DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)

PERMOHONAN BAGI SEMAKAN KEHAKIMAN NO: R4(2)-25-256-2008

Dalam perkara suatu Keputusan seperti yang dinyatakan dalam surat pejabat Kementerian Dalam Negeri bertarikh 7.7.2008 yang diterima pada 12.7.2008

Dan

Dalam perkara Perkara 3, 8, 11, 12 dan 149 Perlembagaan Persekutuan, Seksyen 7, 9, 9A, 17 & 18 Akta Mesin Cetak dan Penerbitan 1984, Seksyen 102, 114, 128 Akta Kastam 1967

Dan

Dalam perkara suatu permohonan untuk Perintah Certiorari, Perintah Mandamus dan Deklarasi

Dan

Dalam Perkara Seksyen 25 Akta Mahkamah Kehakiman 1964 dan Aturan 53 Kaedah-Kaedah Mahkamah Tinggi 1980

ANTARA

JILL IRELAND BINTI LAWRENCE BILL
(No. K/P: 810926-13-5852) ……**PEMOHON**

DAN

1. **MENTERI BAGI KEMENTERIAN DALAM NEGERI MALAYSIA**
2. **KERAJAAN MALAYSIA**

……. RESPONDEN

GROUNDS OF JUDGMENT

Introduction

[1] A directive was issued by the Ministry of Home Affairs dated 5.12.1986 (the impugned Directive) to all Christian publications regarding "Penggunaan Istillah/ Perkataan Yang digunakan Dalam Penerbitan Agama Kristian Berbahasa Malaysia". The impugned Directive stated that 12 words "Al-Kitab", "Firman", "Rasul", "Syariat", "Iman", "Ibadah", "Injil", "Wahyu", "Nabi", "Syukur", "Zikir" and "Doa" are permitted to be used and "Sekiranya penerbitan tersebut berbentuk buku atau risalah yang hendak disebarkan atau dijual perkataan "UNTUK AGAMA KRISTIAN", disyaratkan ditulis di kulit luar (muka depan) buku atau risalah tersebut." 4 words namely "Allah", "Kaabah", "Baitullah" and "Solat" are prohibited.

[2] The respondent claimed that the impugned Directive was a Cabinet decision and it relate to the policy of the Government at that point of time. Public order formed the underlying basis the impugned Directive was made.

[3] As the impugned Directive has not been withdrawn, the officers of the respondents continue to exercise the power under section 9(1) of the Printing Presses And Publications Act 1984 (Act 301) and Customs Act 1967 (Act 235) to enforce the same.

[4] This judicial review application arose out of the confiscation and the detention by the respondents officers, in enforcing the impugned Directive, of the applicant's eight Christian educational audio compact discs (the 8 CDs) belonging to her which had carried the word "Allah" in each of the 8 titles, when she landed at the Sepang Low Cost Carrier Terminal (LCCT) on 11.5.2008 from Jakarta, Indonesia. The applicant claimed that in so doing, the respondents had violated her constitutional rights under Articles 8, 10, 11 and 12 of the Federal Constitution (FC).

[5] On 10.3.2021, I delivered my decision on the application, indicating that it was not the full text that would be read out. The following is the full text of my reasons for the decision I have arrived at.

Background Facts

[6] The factual narrative of the applicant's case was set out in the judgment of the Court of Appeal in *Menteri Bagi Kementerian Dalam Negeri & Anor v Jill Ireland Lawrence Bill & Another Appeal* reported in [2015] 7 CLJ 727 (Jill Ireland Appeal Case). The facts are now revisited to include the events that had taken place following the decision of the Appellate Court.

[7] The applicant's case is that she is a Malaysian citizen, a native Bumiputra Christian from the Melanau tribe of Sarawak. She has been schooled in the National Education System using Bahasa Malaysia as the medium of instruction. The applicant and her family have been using Bahasa Malaysia as their faith language in worship, prayers, intercession and in receiving religious instructions. They also use the Al- Kitab in Bahasa Indonesia and rely upon Bahasa Indonesia written and audio-visual materials in the practice of their Christian faith.

[8] The 8 CDs which she had brought along with her when she landed at LCCT are entitled –

(a) Cara Menggunakan Kunci Kerajaan Allah;
(b) Cara Hidup Dalam Kerajaan Allah;
(c) Ibadah Yang Benar Dalam Kerajaan Allah;
(d) Metode Pemuridan Kerajaan Allah;

(e) Pribadi Yang Bertumbuh Dalam Kerajaan Allah;

(f) Hidup Benar Dalam Kerajaan Allah;

(g) Pemerintahan Kerajaan Allah Dalam Hidup Kita; and

(h) Rahasia Kerajaan Allah.

[9] The 8 CDs according to the applicant were for her personal religious edification.

[10] At the LCCT, a custom officer detained the 8 CDs on account that they had carried the word "Allah" in each of the 8 titles.

[11] On the same day, i.e. on 11.5.2008, the applicant was served with a Notice of Goods Detention (Notis Tahanan Barangan) under section 102 of the Customs Act 1967 (Act 235).

[12] By a letter dated 7.7.2008 the Ministry of Home Affairs confiscated the 8 CDs belonging to the applicant as set out in Lampiran K pursuant to section 9 of Act 301. Lampiran K is the list of the 8 CDs and sets out 3 grounds for the confiscation of the same, namely Istilah Larangan, Ketenteraman Awam and Melanggar Garis Panduan JAKIM.

[13] Dissatisfied with the decision, on 20.8. 2008 the applicant filed an ex-parte application for leave for judicial review and sought the following reliefs:

(a) an order for certiorari to quash the decision of the Ministry of Home Affairs to confiscate and seize the 8 CDs on the grounds stated in the Ministry's letter dated 7.7.2008;

(b) an order for mandamus for the purpose of directing the first respondent to return the 8 CDs to the applicant be issued;

(c) a declaration that pursuant to Article 11 of the FC it is the constitutional rights of the applicant to import the 8 CDs in the exercise of her right to practice religion and right to education;

(d) a declaration that pursuant to Article 8 of the FC the applicant is guaranteed equality of all persons before the law and is protected from discrimination against citizen, *inter alia* on the grounds of religion in the administration of the law, in particular Act 301 and Act 235;

(e) a declaration that pursuant to Article 8 and Article 11 of the FC the applicant is entitled to use and/or to continue to use the word "Allah" and to have access including the right to own, to possess, to use and to import publications which contain the word "Allah" in the said publications including the 8 CDs in the exercise of her freedom to practise religion;

(f) a declaration that it is the legitimate expectation of the applicant to exercise her right to use and/or to continue to use the word "Allah" and have and continue to have the right to own, to possess, to use and to import published materials notwithstanding the use of the word "Allah" in the said publications including the 8 CDs in the exercise of her freedom to practise religion;

(g) an order that all further proceedings in respect of the decision of Ministry of Home Affairs be stayed until determination and disposal of the application herein;

(h) an award of damages including exemplary damages for unlawful and unconstitutional conduct of the respondents in regard to action taken on the 8CDs;

(i) that all necessary and consequential directions and orders which the court deems fit and proper be given;

(j) all other and further reliefs which the court deems fit and proper; and

(k) the costs to be in the cause.

[14] On 4.5.2009, leave was granted by the learned High Court Judge to hear the substantive application.

[15] On 21.7.2014, after the hearing on the substantive judicial review proceedings, the learned High Court Judge only allowed the applicant's reliefs in paragraphs (a) and (b).

[16] The respondents filed their appeal on 22.7.2014 against the learned High Court Judge's decision in granting the orders of certiorari and of mandamus against the first respondent.

[17] The applicant filed her cross-appeal on 15.8.2014 against the non-granting by the learned High Court Judge of reliefs sought in prayers (c), (d), (e), (f), (h), (i) and (j).

[18] On 23.6.2015 the Court of Appeal in the Jill Ireland Appeal Case dismissed the respondents' appeal and affirmed the learned High Court Judge's order in respect of prayers (a) and (b) and allowed the cross-appeal by the applicant in part and remitted back the judicial review application to the High Court to hear on 2 of the 4 remaining declaratory reliefs in prayers (c) and (d).

[19] On 11.8.2015 and 15.9.2015 Majlis Agama Islam Wilayah Persekutuan (MAIWP) and Majlis Agama Islam Selangor (MAIS) respectively filed their applications to intervene (Encls. 36 and 38).

[20] At the material time when the parties in the present proceedings had filed their submissions, there was pending in the Court of Appeal the case of *Jerry W.A Dusing and Anor v Majlis Agama Islam Wilayah Persekutuan & Ors* arising from the decision in Semakan Kehakiman No: R2-25-407-2007 (the Sidang Injil Borneo case).

[21] On 11.8.2016 by agreement of all parties, the hearing of the applications in Encls. 36 and 38 were adjourned to await the outcome of the appeal in the Sidang Injil Borneo case.

[22] The Court of Appeal gave its decision on the Sidang Injil Borneo case on 30.9.2016.

[23] Following the decision of the Court of Appeal , MAIWP withdrew Encl. 36 on 28.10.2016 and was given the permission by this Court to appear as *amicus curiae* for the substantive hearing.

[24] MAIS proceeded with Encl.38. Hearing date was fixed for 16.12.2016. This Court dismissed the intervention application on 13.3.2017 but invited MAIS to appear as *amicus curiae*.

The Cause Papers

[25] The cause papers in this application are –

(a) application for judicial review dated 20.08.2008 (Encl. 1);

(b) statement pursuant to Order 53 Rule 3(2) of the Rules of the High Court 1980 (ROC) dated 20.08.2008 (Encl. 2);

(c) notice of intention to amend statement pursuant to Order 53 rule 7 of ROC dated 9.8.2017 (Encl.40);

(d) notice of intention to apply for necessary and consequential directions and orders and/for further reliefs dated 9.8.2017 (Encl.40);

(e) notice of hearing of the applicant's judicial review application dated 18.05.2009 (Encl. 5);

(f) affidavit-in-Support by Jill Ireland Binti Lawrence Bill affirmed on 20.8.2008 (Encl. 3);

(g) affidavit-in-reply by Suzanah binti Haji Muin affirmed on 28.8.2009 (Encl. 6);

(h) affidavit-in-reply by Jok Wan affirmed on 10.11.2009 (Encl. 7);

(i) affidavit-in-reply by Syed Hamid bin S. Jaafar Albar affirmed on 2.6.2010 (Encl.15);

(j) affidavit by Professor Madya Dr. Khadijah Mohd Khambali @ Hambali affirmed on 11.1.2010 (Encl. 16) exhibiting her expert report (KHK's First Report);

(k) affidavit by Dr. Mohd Sani Badron affirmed on 11.1.2010 (Encl. 17] exhibiting his expert report (MSB's First Report);

(l) affidavit by Ng Kam Weng affirmed on 13.6.2011 (Encl. 29) exhibiting his expert report (NKW's First Report);

(m) affidavit by Tan Kong Beng affirmed on 10.1.2014 (Encl. 34);

(n) affidavit by Syahredzan bin Johan affirmed on 15.1.2014 (Encl. 35);

(o) affidavit by Dr. Azmi bin Sharom affirmed on 13.1.2014 (Encl. 36];

(p) affidavit by Dr. Abdul Aziz bin Bari affirmed on 15.1.2014 (Encl. 37];

(q) affidavit by Jerry WA Dusing @ Jerry W Patel affirmed on 27.07.2017 (Encl. 39];

(r) affidavit by Professor Madya Dr. Khadijah Mohd Khambali @ Hambali affirmed on 09.08.2017 (Encl. 41) exhibiting her expert report (KHK's Second Report);

(s) affidavit by Dr. Mohd Sani Badron affirmed on 09.08.2017 (Encl. 42) exhibiting his expert report (MSB's Second Report);

(t) affidavit by Alfred Rosmin Tais affirmed on 08.09.2017 (Encl. 43);

(u) affidavit by Bishop Melter Jiki Tais affirmed on 11.09.2017 (Encl. 44);

(v) affidavit by Reverend Justin Wan affirmed on 11.09.2017 (Encl. 45);

(w) affidavit by Ng Kam Weng affirmed on 08.09.2017 (Encl. 46] exhibiting his expert report (NKW's First Report).

