Islamic Renaissance Front Bhd v The Minister of Home Affairs

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-242–05 OF 2019
ABDUL KARIM, NOR BEE ARIFFIN AND ABU BAKAR JAIS JJCA
23 JUNE 2020

Administrative Law — Rules of natural justice — Right to be heard — Home Affairs Minister ('Minister') banned appellant's books on ground they could likely prejudice public order, alarm public opinion and prejudice public interest — Whether s 7(1) of Printing Presses and Publications Act 1984 under which Minister exercised discretion to ban the books neither gave appellant right to be heard nor denied appellant of that right — Whether just because statute was silent on the point did not mean appellant could be denied of right to be heard — Whether right to be heard was basic and fundamental even though not statutorily provided for — Whether if right to be heard was denied on grounds of national security Minister had to explain reasons for same — Whether right to be heard could not be denied simply on ground Minister had to act urgently to issue the ban orders if circumstances showed such immediacy or urgency was not warranted

The respondent had issued three orders prohibiting the publication, printing, importation, production, reproduction, sale, issuance, circulation, distribution and possession of three books published by the appellant on the ground they were likely to prejudice public order, alarm public opinion and prejudice public interest. The respondent informed the appellant that the orders were issued after consideration of reports from the Jabatan Kemajuan Islam Malaysia ('Jakim') and the Publication and Quranic Text Control Division ('the Division') which, inter alia, stated that the publications contained matters which deviated from the teachings of Islam as practised in Malaysia. The appellant applied to the High Court by way of judicial review to, inter alia, quash the respondent's orders. For the purpose of the hearing, the appellant applied for, and was granted, an order for discovery of the reports from Jakim and the Division. The respondent supplied the appellant with the full reports from Jakim in respect of only two of the orders while the report for the third order was incomplete. The Division's reports were not supplied at all. The High Court dismissed the judicial review application holding, inter alia, that the court would not, without good reason, disturb the respondent's exercise of his discretion under s 7(1) of the Printing Presses and Publications Act 1984 to issue the orders. The court also dismissed the appellant's complaint that it had not been heard since there was no procedural requirement giving the appellant the right to be heard before the orders were issued and given the reason that the respondent had to issue the orders expeditiously to protect public order and national security. In the instant appeal to set aside the High Court's decision,

the appellant submitted that not only was its right to be heard basic and fundamental and not dependent on whether any statutory provision gave it that right but the respondent had also disobeyed the order of court relating to discovery of the documents requested. The respondent submitted that any right to be heard had to take second place where national security and public order were involved.

Held, allowing the appeal and quashing the respondent's orders:

(1) The respondent's failure to fully comply with the order for discovery of the reports from Jakim and the Division was blatant and serious but the issue was never addressed by the High Court in its judgment or by the respondent in this appeal. This obviously showed that the decision of the High Court could not stand (see paras 33, 38 & 62).

(2) Non-production of the documents covered by the order for discovery raised doubt as to the real reason for the issuance of the orders and also raised suspicion that the respondent was concealing material evidence that was unfavourable to him. The respondent had to show that his exercise of discretion to issue the orders was real and that those documents really existed (see paras 30, 31 & 34).

(3) The failure to give the appellant the right to be heard rendered the respondent's orders indefensible. The High Court wrongly found that if there was no statutory provision granting a right of hearing, such right could generally be denied. A right of hearing was basic and fundamental and was always available even though statute did not provide for it. Only if the respondent had given the appellant a right to be heard and had considered what the appellant had to say would the requirements of natural justice have been fulfilled. In any event, the Printing Presses and Publications Act 1964 did not deny the appellant of a right to be heard (see paras 63, 43–45 & 49–50).

(4) There was no evidence that the respondent had even considered giving the appellant a right of hearing and then decided not to accord such right on grounds of national security. It did not matter that that right was not given eventually. What was important was for the respondent to have shown evidence that he had, in fact, considered giving the appellant the right to be heard. The respondent's contention that a right of hearing would always come secondary to national security was incorrect. The argument that the right of hearing had to be denied because the respondent had to act immediately or urgently to issue the orders was also untenable on the facts and circumstances of the case given that the books in question had been in circulation for a few years before the orders banning them were issued (see paras 55–56 & 60).

