DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN KUALA LUMPUR
(BAHAGIAN KUASA-KUASA KHAS)
[SAM AN PEMULA NO: WA-24-61-10/2022]

Dalam perkara Perkara 5, 8, 10, 39, 40, 55 dan 119, Perlembagaan Persekutuan;

Dan

Dalam perkara seksyen 41, Akta Relief Spesifik 1950 (Disemak 1974);

Dan

Dalam perkara Aturan 15, Kaedah 16 dan/atau bidang kuasa sedia ada Mahkamah;

Dan

Dalam perkara permintaan Defendan Pertama kepada Yang di-Pertuan Agong pada 09.10.2022 untuk membubarkan Parlimen Keempat Belas;

Dan

Dalam perkara pembubaran Parlimen Keempat Belas pada 10.10.2022 melalui P.U.(A) 320;

ANTARA

CHARLES ANTHONY R SANTIAGO
(NO. K/P: 601101-10-5463) ... PLAINTIF

DAN

1. **DATO' SRI ISMAIL SABRI BIN YAAKOB**
   [Disaman atas Kapasiti sebagai Perdana Menteri pada masa yang material]
2. **KERAJAAN MALAYSIA**
3. **SURUHANJAYA PILIHANRAYA ... DEFENDAN-DEFENDAN**

Judgment

Introduction

[1] The Plaintiff on 11.10.2022 filed an Originating Summons **(OS)** for declaratory reliefs under section 41 of the Specific Relief Act 1950 (Revised 1974) in relation to the dissolution of the 14th Parliament by the Yang di-Pertuan Agong **(YDPA)** on 10.10.2022 by way of Proclamation P.U. (A) 320 **(the Dissolution).**

[2] The Plaintiffs OS **(Enclosure 1)** seeks the following reliefs:

2.1 A declaration that the power vested in the YDPA by Article 55(2) of the Federal Constitution **(FC)** can only be exercised in accordance with Article 40(1) and (1 A) of the FC;

2.2 A declaration that the request by the 1st Defendant made to the YDPA on 09.10.2022 for the dissolution of the 14th Parliament **(the Request)** was in contravention of Article 40(1) and (1A) of the FC as the request was not made in

furtherance of the advice, or based on the general authority, of the Cabinet and was therefore null and void;

2.3 Consequentially, a declaration that the dissolution of the 14th Parliament on 10.10.2022, as notified by P.U.(A) 320 (the "Dissolution"), was not in accordance with Article 55(2) read with Article 40(1) and (1A) of the FC and of no legal effect;

2.4 Consequentially, because of the abovementioned declarations, a declaration that the 3rd Defendant has no legal basis to take any steps for the conduct of a General Election including, but not limited to, the issuance of any writ under section 12, Elections Act 1958 and the issuance of any notices under Regulation 3(1), Elections (Conduct of Elections) Regulation 1981;

2.5 An order to restrain the 3rd Defendant and its agents, servants and/or employees from taking any steps for the conduct of a General Election in furtherance of the Dissolution, including but not limited to the issuance of any writ under section 12, Elections Act 1958, the issuance of any notices under Regulation 3(1), Elections (Conduct of Elections) Regulation 1981 and/or from giving effect to any such writ or notices if so issued;'

2.6. Costs; and/or

2.7 Any further order this Honourable Court deems fit, just and/or appropriate.

The striking out Application

[3] On **14.10.2022,** the Defendants filed a Notice of Application **(Enclosure 8)** to strike out the Plaintiff's OS under Order **18**

Rule **19 (1)** (a), or (b) and (d) of the Rules of Court **2012 (ROC) (the Application)** that it does not disclose a reasonable cause of action or is scandalous, frivolous and vexatious, and is otherwise an abuse of the process of the Court.

[4] The Defendants' reasons for their application in Enclosure 8 are as follows:

> "(i) SP tersebut tidak mendedahkan sebarang kausa tindakan mahupun kausa tindakan yang munasabah terhadap Defendan- Defendan atas alasan bahawa:
>
> a) Kuasa Yang di-Pertuan Agong **(YDPA)** dalam membuat pengisytiharan pembubaran Parlimen ke- 14 di bawah Perkara 55(2) dan Perkara 40(2)(b) Perlembagaan Persekutuan **(PP)** tidak boleh diadiii (non justiciable) dan tidak boleh dipertikaikan di hadapan Mahkamah.
>
> b) Kuasa untuk membubarkan sesuatu Parlimen adalah suatu kuasa perogatif (prerogative) YDPA di bawah Perkara 40(2)(b) dan Perkara 55(2) PP yang mana YDPA boleh mengikut budi bicaranya membubarkan Parlimen tanpa perlu untuk mendapatkan nasihat dari Jemaah Menteri di bawah Perkara 40(1) dan Perkara 40(1 A) PP.
>
> c) Isu keesahan permintaan pembubaran Parlimen ke-14 oleh Defendan Pertama kepada YDPA pada 9.10.2022 adalah bersifat akademik kerana YDPA telahpun

memperkenankan permintaan tersebut di bawah Perkara 40(2)(b) dan Perkara 55(2) PP dan seterusnya membubarkan Parlimen ke 14.

