DALAM MAHKAMAH TINGGI MALAYA DI TEMERLOH
DALAM NEGERI PAHANG DARUL MAKMUR
SAMAN PEMULA NO: CB-25-3-03/2024

Dalam perkara berkaitan dengan keputusan Peguam Negara selaku Pendakwa Raya untuk mendakwa Tertuduh, Mashitah binti Sabarudin dalam kes Mahkamah Majistret CB-85-50-02/2024 di bawah Seksyen 323 Kanun Keseksaan

Dan

Dalam perkara suatu permohonan minta kebenaran untuk memulakan permohonan semakan kehakiman selaras dengan Aturan 53 Kaedah-Kaedah Mahkamah 2012

Dan

Dalam perkara Seksyen 323 Kanun Keseksaan dan Seksyen 31(1) Akta Kanak-Kanak 2001

Dan

Dalam perkara berkaitan dengan perenggan 1 Jadual Pertama Akta Mahkamah Kehakiman 1964

Dan

Dalam perkara bidangkuasa sedia ada Mahkamah Tinggi

ANTARA

HASBULLAH BIN SALLEH … PEMOHON

DAN

1. PEGUAM NEGARA MALAYSIA
(SELAKU PENDAKWA RAYA) … RESPONDEN-
2. KERAJAAN MALAYSIA RESPONDEN

ALASAN PENGHAKIMAN

Pendahuluan

[1] Ini adalah permohonan untuk mendapatkan kebenaran memfailkan semakan kehakiman di bawah Aturan 53 Kaedah-kaedah Mahkamah (KKM) 2012. Ia telah difailkan pada 18.03.2024. Permohonan ini juga disertakan dengan penyataan di bawah Aturan 53 kaedah 3 (2) KKM 2012. Pemohon juga telah memfailkan affidavit sokongan.

[2] Pemohon telah memfailkan hujahan bertulis pada 04.04.2024. Responden tidak memfailkan hujahan bertulis dan sebarang dokumen bagi permohonan kebenaran semakan ini. Peguam Persekutuan memohon agar kes ini ditangguhkan bagi membolehkan pemfailan hujahan balasan terhadap hujahan Pemohon. Peguam Pemohon tiada bantahan terhadap permohonan tersebut. Semasa menimbangkan permohonan tersebut Mahkamah ini berpendapat bahawa apabila suatu tarikh telah ditetapkan untuk pendengaran sesuatu kes di Mahkamah adalah diharapkan pihak-pihak akan bersedia untuk mengendalikan pendengaran atau sesuatu perbicaraan. Mahkamah juga adalah sepatutnya bersedia untuk mengendalikan perbicaraan dan pendengaran kes tersebut melainkan timbul perkara-perkara yang tidak dapat dielakkan dan di luar kawalan peguam dan Mahkamah. Ini adalah penting bagi memastikan bahawa proses keadilan dapat dijalankan dengan licin dan teratur tanpa dilengahkan dengan alasan-alasan

remeh dan tidak berdasarkan kepada undang-undang. Jika ini berlaku ia akan menghampakan harapan masyarakat yang ingin mendapatkan sistem keadilan yang cekap, professional dan berkualiti. Sesungguhnya amanah yang disandarkan kepada para Peguam, Peguam Persekutuan dan Mahkamah adalah besar dan perlu ditunaikan dengan tanggungjawab yang tinggi bagi memastikan keadilan tercapai. Bersandarkan kepada keinsafan bahawa tanggungjawab tersebut akan dipertanggungjawabkan kelak maka adalah wajar untuk mengelakkan tindakan menyumbang kepada kelewatan prosiding yang menjejaskan keadilan.

[3] Dalam kes ini Mahkamah mendapati bahawa permohonan ini dibuat pada 18.03.2024. Peguam Pemohon menyatakan ia telah diserahkan kepada Responden pada 20.03.20224. Permohonan ini dikemukakan bersama-sama dengan penyataan di bawah Aturan 53 kaedah 3 (2) KKM 2012 dan affidavit sokongan. Hujahan bertulis Pemohon difailkan pada 28.04.2024. kes ini ditetapkan untuk pendengaran pada 16.05.2024. Berdasarkan kepada kronologi perjalanan kes ini dan jenis permohonan ini iaitu kebenaran untuk memfailkan semakan kehakiman Mahkamah berpendapat tiada alasan yang munasabah untuk ditangguhkan pendengarannya. Oleh itu Mahkamah meneruskan pendengaran kes ini dengan memberi peluang kepada pihak Responden untuk mengemukakan hujahan lisan bersama-sama hujahan bertulis dan hujahan lisan pihak Pemohon.

[4] Permohonan mendapatkan kebenaran semakan kehakiman ini adalah disebabkan keputusan Responden Pertama yang telah

mengemukakan pertuduhan terhadap seorang guru tadika di bawah seksyen 323 Kanun Keseksaan di Mahkamah Majistret Temerloh pada 22.02.2024. Pemohon adalah bapa kepada kanak-kanak yang menjadi mangsa kepada perlakuan jenayah tersebut.

[5] Pemohon menyatakan dalam penyataan fakta bahawa tindakan Responden Pertama mengemukakan pertuduhan di bawah seksyen 323 Kanun Keseksaan adalah tidak rasional. Sepatutnya pertuduhan dibuat di bawah Akta Kanak-kanak 2001 disebabkan mangsa dalam kes jenayah ini adalah seorang kanak-kanak berumur 16 bulan.