A **[Bahasa Malaysia summary**

Responden telah mengeluarkan tiga perintah yang melarang penerbitan, percetakan, pengimportan, produksi, produksi semula, penjualan, pengeluaran, peredaran, pengedaran dan pemilikan tiga buku yang diterbitkan oleh perayu atas alasan buku-buku tersebut berkemungkinan akan memprejudis ketenteraman awam, merisaukan pendapat umum dan memprejudis kepentingan awam. Responden memaklumkan kepada perayu bahawa perintah itu dikeluarkan setelah mempertimbangkan laporan dari Jabatan Kemajuan Islam Malaysia ('Jakim') dan Bahagian Pengendalian Teks Penerbitan dan Al-Quran ('Bahagian') yang menyatakan bahawa, antara lain, penerbitan tersebut mengandungi perkara-perkara yang menyimpang dari ajaran Islam seperti yang diamalkan di Malaysia. Perayu memohon ke Mahkamah Tinggi melalui semakan kehakiman untuk, antara lain, membatalkan perintah responden. Untuk tujuan perbicaraan, perayu memohon, yang mana telah dibenarkan, perintah untuk mengetahui laporan dari Jakim dan Bahagian. Responden memberi perayu laporan lengkap dari Jakim berkenaan hanya dua perintah sementara laporan untuk perintah ketiga adalah tidak lengkap. Laporan Bahagian tidak diberikan sama sekali. Mahkamah Tinggi menolak permohonan semakan kehakiman yang menyatakan, antara lain, bahawa mahkamah tidak akan, tanpa alasan yang kukuh, mengganggu pelaksanaan budi bicara responden di bawah s 7(1) Akta Mesin Cetak dan Penerbitan 1984 untuk mengeluarkan perintah tersebut. Mahkamah juga menolak komplain perayu bahawa ia belum didengar kerana tidak ada keperluan prosedur yang memberikan hak kepada perayu untuk didengar sebelum perintah dikeluarkan dan diberi alasan bahawa responden harus mengeluarkan perintah dengan cepat untuk melindungi ketenteraman awam dan keselamatan negara. Dalam rayuan segera untuk mengetepikan keputusan Mahkamah Tinggi, perayu mengemukakan bahawa bukan hanya haknya untuk didengari yang tidak bergantung pada samada terdapat peruntukan undang-undang yang memberikannya hak itu, tetapi responden juga tidak mematuhi perintah mahkamah yang berkaitan untuk diskoveri dokumen yang diminta. Responden mengemukakan bahawa hak untuk didengar harus berada di tempat kedua di mana keselamatan negara dan ketenteraman awam terlibat.

Diputuskan, membenarkan rayuan dan menolak perintah responden:

(1) Kegagalan responden untuk mematuhi sepenuhnya perintah penemuan laporan dari Jakim dan Bahagian itu adalah terang-terangan sengaja dan serius tetapi masalah ini tidak pernah ditangani oleh Mahkamah Tinggi dalam penghakimannya atau oleh responden dalam rayuan ini. Ini jelas menunjukkan bahawa keputusan Mahkamah Tinggi tidak dapat dipertahankan (lihat perenggan 33, 38 & 62).

(2) Tidak menghasilkan dokumen yang dituntut oleh perintah penemuan

menimbulkan keraguan tentang alasan sebenarnya untuk pengisuan perintah tersebut dan juga menimbulkan kecurigaan bahawa responden menyembunyikan bukti material yang tidak menyebelahinya. Responden harus menunjukkan bahawa budi bicaranya untuk mengeluarkan perintah itu benar dan bahawa dokumen-dokumen tersebut benar-benar ada (lihat perenggan 30–31 & 34).

(3) Kegagalan untuk memberikan hak kepada perayu untuk didengari membuat perintah responden tidak dapat dipertahankan. Mahkamah Tinggi telah terkhilaf apabila mendapati bahawa jika tidak ada peruntukan undang-undang yang memberikan hak pendengaran, hak tersebut secara amnya dapat ditolak. Hak pendengaran adalah perkara asas dan sentiasa ada walaupun undang-undang tidak memperuntukkannya. Hanya jika responden memberikan hak kepada perayu untuk didengari dan mempertimbangkan apa yang harus dikatakan oleh perayu maka syarat keadilan semula jadi telah dipenuhi. Bagaimanapun, Akta Mesin Cetak dan Penerbitan 1964 tidak menolak hak perayu untuk didengari (lihat perenggan 43–45, 49–50 & 63).

(4) Tidak ada bukti bahwa responden telah mempertimbangkan untuk memberikan hak pendengaran kepada perayu dan kemudiannya telah memutuskan untuk tidak memberikan hak tersebut atas dasar keselamatan negara. Ia tidak menjadi masalah sekiranya hak itu akhirnya tidak diberikan. Apa yang penting adalah bagi responden untuk menunjukkan bukti bahawa, pada hakikatnya, dia telah mempertimbangkan untuk memberikan hak kepada perayu untuk didengari. Pendapat responden bahawa hak pendengaran adalah mendahului keselamatan negara adalah tidak betul. Hujah bahawa hak pendengaran harus ditolak kerana responden harus bertindak segera atau mendesak untuk mengeluarkan perintah juga tidak dapat dipertahankan terhadap fakta dan keadaan kes tersebut memandangkan buku-buku tersebut telah beredar selama beberapa tahun sebelum perintah yang melarangnya dikeluarkan (lihat perenggan 55–56 & 60).]

