IN THE FEDERAL COURT OF MALAYSIA

(ORIGINAL JURISDICTION)

CASE NO.: BKA-1-01/2021(W)

Between

SIS Forum (Malaysia) **… Petitioner**

And

Kerajaan Negeri Selangor **… Respondent**

Majlis Agama Islam Selangor **… Intervener**

Coram

Tengku Maimun binti Tuan Mat, CJ
Rohana binti Yusuf, PCA
Azahar bin Mohamed, CJM
Abang Iskandar bin Abang Hashim, CJSS
Mohd. Zawawi bin Salleh, FCJ
Vernon Ong Lam Kiat, FCJ
Zaleha binti Yusof, FCJ
Harmindar Singh Dhaliwal, FCJ
Rhodzariah binti Bujang, FCJ

SUMMARY OF JUDGMENT

INTRODUCTION

[1] This petition arose out of the decision of the High Court in an application for judicial review No. WA-25-204-10/2014 ('JR No. 204') wherein the present petitioner (the applicant there) sought to challenge the validity of a fatwa dated 17.7.2014 (ref. no MAIS/SU/BUU/01-2/002/2013-3(4) and gazetted on 31.7.2014) ('Fatwa'). For completeness, the Fatwa is reproduced below:

> "FATWA PEMIKIRAN LIBERALISM DAN PLURALISM AGAMA.
>
> 1. SIS FORUM (Malaysia) dan mana-mana individu, pertubuhan, atau institusi yang berpegang kepada fahaman liberalism dan pluralism agama adalah sesat dan menyeleweng daripada ajaran Islam.
>
> 2. Mana-mana bahan terbitan yang berunsur pemikiran-pemikiran fahaman liberalism dan pluralism agama hendaklah diharamkan dan boleh dirampas.
>
> 3. Suruhanjaya Komunikasi dan Multimedia Malaysia (SKMM) hendaklah menyekat laman-laman sosial yang bertentangan dengan ajaran Islam dan Hukum Syarak.
>
> 4. Mana-mana individu yang berpegang kepada fahaman liberalism dan pluralism agama hendaklah bertaubat dan kembali ke jalan Islam.".

[2] In the JR No. 204 application, the petitioner sought, among others, for the following declarations: (i) to the extent the Fatwa implicitly provides for offences in relation to newspaper, publications, publishers, printing and printing presses, it is contrary to section 7 of the Printing Presses and Publications Act 1984; (ii) to the extent it directs Malaysian Communication and Multimedia Commission ('MCMC') to block social website, is contrary to section 3(3) of the MCMC Act 1998; (iii) a declaration that the Fatwa is in excess of Articles 10, 11, 74 and List 1 and

List 2 of the Ninth Schedule of the Federal Constitution; and (iv) a declaration that the petitioner being a company limited by guarantee incorporated under the Companies Act 1965 or any other party not able to profess the religion of Islam, cannot be subjected to the said Fatwa.

[3] The High Court held, in part that is relevant to this petition, that in light of section 66A of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ('ARIE 2003') read with clause (1A) of Article 121 of the Federal Constitution ('FC'), the High Court was dispossessed of any jurisdiction to consider the validity of the Fatwa and that the question should instead be posed and determined in the Syariah High Court in accordance with section 66A of the ARIE 2003.

[4] By this petition, the petitioner sought for the following declaration:

> "A Declaration that Section 66A of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 is invalid on the ground that it makes provision with respect to a matter with respect to which the Legislature of the State of Selangor has no power to make, and as such, that said provision is unconstitutional, null and void.".

[5] I must clarify at the outset of this judgment that this Court is not concerned with the procedural or substantive validity of the Fatwa nor is it asked to consider whether the Courts are in the first place generally disempowered to undertake such evaluation under clause (1A) of Article 121 of the FC. This petition concerns only the question of whether the Selangor State Legislative Assembly ('SSLA') was empowered to enact section 66A of the ARIE 2003. I therefore make no comment or ruling on the substantive or procedural validity of the Fatwa.