[6] Pemohon menyatakan bahawa wujudnya isu yang bermerit dalam permohonan untuk dihujahkan di dalam pendengaran semakan kehakiman.

[7] Adalah menjadi undang-undang termaklum bahawa semakan kehakiman adalah suatu prosedur yang wujud bagi membolehkan keputusan yang dibuat oleh badan awam disemak oleh Mahkamah. Namun begitu, Aturan 53 KKM 2012 memperuntukkan bahawa kebenaran untuk memfailkan semakan kehakiman perlu diperolehi terlebih dahulu sebelum Pemohon boleh memfailkan semakan kehakiman.

[8] Pada hemat Mahkamah kebenaran diperlukan dalam satu semakan kehakiman adalah untuk melindungi badan awam daripada permohonan yang remeh, leceh dan palsu. Ia adalah sebagai penapis kepada permohonan-permohonan yang tidak bermerit. Rasional

keperluan kepada kebenaran ini telah dinyatakan dengan menarik oleh Lord Diplock dalam kes **O'Reilly v Mackman [1983] 2 AC 237** seperti berikut:

> *"First, leave to apply for the order was required. The application for leave which was ex parte but could be, and in practice often was, adjourned in order to enable the proposed respondent to be represented, had to be supported by a statement setting out, inter alia, the grounds on which the relief was sought and by affidavits verifying the facts relied on: so that a knowingly false statement of fact would amount to the criminal offence of perjury. Such affidavit was also required to satisfy the requirement of uberrima fides, with the consequence that failure to make on oath a full and candid disclosure of material facts was of itself a ground for refusing the relief sought in the substantive application for which leave had been obtained on the strength of the affidavit. This was an important safeguard, which is preserved in the new Order 53 of 1977. The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision. In contrast, allegations made in a statement of claim or an indorsement of an originating summons are not on oath,* ***so the requirement of a prior application for leave to be supported by full and candid affidavits verifying the facts relied on is an important safeguard against***

***groundless or unmeritorious claims that a particular decision is a nullity**. There was also power in the court on granting leave to impose terms as to costs or security."*

[9] Ia turut dinyatakan oleh Mahkamah Persekutuan dalam kes **Lam Kong Company Ltd v. Thong Guan Co Pte Ltd [2000] 3 CLJ 769** seperti berikut:

"In Kemper Insurance, the case of O'Reilly v. Mackman [1983] 2 AC 237 was referred to, in which Lord Diplock, at p. 280 stated that the purpose of the leave requirement was to protect the public administration against false, frivolous or tardy challenges to official action. This policy has something in common with the policy of requiring leave to appeal, namely to act as a filter against frivolous or unmeritorious proceedings."

[10] Berdasarkan penyataan yang dikemukakan oleh Pemohon adalah jelas menunjukkan bahawa Pemohon berhasrat untuk Mahkamah ini melakukan semakan kehakiman terhadap keputusan Pendakwa Raya yang memutuskan pertuduhan jenayah. Adalah menjadi undang-undang yang mantap bahawa dalam memutuskan kebenaran semakan kehakiman Mahkamah perlu membuat pemerhatian seperti yang dinyatakan dalam kes **WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478** seperti berikut:

"… Without the need to go into depth of the abundant authorities, suffice if we state that leave may be granted if the leave

application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though ie, unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged."

[11] Adalah jelas dan nyata bahawa permohonan semakan kehakiman perlu dimulakan dengan kebenaran. Ia telah dinyatakan di bawah Aturan 53 kaedah 2 KKM 2012 seperti berikut:

"(1) Suatu permohonan bagi apa-apa relief yang dinyatakan dalam perenggan 1 Jadual kepada Akta Mahkamah Kehakiman 1964 (selain permohonan bagi perintah habeas corpus) hendaklah dalam Borang 109.

(2) Suatu permohonan untuk semakan kehakiman boleh mendapatkan apa-apa relief, termasuk suatu permohonan untuk suatu perisytiharan, sama ada bersesama atau sebagai alternatif dalam permohonan yang sama jika ia berhubung dengan atau berkaitan dengan hal perkara yang sama.

(3) Setelah mendengar permohonan bagi semakan kehakiman, Mahkamah tidak terbatas kepada relief yang dituntut oleh pemohon tetapi boleh menolak permohonan itu atau membuat apa-apa perintah, termasuk suatu perintah injunksi atau pampasan wang:

Dengan syarat bahawa kuasa untuk memberikan suatu injunksi hendaklah dijalankan mengikut peruntukan seksyen 29 Akta Prosiding Kerajaan 1956 [Akta 359] dan seksyen 54 Akta Relief Spesifik 1950.

(4) Mana-mana orang yang mendapat kemudaratan dengan keputusan, tindakan atau peninggalan berhubung dengan penjalanan kewajipan atau fungsi awam adalah berhak untuk membuat permohonan itu."

[12] Sementara itu Aturan 53 kaedah 3 KKM 2012 memperihalkan berkenaan dengan kebenaran yang perlu diperolehi sebelum semakan kehakiman dikemukakan di Mahkamah.