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223, CA (refd)

Cooper v Wandsworth Board of Works (1863) 14 CBNS 180; (1863) 143 ER 414 (refd)

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, HL (refd)

Genisys Intergrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors [2008] 6 MLJ 237, CA (folld)

JP Berthelsen v Director General of Immigration, Malaysia & Ors [1987] 1 MLJ 134, SC (refd)

Ketua Pengarah Kastam v Ho Kwan Seng [1977] 2 MLJ 152, FC (refd)

Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] MLJU 667; [2005] 3 CLJ 914, FC (refd)
Minister of Labour, Malaysia v Lie Seng Fat [1990] 2 MLJ 9, SC (refd)
R v Davey [1899] 2 QB 301 (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261, CA (refd)
Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal [1993] 2 MLJ 217, SC (refd)

Legislation referred to

Emergency (Public Order and Prevention of Crime) Ordinance 1969
Evidence Act 1950 ss 2, 114(g)
Federal Constitution arts 3, 10(2), 74(1), Ninth Schedule, List I, item 3(a), List II, item 1
Immigration Act 1959/63 s 59
Printing Presses and Publications Act 1984 s 7, 7(1)
Public Health Act 1875 [UK] s 124

Appeal from: Judicial Review No WA-25–290–11 of 2017 (High Court, Kuala Lumpur)

Khoo Guan Huat (Tunku Farik Tunku Ismail and Grace Teoh with him) (Skrine) for the appellant.
Mohammad Sallehuddin bin Md Ali (Attorney General's Chambers) for the respondent.

Abu Bakar Jais JCA:

INTRODUCTION

[1] This is an appeal arising from the decision by the High Court in refusing the appellant's application for judicial review. The application relates to orders issued by the respondent against three books published by the appellant.

[2] In deciding this appeal, we would address the issues regarding right to be heard, non-compliance of the High Court's order in respect of discovery and whether the orders made by the respondent could still stand in view of the issues raised in this case.

BACKGROUND FACTS

[3] The appellant promotes itself as a body interested in youth empowerment and encouraging Muslim intellectual discourse. In achieving its purpose, the appellant published three books as follows:

(a) 'Wacana Pemikiran Reformis (Jilid 1)' — published in June 2012;

(b) 'Wacana Pemikiran Reformis (Jilid 2)' — published in October 2014; and

(c) 'Islam Tanpa Keekstreman: Behujah Untuk Kebebasan' — published in January 2016.

[4] After the publications were put in circulation, the respondent as the Minister of Home Affairs who is also in charge of public order, made two orders in absolutely prohibiting the printing, importation, production, reproduction, sale, issuance, circulation, distribution and possession of these publications. The first order was issued on 6 September 2017 and published in the Federal *Gazette* on 28 September 2017 in respect of the first two publications and the second order issued and published in the Federal *Gazette* on similar dates, affecting the third publication.

[5] On 3 November 2017 the respondent informed the appellant that these orders were issued pursuant to reports made by Jabatan Kemajuan Islam Malaysia ('Jakim'). These reports among others state that the publications contained confusing matters which may deviate from the teachings of Islam practised in Malaysia. Therefore, the publications are likely to prejudice public order, alarm public opinion and prejudice public interest.

THE APPLICATION FOR JUDICIAL REVIEW

[6] Aggrieved by the orders issued by the respondent, the appellant filed the application for judicial review at the High Court. The appellant sought from the High Court the following:

(a) an order of certiorari to quash the respondent's orders;

(b) a declaration that the orders are null and void in that they are ultra vires the Federal Constitution ('the FC');

(c) a declaration that s 7 of the Printing Presses and Publications Act 1984 ('Act') is unconstitutional, null and void to the extent that Parliament had no power to:

(i) delegate its power under art 10(2) of the FC to the respondent; and/or

(ii) to prescribe a law that absolutely prohibits rights as opposed to merely imposing restrictions on the rights.

THE APPLICATION FOR DISCOVERY

[7] For the hearing before the High Court, the appellant had applied for discovery of the following:

(a) the Jakim's reports relied by the respondent to issue the orders; and

(b) the recommendations and comments of the Publication and Quranic Text Control Division.