The Court of Appeal decision in Jill Ireland Appeal Case

[26] In allowing the applicant's cross appeal in the Jill Ireland Appeal Case against the decision of the High Court in declining to consider the prayers sought regarding her constitutional rights, the Court of Appeal held at page 743 –

> "[39] With respect, we agree with her, partially. We agree with her that any prayer that had sought to challenge the prohibition of the use of the word 'Allah',

following the decision of the majority in the Federal Court in the *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 6 CLJ 541, must not be done in a collateral manner. The Enactment which had contained those prohibition on the use of the word 'Allah' has to be challenged specifically for want of jurisdiction. The impugned provisions in the Enactment cannot be challenged in isolation, as was done in this case. To that extent we would agree with the learned judge's decision on the applicant's prayers that were not granted.

[40] However, we noted that there were prayers that were not inextricably tied down specifically with the use of the word 'Allah' especially those which were predicated upon the deprivation of freedom of religion [art. 11] and the right to equality or freedom from discrimination [art. 8] which we believe, could and ought to have been dealt with by the learned judge, but were not. That would relate to the declarations that were sought for as contained in prayers (c) and (d) of the application. ….

[41] Premised on the above, we hereby allow the cross-appeal by the applicant in part, by us making the following varying order that this case be remitted back to the High Court to hear and consider the applicant's:

(i) prayer (c) namely;

> (c) a declaration pursuant to art. 11 of the Federal Constitution that it is the constitutional rights of the applicant to import the publications in the exercise of her rights to practice religion and right to education; and

(ii) prayer (d) namely;

(d) a declaration pursuant to art. 8 that the applicant is guaranteed equality of all persons before the law and is protected from discrimination against citizen, on the grounds of religion in the administration of the law i.e. the Printing Presses And Publications Act 1984 (Act 301) and Customs Act 1967."

[27] The applicant did not file an application for leave to appeal to the Federal Court against the decision of the Court of Appeal, including in dismissing prayers (e) and (f).

[28] In the *Titular Roman Catholic Archbishop of Kuala Lumpur (supra),* the applicant at the High Court had challenged the validity and constitutionality of section 9 of the various Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactments (the impugned provision). The applicant's application sought, *inter alia*, for an order of certiorari to quash the first respondent's decision dated 7.1.2009 that the applicant's publication permit was subject to the condition that the applicant was prohibited from using the word "Allah" in Herald- The Catholic Weekly. The learned High Court Judge held that the decision was illegal and unconstitutional and that the applicant had a constitutional right to use the word "Allah".

[29] However, the Court of Appeal set aside the orders and the decision of the learned High Court Judge and held that the first respondent's decision

to impose a condition on the Herald came squarely within the function and statutory powers of the Minister, and was intra vires the Federal Constitution and Act 301.

[30] The applicant sought leave from the Federal Court to appeal against the decision of the Court of Appeal in ruling that the first respondent, in prohibiting the applicant from using the word "Allah" in the Malay version of its weekly publication ('the Herald'), was acting intra vires the law and the FC.

[31] The majority decision in the Federal Court was of the view that the net effect of the finding of the High Court was that the impugned provision was invalid, null and void, and unconstitutional and that the respective States' Legislature have no power to enact the impugned provision. The Federal Court held that the learned High Court Judge ought not to have entertained the challenge on the validity and constitutionality of the impugned provision as such a constitutional challenge can only be made pursuant to Articles 4 and 128 of the FC –

> "[43] Premised on the above, I hold that the High Court Judge ought not to have entertained the challenge on the validity or constitutionality of the impugned provision for two reasons , namely procedural non-compliance and for want of jurisdiction. The findings of the High Court judge that the impugned provision is unconstitutional was rightly set aside by the Court of Appeal.

> [44] The constitutional questions posed in Part B of this application concern the rights as guaranteed by arts 3,8,10 and 12 of the Federal Constitution. However, I must emphasis that these questions relate to the usage of the word "Allah" in the Herald. I am of the view that these questions could not be considered in isolation without taking into consideration the impugned provision. As it is my finding that a challenge on the validity and constitutionality of the impugned provision could not be made for the reasons stated earlier, therefore , it is not open to this court to consider the questions posed in Part B."

[32] It is plain and clear that the Court of Appeal in the Jill Ireland Appeal Case has, in light of the Federal Court majority decision in *Titular Roman Catholic Archbishop of Kuala Lumpur – FC, supra*, narrowed the issues that can be ventilated in this judicial proceeding and confined them only to the declaratory reliefs sought by the applicant based on Articles 8 and 11 of the FC in paragraphs (c) and (d). These are prayers that were found not inextricably tied down specifically with the use of the word "Allah" and thus was not caught by the majority decision in the Federal Court.

[33] The Court of Appeal decision is explicit in its terms. It is not for this Court to decide on issues that had sought to challenge the prohibition on the use of the word "Allah" as the same could not be done in a collateral manner. That was the reason for not remitting prayers (e) and (f) because the Enactments which contained those prohibition on the use of the word "Allah" had to be challenged specifically for want of jurisdiction and the

impugned provision in the Enactment could not be challenged in isolation. This Court would not descend into the controversy.

[34] This in my view will necessarily exclude this Court from canvassing the theological issues. I am guided by the majority decision in the Federal Court in the *Titular Roman Catholic Archbishop of Kuala Lumpur, supra*, which did not proceed with the question in Part C that relate to theology issues as the facts show that the Minister 's decision was never premised on theological consideration and found that the views expressed by the learned judges of the Court of Appeal on those issues were mere obiter. Likewise, as the facts in the present judicial review show, the Minister's decision that was being challenged was not predicated on theological considerations. His decision was predicated on public order consideration.

[35] Therefore, it in incumbent on me to proceed cautiously so as not to travel out of the parameters/ setting the further conduct of this judicial review was placed in.

Enclosure 40

[36] Even though the direction by the Court of Appeal in remitting back the case to this Court was to determine the constitutional issues in prayers (c) and (d) only, however, the applicant had on 9.8.2017 filed Encl. 40

which is a notice pursuant to O.53 r.7 of the ROC to (a) amend the Statement filed pursuant to Order 53 Rule 3 (2) of the ROC as contained in Lampiran A; and (b) to seek to substitute the prayers in paragraph 2(i) and/or 2(j) of the Statement with the necessary and consequential directions and orders and/or further reliefs as contained in Lampiran B.

Lampiran A

[37] In Lampiran A, the proposed amendments to the Statement are as follows:

(a) as regards paragraph (c), the insertion of Articles 3, 8 and 12 of the Federal Constitution;

(b) as regards paragraph (d), two new paragraphs were introduced, namely paragraphs (d) (A) and (d)(B). They read –

"(d) (A) declaration that the Applicant together with other native Bumiputra Christians of Sabah and Sarawak have the constitutional right to practice their Christian religion freely and without hindrance including the right to use all religious terminologies in the Malay and Indonesian languages in the same manner as they have always done so when Sabah and Sarawak joined Malaya to form the Federation of Malaysia in 1963;

(d) (B) a declaration that the Government Directive issued by the Publication Control Division of the Ministry of Home Affairs Circular : S. 59/3/9/A Klt.2 dated 5.12.1986 is unlawful and unconstitutional."

Lampiran B

[38] In Lampiran B, the proposed amendments to the Statement are as follows:

"Necessary And Consequential Direction And Orders And/Or Further Reliefs

(1) A declaration that the Applicant together with other native Bumiputra Christians of Sabah and Sarawak have the constitutional right to practise their Christian religion freely and without hindrance including the right to use all religious terminologies in the Malay and Indonesian languages in the same manner as the have always done so when Sabah and Sarawak joined Malaya to form the Federation of Malaysia in 1963;

(2) A declaration that the Applicant together with other native Bumiputra Christians of Sabah and Sarawak have the legitimate expectations to practise their Christians religion freely and without hindrance including the right to use all religious terminologies in the Malay and Indonesian languages in the same manner as they have always done so when Sabah and Sarawak joined Malaya to form the Federation of Malaysia in 1963;

(3) A declaration that the Respondents' decision to withhold delivery of the Publications under the Printing Presses And Publications Act 1984 on the grounds of "Istilah Larangan" ("Prohibited Terms') i.e., the terms set out in the Government Directive issued by the Publication Control Division of the Ministry of Home Affairs Circular: KDN: S.59/3/9/A Klt.2 dated 5.12.1986; "Ketenteraman Awam" ("Public Order") and "Melanggar Garis Panduan JAKIM" (Breach of JAKIM's Guidelines") is unlawful and unconstitutional;

(4) A declaration that the Government Directive issued by the Publication Control Division of the Ministry of Home Affairs Circular: S.59/3/9/A Klt.2 dated 5.12.1986 is unlawful and unconstitutional;

(5) A declaration that in the exercise of powers under the Printing Presses And Publication Act 1984, an authorized officer and/or the Minister in not authorized to deny the Applicant her constitutional right to have access to religious publications including the right to own, to possess, to use and to import publications which contain the religious terminology used as a referent to God in the AlKitab which is the Bible in the Malay and Indonesian languages in the exercise of her freedom to practise her religion pursuant to Article 3, 8, 11 and 12 of the Federal Constitution;

(6) A declaration that in the exercise of the powers under the Printing Presses And Publications Act 1984 by an authorized officer and/or the Minister the refusal of importation into Malaysia and /or the withholding of delivery of any religious publications solely on the ground that the said religious publications contain the religious terminology used as a referent to God in the Alkitab which is Bible in the Malay and Indonesian language is unlawful and unconstitutional.

[39] Order 53 rule 7 of the ROC requires order to be made by the Judge. Inadvertently, there was no order made on Encl. 40 to allow the amendment to the Statement. Notwithstanding there was no order made, I do not think that there is any impediment for me to proceed with the proceedings and

make decisions on the issues based on the proposed amendment Statement.

[40] The respondents were fully aware of Encl 40. It was duly served on the respondents. It was listed as one of the cause papers in learned Senior Federal Counsel's (SFC) written submission. Learned SFC did not raise any objection at the hearing of the judicial proceedings when learned counsels made his submission on the amended Statement. The learned SFC had in turn also submitted on the same, opposing the reliefs sought by the applicant. It was clear to me that the respondents were not taken by surprise, prejudiced, embarrassed or misled.

[41] The decision of the Federal Court in *Iftikar Ahmed Khan v Perwira Affin Bank Bhd* [2018] 1 CLJ 415 is a case on point. Even though the facts in the that case are not in all four with the present case as *Iftikar Ahmed Khan supra*, deals with the cause of action not pleaded, but the principle expounded by the Federal Court can be applied to the problem at hand. Abu Samah Nordin FCJ in delivering the decision of the Federal Court said –

> "[38] …The cases cited by both counsels to us clearly show that the law on the first question posed by the appellant is settled. It is this. In a case where the matter or material facts are not pleaded but evidence is led without objections at trial, the court is duty bound to consider such evidence although it may a

> departure from the pleading. It has the effect of curing defect in the pleading. In such a case, the opposite party is not taken by surprise, prejudiced, embarrassed or misled. The exception is where the evidence represents a radical departure from the pleading and is not just a variation, modification or development of what has been alleged in the pleading. *Dato Hamzah Abdul Majid v Omega Securities Sdn Bhd* [2015] 9 CLJ 677 is an illustration of a case where there was a radical departure from the pleading…..".