BACKGROUND FACTS

[6] The petitioner, SIS Forum (Malaysia) is a corporation who claimed to be aggrieved by the Fatwa. They accordingly filed an application for judicial review in JR No. 204 which was dismissed. As adverted to above, the learned High Court Judge held that in light of clause (1A) of Article 121 of the FC and section 66A of the ARIE 2003, the High Court had no jurisdiction to determine the validity of the Fatwa.

[7] Taking the position that section 66A was invalid on the ground that the SSLA had no power to make it, the petitioner filed this petition upon obtaining leave from a single Judge of this Court under clauses (3) and (4) of Article 4 and clause (1) of Article 128 of the FC.

[8] In this connection, the said section 66A, which was inserted into the ARIE 2003 vide section 11 of the Administration of the Religion of Islam (State of Selangor) (Amendment) Enactment 2015, stipulates thus:

> "The Syariah High Court, may, in the interest of justice, on the application of any person, have the jurisdiction to grant permission and hear the application for judicial review on the decision made by the Majlis or committees carrying out the functions under this Enactment.".

THE CRUX OF THE SUBMISSIONS

[9] Learned counsel for the petitioner, Dato' Malik Imtiaz, assailed the constitutional validity of section 66A of the ARIE 2003 on the following grounds.

[10] Firstly, learned counsel submitted that the 'Majlis' referred to in section 66A of the ARIE 2003 is not a 'person professing the religion of

Islam' which is a phrase contained within item 1 of the Ninth Schedule of the State List. Item 1 reads:

> "1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public place of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Syariah courts, **which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph**, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom." [Emphasis added]

[11] Section 2 of the ARIE 2003 defines the word 'Muslim' to include the 'Majlis' established under section 4 of the same statute. Learned counsel for the petitioner argued, in essence that the definition of the word 'Muslim' in section 2 is not in accord with item 1 of the State List because effectively only a natural person may 'profess' the religion of Islam. As such, the Syariah Courts cannot have jurisdiction over an artificial person.

[12] The next argument advanced by learned counsel for the petitioner is on the interpretation of the words 'judicial review' employed in section

66A of the ARIE 2003 and whether those words confer power on the State-legislated Syariah Courts in excess of the scope permitted by item 1 of the State List. Learned counsel argued that judicial review is a unique and exclusive aspect of judicial power vested in the Civil Superior Courts.

[13] Learned counsel also argued that the Syariah Courts, as a matter of constitutional policy, are incapable of exercising judicial power for the reason that they do not share the same constitutional guarantees of judicial independence as the Civil Superior Courts.

ANALYSIS/DECISION

The Concept of Judicial Review Generally

[14] This Court has consecutively and consistently held in its decisions in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 (‘*Semenyih Jaya’*), *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 (‘*Indira Gandhi’*) and *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 (‘*Alma Nudo’*) that the judicial power of the Federation remains reposed solely in the Civil Courts.

[15] A fundamental aspect of judicial power is judicial review. In this country, judicial review has two broad aspects. The first is constitutional judicial review and the second is statutory judicial review (also known as administrative judicial review). Both versions of it are primarily grounded on the concept of the doctrine of *ultra vires* – and this is explained further below.

Constitutional Judicial Review

[16] It is my view that the jurisdiction for judicial review was intended to be conferred on the Civil Superior Courts by way of the general empowering provision in clause (1) of Article 4 of the FC and not by reference to the Legislative Lists in the Ninth Schedule.

[17] Constitutional judicial review is ingrained within clause (1) of Article 4 of the FC which stipulates that the FC being supreme, any law inconsistent with it is void to the extent of the inconsistency with the FC. Two things are corollary to this mighty declaration. First, the Civil Federal Judiciary is the only body capable of exercising review powers over the constitutional validity of laws as the final interpreter and independent protector of the FC.

[18] The second corollary feature of clause (1) of Article 4 and the power to constitutionally review the validity of legislation is the concomitant power to review executive action.

[19] The existence of constitutional judicial review as an inherent function of the judicial arm of Government established under Part IX of the FC was recognised by this Court by a majority of 8-1 in *Iki Putra Mubarrak v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 323.