[8] The High Court allowed this application for discovery. Hence, the respondent gave the appellant Jakim's reports in respect of the first two orders. However, for the third order, the respondent only gave incomplete Jakim's report. The respondent also failed to provide the appellant with the recommendations and comments of the Publication and Quranic Text Control Division.

THE HIGH COURT'S DECISION FOR JUDICIAL REVIEW

[9] Basically, the learned High Court judge found that the respondent's action in issuing the orders was very much an executive discretion he had exercised. In this regard, His Lordship found that the courts generally do not disturb such executive discretion without sufficient reasons.

[10] The respondent's discretion is exercised pursuant to the statutory provision of s 7(1) of the Act that reads as follows:

> If the Minister is satisfied that any publication contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is in any manner prejudicial to or likely to be prejudicial to public order, morality, security, or which is likely to alarm public opinion, or which is or is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest, he may in his absolute discretion by order published in the Gazette prohibit, either absolutely or subject to such conditions as may be prescribed, the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of that publication and future publications of the publisher concerned.

[11] His Lordship also found pursuant to the above provision, the respondent issued the orders because the publications were likely to be prejudicial to public order, likely to alarm public opinion or likely to be prejudicial to public interest. The respondent also opined the contents of the publications include statements which are contrary to the teaching of Islam, affects the Islamic faith and may create confusion to Muslim.

[12] The Minister himself had read the publications and he had considered the comments by the Publication and Quranic Text Control Division. The advice and views of Jakim had also been taken into account in issuing the orders. His Lordship found these matters considered by the respondent had assisted the Minister to arrive at a just and fair decision pursuant to the statutory provision earlier mentioned.

[13] The learned High Court judge also interpreted the meaning of the word 'likely' appearing in the above statutory provision. His Lordship found it means potentially happening or probably happening as opposed to the more onerous, actual incidents or actual happenings. As such, it was within the purview of the respondent to find the publications were likely to cause prejudice to public order, likely to alarm public opinion or likely to be prejudicial to public interest. Therefore His Lordship found the respondent had acted within his power conferred by s 7(1) of the Act.

[14] His Lordship also disagreed that since the circulation of the publications had been for several years, this would mean the same could not and had not been prejudicial to public order, likely to alarm public opinion or likely to be prejudicial to public interest. On the contrary, His Lordship found the publications could still be read in future to cause prejudice to public order, alarm public opinion or likely to be prejudicial to public interest.

[15] Further, His Lordship found that there was no procedural requirement for the appellant to be given the right of hearing before the orders were issued. And since this involved public order, the respondent had to act fast without haste. Thus it was unreasonable that a right of hearing should be accorded to the appellant under this circumstance.

[16] The learned High Court Judge also did not find the orders were made ultra vires art 3 and List II of the Ninth Schedule of the FC. With regard to these provisions, His Lordship could not agree with the contention that since the orders considered Islamic matters before they were issued, this is the purview of the States and not Federal's jurisdiction. Thus the respondent as a Federal Minister did not have the power or authority to issue the orders. His Lordship pointed out that the orders were made pursuant to s 7(1) of the Act in maintaining public order and thus is within Federal's law as read with art 74(1) with item 3(a) Federal List, Ninth Schedule of the FC. Therefore, the orders pertain to matters under the Federal List which is within the power of the respondent to issue.

[17] His Lordship also did not agree to the contention of the appellant that the respondent's orders violated art 10(2) of the FC in that this provision provides for Parliament itself to enact laws pertaining to public order without

delegating the same to the respondent. His Lordship also found with respect to this provision, the orders did not totally prohibit a citizen's right to freedom of speech and expression as long as the publications were not against public order, public interest and public opinion.

[18] Hence, the learned High Court judge found no merits in the appellant's application for judicial review.

THE APPELLANT'S ARGUMENTS

[19] In essence for the appeal, the appellant submitted that the learned High Court judge failed to appreciate that not all Jakim's reports relied by the respondent to issue the orders were before the court despite being allowed for discovery as narrated earlier in this judgment. The respondent had failed to show all the reports despite being ordered to do so. The respondent also failed to show the recommendations and comments of the Publication and Quranic Text Control Division.

[20] His Lordship was also wrong to conclude that there was no right for the appellant to be heard before the orders were issued by the respondent.

[21] The High Court also failed to appreciate that the contents of the publications concerned Islam which is within item 1 List II in the Ninth Schedule of the FC. Accordingly, the States Legislatures have the power to promulgate laws concerning Islam and not Parliament at the federal level. Therefore the orders issued by the respondent were ultra vires the FC.

[22] The appellant also contended that Parliament has no authority to delegate all of its powers to legislate to some other authorities. In this respect, it is wrong for the respondent to assume the discretion and legislative powers of Parliament by issuing the orders.