[42] In essence, the basis for the amendments to paragraphs (c) and (d) according to learned counsel for the applicant and as I understand it to be, is as follows.

[43] As the case developed, the applicant found that the very root of her problem is the impugned Directive. It is the applicant's case that firstly, the impugned Directive was arbitrarily made under Act 301 and is ultra vires the Act and secondly, the impugned Directive was unlawfully used as a basis to invoke the use of power under section 9(1) of Act 301.

[44] The basis to introduce the detailed account of the consequential orders is that they are ancillary to the main reliefs. Reference was made to the case of *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288 and *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 in support of the application.

[45] The applicant averred that she was given the two declarations to be heard. So long as that right under Articles 8 and 11 is encumbered by the impugned Directive, the right is illusory and ineffective because at any moment some officials will use Act 301 to seize her publications. Thus, to do effective justice, to ameliorate the position of the applicant if the principal declarations are granted to her, there should be these other consequential reliefs as well.

[46] Needless to say, these amendments too are subject to the parameters set by the Court of Appeal in Jill Ireland Appeal Case. Having heard the parties in this proceedings until its conclusion, in the circumstances, my findings on the amendment sought are as follows.

Amendment in Lampiran A

[47] The context of paragraph (d) (A) is substantially similar to the context in paragraph (e), but worded differently. It will be recalled that the Court of Appeal had only remitted for determination paragraphs (c) and (d) and not paragraphs (e) and (f). There was no leave to appeal against the decision of the Court of Appeal for not remitting paragraphs (e) and (f) filed by the applicant in the Federal Court. Thus the decision of the Court of Appeal is taken to be final. In my view, it is fundamentally wrong to revive paragraph (e) by means of the amendment sought to the Statement.

[48] As regards the amendment in the proposed paragraph (d) (B), significantly, the impugned Directive was the basis for the exercise of the

power under section 9 (1) of Act 301 by the first respondent when confiscating the 8 CDs. The Minister at the material time was Syed Hamid B. S. Jaafar Albar. He affirmed an affidavit in Encl. 15 giving justification in arriving at the decision to withhold the 8 CDs -

"6. Selanjutnya saya menyatakan bahawa –

6.1 Suatu Arahan Kerajaan bertarikh 19/5/1986 telah dikeluarkan melarang sama sekali penggunaan istilah Allah, Kaabah, Solat dan Baitullah di dalam penerbitan Al-Kitab;
(*Salinan arahan tersebut adalah dilampirkan di sini dan ditandakan sebagai Ekshibit "SHA-1")*

6.2 Selanjutnya pada 5/12/1986, Kerajaan telah mengeluarkan suatu arahan khusus bagi semua penerbitan Kristian bahawa penggunaan istilah Allah, Kaabah, Solat dan Baitullah adalah dilarang sama sekali di dalam semua penerbitan;
(*Salinan arahan tersebut adalah dilampirkan di sini dan ditandakan sebagai Ekshibit "SHA-2")*

6.3 Antara sebab larangan empat (4) perkataan tersebut adalah untuk mengelakkan berlakunya sebarang salah faham di antara penganut Islam dengan penganut Kristian yang boleh mengancam keselamatan dan ketenteraman awam serta menimbulkan sensitiviti keagamaan di kalangan rakyat Malaysia; dan

6.4 Arahan bertarikh 5/12/1986 tersebut masih berterusan dan tidak pernah ditarik balik."

[49] The impugned Directive was the same Government Directive 1986 that was referred to by the High Court in *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Anor* [2010] 3 LNS 2 and by the Court of Appeal in *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 MLRA 8.

[50] The impugned Directive did not come under scrutiny then in both the High Court, and the Court of Appeal even though Abdul Aziz Abdul Rahim JCA did enquire from learned counsel for the respondents whether the respondents had taken any action to protest against or to challenge the same. This can be seen from the passage below appearing at page 39 of the report –

> "[80] The 1986 directive has never been withdrawn and still in force. Mr Porres Royan, learned counsel for the respondent was asked whether the respondent took any action to protest against or to challenge the 1986 directive. His response was that to the best of his knowledge there was none. Then he said (and this is from the Bar but without any objection from any of the appellants) at that time the Herald was not yet in publication ….."

[51] The impugned Directive will be canvassed in this Judgment but again, not without the constraint alluded to.

[52] In respect of Lampiran B, my concern is –

(a) the proposed paragraph (1) is similar word per word with the proposed paragraph (d)(A) of Lampiran A;

(b) the context of the proposed paragraph 2 is substantially similar to paragraph (f) that was not remitted by the Court of Appeal;

(c) the proposed paragraphs 3 is the administrative relief that has already been dealt with by the learned Judge.

(d) the proposed paragraphs 4 is similar to the proposed paragraph (d) (B) in Lampiran A.

(e) the proposed paragraphs 5 and 6 are similar in context to the prayers in paragraphs (c) and (d) of the main declaratory reliefs.

[53] In the result, what is left for determination in Lampiran B are issues that are already subsumed in the two constitutional issues remitted by the Court of Appeal in paragraph (c) and (d).

The Law on Judicial Review

[54] There is a host of well known high authorities that had firmly determined the law on judicial review. I need only to refer to the cases below.

[55] In *R Rama Chandran, supra,* Edgar Joseph Jr FCJ held at paragraph 172 of the report –

> "It is often said that judicial review is concerned not with the decision but the decision- making process. (See, e.g. *Chief Constable of North Wales v Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the Courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.
>
> But, Lord Diplock's other grounds for impugning a decision susceptible to judicial review make it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and , in practice, this permits the Courts to scrutinize such decisions not only for process, but also for substance.

In this context it is useful to note how Lord Diplock defined the *three* grounds of review, to wit, (i) illegality, (ii) irrationality and (iii) procedural impropriety. This is how he put it:

By 'illegality' as a ground for judicial review I mean that the decision maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided in the event of a dispute, by those persons, the Judges, by whom the judicial power of the state is exercised.

By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category, is a question that Judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the Courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's indigenous explanation in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, of irrationality as a ground for a Court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision-maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as 'procedural impropriety' rather than failure to observe basic rule of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision. This is because

susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

Lord Diplock also mentioned 'proportionality" as a possible fourth ground of review which called for development."

[56] In *Ranjit Kaur S Gopal Singh v Hotel Excelsor (M) Sdn Bhd* [2010] 8 CLJ 629, an industrial court case, one of the question of law formulated for determination was what is the function of the court in an application for judicial review and what is the correct test to be applied in reviewing finding of facts made by the Industrial Court. Raus Shariff FCJ (as His Lordship then was) delivering the judgment of the court said –

"[15]…. Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. *Rama Chandran* is the mother of all those cases. The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of "illegality", "irrationality" and possibly "proportionality" which permits the courts to scrutinize the decision not only for process but also for substance. It allowed the courts to go into the merits of the matter. Thus, the distinction between review and appeal no longer holds."

[57] The issue of what test should be applicable in judicial review, subjective or objective was raised and considered by the Federal Court in *Titular Roman Catholic Archbishop of Kuala Lumpur, supra.* In this case, the leave questions before the Federal Court were divided into 3 parts, under the headings of administrative law questions, constitutional law questions and general questions.

[58] The administrative law questions relate to the test in judicial review. The applicant argued that the Court of Appeal, in determining the reasonableness of the first respondent's decision, had applied the wrong subjective test instead of the objective test. Arifin Zakaria CJ in delivering the majority decision held that the test applicable is the objective test -

> "[27] Having considered the issue at hand, I agree with learned counsel for the applicant that the law on judicial review has advanced from the subjective to that of the objective test. Hence, in *Merdeka University Berhad v Government of Malaysia* [1982] 2 MLJ 243, FC, Suffian LP observed :
>
> > It will be noted that s 6 used the formula "If the Yang di- Pertuan Agong is satisfied etc." In the past such subjective formula would have barred the courts from going behind His Majesty's reasons for his decision to reject the plaintiff's application; but, as stated by the learned judge, administrative law has since so far advanced such that today such a subjective formula no longer excludes judicial review if objective facts have to be ascertained before arriving at such satisfaction and the test of unreasonableness is not whether a particular person considers a

particular course unreasonable, but whether it could be said that no reasonable person could consider that course reasonable- see the cases cited by the learned judge at p 360.

(See also *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, FC;….).

As laid down by the above authorities it is therefore trite that the test applicable in judicial review is the objective test.".

[59] It is trite that judicial review would lie if a decision maker had made a decision that is illegal, irrational or procedurally improper. In this present case, the applicant contends that the action of the respondents is illegal, irrational and unconstitutional.

Decision

[60] The applicant claimed that in enforcing the impugned Directive and purportedly acting under section 9(1) of Act 301, Christian publications have been subjected to enforcement action under Act 301 and continue to be liable to such action solely on the ground that they contained the word "Allah" regardless of their contents. This she claimed, is a direct denial of her right to profess and practise her freedom of religion.

[61] The core issue now in this judicial review is the applicant's challenge that the impugned Directive is invalid and unconstitutional.

The Impugned Directive

[62] As the validity of the impugned Directive comes under judicial scrutiny for the first time in this proceeding, it is pertinent to ask this question - if the impugned Directive was followed through the years unquestionably because it was never challenged in any court of law before, whether one can mount a challenge now?

[63] I find no reason to exclude this issue from being ventilated. In this context, I adopt the observations made by eminent author M.P Jain In Administrative Law of Malaysia And Singapore (Second Edition, 1989 Malayan Law Journal) at p.105 –

> "The nature of the judicial function vis- a- vis delegated legislation has the following characteristic as becomes clear from the House of Lords' decision in *Hoffman-La Roche*. The courts do not act on their own motion or initiative. Their jurisdiction to determine whether delegated legislation is *ultra vires* arises only when its validity is challenged in proceedings *inter partes* either brought by one party to enforce the law against another party, or brought by a party whose interest are affected by the law so declared and having locus standi to challenge the *vires* of the delegated legislation in question.

The judgment of a court that any piece of delegated legislation is void as being ultra vires the parent Act or inconsistent with any Act or the Constitution renders it incapable of ever having had any legal effect upon the rights and duties of the parties to the proceedings. Although such a decision is directly binding only as between the parties to the proceedings in which it was made, because of the doctrine of precedent, the benefit of the decision accrues to all other persons whose legal rights have been interfered with in reliance on the law which the delegated legislation purported to declare. Finally, until there is a challenge to the validity of some delegated legislation, and the same is upheld or invalidated by a court of law, there is presumption of the validity of the delegated legislation as well as the legality of acts done in pursuance thereof. In the words of Lord Diplock in *Hoffman*:

"All that can be usefully be said is that the presumption that subordinate legislation is *intra vires* prevails in the absence of rebuttal, and that it cannot be rebutted except by a party to legal proceedings in a court of competent jurisdiction who has *locus standi* to challenge the validity of the subordinate legislation in question"."

[64] Locus standi of the applicant in mounting this challenge is never an issue as between the parties. In any event, the applicant has the locus standi because her interest was affected by the impugned Directive as the confiscation of her 8 CDs was based on the impugned Directive despite the fact that the impugned Directive was directed towards the publishers. The respondents have allowed their officers to enforce the impugned Directive against her.

