

[13] Thus, inasmuch as the court had no jurisdiction not to hear the appellant when he appeared before the High Court at leave stage, the appellant should, as a necessary corollary, have the right to appeal to this court against the decision of the High Court to grant leave and when he does, this court has to hear him on the appeal. The rationale to make the appellant a party to the proceeding was stated in *Kanawagi Seperumaniam v. Dato' Abdul Hamid Mohamad* [2004] 5 MLJ 495 at p. 500, para. [4] as follows:

> There is a good reason why the applicant is required to serve the cause papers on the AG. The rule is based on the principle that judicial review is a principal tool of 'public law' applicable to 'public' bodies in claims brought before a specialised administrative court. In Malaysia, this administrative court is the High Court in its originating jurisdiction. **As public bodies impliedly attract public interest and the guardian of public interest is the AG this provision makes the AG a nominal party in all judicial review applications**. The intention of this rule was to ensure that the AG vets all judicial review applications in order to ascertain if his participation is warranted. Whether the AG elects to appear or not is solely at his discretion. And if the AG does elect to appear by himself or his representative then the court is bound to give a hearing and thereafter decide the matter. The court has **no jurisdiction not to hear the AG. However if the AG appears it is for the AG to show the public element involved in the application and to either support or oppose the application**. However, if there is no public element involved, there is no need for the AG to appear and it would be implied that the non-appearance of the AG would mean that the application did not touch issues of public interest. (emphasis added)

[14] The appellant's role in the public interest is to safeguard public authorities by deterring or eliminating clearly ill-founded claims without the need for them to become a party to litigations and to prevent public administrative actions from being paralysed. In this case, there is a glaring presence of the element of public interest relating to the conduct of general election in the country in particular the review of the division of the Federation and the States into constituencies that would justify the appearance of the appellant as a party in the court below and here on appeal. Thus, when the learned judge granted a stay, not only that the order of stay of the notice and the process of delimitation of constituencies had affected the Lembah Pantai constituency, but the stay order had also effectively stayed all the process of delimitation of constituencies including local

A enquiries for the whole of the Federal Territory of Kuala Lumpur. The stay order had thus paralysed and would have stultifying effect on the EC in the exercise of its constitutional functions.

[15] There is admittedly a dearth of clear authorities directly on the point in contention herein with respect to whether the Attorney General can appeal B against the granting of leave in a judicial review application in which the Attorney General has raised an objection against the granting of such leave. However, reference in this connection may be made to several cases that would directly show that the Attorney General had previously always been allowed to intervene or appeal in public interest cases where he was not even C a party. These matters concerned various subjects or elements of public interest including matters in relation to jurisdiction, interpretation of statutory provisions and the effect of constitutional provisions. Thus, in *Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia* [2013] 2 CLJ 1009; [2013] 2 MLJ 321 where the appellant appealed against the decision allowing D leave to the Court of Appeal, he subsequently was made a respondent in the Federal Court. In *Tan Sri Joseph Kurup v. Danny Anthony Andipai; Attorney General, Malaysia (Intervener)* [2009] 3 CLJ 523; [2009] 3 MLJ 1 the Federal Court allowed the Attorney General to intervene in an appeal concerning an election petition. This is what the court had to say:

E > [1] At the outset of the appeal, the learned Attorney General of Malaysia, by encl 10(a), applied to intervene in the appeal. After hearing the parties, we allowed the application, with costs in the cause, on the ground that this appeal involved public interest pertaining to the conduct of the general election in the country, and that the Attorney General, being the legal adviser to the government, was most appropriate to intervene and F be added as a party in the appeal.

[16] In *Beta Tegap Sdn Bhd v. Majlis Perbandaran Sepang; Peguam Negara Malaysia (Intervener)* [2013] 10 MLJ 240 the issue of *locus standi* and the role of the Attorney General were explained as follows:

G > [4] The respondent opposed the application on the ground that the attorney general does not have *locus standi* to intervene based on the Federal Court decision in the case of *Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors* [2009] 6 MLJ 307. In *Bong*' case the Federal Court held, *inter alia*, that O. 53 r. 8(1) of the Rules of the High Court 1980 specifically caters to person claiming an interest in the judicial review proceedings and H who wishes to be heard in opposition ... The attorney general also has not shown that he has a direct interest in the matter. The Federal Constitution does not give him power to intervene as required by art 145. The attorney general has also not shown any other law that gives him power to intervene. Further it is also argued that the issue in dispute is a private matter and will not affect the interest of the public.

I

The High Court held:

> [7] ... I agree with the learned counsel for the attorney general that the attorney general's position is special. He is not just a person. He is supposed to be a guardian of public interest; he is supposed and expected to act when matters concern public interest or public policy. This is a common law principle which one follow by virtue of s. 3 of Act 67. The AES camera concerns the enforcement of traffic laws and I feel the court can take judicial notice of the public interest generated by the AES cameras.
>
> [8] Hence, I am of the opinion that the right to intervene by the attorney general is independent of the Rules of Court 2012 whether it is O. 15 r. 16 or O. 53 r. 8, ...