d) Pengisytiharan dan pembubaran Parlimen merupakan kuasa YDPA di bawah Perlembagaan Persekutuan yang mana badan kehakiman selaku penjaga kepada keadilan (guardian of justice) perlu memelihara prinsip keperlembagaan ini.

e) Defendan Ketiga mempunyai tugas keperlembagaan (constitutional duty) di bawah Perkara 55(4) PP dan dibaca bersama Perkara 113(1) PP untuk mengadakan suatu Pilihan Raya Umum dalam masa enam puluh hari selepas pembubaran Parlimen.

f) Kuasa Defendan Ketiga di bawah Perkara 55(4) PP dan dibaca bersama Perkara 113(1) PP untuk mengadakan Pilihan Raya ke-15 dalam masa enam puluh hari selepas pembubaran Parlimen ke-14 adalah suatu perkara yang tidak boleh diadiii (non justiciable).

g) Plaintif tidak dapat mengekalkan (sustain) sebarang bentuk relif yang mempunyai kesan sama dengan mencabar kuasa YDPA untuk pembubaran Parlimen ke-14dan seterusnya menghalang Pilihan Raya Umum ke-15 untuk diadakan.

h) Plaintif tidak dapat mengekalkan (sustain) sebarang bentuk relif yang mempunyai kesan sama dengan injunksi atau perlaksanaan spesifik terhadap Defendan-Defendan sepertimana diperuntukkan di bawah Seksyen 29 Akta Prosiding Kerajaan 1956.

i) Sebarang cabaran terhadap sesuatu perjalanan Pilihan Raya tidak boleh dipersoalkan kecuali melalui petisyen pilihan raya sepertimana yang diperuntukkan di bawah Perkara 118 PP.

Alasan-alasan permohonan Defendan-Defendan di sini antaranya adalah SP tersebut mengaibkan, remeh atau menyusahkan, atau ia selainnya adalah suatu penyalahgunaan proses Mahkamah serius."

Parties and background of facts

[5] The Plaintiff was the former Member of Parliament for the constituency of Klang. He had won the said constituency seat during the 14th General Elections.

[6] The 1st Defendant was the former 9th Prime Minister of Malaysia. After the dissolution of Parliament, the 1st Defendant continues serving as the Prime Minister in a caretaker capacity.

[7] The 3rd Defendant pursuant to Article 113 of the FC is empowered to conduct elections to the Parliament and the Legislative Assemblies of the States.

[8] On 9.10.2022, the 1st Defendant had made a request to YDPA for the dissolution of Parliament.

[9] Subsequently, the 1st Defendant received a royal consent for the dissolution of Parliament which was later notified by P.U. (A) 320 dated 9.10.2022. Following the dissolution of the Parliament, by virtue of Article 55 (4) of the FC, a general election must be held within 60 days from the date of the dissolution.

[10] A statement was issued on 10.10.2022 by the Comptroller of the Royal Household, Dato' Seri Ahmad Fadil Shamsuddin, confirming that a request was made by the 1st Defendant on 9.10.2022 and it had been consented to by YDPA.

[11] At the same time, a statement has been issued to the 3rd Defendant stating that a meeting will be held on 20.10.2022, to determine the upcoming important dates for the 15th General Election, such as the nomination and polling dates.

[12] Hence, the Plaintiff filed an OS which states that the dissolution has no legal effect as it was done based on the request which was null and void.

[13] The Plaintiff in their submission stated that the challenge in his OS turns on one narrow issue:

> **"Whether Article 40 (1) and (1A) of the FC applies to Article 55 (2) such that the advice of Cabinet under Article 40 (1) is a condition precedent to the exercise of that power by the YDPA."**

[14] Having perused the cause papers, and submissions of both parties, I am of the considered view that the main issue that arises in the present application (Enclosure 8) to be determined by this Honourable Court is:

"Whether the plaintiff's OS does not disclose a reasonable cause of action or is scandalous, frivolous and vexatious, and is otherwise an abuse of the process of the Court."

