DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)
PERMOHONAN SEMAKAN KEHAKIMAN NO. WA-25-386-12/2021

Dalam perkara laporan atau pengesyoran yang disediakan oleh Pasukan Petugas Khas yang ditubuhkan oleh Kerajaan Malaysia;

Dan

Dalam perkara Artikel-Artikel 5, 8 dan 10 Perlembagaan Persekutuan;

Dan

Dalam perkara Akta Rahsia Rasmi 1972;

Dan

Dalam perkara Seksyen 25(2) dan/atau Jadual, Akta Mahkamah Kehakiman 1964;

Dan

Dalam perkara Aturan 53, Kaedah-Kaedah Mahkamah 2012 dan/atau bidang kuasa sedia ada Mahkamah;

ANTARA

NORHAYATI BINTI MOHD ARIFFIN
(NO. K/P: 730225-10-5992) …PEMOHON

DAN

1. **MOHD RUSSAINI BIN IDRUS**
   (NO. K/P: 770330-09-5163)
2. **KERAJAAN MALAYSIA ...RESPONDEN-RESPONDEN**

JUDGMENT

The Factual Background

[1] The background facts, as narrated by the plaintiff, are as follows.

[2] The plaintiff's husband, Amri Che' Mat, was allegedly abducted close to midnight on 24.11.2016 as he was driving along Jalan Padang Behor, not far from their family residence, towards Jitra, Kedah to meet up with his friend, one Abdul Jamil. While Amri was driving along the said road, three vehicles were said to have forced him to stop 500 meters from his house.

[3] The vehicle used by Amri, a Toyota Fortuner, was subsequently found in an abandoned construction site at Bukit Chabang at around 12.30 am the next day.

[4] Aggrieved, the plaintiff filed a civil suit against several public officers and the Government of Malaysia at the Kuala Lumpur High Court Civil Suit No. WA-21NCVC-79-11/2019 ("Suit No. 79"). The claim in Suit No. 79 centres on the failure of the defendants therein to effectively investigate the alleged abduction of Amri.

[5] Prior to the filing of Suit No. 79, the Human Rights Commission of Malaysia ("SUHAKAM") had commenced an inquiry on the alleged abduction. The inquiry was made pursuant to s 12 of the Human Rights Commission of Malaysia Act 1999 ("the SUHAKAM Act").

[6] The inquiry was concluded on 6.3.2019.

[7] On 3.4.2019, SUHAKAM issued its report on the public inquiry ("the Report"). In the Report, at para 171, the SUHAKAM panel ("the Panel") states as follows:

> 171. The Panel is of the considered view that the enforced disappearance of Amri Che Mat was carried out by agents of the State, namely, the Special Branch, Bukit Aman, Kuala Lumpur, within the definition of the first limb of Article 2 of ICPPED.

ICPPED refers to the International Convention for the Protection of All Persons from Enforced Disappearance.

[8] The Panel further concluded that there were several shortcomings in the investigation by the Royal Malaysian Police ("PDRM") into the disappearance of Amri. The shortcomings include the fact that the disappearance of Amri was classified as that of a missing person case instead of one of abduction.

[9] Subsequent to the release of the Report, the Minister of Home Affairs ("the Minister") announced in May 2019 that the Government of Malaysia, the 2nd respondent herein, had decided to set up a special task force ("the STF") to investigate the matters raised therein.

[10] On 16.1.2020, the Minister announced that the STF requested more time to complete its report. Unfortunately, according to the applicant, there was no response from the Government of Malaysia on the calls to make public the report from the STF, including one from SUHAKAM.

[11] On 25.5.2021, the plaintiff filed an application for discovery in Suit No. 79 for the STF Report ("the STF Report") to be disclosed for the purpose of the action. The defendants in Suit No. 79 objected to the discovery application and filed an affidavit in reply ("AIR-Suit No. 79") through the 1st respondent, which was affirmed on 13.9.2021. The 1st respondent is the secretary to the Task Force.