[13] Peguam Pemohon berhujah melalui hujahan bertulis dan hujahan lisan bahawa Pemohon adalah orang yang mendapat kemudaratan daripada keputusan dan tindakan Responden Pertama. Ini adalah disebabkan Pemohon adalah merupakan bapa kepada kanak-kanak yang menjadi mangsa kepada kejadian jenayah tersebut. Malahan keputusan yang dibuat oleh Responden Pertama untuk mengemukakan pertuduhan di bawah seksyen 323 Kanun Keseksaan adalah tidak rasional dan memerlukan campur tangan Mahkamah ini dengan memberikan kebenaran untuk keputusan itu disemak melalui proses semakan kehakiman. Pemohon menyatakan bahawa dia telah diberitahu oleh pegawai penyiasat bahawa siasatan sedang dibuat di bawah seksyen 31(1) Akta Kanak-kanak 2001. Sepatutnya pertuduhan

dibuat di bawah seksyen tersebut dan bukannya di bawah seksyen 323 Kanun Keseksaan.

[14] Sebaliknya Peguam Kanan Persekutuan berhujah bahawa pihak Pemohon tidak dapat menunjukkan bahawa Pemohon adalah pihak yang mendapat kemudaratan dengan keputusan Responden Pertama.

[15] Dalam hal ini adalah wajar untuk Mahkamah meneliti apakah yang dimaksudkan dengan frasa **mana-mana orang yang mendapat kemudaratan dengan keputusan, tindakan atau peninggalan**. Ini adalah disebabkan pihak Pemohon menyatakan bahawa terdapat dua perkara yang perlu dilihat dalam aspek kemudaratan iaitu bagi menentukan locus standi seseorang itu untuk mengemukakan semakan kehakiman.

[16] Adalah didapati bahawa kedudukan terkini berkenaan dengan perkara tersebut telah diperjelaskan oleh Mahkamah Persekutuan dalam kes **Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals [2023] 3 MLJ 829** seperti berikut:

> ***"[401]*** *As such the availability of remedies to a citizen in the field of public law, albeit in the form of prerogative writs or otherwise, in this jurisdiction are provided for in the Federal Constitution and the CJA.*
>
> ***[402]*** *That is the macroscopic position. In practice, in order to give effect to a claim for such a remedy, a litigant has to bring an*

action in the manner and form specified by the RC 2012. However, to achieve the standing to sue, the prospective litigant is required vide O 53 r 2(4) to fall within the category of persons who are 'adversely affected'.

[403] *Who is a person who is 'adversely affected'? There is no statutory definition of persons who fall within the category of being 'adversely affected'. It is not to be found in any statute. Instead, the rules relating to standing were and continue to be made by judges. These rules have accordingly changed and evolved over the years to meet and maintain the integrity of the rule of law, notwithstanding changes to the social structure reflected in the form of rapid industrial progress, scientific development and globalisation.*

[404] *If the term 'adversely affected' is construed narrowly, this serves to restrict the body of persons who can initiate such actions. If construed broadly it expands the body of persons who can bring such an action. The determination of whether a person is 'adversely affected' is primarily a matter of construction by the courts predicated on case law and statute as it stands presently. This requires a comprehension of how standing has been dealt with in Malaysia over the years."*

[17] Malahan di perenggan [444] Mahkamah Persekutuan menyatakan bahawa kedudukan undang-undang berkenaan dengan kebenaran untuk semakan kehakiman adalah mengikut keputusan YA

Hakim Abdoolcader, Hakim Mahkamah Persekutuan dalam kes **Government of Malaysia Lim Kit Siang [1988] 2 MLJ 12**. Ini dinyatakan seperti berikut:

> ***"[444]*** *For these reasons we reiterate that the dissenting decision of the minority judges, particularly as reflected in the judgment of Abdoolcader SCJ, reflects the correct position in law and ought to be followed. His decision outlines the fundamental requirements that are to be considered by a court when determining whether or not to grant leave for judicial review. The cases of Lim Cho Hock and Othman Saat provide a sound basis for the evolution of the law on standing to sue from that period to the present as it presents a rational and coherent development/progression."*

[18] Dalam kes **Government of Malaysia Lim Kit Siang** (supra) YA Hakim Abdoolcader menyatakan:

> *"I have given judgment in two cases setting out the relevant precepts relating to standing – in the High Court in Lim Cho Hock v Government of The State of Perak & Others [1980] 2 MLJ 148 and in the Federal Court in Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177 and I see no reason to depart from the principles expounded in these two decisions. The Federal Court approved Lim Cho Hock in Tan Sri Haji Othman Saat and endorsed (at p. 179) the concept of liberalizing the scope of individual standing, and these two judgments must be read in the light of the continuing development of the doctrine of locus*

standi here and in other jurisdictions. I alluded to the necessity of keeping in tune with the times in the development of the approach to the question of locus standi in Tan Sri Haji Othman Saat (at p. 179) to this effect:

> *"Even if the law's pace may be slower than society's march, what with increased and increasing civic-consciousness and appreciation of rights and fundamental values in the citizenry, it must nonetheless strive to be relevant if it is to perform its function of peaceful ordering of the relations between and among persons in society, and between and among persons and government at various levels."*

Liberalization of standing has in varying degrees been proceeding or proposed in other common law jurisdictions as I have shown in these two judgments, and it would be a shame if we were to lag behind.