[17] The argument before us was also directed on the issue of an abuse of process in which we were pressed with the argument that the appellant was estopped from objecting to the application for judicial review as in another similar application involving identical issues, that is, the Selangor Government case, the appellant did not object during the leave stage. The implication was that the appellant was now estopped from objecting to the application herein as the two cases were similar. The appellant had effectively agreed that the matters raised in the Selangor Government Case were amenable to judicial review. This is a position that the appellant had taken in its capacity as the representative of the public. The appellant was estopped from taking an inconsistent position by objecting to leave in this case. Such a position, learned counsel argued, amounted to an abuse of the court process referring in this connection to the case of *OJSC Oil Company Yugraneft v. Roman Arkadievich Abramovich* [2008] EWHC 2613 (Comm) in which Christopher Clarke J said, at paras. 429 and 430:

> 429. They also refer, by way of an analogy to a US doctrine described as "judicial estoppel" under which a party who assumes a particular position in litigation and succeeds in persuading the court to accept that position may not be permitted to take an inconsistent position in later litigation. The Court of Appeals for the Sixth Circuit explained the position in *Edwards v. Aetna Life and Casualty* 690 F 2s 595 (1982):
>
> > The policies supporting judicial estoppel are different from those that support the more common doctrines of issue preclusion, equitable and collateral estoppel. Courts apply equitable estoppel to prevent a party from contradicting a position taken in a prior judicial proceeding ... Equitable estoppel enables a party to avoid litigating, in the second proceeding, claims which are plainly inconsistent with those litigated in the first proceeding. Because the doctrine is intended to ensure fair dealing between the parties, the courts will apply the doctrine only if the party asserting the estoppel was a party in the prior proceeding and if that party has detrimentally relied upon his opponent's prior position. See Id. at

A 689-90. Collateral estoppel prevents relitigation of factual matters that were fully considered and decided in a prior proceeding. Thus, collateral estoppel operates to prevent repetitive litigation. ....

The doctrine of judicial estoppel applies to a party who has successfully and unequivocally asserted a position in a prior
B proceeding; he is estopped from asserting an inconsistent position in a subsequent proceeding ... Unlike equitable estoppel, judicial estoppel may be applied even if detrimental reliance or privity does not exist. ... This distinction reflects the difference in the policies served by the two rules. Equitable estoppel protects litigants from less than scrupulous opponents. Judicial estoppel, however, is
C intended to protect the integrity of the judicial process. ... *Scarano v. Central R. Co.,* 203 F.2d 510, 512-13 (3rd Cir. 1953) ("such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasised as an evil the court should not tolerate.") The essential function of judicial estoppel is to prevent intentional inconsistency; the
D object of the rule is to protect the judiciary, as an institution, from the perversion of judicial machinery. ... Collateral estoppel is essentially a finality rule, which serves to conserve judicial resources by precluding the litigation of issues previously decided. Judicial estoppel addresses the incongruity of allowing a party to assert a position in one tribunal and the opposite in another
E tribunal. If the second tribunal adopted the party's inconsistent position, then at least one court has probably been misled ...

430. Sibir mounted a claim based on the contention that the receipt by the six offshore companies of the participation interests (knowingly assisted by Mr Abramovich) was unlawful. It failed in that attempt since
F the BVI Courts, held that the relevant law is the law of Russia, by which law Sibir has no claim. They did so as a result of Sibir's own contention that there was no claim in Russian law by Sibir (or Yugraneft). Now through Yugraneft, its privy, it seeks to bring a claim in knowing receipt against Mr Abramovich and Millhouse, on the footing that the receipt was unlawful in Russian law. Yugraneft also seeks to bring a claim in knowing
G assistance against Mr Abramovich when Sibir had previously claimed that the BVI court should refuse a stay on the ground that neither it nor Yugraneft had any claim. *That seems to me an abuse of the process of the courts. Part of the rationale for the doctrine is the protection of the Court's process and avoidance of the harassment of defendants. Sibir's changes of tack and jurisdiction, alleging, at one moment, that the claims are governed by BVI law as the place of*
H *receipt, then BVI law as the law of the forum, then English law as the place of enrichment, and that Russian law (a) does not and (b) does afford a remedy, seems to me to offend on both counts.* This is not only an example of forum shopping but of issue switching which the courts should not be prepared to tolerate. (emphasis added)

I **[18]** Learned counsel also referred to the Federal Court's decision in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331 which recognised that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances

of the case and indeed "the circumstances in which the doctrine may operate are endless" and that "the essential nature of the doctrine does not appear to be any different in American equity jurisprudence". Also cited by learned counsel in the course of his submission was the case of *Zulpadli Mohammad & Ors v. Bank Pertanian Malaysia Bhd* [2011] 1 LNS 1853; [2013] 2 MLJ 915 in which this court had applied the principle above to estop a litigant from taking a different position from that pleaded in an earlier suit against a different party.

[19] On the facts of the present case, we agreed with the learned Senior Federal Counsel that the doctrine as propounded by the United States' court in *Yugraneft*, *supra*, had no relevance to the instant appeal before this court. We drew a comparison between the Selangor Government case with that of the present application, and we would confidently say that we discerned no exact similarity between the two applications. Having perused the cause papers of the Selangor Government case, it was apparent that the Attorney General would require affidavit evidence and arguments to refute the allegations made therein. There were issues raised in the Selangor Government case which were not raised and were in fact not an issue in the application in the instant appeal. These were the issues pertaining to the electoral roll and the alleged absence of correct and updated addresses of 136,272 voters in the State of Selangor which were allegedly used by the EC in reviewing the delimitation of constituencies in the States of Malaya as raised in paras. (1)(c), (2), (3), 4(c), 5(c) and 6(b) and (c) of the application.