[12] In AIR-Suit No. 79, the 1st respondent asserted the STF Report was classified as an official secret ("the impugned Decision") under the Official Secrets Act 1972 ("OSA"). Para 6 of AIR-Suit No. 79 states as follows:

> Selanjutnya, merujuk kepada perenggan 5.7, 6, 7, 8.1, 8.2 dan 8.3 Afidavit Sokongan Pemohon, saya sesungguhnya menyatakan bahawa Laporan Pasukan Petugas Khas tidak dapat dizahirkan kepada umum kerana Laporan tersebut merupakan maklumat terperingkat yang telah diklasifikasikan sebagai "Sulit". Laporan ini juga telah direkodkan dalam Buku Daftar Suratan Rahsia Rasmi di Luar Jadual/ Bawah Jadual Akta Rahsia Rasmi 1972. Sekiranya didedahkan kepada umum, ia adalah bertentangan dengan kepentingan negara.

[13] Aggrieved, the applicant filed this application for leave for judicial review, which leave was granted on 19.7.2022.

[14] In the meantime, subsequent to filing this application, the applicant took steps to withdraw the discovery application in Suit No. 79.

[15] In the application for judicial review, the applicant seeks *inter alia* as follows:

(a) A declaration that the report prepared by the STF to investigate the Report made by SUHAKAM does not fall within the definition of an "official secret" under s 2 of OSA.

(b) A direction in the nature of certiorari to quash the impugned Decision; and

(c) A direction of the nature of mandamus to compel the 2nd respondent, the Government of Malaysia, to release, provide or disclose the STF Report to the applicant within seven days from the date of the order.

The Judicial Review

[16] This application for judicial review is supported by the affidavit of the applicant in Encl 3 ("AIS-3") and a further affidavit by Surendra Ananth a/l Anandaraju in Encl 9 ("Surendra"). Encik Surendra is the solicitor acting for the applicant in Suit No. 79.

[17] The 1st respondent filed his affidavit in reply in Encl 22 ("AIR-22").

[18] They were further affidavits filed by the parties, which we will be referred to as and when the need arises.

[19] In his AIR-22, the 1st respondent exhibited a document he signed dated 14.9.2020 and marked as R-2. The document is a certificate made under s 16A of the OSA purporting to classify the STF Report as an official secret. Since the document is pertinent to this application for judicial review, it is reproduced here *in toto*:

> Saya, MOHD RUSSAINI BIN IDRUS, Setiausaha Bahagian, Suruhanjaya Pasukan Polis, Kementerian Dalam Negeri merangkap Setiausaha Pasukan Petugas Khas yang dipertanggungkan dengan tanggungjawab menjaga hal ehwal berkaitan dengan

> perlantikan, pengesahan, kemasukan ke dalam perjawatan tetap atau perjawatan pencen, kenaikan pangkat, pertukaran dan perjalanan kawalan tatatertib ke atas anggota pasukan polis, dengan ini memperakui bahawa dokumen rasmi berhubung dengan klasifikasi Laporan Pasukan Petugas Khas bagi menyiasat kehilangan Amri Che Mat dan Pastor Raymond Koh telah dikelaskan sebagai rahsia rasmi di bawah Akta Rahsia Rasmi 1972.

[20] According to the 1st respondent, he is duly appointed by the Minister under s 2B of the OSA to classify any official document, information or material as "Top Secret ", "Secret ", "Confidential" or "Restricted", as the case may be. The appointment instrument, dated 28.8.2018, was signed by the Minister and marked as Exh R-1.

[21] The applicant took umbrage at the content of the certificate. According to her, the certificate does not state the basis on which the STF Report was classified as an official secret.

[22] The basis of the classification was only explained in para 6(vi) of the 1st respondent's AIR-22. It states as follows, where "PPK" refers to the STF:

> Saya juga mengesahkan bahawa laporan PPK tersebut telah dikelaskan sebagai Rahsia Rasmi di bawah Akta Rahsia Rasmi 1972. Kandungan tersebut mengandungi perkara yang melibatkan keselamatan Negara. Laporan PPK tersebut ada menyentuh mengenai pengoperasian dan gerak kerja pihak Polis Diraja Malaysia (PDRM) yang tidak boleh didedahkan sewenang-wenangnya kepada orang awam. Hal ini kerana sekiranya didedahkan, ia akan memberi ruang kepada penjenayah dan musuh negara untuk mengambil kesempatan terhadap pengoperasian dan gerak kerja PDRM ini selaku pihak yang bertanggungjawab menjaga hal ehwal keselamatan negara.