Finding

Order 18 Rule 19 (1) (a) or (b), and (d) of the ROC

[15] The Defendants rested their application in Enclosure 8 under Order 18 Rule 19 (a) or (b), and (d) of the ROC.

[16] For ease of reference, Order 18 rule 19 (1), (2) of the ROC is reproduced below:

"19. Striking out pleadings and endorsements (O. 18 r. 19)

(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that-

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subparagraph (1)(a)."

[17] The Federal Court in *Tan Wei Hong (a minor suing through guardian ad litem and next friend Chuang Yin E) & Ors v. Malaysia Airlines Bhd and other appeals* [2018] 9 CLJ 425; [2019] 1 MLJ 59; [2018] 6 AMR 529; [2018] 6 MLRA 433**,** had explained the basic test for striking out application laid down by the then Supreme Court in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 1 MLRA 611; [1993] 3 MLJ 36; [1993] 2 AMR 1969**.** Ramly Ali FCJ (as His Lordship then was) stated as follows:

"[16] The principle for striking out of pleadings pursuant to O. 18 r. 19 of the ROC is well settled. It is applicable only in a plain and obvious case or where a claim is, on the face of it, obviously unsustainable (see: *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36 (SC); *Hubbuck & Sons, Limited v. Wilkinson, Heywood & Clark, Limited* [1899] 1 QB 86; *Attorney-General of the Duchy of Lancaster v. London and North Western Railway Company* [1892] 3 Ch 274).

[17] The tests for striking out application under O. 18 r. 19 of the ROC, as adopted by the Supreme Court in Bandar Builder are, *inter alia*, as follows:

(a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule;

(b) this summary procedure can only be adopted when it can be clearly seen that a claim or

answer is on the face of it obviously unsustainable;

(c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence;

(d) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 of the ROC; and

(e) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[18] The Court of Appeal, in *Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors* [2012] 1 CLJ 75; [2012] 1 MLJ 473, had adopted the well-settled principle of striking out in the following passage:

> A striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration. It should also not be made if there is issue of fact that is capable of resolution only after taking *viva voce* evidence during trial (see: *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 2 MLJ 565 (FC)).

[19] The basic test for striking out as laid down by the Supreme Court in Bandar Builder is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but

> also on the word 'obviously', i.e., the degree of unsustainability must appear on the face of the statement of claim without having to go into a lengthy and mature consideration in detail. If one has to go into a lengthy detailed argument and mature consideration of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at the trial."

[18] Briefly, the Defendants submitted that the Plaintiff has no reasonable cause of action against the Defendants on the ground that the proclamation and dissolution are non-justiciable subjects, the prerogative power to dissolve the Parliament is vested solely on the YDPA, YDPA is vested with the absolute discretion to order dissolution under Article 55 (2) read together with Article 40 (2) of the FC.

[19] The Defendants also submitted that the Plaintiff's OS is obviously scandalous, frivolous or vexatious and a serious abuse of the court's process hence should be struck out.

The Concept of Justiciability

[20] The Defendants in their striking out application had averred that there was no reasonable cause of action shown by the Plaintiff on the ground that the proclamation and dissolution are non-justiciable subjects.

[21] The non-justiciable concept adopted by the Court of Appeal was explained in *Dato' Sri Mohd Najib bin Tun Hj Abdul Razak v. Peguam Negara& Ors* [2020] 2 CLJ 73; [2020] 3 MLJ 114; [2020] 1 MLRA 583 as follows:

> "[34] The court would commonly refuse to grant leave in cases where the matters are non-justiciable. Gopal Sri Ram

(JCA) (as he then was) in the case of *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927 [2006] 5 MLJ 60 at p 67 at p 929, had the occasion to state:

> Applications for leave under O. 53 are made — and they must be made — through a two stage process. The High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous. If, for example, the applicant is a busybody, or the application is made out of time or against a person or body that is immunised from being impleaded in legal proceedings then the High Court would be justified in refusing leave *in limine*. **So too will the court be entitled to refuse leave it is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable, eg proceedings in Parliament, (paras 5 & 10).**

(emphasis added)

[22] Hasnah Hashim JCA (now FCJ) in explaining the concept of justiciability, made reference to the case of *Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v. Yang Maha Mulia Pemangku Raja Kelantan & Ors* [2010] 11 MLRH 277; [2011] 1 MLJ 128**,** as follows:

"[35] The issue of justiciability in an application for leave for judicial review was discussed at great length by Mohamad Ariff Md Yusuf J (as he then was) in the case of *Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v. Yang Maha Mulia Pemangku Raja Kelantan & Ors* [2010] 1 LNS 1390; [2011] 1 MLJ 128:

A good definition of 'justiciability' can also be found in Chris Finn, The Concept of 'Justiciability' in Administrative Law' in Groves & Lee, Australian Administrative Law (2007):

> The term 'justiciability' refers to the suitability for, or amenability to, judicial review of a particular administrative decision or class of decisions. The term derives from the common law and reflects a series of self-imposed judicial restraints, themselves founded in a view as to the appropriate constitutional balance between the respective roles of the executive and the judiciary. Thus, a matter may be deemed 'non-justiciable' by a Court which feels that its resolution either is beyond the institutional competence of the Court or would involve stepping outside its appropriate constitutional role, (at p 143).

In Association of *Bank Officers v. Malayan Commercial Banks* [1990] 2 CLJ 734; [1990] 3 MLJ 228, Ajaib Singh SCJ, speaking for the Supreme Court said this:

The guiding principles ought to be that the applicants must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application."

[23] The court in *Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra's* (*supra*) case held that the Regent is intended to be constitutionally vested with all the necessary powers of the Sovereign during the period of incapacitation. The context certainly does not exclude the exercise of powers under art. VII

of the Laws of the Constitution of Kelantan. Nevertheless, this power is temporary in nature and exists only during the period of incapacitation of the Sovereign. The subject matter of the present application for leave for judicial review was inherently non-justiciable. In a matter such as this, the proper forum to resolve the dispute would be the Sultan himself, once His Royal Highness is no longer incapacitated.

[24] The above view of justiciability was recognized by the Federal Court in the case of *Peguam Negara Malaysia v. Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 4 CLJ 561; [2019] 3 MLRA 183; [2019] 3 AMR 625; [2019] 3 MLJ 443; [2019] MLJU 202 where Zawawi Salleh, FCJ (as His Lordship then was) emphasized as follows:

> "[48] It is trite that not all cases brought before courts are reviewable. Before proceeding to hear a case, a court must first examine, *inter alia*, its justiciability. 'Justiciability[1] concerns the limits upon legal issues over which a court can exercise its judicial authority. Non-justiciability in its administrative law sense signifies that a matter is not capable of or susceptible to, judicial review, as well as non-justiciability in the sense of there being no jurisdiction to entertain an issue or to grant approved relief."

[25] Recently, the Court of Appeal in *Tan Sri Musa bin Hj Aman & Ors v. Tun Datuk Seri Hj Panglima Hj Juhar Hj Mahiruddin & Ors* [2021] 3 MLRA 503; [2021] 3 MLJ 329, had the opportunity to decide whether the act of issuing the proclamation and dissolving the Sabah State Legislative Assembly by the First Respondent was justiciable and within the jurisdiction of the High Court for submission, deliberation and eventual decision.

[26] The case is pertaining to an appeal against the decision of the High Court delivered by the learned Judicial Commissioner **(JC)** who dismissed the application by the Appellants for leave of the judicial review. On **29.7.2020,** the Second Respondent acting as the then Chief Minister of Sabah wrote to the First Respondent acting as Yang di-Pertua Negeri **(YDPN),** requesting the latter to issue a proclamation for the dissolution of the 15th Sabah State Legislative Assembly **(SLA).** On **30.7.2020,** the First Respondent agreed to the request and signed and issued the proclamation of the dissolution of SLA ('the proclamation'). On the same date, the proclamation was gazetted. The Appellants applied at the High Court for leave for judicial review essentially to quash the decision of the First Respondent to dissolve the SLA and the proclamation. The JC dismissed the application and hence this appeal.

[27] Abu Bakar Jais JCA in dismissing the appeal held as follows:

> **"Held,** dismissing the appeal
>
> (1) It was a remiss and too simplistic an approach to just determine that the proclamation and dissolution *per se* were not justiciable, without looking at the legality of actions done by the first and second Respondents prior to the proclamation and dissolution. The legality of the actions leading up to the proclamation and dissolution must be determined. The legality of the proclamation and the dissolution itself must also be decided. Hence, it was inevitable that the learned JC had alluded to the relevant provisions of the Sabah Constitution to determine these matters. It was therefore incorrect for the appellants to submit that this should not be done by learned JC at the leave stage for judicial review. The legality of the two parts was so connected and

overlapped each other. Before coming to the decision that the proclamation and dissolution of the SLA was not justiciable, the learned JC had also correctly approached that issue by explaining there were matters that were always not justiciable before the courts.