[65] In challenging the validity and constitutionality of the impugned Directive, the line of submission adopted by learned counsels for the applicant was predominantly on the prohibition on the use of the word "Allah". It was submitted that the impugned Directive is draconian, arbitrarily made and discriminatory in nature, that it distinguishes the Muslims from the non- Muslims whereby the non-Muslims, the Christians in this case, are not allowed to use the word "Allah" whilst the Muslims are allowed to use the word even though historically both have been using the word. To justify the use by the Christians, references to the verses in the Al Quran were brought in to show that there is no prohibition in the religion of Islam to the use of the word "Allah" by the non- Muslims. Learned SFC too made similar references in his rebuttal submission. So did learned counsels representing MAIWP and MAIS when invited to address this Court.

[66] It is also to be observed that learned counsels for the applicant informed this Court that they are not challenging the State Enactments in any collateral way. This Court takes cognisant that similar stance too was taken by the applicant in the earlier proceeding of this judicial review. The learned High Court Judge in the earlier proceedings, in not granting the applicant's constitutional prayers, however opined that although the applicant was not challenging the State Enactments, the issue however could not be considered without taking into consideration the provision of the Enactments; the validity and constitutionality. Reproduced below is the excerpts of the learned High Court Judge's decision appearing at page 742 in the Jill Ireland Appeal Case -

[37] We must revert to the judgment of the learned judge to see how she had dealt with the applicant's prayers which she had subsequently declined to grant. That must necessarily lead us to p. 719 of the appeal records. It was contained in para. [16] of her judgment as follows:

> The applicant in this application also seeks for certain declarations concerning her rights as guaranteed by Article 8 and 11 of the Federal Constitution. In the respondent's affidavit in Enclosure 6, the respondent states that the applicant's action in bringing the 8 CDs will lead to violation of provision of state enactments on control and restriction of propagation of non- Islamic religion among Muslims pertaining to the prohibition of certain words or phrases by non- Islamic religion. Although the applicant is not challenging those Enactments, but in my view, the issue here cannot be considered without taking into consideration the provision of those enactments; its validity and constitutionality.

[38] In para.17 of her judgment, the learned judge had gone on to say as follows:

> The question on the usage of the word :Allah" which the applicant argues to be her right guaranteed by Article s 8 and 11 of the Federal Constitution, cannot in my view be considered in isolation without taking into consideration n the validity and constitutionality of those laws as well…"

[67] As mentioned, the Court of Appeal had agreed with the learned High Court Judge's decision.

[68] Needless to say, and without more, the same constraint applies. I am duty bound to abstain from considering any challenges on the prohibition of the use of the word "Allah" in considering the challenge on the impugned Directive as the challenge on such prohibition must not be done in a collateral manner.

[69] Having said that, I shall now proceed to consider the issues pertaining to the impugned Directive. This Court will examine the decision in issuing the impugned Directive not only in relation to the process but also for substance in order to ascertain if such decision was tainted with illegality, irrationality or even procedural impropriety within the established principles governing the law on judicial review. In my view, the impugned Directive has, foremost, to be validly issued in accordance with the law in order for the prohibition imposed therein to be legally sustained. If the impugned Directive was validly issued and not offending the FC, then the only way the challenge the prohibition on the use of the word "Allah" found therein, will be in the manner as stipulated in the majority decision of the Federal Court in the *Titular Roman Catholic Archbishop of Kuala Lumpur*.

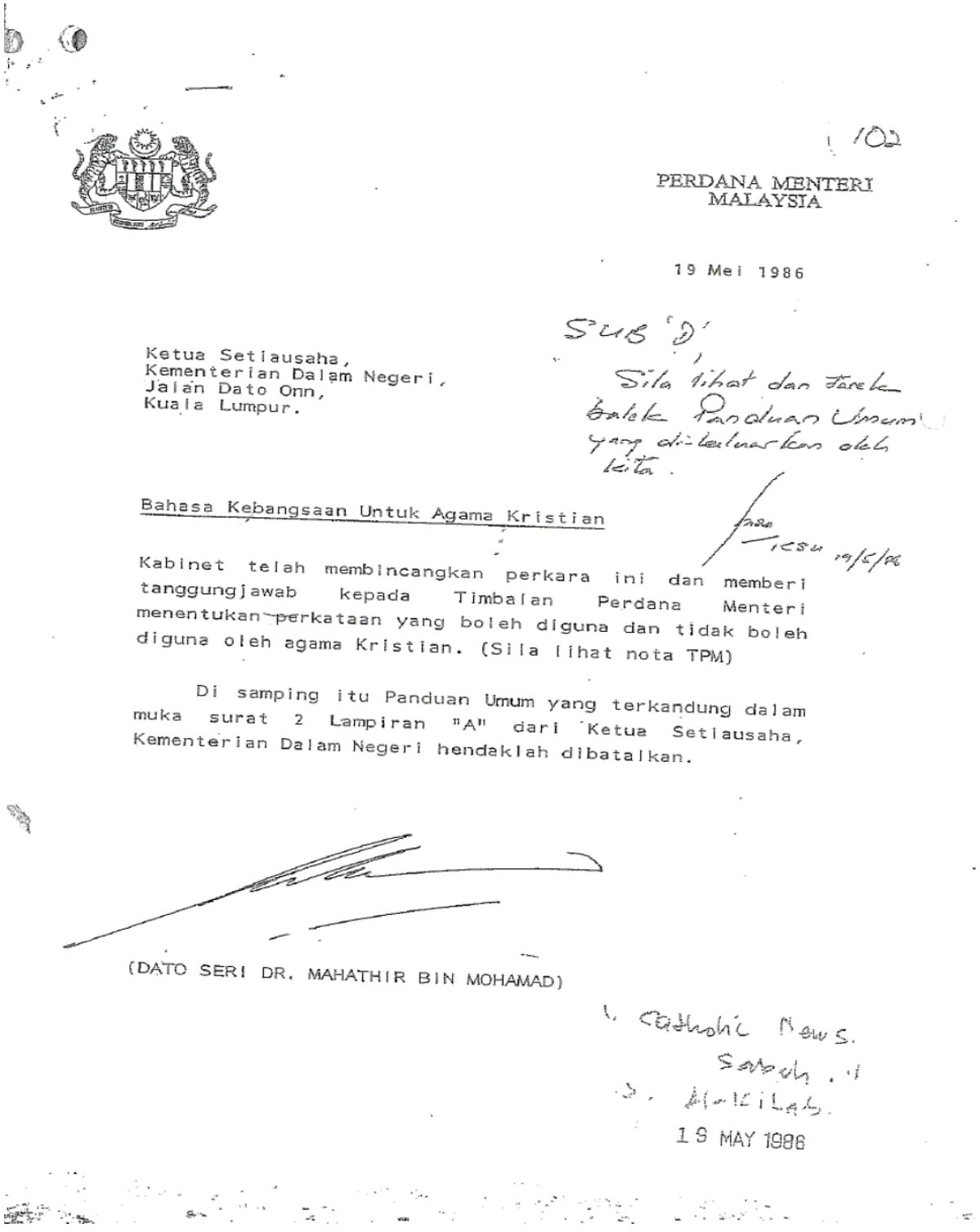
[70] To recapitulate, the respondents' case is that the impugned Directive was a Cabinet's decision which relate to the policy of the Government at that point of time to avoid any confusion among the Muslims and Christians community which is likely to be prejudicial to public order and creating religious sensitivity amongst the Malaysians.

[71] The Cabinet's policy decision referred to by the respondents was the decision made by the Cabinet on 19.5.1986.

[72] This was confirmed by the Minister in his affidavit in Encl. 15. Marked as Exhibit SHA-1 was a letter dated 19.5.1986 from the Prime Minister (PM) to the Secretary General, the Ministry of Home Affairs, which showed that the Cabinet had discussed and the Deputy Prime Minister (DPM) was assigned to determine on the words permitted to be used and prohibited from use in the Christian religion, with the note from the DPM dated 16.5.1986 appended thereto (DPM's Note). The DPM's Note also appeared as exhibit "SHM-4" in enclosure 6).

[73] Reproduced below are the PM's letter and the DPM's Note –

A. The PM's letter:



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PERDANA MENTERI
MALAYSIA

19 Mei 1986

SUB 'D'

Sila lihat dan tarek balek Panduan Umum yang dikeluarkan oleh kita.

Ketua Setiausaha,
Kementerian Dalam Negeri,
Jalan Dato Onn,
Kuala Lumpur.

Bahasa Kebangsaan Untuk Agama Kristian

Jasa Tesu 19/5/86

Kabinet telah membincangkan perkara ini dan memberi tanggungjawab kepada Timbalan Perdana Menteri menentukan perkataan yang boleh diguna dan tidak boleh diguna oleh agama Kristian. (Sila lihat nota TPM)

Di samping itu Panduan Umum yang terkandung dalam muka surat 2 Lampiran "A" dari Ketua Setiausaha, Kementerian Dalam Negeri hendaklah dibatalkan.

(DATO SERI DR. MAHATHIR BIN MOHAMAD)

1. Catholic News.
Sabah.
2. Malaysia.
19 MAY 1986

B. The DPM's Note:

PEJABAT TIMBALAN
PERDANA MENTERI,
JALAN DATUK ONN,
KUALA LUMPUR
Tel.: K.L. 203722

MEMO

PEJABAT TIMBALAN PERDANA MENTERI

YAB. Perdana Menteri,

Istilah/Perkataan Islam Di Dalam
"Al-Kitab" Yang Tidak Boleh Digunakan

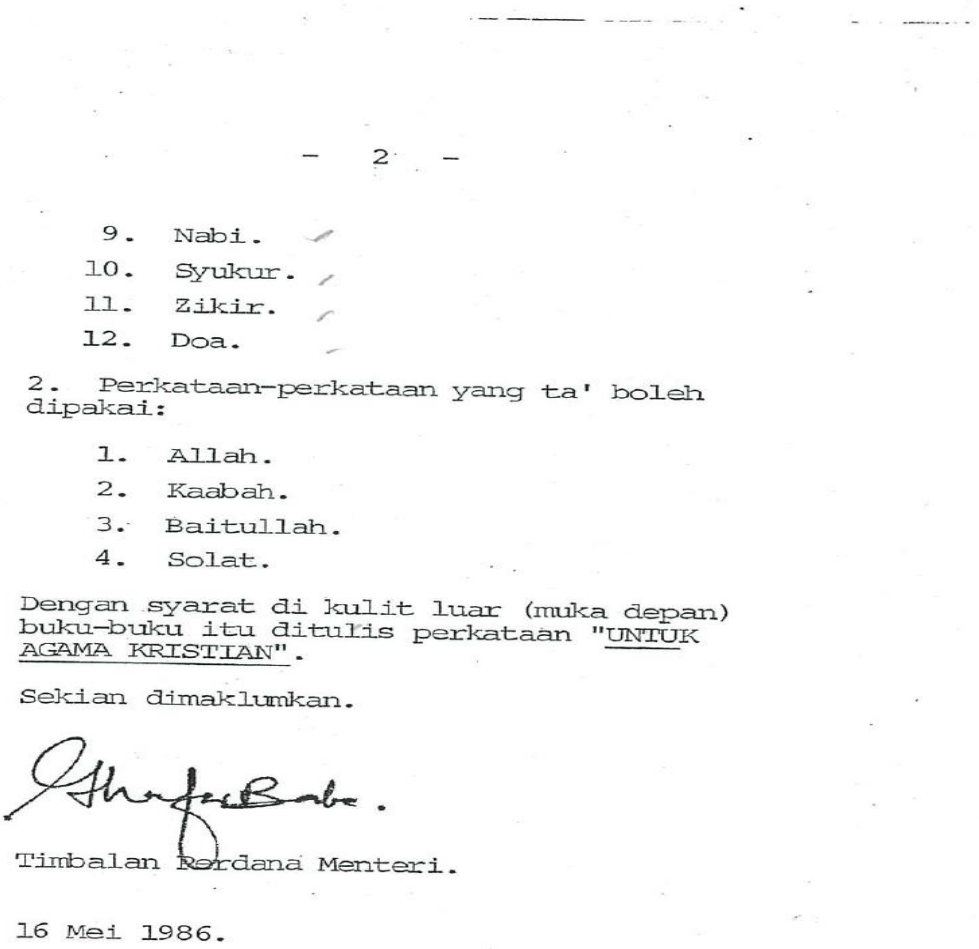
Kabinet memutuskan saya sendiri - Anwar dan James mengkaji perkara di atas.