[23] In short, the respondents rely on s 16A of the OSA. It provides as follows:

> A certificate by a Minister or a public officer charged with any responsibility in respect of any Ministry, department or any public service or the

> Menteri Besar or the Chief Minister of a State or by the principal officer in charge of the administrative affairs of a State certifying to an official document, information or material that it is an official secret shall be conclusive evidence that the document, information or material is an official secret and shall not be questioned in any court on any ground whatsoever.

[24] The applicant's application is anchored on two main grounds:

(a) Any exercise of discretion by a public body can be reviewed on an objective test. According to the applicant, S 16A of the OSA does not alter the aforesaid proposition.

(b) The respondents have not adduced any material to show that the STF Report is prejudicial to national security. The applicant contended that in an objective assessment, there is no basis to conclude that the STF Report is prejudicial to national security.

[25] As to whether an act is prejudicial to national security, learned counsel for the applicant referred me to the judgment of the Federal Court in ***Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia*** **[2010] 3 MLJ 307 FC**, and submitted that the test should be an objective one. The Federal Court held that the question that a court must ask itself was whether a reasonable Minister apprised of the material set out in the statement of facts objectively be satisfied that the actions of the appellant were prejudicial to public order. In short, the court should be the final arbiter on the matter.

[26] The proposition was reiterated by the Court of Appeal in ***Government of the State of Penang v Minister of Home Affairs & Ors*** **[2017] 4 MLJ 770 CA**. It was held that the test to be applied in determining the exercise of the Minister's discretionary power in cases involving national security or activities prejudicial to public order was the objective test where the court could consider the substance of the Minister's decision.

[27] Learned counsel then urged me to conclude that the same approach applies to the OSA. To begin with, according to learned counsel, the OSA seeks to restrict fundamental rights in two aspects. First, it restricts the right to information guaranteed under Art 10(1)(a) of the Federal Constitution. Secondly, according to learned counsel, the

OSA infringes on the right to justice, which is a constitutionally guaranteed right under Art 5(1) of the Federal Constitution.

[28] As to the implication of s 16A of the OSA, my attention was drawn to the judgment of the High Court in ***Takong Tabari v Government of Sarawak*** **[1994] MLJU 386**. Richard Malanjum J (as the former Chief Justice then was) held that it is not per se correct to suggest that once a certificate has been issued under s 16A of the OSA certifying that a document is an official secret, it is completely excluded from being disclosed in court. This proposition, in my view, is nothing new. In ***BA Rao v Sapuran Kaur*** **[1978] 2 MLJ 146 FC**, the Federal Court, in interpreting the question of admissibility under ss 123 and 162 of the Evidence Act 1950, held that it was for the court, not the Executive, ultimately to determine that there was a real basis for the claim that "affairs of State is involved" before it could permit non-disclosure.

[29] Applying the propositions to the facts of the case in this judicial review application, learned counsel for the applicant invited me to conclude that:

(a) The Certificate in Exh R-2 in AIR-22 is only conclusive of the fact that the Report was classified as an official secret.

(b) The legality of the classification is entirely a different issue for this Court to exclusively determine.

(c) The Certificate itself does not mention any threat to national security.

(d) Therefore, the 1st respondent is not at liberty to raise the reasons at the affidavit stage, particularly in para 6(vi) of AIR-22, when challenged with the propriety of the issuance of the Certificate. Learned counsel submitted that any explanation as to the decision stated in the affidavits should be treated as “merely elucidatory”; ***Perbadanan Pengurusan Trellises & Ors v Datuk Bandar Kuala Lumpur & Ors*** **[2021] 3 MLJ 1 CA**.

[30] Before me, the learned Senior Federal Counsel contended that the respondents had never stated the STF Report as an official secret under the First Category and the Second Category of s 2 of the OSA. On the contrary, according to the learned SFC, the STF

Report was classified as an official secret by the 1st respondent, who is a public officer appointed under s 2B of the OSA. According to the learned SFC, the STF Report was classified as an official secret even before the applicant filed the discovery application in Suit No. 79 on 25.5.2021.

[31] As to the right of information, purportedly under Art 10(1)(a) of the Federal Constitution, the learned SFC contended that the respondents do not owe any legal duty to provide any information to the applicant. In the circumstances, the respondents' position is that there is no interference with the applicant's freedom of expression as enshrined in the Federal Constitution.