[23] The appellant also submitted that the learned High Court judge failed to appreciate that Parliament has no power to make laws that completely prohibit freedom of speech and expression. The respondent's orders had that effect when it absolutely prohibited the publications and this fact was not fully appreciated by the learned High Court judge.

THE RESPONDENT'S ARGUMENTS

[24] The respondent submitted that in cases involving public order and national security, there is no absolute right to be heard. In this case there is a

need to take immediate action in preserving public order, hence the issuance of the orders by the respondent. As such, the appellant cannot claim the right to be heard in respect of the orders.

[25] The respondent further submitted that freedom of speech and expression as stipulated in the FC is not absolute. The FC does provide that such freedom could be restricted by imposition of relevant laws.

[26] The respondent also argued that the orders issued pertain to maintaining public order. This is a subject well within Parliament to legislate and not the State Legislatures.

OUR DECISION

[27] Although as stated, there are several points of arguments being canvassed for the appeal, we find there is absolutely no necessity to address all of them. After evaluating the issues raised, we would say there are only two important points, which we will focus and highlight that would be sufficient to effectively determine this appeal to its conclusion.

[28] First is the undeniable fact that both the High Court and the respondent chose to avoid the issue that the respondent failed to comply with the order of discovery made by the High Court itself. The learned High Court judge with respect did not address this issue at all in His Lordship's grounds of judgment. And likewise, the counsel for respondent, for reasons only known to them, chose not to address this issue both during the oral hearing and in the written submission.

[29] It is undisputed that because of the order of discovery, the appellant is entitled to the Jakim's reports and the recommendations and comments of the Publication and Quranic Text Control Division. There is also no dispute that part of the Jakim's reports and the recommendations and comments of the Publication and Quranic Text Control Division were never provided to the appellant. And it cannot be disputed these are crucially relevant documents because the respondent had relied on the same to issue the orders affecting the publications. The respondent must show these documents to allay the suspicion these documents do not exist.

[30] In this regard, the Supreme Court in the case of *Minister of Labour, Malaysia v Lie Seng Fat* [1990] 2 MLJ 9 referred approvingly the celebrated case of *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223. It referred to the principles for executive discretion and Hashim Yeop A Sani CJ (Malaya) quoted Lord Green as follows:

> Lord Greene elaborated on those principles and they are that *the exercise of the*

> *discretion must be a real exercise of the discretion* and that the authority exercising the discretion must consider matters required to be considered and disregard irrelevant collateral matters. (Emphasis added.)

[31] Bearing in mind the above quotation, we are of the opinion that the respondent exercise of discretion cannot be real. This is because the respondent failed to show the recommendations and comments of the Publication and Quranic Text Control Division, not to mention part of the reports by Jakim. As indicated these comments and recommendations were taken into account by the respondent before the orders were issued. And it cannot be over-emphasised the High Court allowed the discovery of these comments and recommendations for the appellant. Yet as pointed out, these were not provided to the appellant by the respondent. The failure to show these begs the question whether it is true in the first place that the same were taken into account by the respondent before issuing the orders. It also begs the question whether the same is even material to be considered. Even more serious is the suspicion that these documents do not exist at all. The sum effect of this amounts to serious doubt whether there was a real exercise of discretion by the respondent as required by *Lie Seng Fatt* and *Wednesbury Corp.*

[32] It is made worse because the learned High Court judge took into account these documents which most probably were not in existence in arriving at His Lordship's decision. In the grounds of judgment of the High Court, His Lordship said as follows:

> In the present case, the Minister had read and analysed the publications *aside from taking into account the views of JAKIM and Bahagian Kawalan Pernerbitan dan Teks Al Quran* as mentioned earlier. (Emphasis added.)

[33] There is also another aspect to the non-production of these documents. It proves that the respondent had been blatant in disregarding the order made by the High Court for discovery. It is trite that until set aside, an order of a court must be obeyed. The Supreme Court in *Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217 said:

> It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of court runs the risk of being held in contempt with all its attendant consequences.

[34] The non-production of the documents forces not only the appellant but also a neutral party to doubt the real reasons for the issuance of the orders by the respondent. After all, if indeed the orders were issued above board, it would not be too difficult for the respondent to produce the documents for inspection.

Not producing it after being ordered to do so by the High Court only makes one suspect that the respondent is concealing material evidence unfavourable to the same.

[35] In this regard the appellant had urged this court to invoke s 114(g) of the Evidence Act 1950 ('the EA') for adverse inference against the respondent for the failure to produce these documents. With respect to the appellant, invoking this provision cannot be done because s 2 of the EA, the very statute referred by the appellant provides as follows:

> Extent
>
> This Act shall apply to all judicial proceedings in or before any court, but not to affidavits presented to any court or officer nor to proceedings before an arbitrator.