(2) Even though the provisions of the Sabah Constitution could be argued, litigated and determined for its effect and applicability in relation to this appeal, this still would not assist the appellants in their argument because at the end of the day, **a dissolution of a state assembly was a non-justiciable subject and consequently not amenable for judicial review.**

(3) There were questions and issues in this appeal that could not be simply put aside by saying the same were not justiciable. **However, the proclamation and dissolution of the SLA was not justiciable as explained earlier. Even though the appellants had raised other issues which were justiciable, the core issue remains a non-justiciable subject.**

(4) **The proclamation and dissolution of the SLA should be considered a matter within the executive or legislature's exclusive sphere that should not be encroached by the judiciary. The first, second and the fourth defendants, were the persons and body most suited to decide under what circumstances and timing should the proclamation and dissolution of the SLA should take place. They would be in a much better position compared to the courts in making the call for the end of term for the SLA. The dynamics of politics were within**

their better grasps than the courts in deciding this.

(5) **As already pointed out, the issue of the proclamation and dissolution of the SLA in itself could not be justiciable for determination.** And in this regard, the learned JC was entitled to dismiss the application for judicial review even at the leave stage."

(emphasis added)

[28] The Defendants in our respective case herein contended that the Plaintiff has no reasonable cause of action against the Defendants on the ground that the proclamation and dissolution are non-justiciable subjects.

[29] The Plaintiff however in the OS clearly emphasized that the relief sought by the Plaintiff is directed at the validity of the request for the dissolution. The Plaintiff contends that the request by the Prime Minister was null and void as it was made without the Cabinet's approval.

[30] In this respect, the subject matter to be considered is whether the subject is justiciable.

[31] This approach in looking at the subject matter can be seen in the then Supreme Court case of *Superintendent of Pudu Prison & Ors v. Sim Kie Chon* [1986] CLJ Rep 256; [1986] 1 MLRA 131; [1986] 1 MLJ 494 where Eusoffe Abdoolcader SCJ (as His Lordship then was) said as follows:

"[6] ... In relation to the question of the amenability of a prerogative power to judicial review we think that the enlightened approach is that this would be dependent on its nature or subject matter and we find

support for this view in the decision of the House of Lords in Council of *Civil Service Unions & Ors v. Minister for the Civil Service* [1985] AC 374 where Lord Scarman in his speech (at p **407)** says that it can be said with confidence the exercise of a prerogative power is subject to review if the subject matter in respect of which it is exercised is justiciable, that is to say, if it is a matter upon which the court can adjudicate, and again in the speech of Lord Roskill (at p **418)** where he refers to examples of prerogative powers which he did not think could properly be made the subject of judicial review, such as *inter alia* that relating to the prerogative of mercy, because their nature and subject matter are such as not to be amenable to the judicial process."

[32] The Federal Court in *Peguam Negara Malaysia v. Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* (*supra*) states as follows:

"[50] **There are certain areas which the court is reluctant to delve into. These include** the power of the state to enter into treaties and conduct of foreign policy, the defence of the realm and the control of the armed forces, the prerogative of mercy, **the dissolution of parliament** and the appointment of Ministers. Such powers are governed by broader policy considerations which are more appropriately entrusted to the political branches of government, and which are unsuited to be examined by the courts. One such instance is the case of Council of *Civil Service Unions v. Minister for the Civil Service* [1985] AC 374."

(emphasis added)

[33] In our respective case, the subject matter involved is the proclamation and the dissolution of Parliament. Such dissolution of Parliament was in consequence of the consent given by YDPA, acting on his own discretion, pursuant to Article 40(2)(b) and 55(2) of the FC, upon the request made by the Prime Minister.

[34] Therefore, it is apparent that with regard to the subject matter of proclamation and the dissolution of Parliament, this present application is not justiciable. See also *Tan Sri Musa bin Hj Aman & Ors v. Tun Datuk Seri Hj Panglima Hj Juhar Hj Mahiruddin & Ors* (*supra*) in paragraph 74.

[35] The Plaintiff in the OS obviously stressed that the relief sought by the Plaintiff is directed at the validity of the request for the dissolution of Parliament not the Proclamation or the dissolution of Parliament itself.