Keputusan:

1. Perkataan-perkataan di bawah ini boleh digunakan:

   1. Al-Kitab.
   2. Firman.
   3. Rasul.
   4. Syariat.
   5. Iman.
   6. Ibadah.
   7. Injil.
   8. Wahyu.

2/..



- 2 -

9. Nabi.
10. Syukur.
11. Zikir.
12. Doa.

2. Perkataan-perkataan yang ta' boleh dipakai:

1. Allah.
2. Kaabah.
3. Baitullah.
4. Solat.

Dengan syarat di kulit luar (muka depan) buku-buku itu ditulis perkataan "UNTUK AGAMA KRISTIAN".

Sekian dimaklumkan.

Timbalan Perdana Menteri.

16 Mei 1986.

[74] It is apparent that the PM's letter endorsed the 'Keputusan' contained in the DPM' Note. Thus, it is reasonable to infer that the "Keputusan" in the DPM's Note became the Cabinet's policy decision on the words that can and cannot be used by the Christian religion (the Cabinet's policy decision).

[75] Approximately 7 months later, the impugned Directive was issued and it is reproduced below –

LAMPIRAN 11

(13)

KEMENTERIAN DALAM NEGERI
(BAHAGIAN KAWALAN PENERBITAN)
TINGKAT 1, BANGUNAN STRAITS TRADING
LEBOH PASAR BESAR, PETI SURAT 10382
50712 KUALA LUMPUR.

Tel: 2931322/2931717

Ruj. tuan :

Ruj. kami : KDN: S.59/3/9/A Klt.2 - ( )

Tarikh : 5hb Disember, 1986.

Kepada :

Semua Penerbitan Agama Kristian
seperti di Lampiran (nama, alamat
dan rangkuman)

Tuan/Puan,

Penggunaan Istillah/Perkataan Yang Digunakan
Dalam Penerbitan Agama Kristian Berbahasa Malaysia.

Adalah saya diarah merujuk kepada perkara di atas berhubung dengan kekeliruan dikalangan masyarakat tentang istillah/perkataan yang merujuk kepada agama Islam yang juga digunakan dalam penerbitan agama Kristian dalam Bahasa Malaysia.

2. Adalah dengan ini diberitahu iaitu Kerajaan telah memutuskan perkataan dibawah ini boleh digunakan dalam penerbitan agama Kristian :-

1.	Al-Kitab	7.	Injil
2.	Firman	8.	Wahyu
3.	Rasul	9.	Nabi
4.	Syariat	10.	Syukur
5.	Iman	11.	Zikir
6.	Ibadah	12.	Doa

Sekiranya penerbitan tersebut berbentuk buku atau risalah yang hendak disebarkan atau dijual perkataan "UNTUK AGAMA KRISTIAN", disyaratkan ditulis di kulit luar (muka depan) buku atau risalah tersebut.

3. Perkataan yang tidak boleh dipakai atau digunakan dalam semua penerbitan Kristian di negara ini ialah :-

... 2/-

1. Allah
2. Kaabah
3. Baitullah
4. Solat

Untuk makluman, Majlis-majlis Agama Islam Negeri-negeri dalam hal ini mempunyai bidang kuasanya untuk memutuskan perkara berkaitan dengan hal ehwal Agama Islam bagi negeri masing-masing.

4. Tujuan Kerajaan mengambil ketetapan berhubung dengan istilah/perkataan serta syarat di atas kepada penerbitan agama Kristian adalah semata-mata untuk menjaga ketenteraman awam dan mengelakkan berlakunya salah faham diantara umat Islam dengan penganut-penganut ugama Kristian. Oleh itu tuan/puan adalah dengan ini diingatkan supaya mematuhi arahan Kerajaan dalam semua bentuk penerbitan agama Kristian yang diterbitkan.

Sekian, dimaklumkan.

" BERKHIDMAT UNTUK NEGARA "

Saya yang menurut perintah,

(HASSAN BIN JANTAN)
b.p. Ketua Setiausaha,
Kementerian Dalam Negeri.

s.k.

Pengarah Cawangan Khas,
Ibu Pejabat Polis Diraja Malaysia,
Bukit Aman,
50560 KUALA LUMPUR.

(u.p: Encik Zainul Azmi bin Hj. Zabidi)

Pengawal Penerbitan,
Kementerian Dalam Negeri,
(Cawangan Kawalan Penerbitan),
Tingkat 8, Blok B,
Wisma Persekutuan,
80000 JOHOR BAHRU.

(u.p: Encik Husin bin Ahmad)

Pengawal Penerbitan,
Kementerian Dalam Negeri,
(Cawangan Kawalan Penerbitan),
Leboh Pantai,
10300 PULAU PINANG.

(u.p: Encik Mohd. Zahari bin Dahalan)

Semua Setiausaha Keselamatan Negeri.

[76] In his affidavit in Encl. 15, the Minister explained the content of the impugned Directive –

> "7. Selaras dengan **peruntukan undang-undang dan polisi kerajaan**, semua penerbitan Kristian tidak boleh menggunakan istilah Allah, Kaabah, Solat dan Baitullah dan Kementerian Dalam Negeri sebagai kementerian yang mengawal selia percetakan dan penerbitan adalah bertanggungjawab untuk melaksanakan dan menguatkuasakan undang-undang dan polisi-polisi kerajaan tersebut khususnya di bawah Akta 301.
>
> …….
>
> 9. Oleh itu, saya sesungguhnya percaya bahawa keputusan melarang semua penerbitan Kristian menggunakan istilah Allah, Kaabah, Solat dan Baitullah sejak 1986 dan perlaksanaan serta penguatkuasaan larangan oleh pihak kementerian itu adalah tepat.
>
> 10. Saya merujuk kepada Afidavit Jawapan Responden Suzanah bin Haji Muin yang telah diikrarkan pada 28/8/2009 dan bersetuju serta mengesahkan bahawa tindakan beliau tersebut adalah selaras dengan tindakan melaksanakan dan menguatkuasakan **undang-undang dan polisi kerajaan** sejak tahun 1986 tersebut melalui peruntukan di bawah Akta 301."
>
> [Emphasis added]

[77] From paragraphs 7 and 10 of the Minister's affidavit above, the Minister described the impugned Directive as "undang-undang dan polisi kerajaan" - the law and the policy of the government. The Minister averred that consistent with the law and the policy of the government, all Christian publications are not permitted from using the words "Allah", "Kaabah", "Solat" and "Baitullah". His Ministry having the charge of regulating, printing and publication, was made responsible to execute and enforce the said law and the policy government under Act 301.

[78] The process that had taken place as can be distilled from the PM's letter, the DPM's Note and the impugned Directive is that when the PM passed over to the Ministry of Home Affairs the Cabinet's policy decision, what followed next was the issuance of the impugned Directive by the Bahagian Kawalan Penerbitan of the Ministry of Home Affairs. In other words, the Ministry of Home Affairs was executing the Cabinet's policy decision by making and issuing the impugned Directive.

[79] In the circumstances, the impugned Directive then must mirror the Cabinet's policy decision. The question is whether it did? Upon painstakingly perusing through all evidence adduced in this proceedings, I entertained serious doubt whether the Cabinet's policy decision was incorporated in the impugned Directive as there appears to be marked discrepancies between the Cabinet's policy decision and the impugned Directive. My reasons are as follows.

[80] Paragraph 1 of the DPM's Note stated that 12 words "Al-Kitab", "Firman", "Rasul", "Syariat", "Iman", "Ibadah", "Injil", "Wahyu", "Nabi", "Syukur", "Zikir" and "Doa" were permitted to be used. There was no condition attached to the use of these words.

[81] Paragraph 2 of the DPM's Note stated that 4 words "Allah", "Kaabah", "Baitullah" and "Solat" were not permitted to be used and appearing immediately below the 4 words were these words " Dengan syarat di luar kulit (muka depan) buku-buku itu ditulis perkataan "UNTUK AGAMA KRISTIAN".

[82] The DPM's Note relates to the subject " Istilah/ Perkataan Islam Di Dalam "AlKitab" Yang Tidak Boleh Digunakan". The AlKitab is an Indonesian translation of the Bible where the word "Allah" appears therein. The DPM's Note was couched in an unambiguous terms. The plain and clear language in DPM's Note in my view simply means that the 12 words can be used unconditionally while the 4 words cannot be used but the 4 words can be used subject to the condition stated immediately below the 4 words. It is crucial to bear in mind that the words " Dengan syarat di luar kulit (muka depan) buku-buku itu ditulis perkataan "UNTUK AGAMA KRISTIAN" appeared only in paragraph 2 and not paragraph 1 of the DPM's Note.

[83] However, there is a marked departure in the impugned Directive from the Cabinet's policy decision as contained in the DPM's Note.

[84] Firstly, with regard to the 12 words. There is now attached in paragraph 2 of the impugned Directive these words "Sekiranya penerbitan tersebut berbentuk buku atau risalah yang hendak disebarkan atau dijual perkataan "UNTUK AGAMA KRISTIAN", disyaratkan ditulis di kulit luar (muka depan) buku atau risalah tersebut." These words do not appear in paragraph 1 of the DPM's Note.

[85] Secondly, with regard to the 4 words namely "Allah", "Kaabah", Baitullah and Solat, the words "Dengan syarat di kulit luar (muka depan) buku-buku itu ditulis perkataan "UNTUK AGAMA KRISTIAN" as appeared in the paragraph 2 of the DPM's Note, are not there in paragraph 3 of the impugned Directive.

[86] I accept that the words " Dengan syarat di kulit luar (muka depan) buku-buku itu ditulis perkataan "UNTUK AGAMA KRISTIAN"" as appeared in the DPM's Note and the words "Sekiranya penerbitan tersebut berbentuk buku atau risalah yang hendak disebarkan atau dijual perkataan "UNTUK AGAMA KRISTIAN", disyaratkan ditulis di kulit luar (muka depan) buku atau risalah tersebut"" as appeared in the impugned Dircetive, would carry similar effect.

[87] Even if one is to argue that the words “Dengan syarat di kulit luar (muka depan) buku-buku itu ditulis perkataan “UNTUK AGAMA KRISTIAN” appearing in the DPM’s Note referred not only to paragraph 2 but it is all encompassing, meaning to say that the conditions apply for both usages of the 12 words as well as the 4 words, what that line of argument takes us to is that those words would appear in paragraph 2 as well as paragraph 3 of the impugned Directive. In so far as it concerned the 12 words, that have now been accounted for, with the insertion of the words “Sekiranya penerbitan tersebut berbentuk buku atau risalah yang hendak disebarkan atau dijual perkataan “UNTUK AGAMA KRISTIAN”, disyaratkan ditulis di kulit luar (muka depan) buku atau risalah tersebut” in paragraph 2 of the impugned Directive.