[20] It is legitimate at this stage to have regard to the respondents' application herein which was grounded only on the issues of the constitutionality of the notice and proposed recommendations and the legality of the local enquiry conducted by the EC. The issue relating to the electoral roll is conspicuously not an issue in the present application. With the withdrawal of the issue of the constitutionality of the notice and the proposed recommendations, the application for judicial would now be limited and confined solely to the issue of the legality of the local enquiry. Learned counsel for the respondents did not seem to realise that this issue was completely different from the issues raised in the Selangor Government case. Since the issues raised in the Selangor case might disclose an arguable case at the substantive hearing stage that would require the Attorney General to refute the various allegations raised in the application by way of affidavit evidence to be filed, the Attorney General did not in consequence raise an objection to the application for leave.

[21] In any event, in law, the doctrine of judicial estoppel will only apply to a party where the said party, the appellant in this appeal, had successfully and unequivocally persuaded the court on, or asserted, a position in the Selangor Government case so that when that had taken place, the appellant would be estopped from asserting an inconsistent position in a subsequent proceeding which in this appeal is the application for judicial review. The

essential function of judicial estoppel is to prevent intentional inconsistency while the object of the rule is to protect the court from the perversion of judicial machinery. Judicial estoppel seeks to address the incongruity of allowing a party to assert a position in one court and the opposite in another tribunal. (*Yugraneft* at para. 429). We were satisfied, for the reasons that we have given in the preceding paragraph, that no such successful or unequivocal persuasion or assertion was ever made by the appellant in the earlier Selangor Government case for the doctrine to apply in the instant application for judicial review. The appellant merely did not raise an objection to the leave application. The condition precedent for the doctrine to apply therefore was not fulfilled.

[22] Having considered the notice of motion, the affidavit in support thereof and having heard the submissions of both parties, we did not think anything material turned upon the issues raised in the notice of motion and the respondents' contentions. We were consequently led to one glaring conclusion which is that the notice of motion was wholly unmeritorious and accordingly we had no other alternative but to dismiss it with no order as to costs.

Our Deliberation And Decision On The Appeal

[23] We begin by stating the law on the granting of leave in an application for judicial review. The law on the subject is well-settled and the authority on which the appellant principally relies in considering the test for granting leave is the pronouncement of the Federal Court in the case of *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Berhad* [2012] 4 CLJ 478; [2012] 4 MLJ 296 in which the applicable test was stated in para. 12 at p. 488 in the following terms:

> ... At the leave stage, on a quick perusal of the material available, if the court thinks that subsequently at the substantive hearing stage an arguable case may be disclosed, and the relief sought may be granted, leave should be granted ... Without the need to go into depth of the abundant authorities, suffice if we state that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome.

We would also refer to the case of *Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd* [1995] 3 CLJ 627; [1995] 2 MLJ 442 wherein the Supreme Court approved the following guidelines stated in *R v. Secretary of State for the Home Department, ex parte Rukshanda Begum* [1990] COD 107:

> (i) The judge should grant leave if it is clear that there is a point for further investigation on a full *inter partes* basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law.

(ii) If the judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review. A

[24] The position adopted for the respondents was described in this court by their counsel that since the respondents were no longer pursuing their grounds on the notice and the proposed recommendations, the only issue before this court would now be limited to the local enquiry. The appeal B therefore raised a question concerning the legality of the local enquiry in question conducted by the EC on 8 November 2016. The gravamen of the respondents' complaints that the local enquiry was unlawful as set out in the application and further augmented by learned counsel in his submission could broadly be summarised below as follows: C

(i) the EC was not lawfully constituted during the local enquiry;

(ii) the seven days' notice given before the enquiry day was inadequate to prepare for the hearing;

(iii) the local enquiry was *quasi*-judicial in nature and the respondents were denied a fair hearing by the acts of the EC in: D

(a) failing to inform them of the reasons behind and the effect of the proposed recommendations;

(b) only allowing three persons from amongst the objectors to speak on behalf of the group and only 20 of the objectors were allowed to enter the enquiry hall; E

(c) denying them their right to legal representation which is provided for by virtue of s. 18 of the Commissions of Enquiry Act 1950 (Act 119); F

(d) failing to make available the two officers of the Federal Government who had advised the EC on the topography of, and the distribution of the population in the constituency pursuant to art. 115 cl. (2) or to inform them of the advice given by these officers in formulating the proposed recommendations so as to ascertain the reasons behind the proposed recommendations; and G

(e) the local enquiry was not conducted before an impartial and independent tribunal.

[25] The argument before us on the first complaint centered around the H legality of the local enquiry in which we were pressed by learned counsel that it was not lawfully constituted as only five out of the seven members of the EC were present thereat. The respondents therefore were not heard before the EC at the local enquiry in question. The issue arose as the irrefragable fact showed that during the said local enquiry, the post of the Deputy I Chairman and the post of one member of the EC were vacant. Nevertheless, the learned Senior Federal Counsel, on behalf of the appellant, advanced the most compelling argument against this ground stating that contrary to the

respondents' submission, there were specific provisions in the Federal Constitution which allowed the EC to function lawfully in the event of vacancies in their numbers. The first provision is found in art. 160 cl. (1) read with s. 33C of the Eleventh Schedule to the Federal Constitution. Article 160 cl. (1) states:

> The Interpretation and General Clauses Ordinance 1948 [M.U. 7 of 1948], as in force immediately before Merdeka Day **shall, to the extent specified in the Eleventh Schedule, apply for the interpretation of this Constitution** as it applies for the interpretation of any written law within the meaning of that Ordinance, but with the substitution of references to the Yang di-Pertuan Agong for references to the High Commissioner. (emphasis added)