[36] In regards to the Plaintiff's contention, I would like to refer to a Federal Court's case of *Juraimi bin Husin v. Pardons Board, State of Pahang & Ors.* [2002] 4 CLJ 529; [2002] 2 MLR A 121; [2002] 4 MLJ 529; [2002] 4 AMR 4785**.** In this case, the Plaintiff, together with two others, had been convicted for murder and sentenced to death by the High Court at Temerloh. His appeal to the Court of Appeal and the Federal Court had been dismissed. On 30.6.1999, he petitioned for clemency to the Sultan of Pahang. His petition was rejected on 4.4.2001. By way of an originating summons filed in the High Court at Kuala Lumpur, the Plaintiff applied for several declaratory orders pertaining to the rejection of the clemency petition. Meanwhile, the Defendants applied under O. 18 r. 19 of the Rules of the High Court 1980 for the originating summons to be dismissed on the ground that the decision of the Pardons Board was not

justiciable. During the hearing of the Defendants' application, the Plaintiff's counsel urged the court to remit the matter to the Federal Court under s. 84 of the Courts of Judicature Act 1964 ('the CJA') for the Federal Court to decide on the constitutional issues raised. The High Court, however, dismissed the Defendant's application. On appeal to the Court of Appeal, the Court of Appeal allowed the Plaintiff's appeal and ordered the hearing of the originating summons in the High Court to be stayed and directed the High Court to remit to the Federal Court the question of whether the decision making process of the decision by the Sultan of Pahang under art. 15 of the Laws of the Constitution of Pahang, read together with art. 42 of the FC, was justiciable. Counsel for the Plaintiff stated that although there could be no judicial review or justiciability of the decision of the Pardons Board on the merits, the decision making process resorted to by the Board could be examined to consider whether it was in line with the spirit of the relevant constitutional provisions. According to counsel for the Plaintiff, the inordinate delay between the presentation of the clemency petition and the decision making process leading to the rejection of the said petition amounted to a contravention of arts. 5(1), 42(4)(b) and (8) and s. 38 in the 11th Sch. of the FC.

[37] Ahmad Fairuz CJ (Malaya) (as His Lordship then was) held as follows:

> "[16]...The High Court, after referring to several authorities which include the case of *Sim Kie Chon v. Superintendent of Pudu Prison* and the Civil Service Unions case held that, at p 67 (of Karpal Singh):
>
> > Basically, **the originating summons relates, at least indirectly,** if not directly, **to an issue concerning the process of clemency which is clearly non-justiciable.** (Emphasis added.)

[17] The High Court then proceeded to hold the issue raised in the originating summons is not justiciable.

[18] In the light of the above mentioned authorities, we find it difficult to agree with the Indian authorities referred to in this judgment and by the plaintiff. **To us, the effect of making the decision making process justiciable would, in the final analysis, make the decision itself to be held null and void. This would have the same effect as having the decision itself justiciable. Consequently, we are of the view that any attempt to make the decision making process justiciable would indirectly make the decision itself justiciable. Hence we answered the first question in the negative."**

(emphasis added)

[38] Therefore, it can be inferred from the above case that if a matter is found to be not justiciable, the decision making process leading to the non-justiciable matter should also be not justiciable.

[39] I am of the considered view that the validity of the request for the dissolution of parliament should also be non-justiciable based on the case of *Juraimi bin Husin* (*supra*), consequently not a matter that is suitable and appropriate to be reviewed before the courts. See also *Tan Sri Musa bin Hj Aman & Ors v. Tun Datuk Seri Hj Panglima Hj Juhar Hj Mahiruddin & Ors* (*supra*).

[40] Based on the above issue, I am of the view that the Plaintiff at this juncture has no reasonable cause of action against the Defendants on the ground that the request for the dissolution of

parliament, the proclamation as well as the dissolution of parliament are non- justiciable subject matter.

Dissolution of Parliament

[41] The Defendants submitted that the prerogative power to dissolve the Parliament is vested solely on the YDPA. This power can be found in Article 55 (2) of the FC.

[42] For convenience, Article 55 (2) and Article 40 of the FC is reproduced below for ease of reference:

> **"Summoning, prorogation and dissolution of Parliament**
>
> 55. (1) The Yang di-Pertuan Agong shall from time to time summon Parliament and shall not allow six months to elapse between the last sitting in one session and the date appointed for its first meeting in the next session.
>
> (2) The Yang di-Pertuan Agong may prorogue or dissolve Parliament.
>
> (3) Parliament unless sooner dissolved, shall continue for five years from the date of its first meeting and shall then stand dissolved.
>
> (4) Whenever Parliament is dissolved a general election shall be held within sixty days from the date of the dissolution and Parliament shall be summoned to meet on a date not later than one hundred and twenty days from that date."