The imbroglio that has arisen in this matter is the result of the myopic obfuscation of the distinction between public law and private law cases. The appellants contend that the principle that is applicable is that laid down in Gouriet v Union of Post Office Workers [1977] 3 All ER 70; [1978] AC 435 and Boyce v Paddington Borough Council [1903] 1 Ch 109 which I have dealt with in Tan Sri Haji Othman Saat.

The English courts no longer worry about Gouriet. It has been authoritatively distinguished by the House of Lords in Inland

Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617; [1981] 2 All ER 93. The applicant in that case was a company formed to promote the interests of small business. Alleging that its constituents and other non-unionists were pursued without leniency for not paying their taxes, the applicant sought judicial review of a deal that the Revenue had struck with printing industry unions whereby certain tax investigations would be dropped in return for union cooperation in securing an end to casual workers evading income tax by using fictitious names. The unions, it was said, were receiving preferential treatment, and mandamus and declaratory relief were sought. Lords Diplock, Scarman and Roskill (at pp. 638–639,649 and 657–658 respectively) distinguished Gouriet on the basis that it concerned only private law. The House of Lords held that the Court of Appeal had been wrong, in an application for judicial review, to treat the question of locus standi as a threshold issue to be decided in isolation from the legal and factual context of the case; his is where the bifurcation into public law and private law aspects of litigation assumes vital significance in determining the issue. The general conclusion to be drawn from National Federation is that the majority thought the issue of standing should usually be considered along with the merits, as it is now a matter for the court's discretion – the graver the illegality, the less insistence on showing standing. The minority would abolish standing."

[19] Mahkamah Persekutuan dalam kes **Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor [2014] 3 MLJ 145** telah menggunakan satu ujian sahaja bagi menentukan sama ada terdapatnya mana-mana orang yang mendapat kemudaratan dengan keputusan, tindakan atau peninggalan kewajipan atau fungsi awam. Ini dinyatakan seperti berikut:

> ***"[57]*** *In view of the foregoing we are of the view that the view expressed by the Court of Appeal in QSR Brands Bhd v Suruhaniava Sekuriti & Anor that the 'adversely affected' test was a single test for all the remedies provided for under O 53 of the RHC is to be preferred. Hence the answer to the question posed in this appeal has to be in the negative."*

[20] Ini juga telah dijelaskan oleh Mahkamah Rayuan dalam kes **Perbadanan Pengurusan Trellises & Ors v Datuk Bandar Kuala Lumpur & Ors [2021] 3 MLJ 1** seperti berikut:

> ***"[65]*** *In our view, this objection on lack of locus standi is without merit. The application before us is an application for judicial review wherein the provisions of O 53 of the Rules of Court 2012 apply. The Rules of Court 2012 are made pursuant to the Courts of Judicature Act 1964 (Act 91) which expressly provide for the supervisory jurisdiction of the court to judicially review decisions of inferior or subordinate bodies and the executive such as the first respondent, the Datuk Bandar.*

[66] *Order 53 r 2(4) expressly allows persons who are 'adversely affected' by the decision made by a public authority to initiate judicial review applications:*

> *Any person who is adversely affected by the decision of any public authority shall be entitled to make the application. (Emphasis added.)*

[67] *It is not in dispute that the impugned decision is made by the first respondent, the Datuk Bandar who is a public authority. What is in dispute is the appellants' right to challenge that impugned decision, that O 53 r 2(4) merely provides for a threshold locus standi and that the appellants must further establish substantive locus standi; and substantive locus standi is as provided under r 5(3) of the Planning Rules.*

[68] *In our view, this line of submission is without merit. Order 53 r 2(4) does not make any distinction between threshold and substantive locus standi. Order 53 is the written manifestation of the court's power on supervisory [2021] 3 MLJ 1 at 27jurisdiction through judicial review and as to how that jurisdiction may be engaged. Consequently, we should not read into O 53, any requirements which are not simply not there. The approach of requiring two thresholds of locus standi as expressed in Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals [1997] 3 MLJ 23 ('Kajing Tubek') has since been rejected and was in any case, the position under the old O 53 of the Rules of the High Court 1980.*

[69] *This was made clear by the Federal Court in Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor [2014] 3 MLJ 145 ('Malaysian Trade Union'). In our view, this decision has put to rest the argument that there must be established both threshold and substantive locus standi. The Federal Court examined the decision in Kajing Tubek which had made that proposition and where at pp 40–41, the Court of Appeal opined as follows:*

> *In public law — and, in so far at least as the appellants in the first and second appeal are concerned, the summons in the present instance lies in public law — there are two kinds of locus standi. The first is the initial or threshold locus standi: the second is the substantive locus standi. Threshold locus standi refers to the right of a litigant to approach the court in relation to the facts which form the substratum of his complaint. It is usually tested upon an application by the defendant to have the action struck out on the ground that the plaintiff, even if all that he alleges is true, cannot seek redress in the courts. Although a litigant may have threshold locus standi in the sense discussed, he may, for substantive reasons, be disentitled to declaratory relief. This, then, is substantive locus standi. The factors that go to a denial of substantive locus standi are so numerous and wide ranging that it is inappropriate to attempt an effectual summary of them. Suffice to say that they range from the nature of the subject matter in respect of which curial intervention is sought*

to those settled principles on the basis of which a court refuse declaratory or injunctive relief."