[20] The fact that the Superior Courts are the only bodies capable of deciding constitutional issues or issuing public law remedies has also been made plain in decided cases. In *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544, the Supreme Court noted that the subordinate Courts (Magistrates' and Sessions Courts) are incapable of

exercising any supervisory powers over the powers of the Public Prosecutor (at pages 548-549).

[21] That judicial review is a feature unique to the Civil Courts is confirmed by this Court where it was held in *Semenyih Jaya* (supra) and *Indira Gandhi* (supra) that despite the change in language in clause (1) of Article 121 of the FC post-amendment, the judicial power of the Federation remains vested in the Courts established under Part IX of the FC.

[22] Further, in a federalist system of government, with only a single federal judicial structure, it is only appropriate that the Federal Civil Courts exercise that power. The very fact of the concentration of certain powers in the federal system was recognised by Azahar Mohamed CJM in his concurring judgment in *Iki Putra* (supra), at para [110] of the judgment.

Statutory Judicial Review

[23] While constitutional judicial review essentially concerns the invalidity of legislative and/or executive conduct to the extent that they are in excess of constitutionally permissible limits, statutory judicial review encompasses all other forms of judicial review that is not constitutional judicial review. It includes but is not limited to actions challenging executive orders, decisions and/or discretions; the decisions of inferior tribunals for example the Industrial Court; whether any subsidiary legislation is invalid on the grounds that it is *ultra vires* the parent statute, and so on.

[24] Statutory judicial review cannot be defined outright but can be discerned from its features. These features include having a prayer for

relief seeking any or all of the remedies specified in paragraph 1 of the CJA 1964 premised on any of the usual grounds for judicial review to wit, illegality, procedural impropriety, irrationality or proportionality.

[25] Statutory judicial review is different from constitutional judicial review because statutory judicial review applications involve supervising and checking the exercise of public law powers without a prayer per se for the invalidation of any statutory provision. A public law power may itself be a constitutional power but without any prayer for invalidation of the primary or parent Act, such an application would still be considered statutory judicial review.

[26] While the specified powers to afford redress for statutory judicial review are substantively in statutory law, foremost is section 25(2) of the CJA 1964 read with paragraph 1 of the Schedule to the CJA, the means for redress for constitutional judicial review is provided directly under clause (1) of Article 4 of the FC to strike down unconstitutional legislation.

Significance of Judicial Review and Interpretation of Item 1 of the State List, Ninth Schedule

[27] On the significance of judicial review, I can do no better than echo the following dictum of Salleh Abas LP in *Lim Kit Siang v Dato Seri Dr Mahathir Mohamad* [1987] 1 MLJ 383, at pages 386-387, as follows:

> "When we speak of government it must be remembered that this comprises three branches, namely, the legislature, the executive and the judiciary. **The courts have a constitutional function to perform and they are the guardian of the Constitution within the terms and structure of the Constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review — a concept that pumps**

> **through the arteries of every constitutional adjudication and which does not imply the superiority of judges over legislators but of the Constitution over both. The courts are the final arbiter between the individual and the State and between individuals inter se, and in performing their constitutional role they must of necessity and strictly in accordance with the Constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action**. If that role of the judiciary is appreciated then it will be seen that the courts have a duty to perform in accordance with the oath taken by judges to uphold the Constitution and act within the provisions of and in accordance with the law.".
>
> [Emphasis added]

[28] Judicial review is thus a core tenet of the rule of law which is inextricably linked to the notion of constitutional supremacy in a democratic form of Government. This is because a core feature of the rule of law is the doctrine of separation of powers, a corollary to which is the concept of check and balance.

[29] Judicial review – whether constitutional review or statutory review – is a fundamental aspect of check and balance and is the vehicle through which the judicial branch of government can perform its constitutional function vis-à-vis the other branches of government.

[30] At the risk of repetition, in line with decided cases, the judicial power of the Federation which includes judicial review (constitutional and statutory) is vested by constitutional design solely in the two High Courts. Specifically, this Court has definitely decided this point in *Indira Gandhi* (supra).

