

IN THE COURT OF APPEAL AT PUTRAJAYA
CIVIL APPEAL NO: W-02(NCVC)(A)-959-05/2018

BETWEEN

1. CHOW JIEEN (IC No: 031014-01-1272)
(a minor claiming through her father as
litigation representative, Chow Chee Kong)
2. EEU XIN MIN (IC No: 010612-01-1464)
(late a minor but now of full age)
3. YEO YI XHUAN (IC No: 010223-10-0914)
(late a minor but now of full age) ... APPELLANTS

AND

1. CHAIRMAN OF UNITED CHINESE SCHOOL
COMMITTEES' ASSOCIATION OF MALAYSIA
(Registration No: 937)
(sued on behalf of United Chinese School
Committees' Association of Malaysia pursuant
to section 9 (c) of the Societies Act 1966)
2. CHONG HWA SECONDARY SCHOOL
KUANTAN ... RESPONDENTS

[IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR
CIVIL SUIT NO: WA-24NCVC-1702-10/2016

In the matter of the Unified
Examination Certificate (UEC) exam
conducted by the United Chinese
School Committees' Association of
Malaysia

And

In the matter of Chong Hwa Kuantan
Secondary School and 60 Chinese
Private Secondary Schools

And

In the matter of the Letter of Director General of Education Malaysia, Ministry of Education Malaysia to Chong Hwa Kuantan Secondary School dated 22.10.2015

And

In the matter of the Examination Board Letters, the Ministry of Education to the Malaysian Chinese School of Formerly Pupils Association of Malaysia dated 8.9.2016 and 2.10.2016

And

In the matter of Sections 17, 18, 19, 69 & 151 of the Education Act 1996 (Act 550)

And

In the matter of Rules 7 and 76 (3) of the Rules of the Court of 2012

Between

1. Chow Jieen (IC No: 031014-01-1272)
(a minor claiming through her father as
litigation representative; Chow Chee Kong)
2. Eeu Xin Min (IC No: 010612-01-1464)
(late a minor but now of full age)
3. Yeo Yi Xhuan (IC No: 010223-10-0914)
(late a minor but now of full age)
4. Kenny Wong Hao Ren (IC No: 031203-01-0041)
(a minor claiming through his father as
litigation representative; Wong Sang See) ... Plaintiffs

And

1. Government of Malaysia
(Ministry Of Education Malaysia)
2. Chairman of United Chinese School
Committees' Association of Malaysia
(Registration No: 937)
(sued on behalf of United Chinese School
Committees' Association of Malaysia pursuant
to section 9 (c) of the Societies Act 1966)
3. Chong Hwa Secondary School Kuantan ... Defendants]

CORAM

IDRUS BIN HARUN, JCA
SURAYA BINTI OTHMAN, JCA
STEPHEN CHUNG HIAN GUAN, JCA

JUDGMENT OF THE COURT

The appeal: background facts

[1] In 2010 SM Persendirian Chong Hwa Kuala Lumpur (Chong Hwa Kuala Lumpur) applied to the Minister of Education to establish a branch in Kuantan to be known as Sekolah Menengah Chong Hwa Kuantan (Chong Hwa Kuantan). Its application stated that apart from teaching the national curriculum, it would also be teaching the 'Kurikulum Sekolah Menengah Persendirian Cina yang ditetapkan oleh Dong Zong' (United Chinese School Committees' Association of Malaysia) and for its students in Kuantan to sit for the Unified Examination Certificate (UEC) examination conducted by Dong Zong.

[2] In July, 2012 the Director-General of Education approved the registration of the school as such under sections 17, 18 and 19 of the Education Act 1996 (the Act). Chong Hwa Kuantan conducted the first UEC examination for its students in October, 2016. Since then it had conducted and continues to conduct the UEC examination every year.

[3] It is not in dispute that students of 60 Chinese Private Secondary Schools (CPSS) in the country were eligible and allowed to sit the UEC annual examination conducted by Dong Zong. This status quo was confirmed in a statement made in Parliament (see Hansard: Bil. 63, Isnin, 18 Disember 1995). Chong Hwa Kuala Lumpur is one of the 60 CPSS.