[21] Ia disahkan oleh Mahkamah Persekutuan dalam kes **Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals [2023] 3 MLJ 829.**

[22] Namun demikian jika diteliti pandangan Mahkamah Persekutuan dalam kes **Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals** (supra) adalah didapati bahawa perlu diseimbangkan di antara hak pihak-pihak untuk mengemukakan sesuatu permohonan semakan kehakiman terhadap keputusan badan awam dengan lambakan permohonan semakan kehakiman yang mungkin akan dibuat oleh pihak-pihak terhadap badan awam dalam mempertimbangkan sama ada terdapat mana-mana orang yang mendapat kemudaratan dengan keputusan badan awam tersebut.

[23] Walau bagaimanapun Peguam Pemohon berhujah bahawa kini Mahkamah telah menyatakan bahawa keputusan yang dibuat oleh Pendakwa Raya di bawah bidang kuasa Perkara 145 (3) Perlembagaan Persekutuan adalah tertakluk kepada semakan kehakiman. Dalam erti kata lain bidang kuasa Pendakwa Raya bukan lagi tidak boleh dijadikan perkara untuk semakan kehakiman. Ini telah dinyatakan dalam kes **Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors [2021] 6 CLJ 199**.

[24] Malahan dalam penggunaan budi bicara oleh Peguam Negara juga telah diputuskan tertakluk kepada semakan kehakiman. Ini telah dinyatakan dalam kes **Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal [2019] 4 CLJ 561** seperti berikut:

> ***"[77]*** *Reverting back to our present appeals, we have carefully considered the judgment of the Court of Appeal in Appeal No. 58 while keeping in mind the principles of law on the subject as propounded by the courts in other jurisdiction. We found there was no flaw in its reasoning in holding that the power of the AG to give or refuse consent under s. 9(1) of Act 359 is amenable to judicial review. We are in total agreement with the Court of Appeal's reasoning as alluded to earlier in para. [18]."*

[25] Sebenarnya Mahkamah Persekutuan di dalam kes **Mohd. Nordin Johan v. The Attorney-General, Malaysia [1983] CLJ Rep 271** melalui penghakiman YA Raja Azlan Shah Pemangku Ketua Hakim Negara telah membenarkan rayuan keputusan Mahkamah Tinggi yang telah menolak permohonan kebenaran semakan kehakiman di atas keputusan Peguam Negara mengeluarkan sijil di bawah ESCAR 1975 Regulation 2 (2) dan 6 (1). YA Raja Azlan Shah menyatakan seperti berikut:

> *"We allowed the appeal and granted the appellant leave to apply for an order of certiorari because we are of the view that the learned Judge was wrong in refusing leave as the point taken was not frivolous to merit refusal of leave in limine and justified*

argument on a substantive motion for certiorari. When this Court grants leave, it has jurisdiction to hear the substantive motion itself. This practice is not inconsistent with the one in vogue in England; See Regina v. Industrial Injuries Commissioner, Ex parte Amalgamated Engineering Union [1966] 2 QB 21 which was followed in Regina v. Croydon Justices, Ex Parte Lefore Holdings Ltd.[1980] 1 WLR 1465."

[26] Namun demikian Peguam Kanan Persekutuan telah menyatakan bahawa dalam kes **Sundra Rajoo Nadarajah** (supra) Mahkamah Persekutuan telah menyatakan bahawa pihak yang ingin mendapatkan semakan kehakiman perlulah mematuhi dua ujian seperti yang dinyatakan di perenggan [112] hingga [115] seperti berikut:

"[112] *Article 145(3) of the FC provides the AG/PP with a wide discretion to institute, conduct or discontinue any proceeding for a criminal offence. This wide discretion means the AG/PP has sole and exclusive discretion in that only he/she can exercise such power. However, the AG/PP does not have absolute or unfettered discretion under art 145(3). As alluded to in the preceding discussion and following from it, it is our judgment that in appropriate, rare and exceptional cases, such discretion is amenable to judicial review.*

[113] *In all challenges against the decisions of the AG/PP exercising his powers under art 145(3) of the FC, the position is that his decisions are cloaked with the presumption of legality. The*

onerous burden lies on the challenging party to overcome the strong presumption of legality with compelling prima facie evidence of grounds to review the AG/PP's decision within the recognised reasons for judicial review.

[114] *Based on the foregoing authorities, it can be surmised that any challenge must therefore pass a two-step threshold which must be satisfied at the leave stage of any application for judicial review.*

[115] *Firstly, the burden of proof lies on the applicant. The applicant will have to show that he has a legal basis to challenge the decision of the AG/PP. This refers to the traditional grounds of judicial review and other bases implicitly recognised by the earlier judgments on this subject, including but not limited to:*

(a) illegality;

(b) procedural impropriety (eg breach of the rules of natural justice);

(c) irrationality (considering irrelevant considerations or ignoring relevant and material considerations); and

(d) mala fides."