[31] The respondent submitted (and the intervener appears to support it) that the term 'judicial review' employed in section 66A of the ARIE 2003

is not the same as ‘judicial review’ in the civil law sense but that it refers only to Syariah law and the Syariah Courts’ supervisory powers on that subject-matter alone. To support that argument, the respondent placed reliance on clause (1A) of Article 121 and on the words ‘constitution, organization and procedure of Syariah courts’ in item 1 of the State List.

[32] With respect, the use of the words ‘judicial review’ alone and in a manner which enables the Syariah Courts to exercise such powers is itself to assign unto such Courts powers which have always been unique and exclusive to the Civil Courts. The words ‘constitution, organization and procedure of Syariah courts’ must be appreciated in context. As correctly submitted by the petitioner, to constitute and organize merely means to create or establish the Syariah Courts in its different tiers. The words ‘constitution, organization and procedure of Syariah Courts’ cannot be stretched to confer such powers on the Syariah Courts. Given the settled demarcation of the jurisdiction of the Civil and Syariah Courts, the demarcation will be obscured, should the Syariah Courts exercise and possess parallel powers of judicial review and public law remedies.

[33] For the intervener, it was submitted among others that judicial review, having been derived from Order 53 of the ROC 2012, is procedural law; that the supervisory power and jurisdiction relating to the procedure of judicial review are conferred by statutes (Acts of Parliament); that they are not expressly provided for in the FC and neither do they originate from any inherent judicial powers; and that the procedure of judicial review is not restricted or confined to disputes or matters of constitutional nature or having constitutional elements.

[34] For the reasons explained above on the conceptual differences and similarities between constitutional and statutory judicial review

(specifically) and the nature of judicial review generally, and in light of clause (1) of Article 4 which declares that the FC is supreme and the Judiciary is the only organ responsible to ensure the supremacy of the FC, there is no need for an express provision or declaration to say that judicial review (no matter the form) is a judicial power reposed exclusively and singularly in the Civil Courts. The power, as alluded to earlier, is ingrained and inherent in the Civil Superior Courts.

[35] It follows that there is no basis in law for the intervener's submission. Order 53 of the ROC 2012, the CJA 1964 and related written laws are merely to facilitate the process of judicial review but cannot be said to be the basis of such powers.

'Hukum Syarak' and the Syariah Courts

[36] To my mind, the said section 66A is incompatible with the legislative lists for the reason that the provision when read as a whole confers power on the Syariah Courts far beyond what item 1 of the State List allows.

[37] This Court has in recent decisions, clarified the scope of judicial review when it concerns matters pertaining to religion. Where a matter concerns public law powers specifically, questions of obligations and compliance or non-compliance with written law are subject to judicial review no matter the essence of the original subject matter. It should be evident that written law here includes both federal and State laws. Two cases aptly illustrate this, namely *Indira Gandhi* (supra) and *Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 181 ('*Rosliza*').

[38] In terms of subject matter, section 66A of the ARIE 2003 as it stands, confers powers wider than what can reasonably be encompassed within the words 'Islamic law and personal and family law of persons professing the religion of Islam' in item 1 of the State List. Section 66A in its present form, does not relate to purely doctrinal matters or those relating to the religion of Islam. On the face of it, it relates to the public law powers of the Majlis.

[39] Moving on to the words 'or committees carrying out the functions under this Enactment' in section 66A, in the context of this petition, the relevant 'committee' would be the Fatwa Committee established in accordance with Part III of the ARIE 2003. Section 48 in particular details the procedure to be followed for the making of a fatwa. Naturally, there is a difference between the making of a fatwa (as in the procedure and law to adhere to) and the substantive contents of the fatwa.

[40] As regards the procedure, it necessarily requires compliance with written law and the failure to do so might result in the issuance of public law remedies that can only be issued by the Civil Superior Courts. The contents of the fatwa and their interpretation are a different story and a matter purely for the jurisdiction of the Syariah Courts to the extent that it relates to 'hukum syarak' or personal law and not matters which objectively might be taken to contradict any written law (federal or State statutes or even the FC for that matter).

[41] Thus, simply put, if the vires of any fatwa or the conduct of the Fatwa Committee is challenged purely on the basis of constitutional or statutory compliance, then it is a matter for the Civil Courts. If the question pertains to the matters of the faith or the validity of the contents of the fatwa tested

against the grain of Islamic law, then the appropriate forum for review is the Syariah Courts.