[36] Bearing in mind that the appellant's application for judicial review is premised on affidavit evidence, it is clear the above provision prohibits the application of the statute in this case. But independently of s 114(g) of the EA, the fact that the documents were not shown still would render a serious suspicion on the respondent. Hence as stated, the failure to produce the documents despite being ordered so, would only mean the respondent's action still must not be accepted.

[37] In addition, the respondent at para 18 of the written submission conceded that his subjective satisfaction could be viewed objectively by the courts as there is no such thing as unfettered discretion. Because of this concession, it is only appropriate to scrutinise the respondent's exercise of his discretion objectively by also asking why the order for discovery has not been complied with.

[38] We are of the view that this issue regarding the non-production of the documents alone merits the appeal to be allowed, no less by the fact this is a serious issue which was not addressed at all by the High Court and the respondent.

[39] Nonetheless, we could also allude to another important point of contention that is material in conclusively disposing the appeal, without the need to address all the issues raised. This relates to the submission regarding the right to be heard before the respondent's orders were issued. As indicated, there is also no dispute this right was not accorded to the appellant.

[40] As recalled, the respondent argued there is no absolute right of hearing as the respondent was dealing with the issue of public order and national security and hence the need to act promptly. In support of this proposition the respondent highlighted what the learned High Court judge said in His

Lordship grounds of judgment. His Lordship said that the law does not provide right to be heard to the appellant before the orders were issued. According to His Lordship, since the law does not grant the right to be heard, there can never be procedural non-compliance in issuing the orders. His Lordship had relied on the Federal Court's case of *Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] MLJU 667; [2005] 3 CLJ 914 for this proposition. The passage relied by the learned High Court judge in this case reads as follows:

> In our view, courts must give effect to the amendments. That being the law, it is the duty of the courts to apply them. So, in a habeas corpus application where the detention order of the Minister made under s 4(1) of the Ordinance or, for that matter, the equivalent ss. in ISA 1960 and DD(SPM) Act 1985, the first thing that the courts should do is to see whether the ground forwarded is one that falls within the meaning of procedural non-compliance or not. To determine the question, the courts should look at the provisions of the law or the rules that lay down the procedural requirements. It is not for the courts to create procedural requirements because it is not the function of the courts to make law or rules. *If there is no such procedural requirement then there cannot be non-compliance thereof. Only if there is that there can be non-compliance thereof and only then that the courts should consider whether, on the facts, there has been non-compliance*. (Emphasis added.)

[41] First, as seen, without doubt the findings above made by the learned High Court judge stand on the authority of *Lee Kew Sang*. With this case as a basis, the learned High Court judge perceived and concluded that there should not be a right of hearing for the appellant. This is because the relevant statute did not state that right of hearing is a procedural requirement.

[42] Second, arising from the above, we are obliged to point out that the procedural requirement referred in *Lee Kew Sang* does not refer to the right of hearing. The procedural requirement referred in this Federal Court's case relates to something else. In *Lee Kew Sang* the issue was whether it is a procedural requirement that a criminal prosecution must be initiated. And whether it is also a procedural requirement that the order made in that case must be made within certain time from the alleged criminal act. Again, in *Lee Kew Sang* the procedural requirement is not at all about right of hearing.

[43] The High Court judge erred in quoting the passage in *Lee Kew Sang* above to find right of hearing is not a procedural requirement for the appellant in the present appeal. With respect, the learned High Court judge erred in this respect because first as pointed out, the procedural requirement mentioned in *Lee Kew Sang* is not about the right of hearing. Second, the learned High Court judge was also wrong to generally find that once there is no statutory provision granting the right of hearing, such right can be denied. And His Lordship had based this on *Lee Kew Sang*. This reliance on this Federal Court's case for such proposition of the law is with respect inappropriate. This is because in *Lee Kew Sang*, the Federal Court took into account a statutory provision that specifically

disallowed judicial review in coming to its decision unless in contravention with a procedural requirement under the Emergency (Public Order and Prevention of Crime) Ordinance 1969. This statutory provision is s 7C(1) of the Emergency (Public Order and Prevention of Crime) (Amendment) Act 1989 which states:

> There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Ordinance, save in regard to any question on compliance *with any procedural requirement in this Ordinance* governing such act or decision. (Emphasis added.)