[32] The learned SFC then referred me to the judgment of the Court of Appeal in ***Haris Fatillah bin Mohd Ibrahim v Suruhanjaya Pilihan Raya Malaysia*** **[2017] 3 MLJ 543 CA**. In delivering the judgment of the Court, Zamani Rahim JCA made the following observations:

> Unlike India, we do not have a specific statute such as the Right to Information Act 2005 which provides an elaborate and comprehensive matter on right to information. Neither do we have similar freedom of opinion and expression under s. 2(b) of the Canadian Charter of Rights and Freedoms which clearly permits an access to information under s. 2(b). But what we take pride of and observe is our Constitution which stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied and this wording "can never be overridden by the extraneous principles of other Constitutions".

[33] In any event, the learned SFC submitted that matters of national security involve policy consideration which is within the domain of the Executive. Relying on the majority judgment of the Federal Court in ***Datuk Seri Anwar Ibrahim v Kerajaan Malaysia & Anor*** **[2021] 6 MLJ 68 FC**, the learned SFC further contended that the courts do not possess knowledge of the policy consideration which underlay administrative decisions.

[34] Finally, the learned SFC attracted my attention that no order of certiorari or mandamus can lie against the respondents. In short, it is the contention of the learned SFC that the Certificate issued by the 1st respondent is conclusive under s 16A of the OSA and "shall

not be questioned in any court on any ground whatsoever". To amplify his point, the learned SFC cited ***Lim Kit Siang v PP*** **[1980] 1 MLJ 293 FC** and submitted that the Government, in this case, the respondents, must surely have the undoubted right to decide what information it would keep from the public. Such information would be official secrets and would be caught by the OSA.

[35] In so far as the order of mandamus is concerned, the learned SFC submitted that there is no provision of law imposing an obligation on the 2nd respondent to disclose or release the Report to the applicant.

Analysis

[36] In the course of writing this judgment, I am made aware of a decision made by my learned brother Christopher Chin J in ***Harris Mohd Salleh v Chief Secretary, Government of Malaysia & Ors*** **[2023] 1 LNS 365**. In essence, in that case, the applicant, a former Sabah Chief Minister, filed an application for mandamus for the Court to direct the respondents to declassify the investigation report by Malaysian authorities into the crash of Nomad Aircraft 9M-ATZ Crash on 6.6.1976 at Kota Kinabalu, Sabah.

[37] In allowing an order of mandamus, the learned Judge held *inter alia* that the right to information exists as a corollary to the right to free speech. The Federal Constitution seeks to establish an egalitarian society where citizens exercise their right to free speech on facts and reason, not on assumptions and conjecture.

[38] In arriving at his conclusion in *Harris Mohd Salleh*, the learned Judge referred to the speech of HRH Sultan Azlan Shah in a public lecture entitled "The Right to Know", which was delivered at the Universiti Sains Malaysia on 19.12.1986. The former Lord President considered the provisions of the OSA and remarked as follows:

> Though the Federal Constitution does not expressly provide that all persons have the "right to know" (it does not mention the right to information), the fundamental right of expression as embodied in Article 10(1)(a) will be meaningless if the public do not have the necessary information on which they can express their views.

[39] There is no doubt in my mind that the STF Report is relevant to the applicant in Suit No. 79. As I alluded to earlier, the claim centres on the alleged failure of the named defendants in Suit No. 79 to effectively investigate the purported abduction of Amri. The allegations include the named defendants' purported failure to examine the CCTV recording that afforded the view of the alleged abductions. It was also alleged that there was no attempt to trace two other vehicles involved in the surveillance of the applicant's house.

[40] Hence the application in this judicial review.

[41] The applicant contended that she needed the STF Report to establish her case against the named defendants in Suit No. 79. The respondents, on the other hand, argued that the Certificate made under s 16A of the OSA is final and cannot be challenged in Court.

[42] To begin with, I do not think that the constitutionality of the OSA is the issue here. Just like in *Harris bin Mohd Salleh*, rather the main challenge is the statutory exercise of the discretion allowed in the OSA. In essence, it is the impugned Decision made by the 1st respondent as a public officer that the judicial review is sought.

[43] The learned SFC relied very heavily on the judgment of the Federal Court in *Lim Kit Siang*. No doubt, *Lim Kit Siang* is a criminal case. But the Federal Court took the opportunity to discuss the legal implication of the OSA. Despite the spirited attack on the OSA by learned counsel for the appellant, Encik Karpal Singh, Raja Azlan Shah CJ (Malaya) (as the former Lord President then was) held that the Courts do not have the power to create a right for any person to ignore the provisions of the OSA.