[4] In October, 2016 the 4 plaintiffs filed an Originating Summons (OS), as amended, against the Government of Malaysia (Malaysian Ministry of Education) (1st defendant), the Chairman of the United Chinese School Committees' Association of Malaysia (2nd defendant/1st respondent) and Chong Hwa Kuantan (3rd defendant/2nd respondent) contending that Chong Hwa Kuantan, being not one of the 60 CPSS, and Dong Zong in not obtaining any prior written approval from the Director of Examination under section 69(1) of the Act, could not conduct the UEC examination in the school for its students. The OS posed the following questions and for a declaratory order:

1(a) Whether it is legal for Dong Zong to allow the 113 students from Chong Hwa Secondary Kuantan (or any of its students) to participate in an examination known as the Unified Examination Certificate (UEC)?

1(b) Whether the 113 students from Chong Hwa Secondary School Kuantan (or any of its students) are eligible and legal to participate in an examination known as the Unified Examination Certificate (UEC)?

2. In the event that the answer and determination on the above paragraph (1)(a) and/or (b) is negative, whether the results of the UEC examination for the 113 students from Chong Hwa Secondary School Kuantan (or any of its students) are null and void?

3. In the event that the answer and determination on the above paragraph (1)(a) and (b) is negative, a declaration be given to recognize the legality of the UEC examination for all the students from 60 Chinese Private Secondary Schools and that the legality for Dong Zong to conduct UEC examination is not affected.

[5] The 1st defendant applied to strike out the OS application which was dismissed in the High Court. On appeal, the appeal was allowed and the OS against the 1st defendant was struck out.

[6] The main issue before the High Court was, whether the 1st respondent (Dong Zong) was required to obtain the written approval of the Director of Examinations pursuant to section 69(1) of the Act to conduct the UEC and allowed the students of Chong Hwa Kuantan, not being one of the CPSS, to sit for the same?

[7] After hearing submissions of the parties, the learned Judge did not grant the OS application in terms. The 1st, 2nd and 3rd plaintiffs (appellants) filed an appeal against the decision of the High Court whereas the 4th plaintiff did not appeal.

[8] In the midst of the appeal, the 1st respondent applied to strike out the appeal on the ground that the appellants lacked locus standi and

could not maintain this appeal. The record showed that previously the 1st respondent made a similar application in the High Court which was dismissed. There was no appeal filed against that decision. After hearing submissions, we dismissed the motion to strike out the appeal and proceeded to hear the appeal on the merits.

[9] During the appeal, the 2nd and 3rd appellants, previously minors, claiming through their parents as litigation representatives, have attained the age of majority and adopted the action. They have applied and were granted leave to amend the title of the proceedings to reflect that fact.

The Appellants' submission

[10] The appellants submitted that the 1st respondent as the “person or educational institution” who wishes to “conduct, permit or cause to be held or conducted, or be in any manner concerned in the holding or conducting of” the UEC for students of the 2nd respondent must obtain the prior written approval from the Director of Examinations pursuant to section 69(1) of the Act which is mandatory.

[11] It was submitted that the 1st respondent did not obtain the prior written approval and not allowed to conduct the UEC for the students of the 2nd respondent which is not one of the CPSS.

[12] It was submitted that section 69(4) was not applicable to the 1st respondent which is not a body or syndicate established to manage and conduct examinations under section 68(e) of the Act nor conducting examinations for the purpose of assessing its own pupils.

[13] The appellants submitted that the learned Judge had erred in holding that the 1st respondent did not require the written approval of the Director of Examinations pursuant to section 69(1) based on the relevant correspondence that the Ministry of Education had given its tacit approval for students of the 2nd respondent to take the UEC examination. It was submitted that the mandatory requirement could not be subsumed by the history of the CPSS, the setting of the 2nd respondent and the correspondence from the Ministry of Education.

[14] It was submitted that the 1st respondent contravened section 69(1) of the Act when it conducted the UEC and allowed the students of the 2nd respondent to sit for the same.

The 1st Respondent's submission

[15] It was submitted that the Director-General of Education Malaysia approved the registration of the school via a letter dated 26.7.2012 to teach both the national curriculum and the curriculum outside the national curriculum. It was submitted that this was confirmed in the certificate of registration issued by the Ministry and therefore no further or subsequent application or approval is required.