Mahkamah Persekutuan telah menilai fakta dalam kes **Sundra Rajoo Nadarajah** (supra) seperti yang dinyatakan di perenggan [121] dan [122] penghakiman seperti berikut:

[121] *On the facts of the present appeal, we were satisfied that the appellant correctly identified illegality as a ground for judicial review. More specifically, the appellant adduced cogent documentary evidence to the effect that the second respondent acted in contravention of the law in exercising his powers under art. 145(3) of the FC - specifically - in breach of Act 485 - rendering the charges null and void.*

[122] *The evidence on record led to no other conclusion but that the second respondent knew or ought to have known that the appellant was covered by the scope of his functional immunity. Despite this, the second respondent had obviously made up his mind to charge the appellant. One clear and direct indication of this is the second respondent's issuance of his consent to prosecute the appellant to the third respondent in spite of the letter from the Secretary General of AALCO of even date indicating that the first and second respondents had already requested independently for an ad hoc waiver of immunity which requests were vigorously denied."*

Akhirnya Mahkamah Persekutuan membuat dapatan seperti berikut:

"[123] *On the factual matrix of this appeal, where the legal issue of immunity and jurisdiction can be determined ex facie, we were satisfied that this was a proper and appropriate case to be determined by judicial review and that the appellant could not avail himself of any other form of legal redress in any other court.*

[124] *Hence, we found that the appellant had satisfied the two-step test. He identified illegality, the correct ground for review, and adduced compelling prima facie evidence to sustain that allegation. The second respondent was unable to rebut those allegations and the presumption of legality over the second respondent's exercise of discretion under art. 145(3) was successfully overcome. In those narrow circumstances, we allowed the appeal."*

[27] Apa yang lebih menarik dalam kes **Sundra Rajoo Nadarajah** (supra) Mahkamah Persekutuan menyatakan bahawa bagi tujuan untuk semakan kehakiman terhadap budi bicara Pendakwa Raya terdapat anggapan bahawa pihak Pendakwa Raya telah menggunakan bidang kuasa tersebut secara teratur dan mengikut undang-undang. Istilah yang digunakan dalam kes **Sundra Rajoo Nadarajah** (supra) tersebut ialah harus terdapat keterangan *prima facie* yang menunjukkan bahawa keputusan Pendakwa Raya itu adalah tidak sah yang dapat mematahkan anggapan keesahan tersebut. Pada hemat Mahkamah apa yang dimaksudkan dengan keterangan *prima facie* ialah dengan sekilas pandangan didapati bahawa keputusan Pendakwa Raya tersebut adalah tidak teratur. Dalam kes **Sundra Rajoo Nadarajah** (supra) tindakan Pendakwa Raya yang mengemukakan pertuduhan di mana Perayu dalam kes tersebut mempunyai imuniti undang-undang yang sepatutnya menghalang daripada pendakwaan dilakukan kepada Perayu dan dalam kes tersebut juga Mahkamah Persekutuan menyatakan bahawa pihak Perayu telah berjaya mengemukakan

keterangan *prima facie* bahawa terdapatnya ketidakesahan dalam keputusan Pendakwa Raya tersebut.

[28] Penelitian dalam kes **Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals** (supra) dan **Sundra Rajoo Nadarajah** (supra) mencadangkan seolah-olah terdapat dua ujian yang berbeza bagi penentuan sama ada mana-mana orang yang mendapat kemudaratan dengan keputusan, tindakan atau peninggalan. Walau bagaimanapun Mahkamah ini berpendapat bahawa ianya bukan sedemikian. Dalam kes **Sundra Rajoo Nadarajah** (supra) Mahkamah Persekutuan telah meletakkan ujian bendul *(threshold)* yang tinggi sedikit jika dibandingkan dengan kes-kes yang lain. Ini dapat difahami kerana Mahkamah Persekutuan menyatakan terdapatnya anggapan keesahan *(principles of legality)* terhadap keputusan Pendakwa Raya. Ini adalah sejajar dengan Perkara 145 (3) Perlembagaan Persekutuan dan 376 Kanun Prosedur Jenayah. Oleh itu sudah pasti bagi menyanggah anggapan tersebut ia memerlukan bendul *(threshold)* yang lebih tinggi. Dalam kes ini Mahkamah berpendapat pendekatan ujian yang dinyatakan dalam kes **Sundra Rajoo Nadarajah** (supra) adalah terpakai.

[29] Seterusnya dalam kes ini adakah fakta yang dinyatakan dalam penyataan Pemohon sudah berjaya memenuhi ujian dalam kes **Sundra Rajoo Nadarajah** (supra) tersebut? Apa yang dapat difahami dalam permohonan ini ialah Pemohon tidak berpuas hati dengan keputusan Pendakwa Raya mengemukakan pertuduhan di bawah seksyen 323 Kanun Keseksaan. Pada pendapat Pemohon ia sepatutnya dituduh di

bawah seksyen 31 (3) Akta Kanak-kanak 2001. Dalam hal ini Mahkamah perlu membezakan di antara pandangan Pemohon secara peribadi yang tidak setuju dengan keputusan Pendakwa Raya dalam pertuduhan tersebut dengan apakah pihak Pendakwa Raya telah berjaya ditunjukkan membuat keputusan secara tidak sah sehingga membolehkan keputusan tersebut disemak oleh Mahkamah. Sekiranya terdapat perkara tersebut maka kebenaran untuk semakan boleh diberikan.