[42] The propositions of law that I have stated above were in fact suggested and accepted by the intervener, the Majlis, themselves. Learned co-counsel for the intervener, Mr Haniff Khatri, however, submitted that section 66A may be read down to the extent that the Syariah Courts will abide by the clear demarcation of laws and will decide only matters that are substantially doctrinal. In that sense, he urged, that the provision is not unconstitutional.

[43] The Syariah Courts are and ought to be trusted to follow the law. That said, the constitutionality of provisions is tested against the language with which they were drafted and the powers they actually confer and not on guarantees given by counsel in the course of litigation. See *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 where Abdoolcader SCJ reminded thus:

> "… The power of the Public Prosecutor under section 418A is uncanalized, unconfined and vagrant. The Deputy however assures us that this power will only be exercised reasonably. Now this is exactly what happened in *Attorney-General v Brown* [1920] 1 KB 773 usually called the 'Pyrogallic Acid Case,' in which to complaints about the tremendous breadth of the authority contended for by the Government in the matter of statutory authorisation for the importation of goods, Sir Gordon Hewart, who was the Attorney General at that time, arguing for the Crown, put (at page 779) what has since become the stock of those who see no danger in Executive power being left uncontrolled (and this is quite ironic in view of his subsequent condemnation of similar apologists): "The Government could be relied upon to see that the power was reasonably exercised." Sankey J., however, had no difficulty in holding the Executive action illegal, and he pointed out (at page 791) that the Crown's argument that the Executive could be trusted begs the question, **for the court could concern**

> **itself only with the bare issue of the possession of the claimed power, and not whether it would be reasonably exercised.**". [Emphasis added]

[44] Section 66A is clear in its terms, namely it allows the Syariah Court to possess powers of judicial review. Based on the *Hansard of Dewan Negeri Selangor Yang Ketiga, Mesyuarat Pertama*, 07 April 2015, at page 116, that was indeed the legislative intention of the SSLA in enacting section 66A –

> "Fasal 11 bertujuan untuk memasukkan seksyen baru 66A ke dalam Enakmen 1/2003 dengan memberikan kuasa semakan kehakiman kepada Mahkamah Tinggi Syariah.".

[45] It was not apparent on record that section 66A was intended to cover matters of Islamic law only and not matters within the realm of public law and/or public law powers. When the provision is cast in general terms and without limitations, it is not permissible for the Court either to mend or remake the statute. Its only duty is to strike it down and leave it to the SSLA, if it so desires, to re-enact it consonant with item 1 of the State List. In the circumstances of the present petition, the doctrine of "reading down" cannot blow life into the section.

<u>'Persons' Professing the Religion of Islam</u>

[46] Suffice to state that the interpretation of the phrase 'persons professing the religion of Islam' and reading the purpose of item 1 suggest that item 1 could not have contemplated and was never intended to confer judicial review powers on the Syariah Courts simply by defining the intervener as a 'Muslim'. Judicial review, by its very nature, involves supervising administrative bodies by reference to public law powers vested in them. There is no regard to religion.

[47] The attempt to confer jurisdiction of judicial review on the Syariah Courts by purporting to define the 'Majlis' as a 'Muslim' is therefore beside the point notwithstanding section 2 of the ARIE, and section 66A of the same therefore stands unconstitutional.

CONCLUSION

[48] Reading section 66A of the ARIE 2003 as it stands and upon analysing the basis for judicial review in this country, I find that section 66A of the ARIE 2003 is unconstitutional and void, as it is a provision which the SSLA has no power to make.

[49] My learned sisters and brothers in the Coram have read the judgment in draft and have agreed that it be the judgment of the Court.

[50] The petition is thus allowed and the declaration as prayed for is unanimously granted.

[51] Pursuant to section 83 of the CJA 1964, there shall be no order as to costs.

Dated: 21 February, 2022.

(TENGKU MAIMUN BINTI TUAN MAT)
Chief Justice,
Federal Court of Malaysia.

Note: This is merely a summary. The final judgment is the authoritative text.