[16] The 1st respondent submitted that on 13.10.2014, it had informed the Director-General of Education of Malaysia that Chong Hwa Kuantan would take part in the UEC examination and by a reply dated 23.10.2014, it stated that it had taken note of the letter.

[17] It was submitted that by a letter dated 13.2.2015, the school wrote to the Director-General of Education stating that the Prime Minister had announced that the students of Chong Hwa Kuantan

were allowed to take the UEC examination and by a reply, dated 11.3.2015, stating that it had taken note of the letter.

[18] It was submitted that it was clear that students of the school could and can sit for the UEC examination. It was submitted that the conduct of the UEC examination by Dong Zong and the taking of the UEC examination by the students of the school were lawful and in compliance with the approval given by the Ministry of Education. It was submitted that section 69(1) of the Act did not apply as approval had been given when the school was registered.

[19] It was submitted that since then, the Ministry of Education, the Department of Education and or the Director of Examinations did not issue any show cause letter nor take any action against the respondents.

[20] It was also submitted the UEC is an internal assessment conducted by Dong Zong within the provisions of section 69(4) of the Act and that the UEC certificate issued by Dong Zong is not recognized by the Ministry of Education as entry to public universities in the country. It was submitted that therefore the students of the school can sit the UEC examination without contravening the Act.

The 2nd Respondent's submission

[21] The 2nd respondent adopted the submission of the 1st respondent and added that there was no dispute or quarrel between the appellants and the students of the 2nd respondent.

[22] It was submitted that the appellants were students of other CPSS in the country whose rights to sit for the UEC examination have never been infringed, interfered or denied and did not suffer any loss or damages and that the 113 students of Chong Hwa Kuantan who sat the UEC examination were not sued as parties in the suit which is against the rule of natural justice and prejudicial to them.

[23] It was submitted that it was not within the purview of the appellants to question whether it was legal for Dong Zong to allow the 113 students to participate in the UEC examination which is within the jurisdiction and power of the Ministry of Education and which cannot be enforced by the appellants.

[24] It was submitted that the questions posed were hypothetical and academic and need not be answered by the court and no court will act in vain by granting meaningless declaration. It was submitted that the appeal be dismissed.

Our decision

[25] In this appeal the appellants submitted that Dong Zong is not a body or syndicate established to manage and conduct examinations under paragraph 68(e) and that section 68(4) of the Act is not applicable to the 1st respondent. It was submitted that the 1st respondent is not even an educational institution as defined in section 2 of the Act nor is it assessing its own pupils. It was submitted that section 69(1) is mandatory and it was obligatory for the 1st and 2nd respondents to obtain the prior written approval of the Director of Examinations for Dong Zong to conduct the UEC examination at

Chong Hwa Kuantan and raised the legality of the 113 students of the school to sit the UEC examination in October, 2016.

[26] It is a cardinal rule of interpretation of statutes that the provisions must be read as a whole: see Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2018] 2 MLJ 590. Section 69(1) should not be read in isolation. The courts are not confined to undertake a literal interpretation of the words therein but are permitted to construe the purpose in the context and scheme of the relevant Act as a whole: see Bar Malaysia v Index Continent Sdn Bhd [2016] 1 MLJ 445. Section 73(1) states that nothing in this Act shall be construed as prohibiting the establishment and maintenance of a private educational institution, which is specifically provided for in section 16(c). Under subsection 73(2), every private educational institution shall comply with this Act and all regulations made under this Act and applicable to the educational institution. Under section 74, a private educational institution shall comply with the requirements of the national curriculum and shall prepare pupils for prescribed examinations. These requirements are set out in sections 17, 18, 19, 67, 68 and 69 of the Act.