While s. 33C in the Eleventh Schedule reads:

> 33C Powers of board, etc., not affected by vacancy, etc:
>
> Where by or under any written law any board, commission, committee or similar body, whether corporate or incorporate, is established, then, unless the contrary intention appears, **the powers and proceedings of such** board, **commission**, committee or similar body shall not be affected by:
>
> (a) any vacancy in the membership thereof; ... (emphasis added)

Reference in relation to this point may also be made to art. 114 cl. (7) which is reproduced below:

> Where, during any period, the chairman of the Election Commission has been granted leave of absence by the Yang di-Pertuan Agong or is unable, owing to his absence from the Federation, illness or any other cause, to discharge his functions, the deputy chairman shall discharge the functions of the chairman during that period, and if the deputy chairman is also absent or unable to discharge such functions, a member of the Election Commission may be appointed by the Yang di-Pertuan Agong to discharge the function of the chairman during that period.

These provisions in our judgment, have unambiguously evinced a legislative intention that the EC is allowed to exist even if it consists of less than seven members and continue to function lawfully in the event of vacancies in the membership thereof. Thus, the powers and proceedings of the EC are clearly not affected by any vacancy in their numbers. This legal position has not been convincingly refuted by the respondents. In the event, we found that the respondents' ground under consideration that seven members must be present at the local enquiry was wholly misconceived in law.

[26] The next point raised questions concerned with the issue of the adequacy of the notice of enquiry in which learned counsel contended that the seven days' notice given before the convening of the local enquiry did not amount to adequate notice and was unreasonable as the objectors were denied sufficient time to prepare for the local enquiry. We would mention the irrefutable fact that the respondents in fact were notified of the enquiry

on 31 October 2016 that the same would be held on 8 November 2016. It is also of some significance to observe that the first time this complaint was being made was during the leave application before the High Court. There was absolutely no evidence that the objectors had applied for the enquiry to be adjourned on the ground that there was insufficient time to prepare for the enquiry. We would say on this aspect that if the notice was thought to be inadequate for the purpose of preparing for the enquiry, the request ought to and could have been made before or at the enquiry for the EC's consideration. However, no such request was made at or before the enquiry and neither was any evidence shown that would have indicated that the respondents wanted a longer time to prepare for the enquiry or the alleged inadequate notice had denied them of their right to prepare for the enquiry adequately. The respondents, in our opinion, should have raised this issue at the earliest possible moment and had they done so or had any such request been made, the EC would have had the opportunity to consider the reasons put forth and considered whether to allow an adjournment or otherwise proceed with the enquiry. We must emphasise that it would be wholly inappropriate so to speak, for the respondents to raise this complaint for the first time at the leave stage in the court below when they had every opportunity to do so at the enquiry where in all fairness to the EC, it could have made a decision on the complaint.

[27] The respondents, moreover, did not even raise this complaint in their letter dated 7 November 2016 written by the first respondent which was received by the EC on the same day on the eve of the enquiry. The only complaint stated in the said letter was in connection with inadequate information and we now quote the relevant para. 3 thereof:

> 3. Walau bagaimanapun pihak Tuan masih gagal **memberi maklumat dan informasi** yang sepatutnya berdasarkan surat pada 14.10.2016 dengan nombor rujukan P121LP/10/169(01). **Kegagalan pihak tuan memberikan maklumat telah menafikan hak kami untuk membuat persediaan secukupnya bagi sesi siasatan** dan pendengaran persempadanan semula.
>
> 4. Oleh hal yang demikian siasatan dan sesi pendengaran tidak boleh dilakukan selagi kes dibawa ke Mahkamah dibatalkan sepenuhnya atau sehingga maklumat yang kami tuntut diberikan. (emphasis added)

The letter of 14 October 2016 referred to in the above-mentioned letter contained the respondents' representation against the notice and the proposed recommendations. One of the complaints raised in this letter was in regard to inadequate time to prepare the respondents' objections due to lack of information. At no time did the respondents, before or during the enquiry complain about inadequate notice being given to them. Delving into this complaint, to our minds, based on the reasons we have deliberated above, there is a good deal of substance in the argument put forward by the learned Senior Federal Counsel that no arguable case had been made out by the respondents for the matter to be further investigated at the substantive stage.

[28] It is the respondents' position that a local enquiry is *quasi*-judicial in nature. The argument taken on this point in this court was premised on the fact that the EC is vested with all the powers that are conferred on Commissioners by Act 119 and that the respondents are constitutionally entitled to be heard. As a consequence, the respondents are entitled to be protected by the rules of natural justice. We accepted that the EC is vested with the powers of the Commissioners appointed under Act 119 as it is clear to us that s. 6 of the Thirteenth Schedule to the Federal Constitution provides as such and the said section reads:

> In relation to any enquiry held under section 5 the Election Commission shall have all the powers conferred on Commissioners by the Commissions of Enquiry Act 1950.

But, the main provision in Act 119 that confers powers on Commissioners is s. 8 which provides for the powers which may adequately be summarised as follows:

(a) to call for any evidence and examine witnesses which are thought necessary;

(b) to take evidence of any witness either on oath or affirmation or by statutory declaration;

(c) to summon any person to attend the enquiry to give evidence or produce documents;

(d) to issue a warrant of arrest to compel the attendance of any person required to attend the enquiry;

(e) to impose a fine not exceeding RM50 to any person who refuses to give evidence as ordered;

(f) to admit any evidence which is inadmissible in civil or criminal proceedings;

(g) to admit or exclude the public and press from any enquiry; and

(h) to reimburse any person who has attended any meeting of the Commissioners.