[88] But, what is pressing is why the same words “Sekiranya penerbitan tersebut berbentuk buku atau risalah yang hendak disebarkan atau dijual perkataan “UNTUK AGAMA KRISTIAN”, disyaratkan ditulis di kulit luar (muka depan) buku atau risalah tersebut” were omitted from paragraph 3 of the impugned Directive?

[89] It is by no means clear that by virtue of the impugned Directive, the use of the 12 words are now subject to the conditions as specified in paragraph 2 and the use of the 4 words have now become absolutely prohibited as shown in paragraph 3.

[90] Construction of documents is a question of law (see *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38). The court is concerned only to discover what the instrument means (*Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [2010] 1 MLJ 597).

[91] In my view, on a true and proper construction of the PM's letter and the DPM's Note, the Cabinet's policy decision did not impose a total ban on the 4 words "Allah", "Kaabah", Baitullah and "Solat". The impugned Directive did. The Cabinet could not, in my view have imposed a total prohibition because the subject matter of the two documents relate to the AlKitab. In force at the material time was P.U.(A) 134/1982 which also concerned the AlKitab.

[92] P.U (A) 134/1982 is an Order made under section 22 of the Internal Security Act 1960 (Act 82) which prohibits the printing, publication, sale, issue, circulation or possession of the AlKitab which was prejudicial to the national interest and security of the Federation but the prohibition i.e. the printing, publication, *etc.* shall not apply to the possession or use in Churches of the AlKitab by persons professing the Christian religion throughout the country.

[93] P.U (A) 134/1982 is reproduced below –

INTERNAL SECURITY ACT 1960

INTERNAL SECURITY (PROHIBITION OF PUBLICATIONS (NO.4) ORDER 1982

Act 82. P.U.(B) 398/76

"In exercise of the powers conferred upon the Minister of Home Affairs by section 22 of the Internal Security Act 1960 and delegated to him, the Deputy Minister makes the following Order :

Citation

1. This Order may be cited as the Internal Security (Prohibition of Publication) (No. 4) Order 1982.

Prohibition of publication

2. The printing, publication, sale, issue, circulation or possession of the publication which is described in the Schedule and which is prejudicial to the national interest and security of the Federation is prohibited, subject to the condition that this prohibition shall not apply to the possession or use in Churches of such publication by persons professing the Christian religion, through-out Malaysia.

Repeal. P.U.(A) 15/82.

3. The Internal Security (Prohibition of Documents (No.3) Order 1982 in repealed.

SCHEDULE

Title of	*Publisher*	*Printer*	*Language*
"ALKITAB"	Lembaga Alkitab Indonesia Jakarta 1979	Printed di Korea	Indonesia

Diperbuat pada 22hb Mac 1982
[KHEDN: O.59/3/9/A;PN.(PU²)24 Pt.II]

ABDUL RAHIM DATUK TAMBY CHIK,
Deputy Minister of Home Affairs

[94] One can see from P.U(A) 134/1982 that it repealed P.U(A) 15/1982. Vide P.U(A) 15/1982, an absolute prohibition was imposed on the printing, publication, sale, issue, circulation or possession of the AlKitab throughout Malaysia. This essentially means the use of the word "Allah" was absolutely prohibited. But in a couple of months later, the absolute prohibition was lifted when P.U(A) 134/1982 was made. The prohibition on the printing, publication, sale, issue, circulation or possession of the AlKitab throughout Malaysia was maintained but that prohibition does not apply to possession or use of the AlKitab by the Christians in churches throughout Malaysia. This essentially means the AlKitab that carries the word "Allah" can be used but within the confines of churches only.

[95] If the Cabinet's policy decision was to impose a total prohibition on the 4 words, it is reasonable to expect that P.U (A) 134/1982 would be repealed or modified or varied to reflect the new policy. This is because the effect of a total prohibition would extend to possession or use in the churches. That was not done. It does not stand to reason that if both are allowed to co-exist and I shall revert to this in later part of this Judgment. In addition, I would also pose this question, why the need for the DPM's Note to carry the words "Sekiranya penerbitan tersebut berbentuk buku atau risalah yang hendak disebarkan atau dijual perkataan "UNTUK AGAMA KRISTIAN", disyaratkan ditulis di kulit luar (muka depan) buku atau risalah tersebut" in paragraph 2 if a total prohibition was to be imposed?

[96] For reasons best known only to the Bahagian Kawalan Penerbitan of the Ministry of Home Affairs, and which remained unexplained, the clear words of the DPM's Note with regard to the use of the 4 words that ought to have been taken into account, was wholly disregarded and substituted instead with the imposition of a total prohibition. Learned SFC's submission that the impugned Directive did not impose total or absolute prohibition on the use of the words "Allah", "Kaabah", Baitullah and "Solat", is based on misapprehension of facts. There is a total ban.

[97] There is no evidence to the effect that there were changes brought about to the Cabinet's policy decision or that the Cabinet had endorsed the changes made to its decision as contained in the impugned Directives.

[98] In the absence thereof and exhibits “SHA -1” and “SHA-2” (and exhibit SHM-3) taken together, it is my view that the impugned Directive is inconsistent with the Cabinet’s policy decision.

[99] The effect of departing from the Cabinet’s policy decision would mean it does not lie in the Minister’s mouth to claim that the impugned Directive was based on the Cabinet’s policy decision. It might have emanated from the Cabinet’s policy decision to begin with but the material discrepancy as demonstrated, have cut off the link. The impugned Directive, in my view is simply a stand alone Directive, so to speak, issued by the Bahagian Kawalan Penerbitan of the Ministry of Home Affairs.

[100] Perhaps, if the Cabinet’s policy decision was correctly, properly and validly carried into effect by using the appropriate law under the charge of the Ministry of Home Affairs, there may not even be this judicial review proceedings. This is because, in my view, the Cabinet’s policy decision is wider in scope than the provisions of P.U (A) 134/1982. Effectively the use of the 4 words are permissible even outside the confines of churches subject to the conditions as prescribed. If the applicant has accepted P.U (A) 134/1982, there is every reason to believe that the Cabinet’s policy decision would be equally acceptable.

[101] It is acknowledged that this marked departure from the express provision of the Cabinet's policy decision, was not addressed by the parties during the hearing.

[102] It matters not, in my view, whether the parties were asked or not asked by this Court to submit on the departure.

[103] In our adversarial system, the role of this Court is to provide to all parties to the controversy and their advocates, the opportunity to present evidence and to argue their point of view in trying to determine the truth of the matter. That was done. This Court does not assume the role of investigator as is the case in an inquisitorial system. In *Teng Boon How v Pendakwa Raya* [1993] 3 MLJ 561, the Supreme Court observed at page 562 -

> "It was Lord Greene MR who explained that justice is best done by a judge who holds the balance between the contending parties without herself/himself taking part in their disputations. ."

[104] This is not a case where the respondents have been denied of being informed of any point adverse to them that is going to be relied on by this Court, where they must be given the opportunity of stating what their answers would be (*Hadmor Productions Ltd And Others v Hamilton and Another* [1982] 2 WLR 322; *Pacific Forest Indusrties Sdn Bhd & Anor*

v Lin Wen-Chih & Anor [2009] 6 CLJ 430). Exhibits SHA -1 and SHM-2 are the respondents' documents. The discrepancies are manifestly apparent on the face of the records and the respondents would have been able to identify them if the documents were given due, proper and appropriate examination. The respondents only have themselves to be blamed if they had not done so.

Illegality and Irrationality Issues

[105] The inconsistency issue aside, indisputably, the Minister referred to the impugned Directive as the law. Learned SFC maintained the stance that there was nothing illegal about the impugned Directive and unless and until it is withdrawn, it continues to be in force and commands compliance. Thus, the inference to be drawn is that the respondents have treated the impugned Directive issued by the Ministry as a subsidiary legislation having the force of law and was legitimately used as the basis to exercise the power under section 9 (1) of Act 301 to confiscate the 8 CDs.

[106] Is the impugned Directive a subsidiary legislation or subordinate legislation or delegated legislation as the terminology is commonly referred to?

[107] Subsidiary legislation is defined in section 3 of the Interpretation Acts 1948 and 1967 (Act 388) as follows :

> "subsidiary legislation" means any proclamation, rule, regulation, order, notification, by-law or other instrument made under any Act, Enactment, Ordinance or other lawful authority and having legislative effect;".

[108] Subsection 23 (1) of Act 388 provides –

> "Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency."

[109] Learned author M.P Jain in his book Administrative Law of Malaysia And Singapore, *supra,* said that section 23 of Act 388 is the foundation of the doctrine of judicial review of subsidiary legislation (see pages 79 and 80). Such a challenge can be sustained when delegated legislation goes beyond the scope of the authority conferred by the parent statute. This is known as substantive ultra vires which refers to the scope, extent and range of power conferred by the statute to make subsidiary legislation. The learned author went on to say –

> "As Lord Diplock pointed out in *McEldowney v Forde*, where the validity of subordinate legislation is challenged, the court has a three-fold task: first , to determine the meaning of the words used in the Act of Parliament itself to describe the subordinate legislation which the delegate is authorized to make;

second, to determine the meaning of the subordinate legislation itself and, finally, to decide whether the subordinate legislation complies with the description."

[110] Thus, the impugned Directive can be regarded as a subsidiary legislation (formatting aside) provided that it is made under Act 301 and it has legislative effect. Learned author M.P Jain explained the effect of the definition of "subsidiary legislation" in these words at p.57 –

"This means that an order, notification, etc. can be regarded as subsidiary legislation only if it has a "legislative effect." Some of the terms mentioned here are also used indiscriminately for "administrative" acts as well. The definition in the Interpretation Act emphasizes two aspects of subsidiary legislation:- (i) it is made under an Act of the Legislature (or Ordinance): and (ii) it has legislative effect. It means that every order, notification etc. is not subsidiary legislation: it is so only if it has 'legislative' effect; if it is not 'legislative' in nature, it is not subsidiary legislation; it may then be regarded as "administrative" in nature…"

[111] There is a difference between what is legislative and what is administrative. Learned author MP Jain further explained at page 58 on how does one distinguishes between the two –

"How to distinguish between 'legislative' and 'administrative'? The distinction between these two concepts is very difficult to draw as there is no articulate norm to evaluate whether an order or function made or discharged by an authority is legislative or administrative. A general test often propounded for

> the purpose is that an instrument (howsoever designated) is legislative in character if it is of general application, but is administrative in nature if applicable not generally but to specific cases.

[112] In *Indian Airlines Corporation v Sukhdeo Rai* A.I.R.1971 S.C.1828, the Supreme Court held that "But all rules and regulations made by the authorities in pursuance of a power under a statute do not necessarily have the force of law. In Kruse v Johnson [1898] 2 Q.B.91 at page 96) while considering the validity of a bye-law made by a county council Lord Russell described a bye-law having the force of law as one affecting the public or some section of the public, imposed by some authority clothed with statutory powers, ordering something to be done or not to be done and accompanied by some sanction or penalty for its non-observance."

[113] Bearing in mind the three-fold task in *McEldowney v Forde* and *Kruse v Johnson*, the impugned Directive in my view cannot be regarded as a subsidiary legislation.