[27] We now refer to section 77(1) which states that no private educational institution registered under this Act shall conduct any course of study or training programme jointly, in association, affiliation or collaboration or otherwise, with a university or institution of higher education or other educational institution or organization within or outside Malaysia, except with the approval in writing of the Minister. This means that a private educational institution may conduct a course

of study jointly in association with an organization with the approval of the Minister. Chong Hwa Kuala Lumpur applied to the Minister to establish a branch in Kuantan. The application was approved and Chong Hwa Kuantan was registered as a private educational institution. Dong Zong is an organization registered in Malaysia. The school had applied to conduct both the national curriculum and the curriculum conducted by Dong Zong including the UEC examination. As stated, the appellants had raised the legality of Dong Zong in conducting the UEC examination at the school pursuant to section 69(1) of the Act whereas the respondents submitted that subsection 69(4) applied, which is an exception to section 69(1).

[28] Pursuant to section 69(1), subject to subsection (4), no person or educational institution shall conduct, permit or cause to be held or conducted, or be in any manner concerned in the holding or conducting of, any examination for any pupil of an educational institution or for any private candidate without the prior written approval of the Director of Examinations. Subsection (4) states that subsection (1) shall not apply to (a) a body or syndicate established to manage and conduct examinations under paragraph 68(e); (b) the Malaysian Examinations Council established under the Malaysian Examinations Council Act 1980 [Act 225]; and (c) an educational institution which conducts its own examination, test or other forms of assessment for the purpose of assessing its own pupils. Paragraphs (b) and (c) are not applicable to this case. Paragraph 68(e) states that the Minister may make regulations to provide for the conduct of examinations including the establishment of a body or syndicate to manage and conduct examinations.

[29] Although Dong Zong is not registered as an educational institution, it comes within the definition of “person” in section 3 of the Interpretation Acts 1948 and 1967. There is no definition for the word “body” in the Interpretation Acts nor in this Act. The Concise Oxford English Dictionary defines ‘body’ to mean ‘an organized group of people with a common function’. Dong Zong comes within the definition of ‘a body’ in paragraph 68(e). In construing the statute, the court must not only look at the language of the statute, but also from a consideration of the social conditions which gave rise to it, and that of the mischief which it was passed to remedy: see Tan Kim Hock Product Centre Sdn Bhd & Anor v Tan Kim Hock Tong Seng Food Industry Sdn Bhd [2018] 2 MLJ 1. Dong Zong was set up, among others, to manage the curricula, examinations and teachers of the Chinese schools in the country. In the statement made in Parliament in 1995, the 60 CPSS in the country were eligible and allowed to sit the annual UEC examination conducted by Dong Zong. This fact is not in dispute. In passing the Education Act 1996 to replace the Education Act 1961, section 151 is a saving provision which preserves the status of Dong Zong to conduct the UEC examination and of the 60 CPSS to sit the UEC examination under the Act. Therefore Dong Zong comes within section 69(4)(a) of the Act.

[30] Notwithstanding the statement made in Parliament, after Chong Hwa Kuala Lumpur applied to establish a branch in Kuantan to conduct the UEC examination in Kuantan, there were concerns raised on the legality of the UEC examination conducted by Dong Zong for the students of Chong Hwa Kuantan. In his judgment, the learned Judge had referred to the letter dated 1.9.2014 from Gabungan Lembaga Pengurus Sekolah Cina Pahang (Gabungan) which raised

this issue. By a letter dated 10.9.2014, initially the Pengarah Pendidikan Pahang replied that the school was not allowed to participate in the UEC examination. By a subsequent letter dated 18.9.2014, it withdrew the earlier letter. This was followed by a letter of same date, namely 18.9.2014, from Ketua Pengarah Pelajaran Malaysia stating that the school is registered as a private educational institution (institusi pendidikan swasta) approved to run both the 'Kurikulum Kebangsaan' and 'di luar Kurikulum Kebangsaan'.

[31] In October, 2014, Dong Zong wrote to the Ketua Pengarah Pelajaran Malaysia that the students of Chong Hwa Kuantan would be sitting the UEC examination. In February and October of 2015, Chong Hwa Kuantan informed the Ketua Pengarah Pelajaran Malaysia that its students would be sitting in the UEC examination in 2016. In October, 2015, Dong Zong and the United Chinese School Teachers' Associations of Malaysia (Jiao Zong) held a conference attended by representatives from the Chinese communities where it was agreed that the students of Chong Hwa Kuantan are eligible and allowed to sit the UEC examination conducted by Dong Zong. There was no complaint made or any action filed to challenge this decision.