[44] There is no such provision in the Act. Therefore in coming to its decision, the Federal Court was confining itself to the statutory provision as narrated above. The Federal Court then did not at all make a ruling of general application that there is no right of hearing when that right is not stated as a procedural requirement. In fact without such statutory constraint as seen in *Lee Kew Sang,* a right of hearing is a basic and fundamental right that should be accorded (see *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261).

[45] Further, the right of hearing is always available and enshrined without requiring it to be stated in any statutory provisions. The Federal Court was clear on this principle in *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152 where Raja Azlan Shah FCJ after referring to several cases unequivocally said:

> The cases show that a fair hearing is required as a 'rule of universal application', 'founded on the plainest principles of justice'. *In particular, the silence of the statute affords no argument for excluding the rule, for the 'justice of the common law will supply the omission of the legislature.' These quotations are derived from the case of Cooper v Wandsworth Board of Works , which has several times recently been approved by the House of Lords as expressing the principle in its full width: see Ridge v Baldwin*; *Wiseman v Borneman* [1971] AC 297.
>
> *In my opinion, the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled 'judicial', 'quasi-judicial', or 'administrative' or whether or not the enabling statute makes provision for a hearing*. But the hearing may take many forms and strict insistence upon an inexorable right to the traditional courtroom procedure can lead to a virtual administrative breakdown. (Emphasis added.)

[46] As indicated there is no dispute that the respondent did not give any right of hearing to the appellant before issuing the orders. This right should have been given following the decision above. Therefore, with respect the High Court erred in following *Lee Kew Sang* and not following *Ho Kwan Seng*.

[47] The proposition that a right of hearing need not be expressly provided in a statute is also seen in the Supreme Court's case of *JP Berthelsen v Director General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134. In this case, Abdoolcader SCJ cited with approval the case of *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180 at p 194; (1863) 143 ER 414 at p 420 that said:

> ... although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.

[48] Thus, once again the appellant should have been given the right to be heard by the respondent following what is stated in *JP Berthelsen*. It is also relevant to note that this case also said:

> In the light of the authorities we have adumbrated, we regard the appellant as so circumstanced in relation to the action of the first respondent as to be entitled to the observance of the rules of natural justice. Whatever the grounds be upon which the first respondent was proceeding, the appellant might, *in addition to attacking those grounds, also desire to refer to any matters of special hardship which the cancellation of his employment pass would impose upon him and he should have been invited to do so. If, having done all this, the first respondent then gives consideration to the appellant's representations, the requirements of natural justice will have been satisfied* and it would be for the first respondent to make his decision whether or not to cancel the employment pass in the exercise of the discretion conferred upon him by regulation 19 of the Regulations.

[49] Following the above, what should have been done by the respondent is to give the right of hearing to the appellant. After this is provided and the respondent considers what is said by the appellant, only then would the requirements of natural justice be fulfilled.

[50] Also relevant to note is the fact the Act itself does not say that a right of hearing should be excluded. The right of hearing can be excluded as seen in s 59 of the Immigration Act 1959/63 post *JP Berthelsen.* But since this was not the case for the Act, the appellant must be given the right of hearing.

[51] There is a need to point out a bit more detail the arguments advanced by the respondent to deny this right of hearing. Another case cited by the respondent on this point is the decision by the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. The passage in this case relied by the respondent relates to the judgment by Lord Fraser that states as follows:

> The decision on whether the requirements of national security *outweigh the duty of fairness* in any particular case is for the Government and not for the courts; the Government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security. (Emphasis added.)

[52] We understood the passage is quoted to argue and emphasise the point that when it comes to national security, the duty to act fairly will become secondary to national security itself. That would include the right to be heard as against the party affected by any decisions based on national security.

[53] However, we would also quote a passage in this House of Lords case to show that proposition of the respondent is with respect not the full truth. This passage we are referring to states as follows:

> That, however, it was for the executive and not the courts to decide whether, in any particular case, the requirements of national security outweighed those of fairness; *and that the evidence established that the minister had considered, with reason, that prior consultation about her instruction would have involved a risk of precipitating disruption at GCHQ and revealing vulnerable areas of operation,* and, accordingly, she had shown that her decision had in fact been based on considerations of national security that outweighed the applicants' legitimate expectation of prior consultation. (Emphasis added.)

[54] That passage above without doubt, requires the Minister in that case to consider whether prior consultation with those affected would be jeopardising national security itself and there must be reasons given. We considered that the word 'consultation' above means the right to be heard. So before a decision is made on the basis of national security, the Minister must think about giving the right to be heard. Only after considering this and with reasons, it is permissible for the Minister not to give that right since giving that right will affect national security. But in the first place, there must be such evidence. There must be evidence the Minister had considered giving the right of hearing.