[114] At the risk of repetition, from the affidavit of the Minister, his Ministry will be implementing the Cabinet's policy decision. How this was supposed to be done would be through the law under the charge of the Minister of Home Affairs. In this regards, it is Act 301.

[115] The impugned Directive was signed not by the Minister but by his officer from that Department on behalf of the Ministry's Secretary General. There is no explanation why that was so and why the Minister himself did not sign it. For convenience, further reference in this Judgment with regard to the individual responsible for the issuance of the impugned Directive, shall be reference to the Minister. The Minister has acknowledged the issuance of the impugned Directive by his Ministry.

[116] The impugned Directive did not state the provision of Act 301 pursuant to which it is was made. If the respondent claimed that the impugned Directive is law, the provision of Act 301 would have been spelt out. When it did not, then it is incumbent on this Court to find out whether Act 301 empowers the Minister to issue the impugned Directive.

[117] It is elementary that one must read and construed the law, in the present case - Act 301, as a whole and in the context to discover whether there is such power (see Bennion on Statutory Interpretation, Sixth Edn.; NS Bindra's on Interpretation of Statutes, Tenth Edn.)

[118] The long title of Act 301 which indicates the general purpose/ object and the scope of the Act provides - "An Act to regulate the use of printing presses and the printing, importation, production, reproduction, publishing and distribution of publications and for matters connected therewith".

[119] From its long title and the other provisions of Act 301 read and taken as a whole, it is plain and clear that Act 301 is not a general law on public order but a specific law directed at regulating the licensing of printing presses, issuance of permits to publish newspapers and the control of undesirable publications which are enforced by penal sanctions.

[120] Part IV of Act 301 deals with control of undesirable publications. The relevant provisions on power to impose prohibition are found in sections 7 and 9. Reproduced below are the excerpts of section 7(1) and 9 (1) –

> **"Undesirable publications**
>
> 7. (1) If the Minister is satisfied that any publication contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is in any manner prejudicial to or likely to be prejudicial to public order, morality, security, or which is likely to alarm public opinion, or which is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest, he may in his absolute discretion by order published in the *Gazette* prohibit, either absolutely or subject to such conditions as may be prescribed, the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of the publication and future publication of the publisher concerned.

Undesirable publication may be refused importation

9.(1) Without prejudice to anything in this Act, the Minister may refuse the importation into Malaysia or withhold delivery or return to the sender thereof outside Malaysia any publication which he is satisfied contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is likely to be prejudicial to public order, morality, security, or which is likely to alarm public opinion, or which is likely to be contrary to any law or is otherwise prejudicial or is likely to be prejudicial to public interest or national interest."

[121] In the Jill Ireland Appeal Case, the Court of Appeal held at page 740 "… there is no getting away from the cardinal principle so entrenched in public law domain that the exercise of a statutory power may only be exercised in the manner as intended by the legislature as expressed in the statutory provisions".

[122] Looking at the 2 provisions above, the Minister is empowered to impose prohibition on and refuse importation of any publication if the Minister is satisfied that the elements prescribed in the said provisions are present in the said publication. Even if one is to assume that Act 301 is a general law on public order as maintained by learned SFC (to which I disagree), there is nowhere in the said provisions and in any other provision and the rule making provision in section 26 which I shall advert to later, that provide the Minister with the power to issue a subsidiary legislation which imposed prohibition on the use of the 4 words in all Christian

publications – “Perkataan yang tidak boleh dipakai atau digunakan dalam penerbitan Kristian di negara ini ..” The publishers were reminded “… supaya mematuhi arahan Kerajaan dalam semua bentuk penerbitan agama Kristian yang diterbitkan.”.

[123] The Minister’s rule making power in section 26 deals substantively with procedural related matters. It is apparent that the Minister is not given the power under section 26 to make rules pertaining to the impugned Directive.

[124] I am mindful of the Printing Presses and Publications (Licences and Permits) Rules 1984 made pursuant to section 26 (2)(d) of Act 301, published as P.U (A) 305/1984. I do not see any relevance of this subsidiary legislation, which came under consideration in *Titular Roman Catholic Archibishop of Kuala Lumpur* in the High Court and the Court of Appeal, to the issuance of the impugned Directive. The impugned Directive made no reference whatsoever to P.U (A) 305/1984 and matters pertaining to conditions attached to licences and permits of the publishers was never an issue. In any event, as the respondent have treated the impugned Directive as law, there is no subsidiary legislation made under section 26 in respect of the impugned Directive in the same manner P.U(A) 305/1984 was made.

[125] The issuance of the impugned Directive is undoubtedly outside the ambit of section 26.

[126] There is a clear lack of statutory power to make and issue the impugned Directive under Act 301.

[127] Therefore, the impugned Directive cannot be a subsidiary legislation that has legislative effect made in the purported exercise of the powers under Act 301.

[128] The Minister must understand the law that regulates his decision making power and he must give effect to it. If the Minister does not follow the law that regulates the exercise of his powers, then he had acted illegally because his action had gone beyond the limits of the power prescribed by the law. In this present case, the Minister has not acted according to the law by wrongly giving himself the jurisdiction to act by misconstruing the provisions of Act 301. Consequently, there is occasioned what is described as a substantive ultra vires. MP Jain explained at page 347 –

> "In substantive *ultra vires*, the main concern of the courts is to see that the authority exercises its discretionary power according to, and within the limits set by, the statute. The first principle of the rule of law is that the authority exercising discretionary power has to act according to law; it should confine

itself within the ambit and scope of, and not exceed, the powers conferred on it by law; and if the authority steps out of the limits set by the controlling statute, then its act is invalid. The court review is based on the hypothesis that in conferring discretion, the legislature could not have intended that the concerned authority should be the sole judge of the extent of its powers. If it were so, the authority will come to enjoy a completely uncanalised power which would be the negation of the rule of law. The courts are thus obligated to ensure that no authority exceeds its powers or go contrary to law."

[129] Zainun Ali FCJ in *Indira Ghandi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 cited the Federal Court case of *Pengarah Tanah dan Galian , Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 said that the executive decision is subject to legal limits –

"[122] … At the outset, it is axiomatic that any exercise of legal power, including discretionary power, is subject to legal limits. In the celebrated pronouncement of Raja Azlan Shah CJ (as His Royal Highness then was) in *Pengarah Tanah dan Galian , Wilayah Persekutuan* (at p 148):

> Every power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised , it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great

> powers and influence, this is a most important safeguard for the ordinary citizen; so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that 'public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place' (per Danckwertts LJ in *Bradbury v London Borough of Enfield* [1967]3 All ER 434 at p 442).
>
> [123] In that case, the Federal Court held that the Land Executive Committee, being a creature of statute, possess only such power as conferred by Parliament; 'therefore when a power vested in it is exceeded any act done in excess of the power is invalid as being ultra vires' (at p 148)."

[130] In the premises, I hold that the applicant is entitled to the declaration sought that the impugned Directive is invalid. In this case, an error in law had occurred when the respondents had treated the impugned Directive as being validly made under Act 301 when it was not justified or authorized by any provision of the said Act, and in allowing its enforcement under section 9 (1) of the same Act.

[131] Even if it is said that the impugned Directive is purely administrative (which is not the position taken by the respondent), the Minister is at no liberty to have unfettered discretion as to what he wishes to do. His decision is still constraint to legal limit and to the control of the court. In this instant case, the power under Act 301 was exercised in excess of jurisdiction. The court is duty bound to intervene so as to keep the

Minister in his place and not to act arbitrarily (see *Pengarah Tanah dan Galian , Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd, supra).*

[132] The impugned Directive stands without any statutory backing and certainly cannot prevail over P.U (A) 134/1982. In the case of *C.L. Verna V State of Madhya Pradesh*, A.I.R. 1990 S.C. 463, a government notification was struck down as ultra vires a statutory rule. The Supreme Court held that an administrative instruction can supplement a statute but it cannot compete with a statutory rule and if there be contrary provisions in the rule the administrative instructions must give way and the rule shall prevail.

[133] Thus, the end result is that the impugned Directive is illegal, unlawful and is a nullity for want of jurisdiction

[134] What is the effect of a nullity? In *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37, a land matter, Abdoolcader J speaking for the Federal Court held at page 39 -

> "The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon, - in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v Bell's Asbestos and Engineering Ltd.,* Lord Diplock L.J (now a Law Lord) said (at page

736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.

Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the reason may appeal 'but he is not bound to (do so) , because he is at liberty to treat the act as void'. [*Birmingham (Churchwardens and Overseers) v Shaw* (at page 880 *per* Denman C.J.)]. In *Barnard v National Dock Labour Board* it was said that, as a notice of suspension made by the local board was a nullity, 'the fact that there was an unsuccessful appeal on it cannot turn that which was a nullity into an effective suspension' (at page 34 *per* Singleton L.J.) Ridge v Baldwin is to the same effect.

Lord Denning said in Director of Public Prosecutor v Head (at page 111) that if an order was void, it would in law be a nullity and there would be no need for an order to quash it as it would be automatically null and void without more ado.."

[135] Applying the principle enunciated in the case above, the impugned Directive is devoid of any legal effect whatsoever from the inception. It follows that the prohibition on the use of the 4 words imposed by the impugned Directive cannot be legally sustained.

[136] It is noteworthy to reproduce again how learned author MP Jain described the effect of a subsidiary legislation that is found to be void as being ultra vires the parent Act -

> "The judgment of a court that any piece of delegated legislation is void as being ultra vires the parent Act or inconsistent with any Act or the Constitution renders it incapable of ever having had any legal effect upon the rights and duties of the parties to the proceedings. Although such a decision is directly binding only as between the parties to the proceedings in which is was made, because of the doctrine of precedent, the benefit of the decision accrues to all other persons whose legal rights have been interfered with in reliance on the law which the delegated legislation purported to declare."

[137] The statement above is self- explanatory on the legal impact of the impugned Directive found to be void and a nullity.

[138] The decision in making and issuing the impugned Directive is also irrational and perverse when there was a total disregarded to the fact that the impugned Directive would be in direct conflict with P.U (A) 134/1982. A matter which the Minister ought to have taken into account and which he did not.

[139] I accept that P.U.(A) 134/1982 relates to the AlKitab. The impugned Directive relates to an absolute prohibition on the use of the 4 words in all Christian publications, and by necessary implication the prohibition would

include the Alkitab. As the impugned Directive presumably refer to future publications, i.e. from 5.12.1986 and thereafter, what happen then to the printing, *etc*. permitted by P.U (A) 134/1982 for the possession and use of the AlKitab which carries the word "Allah" within the confines of churches, which has the force of law indefinitely until the said Order is revoked?

[140] Next, how could the Minister not conforming to the Cabinet's policy decision and substituted it instead by imposing a total prohibition on the 4 words in the Christian publications?

[141] It is obvious that the impugned Directive is fraught with issues. In the circumstances, it is my finding that the decision in imposing such prohibition had not passed the test of Wednesbury principle of reasonableness in *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1984] 1 KB 223. The decision of the Minister is so outrageous in its defiance of logic that no sensible person could have arrived at the decision he had made.

Public Order Issue

[142] As mentioned earlier, public order form the underlying basis the impugned Directive was made.

[143] Whether public order justify the making of the impugned Directive is no longer relevant in view of my finding that there is a clear lack of power to issue the impugned Directive under Act 301. However, for completeness, I shall proceed to analyze the arguments by both parties on this subject.

[144] Learned SFC submitted that 'potential disruption of the even tempo of the community' is a basis to restrict the fundamental liberties of freedom of expression and freedom to practice one's religion. It is so when any particular activity comes within the scope of being prejudicial to public order.