[32] The next series of letter was a letter dated 2.9.2016 from the Malaysia Chinese Educated Students Association (Association) to the Director of Examinations Board raising concerns on the legality of the students of Chong Hwa Kuantan taking the UEC examination. By a letter dated 8.9.2016, the Director of Examinations replied to the Association stating that the students of the school were not permitted to take the UEC examination. However, by a letter dated 2.10.2016, the Director of Examination withdrew the earlier letter dated 8.9.2016.

Clearly the Director of Examinations had agreed to the UEC examination to be conducted by Dong Zong for the students of Chong Hwa Kuantan in October, 2016.

[33] To reiterate, in September, 2010, Chong Hwa Kuala Lumpur, being one of the 60 CPSS, applied to the Minister of Education to establish a branch in Kuantan to be known as Chong Hwa Kuantan because there was no 'sekolah menengah persendirian Cina (SMPC)' in Pahang after eight SMPC converted to 'sekolah menengah jenis kebangsaan (SMJK)'. In its application, it stated that its branch would conduct both the national curriculum and curriculum outside the national curriculum, namely the curriculum conducted by Dong Zong offering the UEC examination, including holding the examinations under both curricula.

[34] Reading the Act, in applying to the Minister to establish an educational institution and in conducting the examinations, there is no provision in the Act which mandates a separate application to the Director of Examinations. In this case Chong Hwa Kuala Lumpur made one application to establish its branch in Kuantan known as Chong Hwa Kuantan including to hold and conduct the examinations under both curricula. It did not make any separate applications to hold examinations under the national curriculum and or the curriculum conducted by Dong Zong. The fact that Chong Hwa Kuantan was approved as such as a private educational institution under sections 16, 17, 18 and 19 of the Act and have held both examinations, the approval to hold and conduct the examinations was implicit in the approval given to establish and register the school. The fact that the school was allowed to hold the examinations such as PMR, SPM and

STPM under the national curriculum without a separate written approval of the Director of Examinations required and no action was taken against the school for holding these examinations, and the UEC examinations, confirmed our conclusion as such: see Fairise Odyssey (M) Sdn Bhd v Tenaga Nasional Bhd [2019] 2 MLJ 84.

[35] Further, we refer to the prayers in the OS application. The appellants did not assert that it was illegal for Dong Zong to allow the 113 students from Chong Hwa Kuantan to participate in the UEC examination or that the UEC examination conducted by Dong Zong for the 113 students of Chong Hwa Kuantan was illegal, null and void or that it was unlawful for the 113 students to participate in the UEC examination conducted in October, 2016 nor any consequential relief thereto. If they did, these might be justiciable.

[36] Instead the appellants posed the questions (i) whether it was legal for Dong Zong to allow the 113 students to participate in the UEC examination and (ii) whether the 113 students were entitled and legal to participate in the UEC examination? The appellants then posed the next question that in the event that the answer and determination to the first two questions are negative, whether the results of the UEC examination for the 113 students from Chong Hwa Kuantan were null and void. In prayer 3, they sought, that in the event the answer and determination to the first two questions are negative, for a declaration be given to recognize the legality of the UEC examination for all the students from the 60 CPSS and that the legality for the Dong Zong to conduct the UEC examination (for the 60 CPSS) is not affected.

[37] The appellants contended that due to the uncertainties, they have an interest for a determination as to the legality of the UEC examination for all the students of the 60 CPSS including themselves and the legality of Dong Zong to conduct the UEC examination for them. It is not in dispute that the appellants and the 4th plaintiff are not students of Chong Hwa Kuantan but students of some of the 60 CPSS. Based on the Government statement, recorded in the Hansard in 1995, since that date there is no dispute that students of the 60 CPSS are entitled and eligible to sit for the UEC examination conducted by Dong Zong. They did not assert that being students of one of the 60 CPSS that they were not allowed or denied from sitting the UEC examination conducted by Dong Zong or that their right as such had been restricted, denied or taken away. Since then the legality for all the students of the 60 CPSS to sit the UEC examination and the legality for Dong Zong to conduct the UEC examination in the 60 CPSS are no longer in issue. In fact the appellants have sat the junior UEC examination. Reading the OS application, prayer 3 has become academic and is redundant.