[43] Article 40 of the FC provides as follows:

"Yang di-Pertuan Agong to act on advice

40. (1) In the exercise of his functions under this Constitution or federal law the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, except as otherwise provided by this Constitution; but shall be entitled, at his request, to any ^ information concerning the government of the Federation which is available to the Cabinet.

(1A) In the exercise of his functions under this Constitution or federal law, where the Yang di-Pertuan Agong is to act in accordance with advice, on advice, or after considering advice, the Yang di-Pertuan Agong shall accept and act in accordance with such advice.

(2) **The Yang di-Pertuan Agong may act in his discretion in the performance of the following functions, that is to say:**

(a) the appointment of a Prime Minister;

(b) the withholding of consent to a request for the dissolution of Parliament;

(c) the requisition of a meeting of the Conference of Rulers concerned solely with the privileges, position, honours and dignities of Their Royal Highnesses, and any action at such a meeting, and in any other case mentioned in this Constitution."

(emphasis added)

[44] Based on the above provisions in the FC, I am of the considered view that Article 55 (2) of the FC must be read together with Article 40 (2) (b) of the FC.

[45] Consequently, it can be grasped that the decision to dissolve the Parliament is the absolute discretion and prerogative rights of the YDPA under Article 55 (2) read together with Article 40 (2) of the FC.

The Prime Minister and the YDPA

[46] The YDPA is a constitutional monarch and is the head of the state while Prime Minister is the head of the government. The executive power resides in the hand of the Prime Minister.

[47] Article 40(1) and (1 A) of the FC provides that the YDPA to be bound by the advice of the Cabinet in carrying out his functions, except for a few matters as provided under Article 40(2) of the FC. (See: *Stephen Kalong Ningkan v. Tun Abang Haji Openg and Tawi Sli* [1966] 1 MLRA 456; [1966] 2 MLJ 187**;** *Teh Cheng Poh v. Public Prosecutor* [1979] 1 MLJ 50; [1978] 1 MLR A 321).

[48] The Prime Minister as the head of the government has the sole power to appoint the Cabinet of his choice. The power that a Prime Minister possesses would include promoting, dismissing and appointing a minister of his choice, at any time, for reasons he thinks fit.

[49] **Emeritus Prof. Datuk Dr. Shad Saleem Faruqi** in his book, **'Our Constitution' Sweet & Maxwell, Thomson Reuters Asia 2019 at page 209,** stated that the Prime Minister possesses the power to determine the meeting of Cabinet and matters to be discussed. The Prime Minister is entitled to say what issues shall be reported to him personally or for decisions outside the

cabinet. As the Prime Minister, he is not bound by the Cabinet's advice. He may by his own initiative confront his colleagues and consult one or two ministers in the "inner Cabinet" to make decisions. He does not need to consult the Cabinet in budget proposals, in foreign policy initiatives or in advising the monarch in dissolving the Parliament.

[50] I am in agreement with this view. The Prime Minister, as the Head of the Executive, does not need the consultation of his Cabinet in making a request to the YDPA to dissolve the Parliament. He is entitled to make his own decision as it is his absolute power as the premier.

[51] Thus, it is my view that since the dissolution of Parliament was made under Article 40(2)(b) of the FC, the need for the Cabinet advice under Article 40(1) & (1A) of the FC was not required. The YDPA acted in his own discretion to dissolve the Parliament on the Prime Minister's request under Article 40(2)(b) of the FC. Unlike Article 40(1) and (1A) of the FC, the YDPA is not bound by the Prime Minister or Cabinet advice in performing his duties under Article 40(2)(b) of the FC.

[52] The Prime Minister too, who held the ultimate power in the Executive does not need to consult his Cabinet in requesting for the dissolution of Parliament. I view that since the sole and ultimate power to request for the dissolution of the Parliament lies solely in the hand of the Prime Minister, the contention of the Plaintiff challenging the validity of the request to dissolve Parliament is of no merit.

[53] Even though the case of *Tan Sri Musa bin Hj Aman & Ors v. Tun Datuk Seri Hj Panglima Hj Juhar Hj Mahiruddin & Ors* (*supra*), in general was of the view that provisions in the FC could be argued, litigated and determined for their effect and applicability, the subject matter is however non-justiciable. This

is because the power to request for the dissolution of the Parliament lies solely in the hand of the Prime Minister as the ultimate power in the Executive. He can decide to make a request for the dissolution of the Parliament without the advice of his Cabinet. And ultimately, the YDPA has the discretion whether to accede or to reject the request for the dissolution under Article 40(2) (b) of the FC.