[44] But then again, law is a living subject. Cases after *Lim Kit Siang* seemed to suggest that the though the OSA is undoubtedly constitutional, the decision of a public officer or a Minister under the Act can still be subject to challenge. In short, the certificate under s 16A is not final. *Takong Tabari* and *Harris Mohd Salleh* are recent examples.

[45] I take cognisance that the Certificate, as pointed out by learned counsel for the applicant, did not proffer any reason as to why the Report was classified as an official secret. The question is, can the omission in the Report be made good by the 1st respondent's

affidavit in AIR-22? In *Perbadanan Pengurusan Trellises*, Mary Lim JCA (now FCJ) held that:

> Another significant factor that seems to be overlooked is that it is the reasons, if any, stated or proffered at the material time which forms the basis of examination; not the explanations that are penned in the affidavits filed in response. Any explanations found in the affidavits of reply should be treated as merely elucidatory.

[46] The aforesaid proposition is nothing new. Another earlier example of the proposition can be seen in ***Kumareshan a/l Subramaniam v Dato' Chor Chee Heung & Anor*** **[2003] 4 MLJ 384**. In that case, the detention order did not disclose that the Minister was satisfied that it was necessary in the interest of public order that the applicant be detained. It was argued in the Ministerial statement that it was necessary to detain the applicant in the interest of public order should be made in the same order and not in a subsequent affidavit after the service of the order. Jeffrey Tan J (later FCJ) held that:

> With respect, the subsequent affidavit could not make good what was required to be done at the time of service of the order. It is clear that there was failure to comply with the procedural requirements of the Act.

[47] While s 16A of the OSA does not mention anything on the need to proffer any reasons for the certification, cases of high authority like *Darma Suria* and the *Government of the State of Penang* are unequivocal in holding that such exercise of discretion in the matter of national security is subject to review and that test should be an objective one.

[48] Having said that, my respectful view is any certificate issued under s 16A of the OSA must state the basis on which the public officer arrives at his conclusion. The reason, to my mind, is quite straightforward. This is to avoid any allegation of an afterthought when the grounds of the exercise of discretion are explained later in the affidavit once there is a challenge to that decision.

[49] However, I hasten to add that the failure is not altogether fatal. I say this since I have to harmonise the approach in *Darma Suria* and the equally forceful judgment of the majority of the Federal Court in

Datuk Seri Anwar Ibrahim. Zaleha Yusof FCJ, in delivering the judgment of the majority remarked as follows:

> It must always be borne in mind that matters of security involve policy consideration which are within the domain of the executive. This has been aptly explained by this court in the case of *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81, that courts do not possess knowledge of the policy consideration which underlay administrative decisions; neither can the courts claim it is ever in the position to make such decisions or equipped to do so.

Findings

[50] In the result, my findings are as follows:

(a) A certificate by a public officer under s 16A of the OSA must preferably state the basis on which the officer arrived at his decision.

(b) Failure to do so would not cause the certificate *ipso facto* fatal but would render any explanation in the affidavits later mere elucidatory.

(c) The explanation given by the 1st respondent in AIR-22 is therefore not conclusive and would be subject to an objective assessment by the Court.

(d) Having read the explanation by the 1st respondent in AIR-22, I do not find it to be watertight. A general assertion that the STF Report, if disclosed, would allow the criminals and enemies of the state to take advantage of the police operation is insufficient.

(e) However, I am equally aware that the STF Report is only relevant to the applicant in her pursuit to establish her case in Suit No. 79 and nothing more.

(f) For that reason, I am making an order for a limited release and disclosure of the STF Report for the purpose of the trial in Suit No. 79. The STF Report should be released by the 1st respondent exclusively to the applicant within 30 days from this order.

(g) The applicant is prohibited from disclosing the STF Report to any members of the public save for her solicitors having conduct of Suit No. 79. The same restriction applies to the applicant's solicitors.

(h) For the avoidance of any doubt, the STF Report can only be used for the purpose of examination in chief, cross-examination and re-examination of the witnesses at the hearing of Suit No. 79. It is not meant for public consumption.

(i) There shall be no order as to costs.

Tarikh: 18 Julai 2023

(WAN AHMAD FARID BIN WAN SALLEH)
Hakim
Mahkamah Tinggi Kuala Lumpur.

Pihak-pihak:

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