In addition to these powers, Act 119 also confers powers on the EC at an enquiry to appoint an interpreter under s. 9 and to punish any person who commits an act of contempt against the EC under ss. 13 to 14.

[29] It does indeed seem to us that the enquiry conducted under Act 119 resembles a court proceeding. However, the local enquiry conducted in accordance with the Thirteenth Schedule to the Federal Constitution is another kettle of fish. We are of the view that the local enquiry convened by the EC is not *quasi*-judicial in nature. The scheme of the Thirteenth Schedule, in particular ss. 4 to 9, shows that the local enquiry is a totally different species from the usual enquiries held under Act 119. Under the said

scheme, the EC does not adjudicate on any matter, enquire into the conduct of any person or make any finding or decision. The EC sits at the local enquiry to hear objections against their own provisional recommendations. The local enquiry is in fact a consultation avenue for the stakeholders to participate in the process by giving their feedback on the EC's provisional recommendations. On its part, the EC is duty bound to consider the feedback for the purpose of revising their provisional recommendations and where the EC revises any proposed recommendations, such revised recommendations will be republished and subjected to a second round of local enquiry in accordance with ss. 4, 5 and 7 of the Thirteenth Schedule so that the electors whose names are shown on the current electoral roll of the constituencies in question have a chance to object and be heard on the proposed recommendations. Upon the completion of the local enquiries or consultation process the EC finalises the recommendations and submits them in a report to the Prime Minister who will then lay the report together with the draft of an order to be made under s. 12 for giving effect to the recommendations contained in the report before the House of Representatives for a decision.

[30] However, the position of an enquiry under Act 119 is completely different from the local enquiry held by the EC under s. 5 of the Thirteenth Schedule. A Commission is set up under s. 2(1) to enquire into the conduct of a Federal officer or department of the public service or a matter concerning public welfare. Persons who are the subject of an enquiry or implicated or concerned, as the case may be, with the subject of the enquiry are entitled to be represented by counsel as provided by s. 18 as it is obvious to us that their legal rights may be affected. This was the position in *Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals* [2012] 1 CLJ 805; [2011] 6 MLJ 490. In that case, the person under enquiry and the judges implicated or concerned with the enquiry were all represented by counsel. Moreover, at the risk of repeating ourselves, the manner in which the enquiry was conducted resembled a court proceeding and this was most particularly so when witnesses and the officer who was the subject of an enquiry may be examined and cross-examined. Reference in this regard may be made to the case of *Pengerusi Suruhanjaya Pilihanraya Malaysia v. See Chee How & Anor* [2015] 8 CLJ 367 in which this court construed and provided rationale to ss. 4 and 5 of the Thirteenth Schedule as follows:

> [57] Having regard to the legislative scheme of Part II of the Thirteenth Schedule, it is clear that the purpose behind the requirement to publish the notice under section 4(a) is merely **to kick start the process of public consultation between the EC and the registered voters**. The process does not end with the publication of the notice. It is only the beginning of the process. **The consultation process itself will take place at the enquiry held**

A **under section 5(b) of the Thirteenth Schedule**. This is the proper forum to trash out any objections to the proposed recommendations, and not the court.

[63] It is not hard to understand why it is made mandatory for the EC to hold an enquiry under section 5(a) upon receiving any representation
B of objection to the proposed recommendations. **It is to give the voters, who have a stake in the election process, to argue for a revision of the proposed recommendations or even to drop any of the recommendations before they are passed into law by the House of Representatives**. The EC's power to revise the proposed recommendations is provided by s. 6 read with s. 7 of the Thirteenth Schedule which respectively provide:
C (emphasis added)

[31] The case of *See Chee How*, *supra*, has undoubtedly established that the nature of the local enquiry is purely consultative. The powers conferred on the EC by s. 8 of Act 119 are to give authority and dignity to the enquiry process but do not change or render the consultative character of the enquiry
D into one that we could convincingly call a *quasi*-judicial process. The enquiry is conducted to hear a representation. Therein lies the uniqueness of the process. Nobody is put on trial or subjected to any form of enquiry; the EC is not enquiring into the conduct of any officer or department neither is it determining the rights of the respondents herein. We accepted that where the
E Thirteenth Schedule does not provide the manner in which the enquiry is supposed to be conducted, fair hearing is to be accorded. But the body of 120 voters was heard. From the respondents' Order 53 statement and the affidavit in support of the application, we could discern no complaints being made by the respondents during the enquiry that they were not heard. Obviously, they
F did not complain during the enquiry.

[32] The condition of allowing tree speakers and only 20 objectors in the enquiry hall did not impede the objectors' right of raising objections as the three speakers could adequately make their representations on behalf of the other objectors. In any event, such condition was imposed at the discretion
G of the EC and we were of the view that the EC had the power to do so as under s. 30 of the Eleventh Schedule to the Federal Constitution, the EC, in imposing such condition, must be construed to have been conferred with such powers as were reasonably necessary to enable it to conduct the local enquiry. The Thirteenth Schedule does not provide a comprehensive
H procedure on the manner in which a local enquiry ought to be conducted. In our view, the said Schedule, ought to be read together with s. 30 of the Eleventh Schedule in determining the appropriate procedure at the local enquiry. Section 30 of the Eleventh Schedule, in our opinion, should be applicable in addition to s. 8 of Act 119 (see for example the case of *Su Yu Min v. Ketua Polis Negeri & Ors* [2005] 3 CLJ 875; [2005] 6 MLJ 768 in which
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the High Court in determining the issue of the power of a Deputy Minister read art. 43A cl. (2) together with s. 30 of the Eleventh Schedule. Section 30 of the Eleventh Schedule reads as follows:

> Construction of enabling words
>
> Where a written law confers power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also conferred as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.