[38] The appellants being not students of Chong Hwa Kuantan, their rights have not been affected. Whether the 113 students of the school were legally allowed to sit for the UEC examination is none of their concern. This should be the concerns of the 113 students and yet none of them has made any complaint or such application. We were of the view that the appellants did not have a real interest in the questions posed: see Affin Bank Bhd v Mohd Kasim Ibrahim [2013] 1 CLJ 465. It has been held that the power to make declaratory judgment is confined to matters justiciable in the court and the binding declaration which it can make is limited to legal or equitable rights and do not

extend to moral, social or political matters nor matters of religious rituals: see Lim Cho Hock v Government of the State of Perak & Ors [1980] 2 MLJ 148. Based on the history of Dong Zong, which the learned Judge had referred to in his judgment, it appears that not only the appellants are busybodies in the OS application, the appellants, being minors at the time, are being used as pawns in the struggle between two factions for control of Dong Zong. The courts should not be dragged into or be used for this purpose. Therefore we came to the view that it was not necessary to answer the questions posed or to make the declaration sought.

[39] Based on the approved registration of the school and the above series of letters, the stand of the Government, via the Director of Examinations, the Department of Education and the Ministry of Education, was consistent namely that they did not have any objection to Dong Zong conducting the UEC examination for the students of Chong Hwa Kuantan. Both the Gabungan and the Association, which had raised the concerns, did not file any application nor challenged the legality of the UEC examination conducted by Dong Zong for the students of Chong Hwa Kuantan.

[40] The concerns raised by the Gabungan and the Association about the legality of Dong Zong conducting the UEC examination at Chong Hwa Kuantan were of great interests to the Chinese communities in the country, including the different factions, and those behind the appellants. Notwithstanding the consistent stand of the Government as stated above, shortly, after the letter dated 2.10.2016 by the Director of Examinations, the appellants filed the OS application. If there were any doubts, the appellants should have

written to the Director of Examinations or the Department of Education or Ministry of Education to seek clarification before filing the OS application. They would have been the best authorities to answer the questions posed instead of filing the OS application. It appeared to be another attempt to derail the holding of the UEC examination at Chong Hwa Kuantan and a continuing saga of factions fighting which should be put to a stop.

[41] At the material times, as far back in 2012, the appellants did not file any application or injunction to restrain Dong Zong, Jiao Zong, Chong Hwa Kuala Lumpur or Chong Hwa Kuantan from holding the UEC examination at Chong Hwa Kuantan. Similarly, in the OS filed in October, 2016, the appellants did not pray for an injunction to restrain the holding of the UEC examination at Chong Hwa Kuantan which was held in October, 2016. No explanation was given for the delay.

[42] The 113 students of the school had sat the UEC examination in 2016. Since then, the UEC examination has been held every year at the school and a few hundred students had sat the UEC examination at the school. The OS application will unduly affect all of them but they were not made parties to the OS and not given the opportunity to be heard. Justice requires that they must be afforded the right and opportunity to be heard. Justice also requires that no order shall be made or shall unduly affect them when they are not parties to the proceedings and not afforded the opportunity to be heard: see Ang Game Hong & Anor v Tee Kim Tiam & Ors [2018] 4 MLJ 432; Vijayarao a/l Sepermaniam v Suruhanjaya Perkhidmatan Awam Malaysia [2018] 12 MLJ 17.

[43] At the end of the appeal, we found that the learned Judge was not plainly wrong and that there were no merits in the appeal. Therefore the appeal was dismissed with costs.

Dated: 29th July, 2019

signed
STEPHEN CHUNG HIAN GUAN
(delivering judgment of the court)
Court of Appeal Judge
Putrajaya

For Appellants : Douglas Yee Wan-Li and Lim Pit Feng
Messrs Douglas Yee

For 1st Respondent : Wong Kong Fatt and Lim Hoon Shi
Messrs KF Wong & Lee

For 2nd Respondent : Ong Siew Wan and Toh Seng Soon
Messrs Andrew-David Wong & Ong