[30] Apa yang jelas dalam kes ini ialah keputusan yang dibuat oleh Pendakwa Raya adalah tidak sejajar dengan kemahuan pihak Pemohon. Adakah ia mempunyai asas di sisi undang-undang. Dalam konteks ini Mahkamah perlu melihat bagaimanakah Pendakwa Raya sewajarnya menjalankan tanggungjawab di bawah 145 (3) Perlembagaan Persekutuan. Ini dapat dilihat melalui satu artikel yang menarik oleh Tan Sri Datuk Haji Abdul Kadir bin Yusof bertajuk **The Office of Attorney General, Malaysia [1977] 2 MLJ xvi** ketika menjelaskan Perkara 145 Perlembagaan Persekutuan seperti berikut:

> *" Under Clause (3) of Article 145, the Attorney-General is conferred with complete discretionary power in relation to criminal proceedings. As explained earlier, this Clause was introduced into the Article by the Constitution (Amendment) Act, 1960. However, this discretionary power is not an arbitrary power but a generally recognised quasi-judical power. This is the position not only in our Constitution but under the unwritten constitutional law in the United Kingdom*

and in the written constitutions of many other Commonwealth countries, the names of which are set out at Note 82 on page 354 of "Commonwealth and Colonial Law" by Sir Kenneth Roberts-Wray. The Indian Constitution, however, does not confer such power on the Attorney-General, and neither does the Indian Criminal Procedure Code confer on him any such power. With regard to the quasi-judicial nature of such power, Sir Kenneth Roberts-Wray explains as follows at page 350 of his aforesaid work:

> *"It does not follow that, because an offence has been committed, proceedings should be taken against the offender. Once a prosecution has been commenced, there are different ways in which it can be conducted; and circumstances may disclose reasons for it to be discontinued. The responsibility for decisions in these matters is quasi-judicial in nature; it necessarily involves the exercise of discretion; and if the rule of law is to be maintained, it must be as well protected from extraneous influence, political or otherwise, as the administration of justice in Courts of law. Any person to whom control of public prosecutions in entrusted should, therefore be endowed therein with a status of independence, recognised as a matter of constitutional law."*

In the exercise of his discretion under Clause (3) of Article 145, the Attorney-General is empowered to act entirely at his

own discretion and is in no way subject to any political control by any Minister or other authority of the Government."

[31] Pada masa yang sama Pendakwa Raya dan Timbalan Pendakwa Raya semasa menjalankan budi bicara di bawah Perkara 145 (3) Perlembagaan Persekutuan adalah dikehendaki mengambil kira prinsip undang-undang dan keterangan serta kepentingan awam. Ia bagi mengelakkan sebarang pertikaian yang timbul sekiranya budi bicara tersebut dilaksanakan tanpa mengikut prinsip-prinsip undang-undang. Walau bagaimanapun Pendakwa Raya dan Timbalan Pendakwa Raya semasa menggunakan bidang kuasa di bawah Perkara 145 (3) Perlembagaan Persekutuan dan seksyen 376 KPJ tidak seharusnya dipengaruhi oleh tekanan oleh mana-mana pihak seperti yang ditegaskan dalam artikel **The Office of Attorney General, Malaysia** (supra) terutamanya kenyataan berikut:

"In the exercise of his discretion under Clause (3) of Article 145, the Attorney-General is empowered to act entirely at his own discretion and is in no way subject to any political control by any Minister or other authority of the Government."

[32] Mahkamah perlu mengiktiraf hak Pemohon yang gusar dan kecewa dengan tindakan Pendakwa Raya yang mengemukakan pertuduhan di bawah Kanun Keseksaan. Namun ia tidak melepaskan tanggungjawab Pemohon untuk menunjukkan bahawa dia mempunyai keterangan *prima facie* bahawa Pendakwa Raya telah menjalankan budi bicara dengan membuat keputusan pertuduhan tersebut secara

tidak sah. Ia perlu dilakukan bagi membolehkan ianya diperbetulkan melalui semakan kehakiman.

[33] Ini adalah disebabkan Pendakwa Raya semasa menjalankan budi bicara bagi menentukan pertuduhan tersebut adalah berdasarkan kepada keterangan-keterangan yang diperolehi. Maklumat dan keterangan tersebut tiada dalam pengetahuan pihak lain melainkan Pendakwa Raya. Pada masa yang sama semasa menjalankan budi bicara tersebut Pendakwa Raya diharapkan akan menjalankannya mengikut prinsip undang-undang dengan menilai dan meneliti keterangan-keterangan yang dikemukakan sebelum memutuskan pertuduhan yang sewajarnya dikenakan. Ini adalah disebabkan semasa menjalankan pertimbangan keterangan-keterangan yang dikemukakan untuk pertuduhan ia menjalankan satu tindakan yang tergolong di dalam *quasi-judicial*. Lord Diplock dalam kes **R v. Deputy Industrial Injuries Commissioner Ex Parte Moore [1965] 1 Q.B 456** menyatakan seperti berikut:

> *"The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a*

matter of reason, has some probative value in the sense mentioned above."

Lord Diplock juga menyatakan seperti berikut:

"If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue. The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view for his."