This instant application is not one where it could be said that the objectors were denied of their rights to object at the enquiry after submitting their written representation objecting to the proposed recommendations.

[33] Further, we are also mindful that under s. 5(a) of the Thirteenth Schedule, it is only where the EC receives a representation objecting to the proposed recommendations from a body of 100 or more persons whose names are shown on the current rolls of the constituencies in question that the EC must hold a local enquiry in respect of those constituencies. Thus, so far as it concerns the local enquiry, the right to be heard as envisaged under this section is obviously the right of a group of 100 or more persons, not the right of an individual voter. Therefore, for the purpose of exercising its powers in conducting the enquiry, it does not mean that each and every one of these voters must be heard by the EC. To our minds, it is indeed within the powers of the EC, applying s. 8 of Act 119, ss. 5 and 6 of the Thirteenth Schedule read together with s. 30 of the Eleventh Schedule to the Federal Constitution, to determine any number of persons from the group of 120 objectors to represent them and to be in the hall during the enquiry. Once this was done, we would say that it would suffice and this group of 120 objectors was adequately and properly given or accorded a fair hearing. The complaint was wholly frivolous and as such we could not accede to the argument urged for the respondents that they were denied a fair hearing.

[34] We must next delve into the issue of the alleged denial of legal representation which learned counsel had submitted that the condition of no legal representation had affected the right of the respondents from presenting their objections. It is of some significance to observe that the respondents presented their representation objecting to the proposed recommendations both orally and in writing. The sole purpose of the local enquiry is to consult electors who have objections against the EC's provisional recommendations. It is abundantly clear that the respondents' role is to raise objections and to provide feedback on the provisional recommendations. The enquiry will give the opportunity to the voters including the respondents to argue for a revision of the proposed recommendations. It is a public consultation between the EC and the electors but there is no evidence to be adduced or need for substantive hearing. But the respondents were not prevented from obtaining any legal advice if they wanted to. Learned counsel in advancing

this point referred to s. 18 of Act 119 contending that the said section guaranteed legal representation as of right. It is necessary in this regard to reproduce s. 18 in full:

> 18. Any person whose conduct is the subject of enquiry under this Act, or who is in any way implicated or concerned in the matter under enquiry, shall be entitled to be represented by an advocate at the whole of the enquiry; and any other person who may consider it desirable that he should be so represented may, by leave of the Commissioner be represented in the manner aforesaid. The Attorney General, the Solicitor General, any Federal Counsel, or any legally qualified member of the State Attorney General's Chambers, Sabah or Sarawak, authorised in that behalf by the State Attorney General, shall be entitled at any time to appear before and address the Commissioners on any matter which to the Attorney General appears to be relevant to the enquiry.

[35] A question has arisen in consequence of the respondents' reliance on s. 18 of Act 119 as guaranteeing their right to legal representation, which is whether the section applies to the enquiry held under s. 5 of the Thirteenth Schedule. This question and the arguments raised by the respondents were the same as that which arose and was rejected in *Teng Chang Khim v. Suruhanjaya Pilihanraya, Malaysia* [1994] 3 CLJ 122; [1994] 2 MLJ 241. The relevant excerpts from the case are reproduced here (at p. 124 (CLJ); pp. 244 - 245 (MLJ)):

> The learned counsel for the plaintiff contends that the plaintiff has a legal right to be represented by counsel at the enquiry. The defendant has no power to deny the plaintiff's right. He relies for his contention on the provisions of s 6 of the Schedule and s 18 of the Commissions of Enquiry Act 1950 ('the Act').
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> Section 6 of the said Schedule provides as follows:
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> > In relation to any enquiry held under section 5 the Election Commission shall have all the powers conferred on Commissioners by the Commissions of Enquiry Act 1950.
>
> Section 18 of the Act provides as follows:
>
> > Any person whose conduct is the subject of enquiry under this Act, or who is in any way implicated or concerned in the matter under enquiry, shall be entitled to be represented by an advocate at the whole of the enquiry; ...
>
> By virtue of s. 6 of the said Schedule, the defendant became vested 'with all the powers conferred on Commissioners ..'. Only powers are vested. **What are the powers of the commissioners under the Act? They are mainly those in s. 8 of the Act. Section 18 has no application**. This section speaks of the right to be represented by counsel of a person at the enquiry under the Act. Section 6 refers to the powers of the commissioners under the Act and not to the rights of persons implicated or concerned in the matter under enquiry under the Act. **Therefore the plaintiff cannot rely on this section to claim that he has a legal right to be represented by counsel at an enquiry held under s. 5 of the said Schedule**.

> As there is no provision in the Federal Constitution, particularly the said Schedule, which gives the plaintiff the right to be represented by counsel at the enquiry, I find that he has no right to be legally represented. (emphasis added)

[36] Before we go more closely into the merits of this issue, for convenience we reproduce s. 18 of Act 119 below:

> 18. Any person whose conduct is the subject of enquiry under this Act, or who is in any way implicated or concerned in the matter under enquiry, shall be entitled to be represented by an advocate at the whole of the enquiry; and any other person who may consider it desirable that he should be so represented may, by leave of the Commissioner be represented in the manner aforesaid. The Attorney General, the Solicitor General, any Federal Counsel, or any legally qualified member of the State Attorney General's Chambers, Sabah or Sarawak, authorised in that behalf by the State Attorney General, shall be entitled at any time to appear before and address the Commissioners on any matter which to the Attorney General appears to be relevant to the enquiry.