Conclusion

[54] Based on all the above, I am of the considered view that the Plaintiff has no reasonable cause of action against the Defendants on the ground that the proclamation and dissolution of Parliament are non- justiciable subjects. The prerogative power to dissolve the Parliament is vested solely on the YDPA, who has the absolute discretion to consent to a request for the dissolution of Parliament under Article 40(2)(b) of the FC.

[55] The Prime Minister's power to request for the dissolution too is a non- justiciable subject matter. Being the head of the Executive, his request to dissolve the Parliament does not need the consultation of the Cabinet members. The decision to dissolve the Parliament is entirely his.

[56] Therefore, it is my judgment that the Plaintiffs OS is obviously scandalous, frivolous or vexatious and an abuse of the court's process, hence should be struck out.

[57] Based on the above reasons, I am of the considered opinion that the Defendants' application in Enclosure 8, made under Order 18 Rule 19 (a) or (b), and (d) of the ROC to strike out the Plaintiff's OS ought to be allowed.

[58] As a consequence, Enclosure 1 is struck out with costs of RM20,000.00 without the allocator fee.

Dated: 1 NOVEMBER 2022

(AHMAD KAMAL MD SHAHID)
Judge
High Court Kuala Lumpur

COUNSEL:

For the plaintiff - Malik Imtiaz Sarwar, Surendra Ananth, Lim Yvonn, Weng Min Yen & Khoo Suk Chye; M/s Surendra Ananth
Peguambela dan Peguamcara,
No: 4, Daiaman Tuanku,
Bukit Tunku,
50480 Kuala Lumpur.
(Ruj. Tuan: 10016/CS/SA/22)

For the defendants - Zulkefli Ahmad Makinudin Wira Mohd Hafarizam Harun, Abu Bakar Isa Ramat, Norhazira Abu Haiyan, Muhammad Amin Othman, Hans Singh Randhawa & Tey Jun Ren, SFC Shamsul Bolhassan, SFC Ahmad Hanir Hambaly @ Arwi, SFC Y M Raja Shahril Anuar; M/s Hafarizam, Wan & Aishah Mubarak
Peguambela dan Peguamcara,
P.O. Box 38, Suite 13A,
Level 13, Menara Dato' Onn,
Jalan Tun Ismail,
50480 Kuala Lumpur.

Case(s) referred to:

Tan Wei Hong (a minor suing through guardian ad litem and next friend Chuang Yin E) & Ors v. Malaysia Airlines Bhd and other appeals [2018] 9 CLJ 425; [2019] 1 MLJ 59; [2018] 6 AMR 529; [2018] 6 MLRA 433

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7; [1993] 1 MLRA 611; [1993] 3 MLJ 36; [1993] 2 AMR 1969

Dato' Sri Mohd Najib bin Tun Hj Abdul Razak v. Peguam Negara& Ors [2020] 2 CLJ 73; [2020] 3 MLJ 114; [2020] 1 MLRA 583

Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v. Yang Maha Mulia Pemangku Raja Kelantan & Ors [2010] 11 MLRH 277; [2011] 1 MLJ 128

Peguam Negara Malaysia v. Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal [2019] 4 CLJ 561; [2019] 3 MLRA 183; [2019] 3 AMR 625; [2019] 3 MLJ 443; [2019] MLJU 202

Tan Sri Musa bin Hj Aman & Ors v. Tun Datuk Seri Hj Panglima Hj Juhar Hj Mahiruddin & Ors [2021] 3 MLRA 503; [2021] 3 MLJ 329

Superintendent of Pudu Prison & Ors v. Sim Kie Chon [1986] CLJ Rep 256; [1986] 1 MLRA131; [1986] 1 MLJ 494

Juraimi bin Husin v. Pardons Board, State of Pahang & Ors. [2002] 4 CLJ 529; [2002] 2 MLR A 121; [2002] 4 MLJ 529; [2002] 4 AMR 4785

Stephen Kalong Ningkan v. Tun Abang Haji Openg and Tawi Sli [1966] 1 MLRA456; [1966] 2 MLJ 187

Teh Cheng Poh v. Public Prosecutor [1979] 1 MLJ 50; [1978] 1 MLR A 321

Legislation referred to:

Specific Relief Act 1950, s. 41

Courts of Judicature Act 1964, s. 84

Rules of Court 2012, O. 18 r. 19 (1) (a), (b), (d), (2)

Rules of the High Court 1980, O. 18 r. 19

Federal Constitution, arts. 5(1), 15, 40(1), (1A), (2)(b), 42(4)(b), (8), 55 (2), (4), 113, Sch. 11