[34] Mahkamah juga meneliti keputusan dalam kes **Teh Cheng Poh (alias Char Meh) v Public Prosecutor, Malaysia [1980] AC 458** berkenaan dengan budi bicara Pendakwa Raya dalam menentukan pertuduhan jenayah di mana Majlis Privy menyatakan seperti berikut:

"There are many factors which a prosecuting authority may properly take into account in exercising its discretion as to whether to charge a person at all, or, where the information available to it discloses the ingredients of a greater as well as a lesser offence, as to whether to charge the accused with the greater or the lesser. The existence of those factors to which the prosecuting authority may properly have regard and the relative weight to be attached to each of them, may vary enormously between one case and another. All that equality before the law requires, is that the cases of all potential defendants to criminal charges shall be given unbiased consideration by the prosecuting authority and that

decisions whether or not to prosecute in a particular case for a particular offence should not be dictated by some irrelevant consideration."

[35] Penelitian kepada kes **Sundra Rajoo Nadarajah** (supra) itu jelas menunjukkan bahawa budi bicara Pendakwa Raya adalah boleh diperbetulkan melalui semakan kehakiman dalam kes yang sesuai, jarang dan luar biasa sahaja. Lihat perenggan [112] penghakiman kes **Sundra Rajoo Nadarajah** (supra).

[36] Dalam kes ini adalah tidak dapat dinafikan bahawa Pemohon adalah bapa kepada kanak-kanak tersebut. Namun fakta bahawa hubungan darah tersebut pada hemat Mahkamah tidak menjadikan dia orang yang mendapat kemudaratan. Pada masa yang sama berdasarkan penyataan fakta dan dokumen yang ada tiada sekilas keterangan yang menunjukkan bahawa Pendakwa Raya telah melaksanakan budi bicaranya dibuktikan sebagai tidak sah.

[37] Secara perbandingannya dalam kes **Sundra Rajoo Nadarajah** (supra), Perayu sendiri telah dituduh dalam kes tersebut yang menjadi asas kepada tindakannya untuk mengemukanan permohonan semakan kehakiman di atas Pendakwa Raya yang ditunjukkan telah tidak sah. Ianya amat berbeza dengan fakta dalam kes ini. Oleh itu ujian dalam kes **Sundra Rajoo Nadarajah** (supra) tersebut tidak berjaya ditunjukkan oleh pihak Pemohon bagi membolehkan kebenaran untuk semakan kehakiman diberikan.

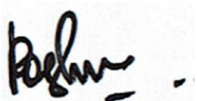
[38] Pada masa yang sama Mahkamah perlu berhati-hati dalam memberikan kebenaran bagi semakan kehakiman yang melibatkan penggunaan budi bicara yang telah diperuntukkan di bawah Perlembagaan Persekutuan. Ini adalah disebabkan tanggungjawab Pendakwa Raya telah dinyatakan dengan jelas di bawah Perkara 145 Perlembagaan Persekutuan khususnya Perkara 145 (3) iaitu berkaitan dengan kuasa Pendakwa Raya. Sekiranya Mahkamah tidak menggunakan ujian yang ketat semasa memberikan kebenaran semakan kehakiman ia akan mendedahkan kebanjiran permohonan-permohonan kebenaran semakan kehakiman di atas setiap keputusan Pendakwa Raya mengemukakan pertuduhan jenayah. Inilah pesanan luhur yang dinyatakan oleh Mahkamah Persekutuan dalam kes **Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals** (supra) yang perlu ditekankan walaupun ia merupakan satu pengulangan. Mahkamah Persekutuan menyatakan seperti berikut:

> ***"[404]*** *If the term 'adversely affected' is construed narrowly, this serves to restrict the body of persons who can initiate such actions.* ***If construed broadly it expands the body of persons who can bring such an action.*** *The determination of whether a person is 'adversely affected' is primarily a matter of construction by the courts predicated on case law and statute as it stands presently. This requires a comprehension of how standing has been dealt with in Malaysia over the years."*

[39] Pada masa yang sama ia bukan bermakna bahawa mana-mana orang tidak boleh mengemukakan semakan kehakiman terhadap keputusan Pendakwa Raya. Ia boleh dilakukan dengan mematuhi ujian yang dinyatakan dalam kes **Sundra Rajoo Nadarajah** (supra) tersebut. Dalam erti kata lain hak individu untuk mengemukakan semakan kehakiman terhadap keputusan Pendakwa Raya tidak terhakis tetapi hendaklah mematuhi prinsip-prinsip yang telah dinyatakan di atas.

[40] Akhirnya Mahkamah berpendapat bahawa permohonan kebenaran untuk semakan kehakiman oleh Pemohon adalah ditolak. Mahkamah juga memerintahkan tiada perintah terhadap kos diberikan.

Bertarikh: 17hb. Mei 2024



(ROSLAN BIN MAT NOR)
HAKIM
MAHKAMAH TINGGI MALAYA
TEMERLOH, PAHANG DARUL MAKMUR

PIHAK-PIHAK:

Bagi Pihak Pemohon

PG Cyril, Nur Aminahtul Mardiah binti Md Nor dan Yallini a/p Munusamy

Chambers of Aminahtul Mardiah

Kuala Lumpur

Bagi Pihak Responden

Noor Fadzillah binti Ishak

Peguam Kanan Persekutuan

Pejabat Penasihat Undang-undang Negeri Pahang

Kuantan, Pahang Darul Makmur