This section clearly comprises three limbs. The first limb deals with the right to representation by counsel which is available to any person whose conduct is the subject of enquiry under Act 119, or who is in any way implicated or concerned in the matter under enquiry. This right, so far as the enquiry concerns this category of person, is without doubt guaranteed as of right. The second limb applies to any other person at the enquiry of the first-mentioned category of person 'who may consider it desirable that he should be so represented' in which case he may, 'by the leave of the Commissioners be represented in the manner aforesaid'. The third limb, which is not relevant to the issue under consideration, allows the Attorney General and his officers or any legally qualified member of the State Attorney General's Chambers, Sabah or Sarawak authorised in that behalf by the State Attorney General, to appear at the enquiry.

[37] The respondents' reliance on the first limb in s. 18 of Act 119 is wholly misconceived as the wording in s. 6 of the Thirteenth Schedule only allows powers vested in Commissioners under Act 119 to be exercised by the EC in a local enquiry, whereas the first limb of s. 18 speaks of the right to legal representation as the High Court in *Teng Chang Khim*, *supra*, had correctly pointed out. Furthermore here, and as was in *Teng Chang Khim*, the position is that the respondents were not defending themselves. It is not difficult to fathom the reason why s. 18 of Act 119, insofar as it concerns the person who is the subject of an enquiry, guarantees this right. This is because the legal right of the person whose conduct is the subject of enquiry may be affected by the outcome of such enquiry. The right to legal representation is thus necessary. In the present case, the conduct of the respondents was not the subject of the enquiry, neither were they implicated nor concerned in the matter under enquiry.

[38] Learned counsel also sought to rely on the second limb of s. 18 of Act 119. We accept that the second limb of s. 18 of Act 119 may involve an exercise of some discretion by the EC on whether to grant or otherwise refuse leave for legal representation to any other person who may consider it desirable that he should be so represented by an advocate. An interesting point which was taken by learned counsel before us was that the respondents' case came under the second limb and it certainly involved the exercise of the EC's power. We think that this argument is fallacious because in the context of an enquiry under Act 119, the words 'any other persons' in actuality refer to a person involved in an enquiry other than the person who is the subject of the enquiry. This person may include a witness at the enquiry who wishes to be represented by an advocate. It certainly does not involve the respondents as they were not the subjects of the enquiry neither did they belong to the category of 'any other person' who were required at the enquiry concerning the conduct of a person.

[39] For all these reasons we were of the view that s. 18 of Act 119 did not apply to the local enquiry held under the Thirteenth Schedule of the Federal Constitution as the respondents could not rely on this section to claim that they had a legal right to be represented by counsel at the local enquiry in questioned. Since the Federal Constitution, in particular the Thirteenth Schedule does not have any provision which gives the respondents the right to be represented by counsel at the enquiry, the respondents had no right to be legally represented. Thus, when the law says nothing about such right, it is a matter for the discretion of the EC which conducted the enquiry whether or not to allow the respondents to be represented by counsel at the enquiry. The plaintiff in *Teng Chang Khim* made a formal application to be represented by an advocate but was turned down. There was also no allegation made by the plaintiff of improper exercise of discretion as his contention was that the defendant had no discretion at all in the matter. Likewise in this case it would be useful to remember that there was no issue of improper exercise of discretion alleged in the Order 53 statement as the respondents' case was that the right of the respondents under s. 18 of Act 119 was a guaranteed right as such the EC had no discretion at all in the matter. Since there was no allegation of improper exercise of discretion by the EC, we found that the EC had exercised its discretion properly and the respondents were not denied a reasonable opportunity of being heard.

[40] The respondents had also alleged that they were not informed of the reasons behind and the effect of the proposed recommendations before or during the enquiry and consequently the failure to do so had rendered their right to an effective hearing illusory. We find no provision in the Federal Constitution which requires the EC to inform the reasons behind the provisional recommendations. All that the scheme requires is for the EC to state the effects of the recommendations which had already been done in the notice and the proposed recommendations when it was opened for

inspection. In fact, the effect of the recommendations is the subject matter of the objections which the respondents had addressed both orally and in their written representations at the enquiry. In any event, we could not, however, fully comprehend why this issue was raised as one of the grounds in questioning the legality of the local enquiry when the legality of the notice and the proposed recommendations are no longer in issue as the respondents had withdrawn the grounds of challenge on the legality of the same including the issue of the alleged failure to provide reasons behind the proposed recommendations.

[41] Another point which was raised by the respondents before us related to the issue of the failure on the part of the EC to call two officers of the Federal Government with special knowledge of the topography of and at the enquiry (see art. 115 cl. 2 of the Federal Constitution). This issue which was raised as a proposition that the officers' absence distribution of the population in the unit of review of Federal elections to be present would render the enquiry invalid, is arguably a non-starter. The assistance obtained from the two officers who advised on the topography and the distribution of the population is now part and parcel of the EC's provisional recommendations. The objections the respondents made against the provisional recommendations were in pith and substance challenges against the advice that made up the said recommendations. In any event, if the officers' presence is necessary in an enquiry, surely the Thirteenth Schedule to the Federal Constitution would have provided to that effect. On that basis, there is certainly no substance in the contention that the enquiry was unlawful on the ground that the EC failed to make available the two officers in question at the enquiry.