[55] Coming back to our case, there cannot be a doubt, there is no evidence the respondent as the Minister had considered to give the right of hearing to the appellant. It does not matter that right was not given to the appellant eventually. What is important is for the respondent to show the evidence that right was in fact considered to be given. The affidavits of the respondent do not indicate this evidence.

[56] Thus we believe that it is demonstrated that this House of Lords case does not simply deny the right of hearing on account of national security. This case goes one step further in holding that before such right is denied, it must come to mind such right if given, is not consistent with national security. Since such right must first be considered, it means there are two possibilities. First, for such right to be given and the other for it to be denied. It shows there is still that fifty percent possibility for such right to be given. With respect, it renders the respondent's contention that a right of hearing will always come secondary to national security as incorrect.

[57] The next authority cited by the respondent to contend there is no right of hearing for the appellant is a very old case ie *R v Davey* [1899] 2 QB 301 and the respondent quoted Chanel J's decision in this case as follows:

> ... the case in which it is easiest to see the propriety of the exception is where, looking at the scope and object of the legislation, it was clearly intended that the parties putting the law in force should act promptly. Such a case is an order for the destruction of unsound meat, which clearly may be made ex parte, because it is desirable in the interest of the public health that it should be acted upon at once.

[58] The respondent on the strength of the quotation above, argued that this case illustrates that where prompt action is needed, such as in this case by the respondent acting as Home Affairs Minister, the right of hearing can be denied to the appellant.

[59] First, it is relevant to note the brief facts of this English case. In this case, a mother had removed her child who had been stricken with scarlet fever from a hospital back to their home. An order was then obtained from the court to take the child back to the hospital. The court gave the order pursuant to s 124 of the Public Health Act 1875 which states as follows:

> Where any suitable hospital or place for the reception of the sick is provided within the district of a local authority, or within a convenient distance of such district, any person who is suffering from any dangerous infectious disorder, and is without proper lodging or accommodation, or lodged in a room occupied by more than one family, or is on board any ship or vessel, may, on a certificate signed by a legally qualified medical practitioner, and with the consent of the superintending body of such hospital or place, be removed, by order of any justice, to such hospital or place at the cost of the local authority.

[60] It should be apparent that the provision above upon which the order was made is with respect to something that needed immediate action involving life and death. Thus it was decided no right of hearing should be given to the mother before the issuance of the order. This action must be taken instantaneously as it relates to a dangerous infectious disease. A situation made more readily understood in our present environment because of the virus infection known as Covid-19. This situation must certainly not be comparable to the action required by the respondent in respect of the books. More so when the books have been in circulation for a few years. The urgency to act in this English case is far from similar with the action needed on the part of the respondent. The respondent may need to act fast in the name of national security and public order but to equate the action similarly as in the English case, with respect, is too remote to be correct. The basis not to give the right of hearing in *R v Davey* is much more acceptable. This is because of the fatally dangerous circumstances that must be avoided at all cost from day one. This cannot be said similarly of the respondent because he was not required to act in

an immediate, urgent, and instantaneously life and death situation as in *R v Davey*. The difference in facts between the English case and the present case cannot be more glaring. The difference between the English statutory provision as narrated and s 7(1) of the Act should also be obvious. We are therefore of the opinion, *R v Davey* should not be followed.

[61] Based on all the reasons aforesaid, with respect, the learned High Court judge erred on two instances. One, in respect of the need for the respondent to show the relevant documents and also in respect of the need to give the right of hearing to the appellant. Therefore, we are inclined to intervene and correct the mistakes made. In this respect we are guided by the Court of Appeal's case of *Genisys Intergrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors* [2008] 6 MLJ 237 where it is said:

> We, as an appellate court, will not interfere with the decision of a trial judge unless satisfied that his or her findings are plainly wrong.

CONCLUSION

[62] The order of discovery made earlier by the High Court meant the respondent must provide the relevant documents that allegedly had been relied to issue the orders. The failure to make available these documents was not even addressed by the High Court and the respondent in this appeal. This obviously shows the decision of the High Court cannot stand.

[63] Besides, the authorities highlighted would indicate that the appellant must be given the right of hearing. Since this was not accorded by the respondent, it follows that the issuance of the respondent's orders cannot be defended.

[64] We are of the considered view these two grounds would be more than sufficient to dispose the appeal. The appeal is accordingly allowed. However since only these two issues are sufficient to decide on the appeal, we would be specific in saying the judicial review is allowed merely to quash the respondent's orders. Hence no order is made for a declaration that the orders are ultra vires the Federal Constitution and s 7 of the Act is unconstitutional as also requested by the appellant.

Appeal allowed, respondent's orders quashed.

Reported by Ashok Kumar