[42] The remaining question is whether the respondents were denied a fair hearing as the local enquiry was allegedly not before an impartial and independent tribunal. The respondents asserted that the conduct of the Chairman of the EC in making certain remarks as highlighted in para. 22.5 of the respondents' affidavit in support gave rise to a complaint of apparent bias. Under our law, bias is one of the grounds of judicial review and an appearance of bias, if proven, is sufficient for a decision to be set aside. One of the features of natural justice is the right to be heard by an unbiased tribunal (*Ridge v. Baldwin* [1964] AC 40). The respondents may complain against the conduct of the Chairman, but in law, bias may well be thought to arise only if the party alleging it namely the respondents could prove that such bias existed. The party alleging bias has the onus of proving it. We would, in considering whether there was apparent or perceived bias, presume impartiality on the part of the EC, but such presumption is rebuttable with cogent evidence. The law will not suppose a possibility of bias in a judge or inferior tribunal such as the EC when holding a local enquiry and whose authority greatly depends on that presumption and idea (see the decision of

this court in *Wong Kie Chie v. Kathryn Ma Wai Fong & Anor & Other Appeals* [2017] 1 LNS 131, Civil Appeal No. Q-02(IM)-289-02-2016 and 19 other related appeals and *Hock Hua Bank (Sabah) Berhad v. Yong Liuk Thin & 7 Ors* [1995] 2 CLJ 900).

[43] The case herein falls to be considered on its own facts. We must ascertain the circumstances which have a bearing on the suggestion that the EC was bias. We had read and considered the remarks in question as set out in para. 22.5 of the respondents' affidavit in support. We were of the opinion that the alleged remarks by the Chairman in all probabilities could not be said to infect his mind with bias and were not sufficient grounds to give rise to apparent bias on the part of the Chairman or the EC when conducting the local enquiry and subsequently publishing the notice and the proposed recommendations. These alleged remarks were made by the Chairman and could not be attributed to, or equated with the remarks or the action of, the EC which conducted the enquiry. Under the law, the notice and the proposed recommendations were prepared by the EC not the Chairman. The respondents in any event were not able to show that the element of apparent bias was reflected in the proposed recommendations or such remarks or actions of the Chairman had given rise to the perception of a real danger of bias in the manner the enquiry was conducted by the EC. It is also appropriate to mention at this stage that s. 5 read with s. 6 of the Thirteenth Schedule require and allow only the EC to conduct the local enquiry. At the risk of repeating ourselves, we would emphasise once again that nobody was subjected to any form of enquiry and the respondents as objectors, were not present at the enquiry to defend themselves. They were merely present to make their representation. Further, the EC is not making any decision. The enquiry is a consultative process to engage electors from the constituency to enable or assist the EC to prepare a revised recommendations where necessary. The allegation of apparent bias is, in our opinion, a *non sequitur*, an invalid argument which is characterised by a disconnect between the premises and the alleged conclusion by the respondents of the alleged perceived bias.

[44] It is a well-established principle that appellate intervention by the appellate court is not typically allowed simply because it disagrees with the decision or would have come to a different conclusion. On the contrary, in certain circumstances particularly where the decision of the trial judge is shown to be plainly wrong, appellate intervention is usually permitted. To reiterate further, we shall lean in favour of appellate intervention if it can be shown that such decision suffers from some serious errors or omissions or if we can find some compelling reasons for disagreeing with the decision. In our judgment, the present appeal is one which clearly falls within the class of cases where appellate intervention by this court is not only permissible but warranted. The learned judge in his brief grounds of decision only addressed the issues raised in paras. 19 to 32 of the Order 53 statement which in due

course had been withdrawn by the respondents. His Lordship had omitted to consider the issues raised pertaining to the local enquiry in the Order 53 statement and the affidavit in support of the application for judicial review. The issues had in fact been ventilated before the learned judge and argued forcefully by both the learned Senior Federal Counsel and learned counsel before us. The learned judge was more inclined to grant leave despite the obvious omission in not directing his mind to these pertinent issues and the arguments thereon. There was indeed a serious misdirection on the part of the learned judge on these critical issues which were relevant in determining whether an arguable case in favour of granting the reliefs sought at the substantive hearing might be the consequence.

Conclusion

[45] While the judgment of the learned judge is entitled to utmost respect, we however find valid justification for the reasons we have alluded, to disturb the decision of the High Court given the factual scenario of this case and the law, which in our judgment are sufficient to support our inexorable conclusion that the respondents had failed to convince us that they had passed the threshold set by the Federal Court in *WRP Asia Pacific Sdn Bhd*, *supra*. In our judgment and for the reasons that we have given, we hold that leave ought not to have been granted as we could not say conclusively that the application was not frivolous, neither were we clear that there was a point for further investigation on a full *inter partes* basis with all such evidence as was necessary on the facts and all such arguments as were necessary on the law. On the whole, the respondents failed to show that if leave was granted, an arguable case in favour of granting the reliefs sought at the substantive hearing might be the result. The grounds relied on by the respondents in challenging the validity of the enquiry are clearly untenable. We found merits in this appeal that patently warranted this court to intervene. In the event, we allowed the appeal and set aside the order of the learned judge in granting leave as well as the stay of the notice and process/proceedings/procedure of delimitation of all constituencies in the Federal Territory of Kuala Lumpur made on 3 January 2016. We made no order as to costs.