[145] This means that when such exercise of discretion by the Minister becomes a subject of a judicial review, it is the duty of the court to execute a balancing exercise between the requirement of national security and public order with that of the interest and freedom of an individual. As a general principle, as decided by case law, the courts will give great weight to the views of the executive on matters of national security.

[146] I am mindful of high authorities on the unsuitability of judicial review on matters related to national security or public order or tranquillity. The legal proposition distilled from these authorities is that the assessment whether the contents of the publication is likely to be prejudicial to public order is within the realm of the executive who has access to the relevant information and thus in this case, it is the Minister and not the court. In

Council for Civil Service Unions & Ors v Minister of Civil Service [1985] AC 374, Lord Fraser said at p 402 –

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

> (see the Federal Court cases of *Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs) Malaysia* [1969] 2 MLJ 129, *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2004] 1 CLJ 81 and *Darma Suria Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 CLJ 300

[147] In *Darma Suria Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 CLJ 300 the Federal Court held that an act is prejudicial to public order if it disrupt or has the potential to disrupt public safety and tranquility. Gopal Sri Ram JCA said –

> [11] In our judgment whether an act of smuggling is prejudicial to public order depends on the facts and circumstances of each case. If it disrupt or has the potential to disrupt the even tempo of the life of the community it would prejudice public order. It would also come within the scope of public order where it disrupt or has the potential to disrupt public safety and tranquility."

[148] The Federal Court in this case said that the phrase " likely to be prejudicial to public order " does not necessarily refer to the existence of

actual public disorder because public disorder include anything potential to disrupt public disorder.

[149] What is the correct test to be adopted in reviewing the impugned Directive? In *Darma Suria, supra* it was observed by the Federal Court that in determining whether an act may fall under public order or otherwise -

> " …. The true test is not the kind, but the potentiality of the act in question…"

[150] By the Federal Court decision in *Darma Suria*, *supra* the issue whether there must first be evidence of actual occurrence of public disorder or disturbance to public order or that such occurrence is imminent, is not the correct test in determining the legality of the impugned Directive. This is due to the fact that the term prejudicial by itself would cover a situation where the potentiality of the act to disturb the even tempo of life would suffice.

[151] There is no doubt that the authorities mentioned above are binding on this Court.

[152] However, high authorities also showed that in the exercise of its judicial review powers, the court requires that there ought to be adequate, reliable and authoritative evidence.

[153] Learned counsel for the applicant referred this Court to the Supreme Court case of *J.P. Berthelsen v Director General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134, the House of Lord case of *Bugdaycay* v *Secretary of State for the Home Department* [1987] 1 AC 514, the Singapore Court of Appeal of *Chng Suan Tze v The Minister of Home Affairs & Ors and other appeals* [1988] 1 SLR 132; [1989] 1 MLJ 69) and the Federal Court case of *Mohamad Ezam Mohd Noor* v. *Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309 to support the contention that public order and even national security claims are reviewable by the High Court in the exercise of its judicial review powers. The High Court in this case requires that there ought to be adequate, reliable and authoritative evidence.

[154] In *J.P. Berteelsen*, *supra,* the Supreme Court at page 138 held –

> "We would add that in any event adequate evidence from responsible an authoritative sources would be necessary on the security as aspect and no relieance can be placed in that regard on a mere *ipse dixit* of the first respondent to that effect in the notice of cancellation of the employment pass which the learned Judge purported to accept without more ado."

[155] The House of Lords in *Bugdaycay, supra,* it was reported at the headnote at page 516 -

> "…although the question whether there was a danger that the removal of a person claiming refugee status to a third country would result in his return to the country where he feared persecution lay exclusively within the jurisdiction of the Secretary of State, that question had not been adequately considered by

him in relation to M. and the decision to remove him having been made without considering the evidence adduced of such danger, the order would be quashed."

[156] In delivering the above judgment in *Bugdaycay,supra*, Lord Templeman stated as follows at pages 537 to 538 -

"In my opinion where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process. In the case of Mr. Musisi, a first reading of the evidence filed on behalf of the Secretary of State and Mr. Musisi, gives rise to a suspicion that the dangers and doubts involved in sending Mr. Musisi back to Kenya have not been adequately considered and resolved. As a result of the analysis of the evidence undertaken…I am not satisfied that the Secretary of State took into account or adequately resolved the ambiguities and uncertainties which surround the conduct and policy of the authorities in Kenya. With relief I gratefully concur in the reasoning of my noble and learned friend, Lord Bridge of Harwich, and agree that the orders made in respect of Mr. Musisi should be quashed."

[157] In *Chng Suan Tze, supra* the Court of Appeal held at page 83 –

"It is clear that where a decision is based on considerations of national security, judicial review of that decision would be precluded. In such cases, the decision would be based on a consideration of what national security requires, and the authorities are unanimous in holding that what national security *requires* is to be left solely to those who are responsible for national security: *the Zamora* and *GCHQ* case. However, in these cases, it has to be

shown to the court that considerations of national security were involved. Those responsible for national security are the sole judges of what action is necessary in the interests of national security, but that does not preclude the judicial function of determining whether the decision was in fact based on grounds of national security.".

"…although a court will not question the executive's decision as to what national security requires, the court can examine whether the executive's decision was in fact based on national security considerations…"

[158] The Federal Court in *Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309 applied the same principle in *Chng Suan Tze, supra.* In delivering the judgment of the Federal Court, Steve Shim CJ (Sabah & Sarawak) stated at page 345 as follows:

"Here, the court is entitled to inquire into the basis for the detaining authority's reason to believe that the appellants had acted or were about to act or were likely to act in a manner prejudicial to the security of Malaysia. As I have said before, on the basis of the affidavits filed by the respondent, there is nothing to indicate or suggest the existence of any material particulars or evidence in support of the detaining authority's reason to believe in terms of s 73(1)(b) aforesaid."

[159] Thus, adequate evidence from responsible and authoritative sources is necessary on the public order aspect.

[160] It is obvious that from the evidence filed in the affidavits of the respondents, there is no adequate, reliable and authoritative evidentiary basis for the impugned Directive. It is to be noted that although the Minister indicated that the basis for the making of the impugned Director was on the ground of public order but he did not provide any supporting reasons. There was no affidavit evidence of any disruption or any potential to disrupt the public order before and at the material time when the impugned Directive was made or even when the Cabinet made its policy decision. The respondents did not cite any particular case of public disorder.

[161] In my view, this Court must not readily accept the *ipse dixit* of the Minister. The only reason advanced by the Minister that the use of the word "Allah" had caused confusion and religious sensitivity leading to the purported perceived threat to public order, was the impact of the decision in the High Court Judicial Review Application No. R1-25-28-2009 (the High Court case of *Titular Roman Catholic Archbishop of Kuala Lumpur, supra*) as found in paragraph 8 of Encl.15 –

> "8. Saya ingin menyatakan bahawa Mahkamah Yang Mulia ini boleh mengambil pengiktirafan kehakiman ("judicial notice") bahawa terdapatnya ancaman berhubung isu kalimah Allah sebagaimana impak yang berlaku akibat keputusan kes Mahkamah Tinggi Kuala Lumpur dalam Permohonann Semakan Kehakiman No. R1-25-28-2009 antara Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & 1 Lagi pada 31 Disember 2009 berhubung penggunaan kalimah Allah dalam Majalah "Herald- the Catholic Weekly" yang telah menimbulkan kekacauan, huru

hara, kemarahan , ketidaktenteraman awam dan mengancam keselamatan rakyat.",

[162] The Minister was making *ex post facto* justification of public order and asking this Court to take judicial notice over the untoward incidents which took place well past 2 decades from the date of the Cabinet's policy decision and the impugned Directive. However, nothing really turns on the judicial notice point. The subject matter was not pursued as it was not submitted on by Learned SFC.

[163] I agree with learned counsel for the applicant that a decision-maker must act on facts, information and materials available to the decision-maker at the time of the decision. The Minister's averment represents an *ex post facto* attempt to create an evidential basis for the impugned Directive where none exists.

[164] It is not disputed that Bahasa Malaysia has been the lingua franca for the native peoples of Sabah and Sarawak living in their home States and in West Malaysia. Taking the evidence adduced in this judicial review as a whole, as can be discerned from the affidavits filed by the applicant in Encl.3 and several other affidavits including the affidavits in Encls. 7, 29, 34, 37, 43, 44 and 45, all of which have not been refuted, it cannot be disputed that the Christian community of Sabah and Sarawak have been using the word "Allah" in Bahasa Malaysia for the word for God for

generations in the practice of their religion in the profession and practice of their Christian faith. It is also an established fact that the word "Allah" that has been used, has not caused problems leading to public disorder.

[165] The uncontroverted historical evidence that the use of the word "Allah" by the applicant and her Christian community in Sarawak was over 400 years, since the year 1629, cannot be ignored. Before this Court, there was absence of evidence of public disorder in all these years, just like the two years in the case of *SIS Forum (Malaysia) v Dato ' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri)* [2010] 2 MLJ 377, which concerns a book published by SIS Forum entitled Muslim Women and the Challenge of Islamic Extremism which was banned by the Minister who acted under section 7 (1) of Act 301 on the ground of public order, after the book was in circulation for over two years in Malaysia.

[166] If the ground of public order failed, the only other ground that the Minister relied on in the making and issuance of the impugned Directive was to avoid confusion and misunderstanding that could arise if the common word "Allah" is used by both the Muslim and Christian communities. This, he claimed may affect peace and harmony. It was so asserted but the Minister did not say how, where and when such confusion and the misunderstanding has broken our peace and tranquility.

[167] Three Muslims deponents, Syahredzan Johan, Dr Aziz Bari and Azmi Sharom had in their affidavits stated that they were not confused by the use of the word “Allah” by the Christians. In the face of their depositions, it is for the respondent to bring forward people who say that they were confused when the Christians use the word “Allah”. None was forthcoming. But of course notwithstanding there being no affidavit filed, common sense dictates that the three deponents cannot possibly represent the Muslims in the country to show that there is no such confusion. To me, the affidavits by the three deponents served to illustrate that there cannot be confusion to the extent that required a total prohibition to be imposed. The Cabinet’s policy decision “Dengan syarat di kulit luar (muka depan) buku-buku itu ditulis perkataan “UNTUK AGAMA KRISTIAN” negate any suggestion to that effect.

[168] As there is no shred of evidence on any alleged confusion or misunderstanding leading to public disorder shown by the respondents, that reason too must fail.

[169] Even post the date of the impugned Directive, the Ten Point Solution is an instance which clearly show that there is no public order issue or threat to public order.

Ten Point Solution

[170] The Ten Point Solution was set out in a letter dated 14.4.2011 from the then Prime Minister to the Christian Federation of Malaysia (see exhibit "TKB-1"). The letter showed that the Government came up with the Ten Point Solution following discussion held with the Christian Federation of Malaysia and other Christian groups to resolve the Bahasa Malaysia/Indonesia Bible and also other religious issues. The Ten Point Solution was a Cabinet decision.

[171] It appears that this is not the first time the Ten Point Solution was raised and canvassed in court. According to learned counsel for the *amicus curie* Encik Haniff Khatri, a motion was filed by the Roman Titular Archbishop of Kuala Lumpur to set aside the notice of appeal in the *Titular Roman Catholic Archbishop of Kuala Lumpur* case. He was one of the counsel appearing before the Court of Appeal. One of the grounds ventilated was the validity of the Ten Point Solution. The Court of Appeal dismissed the motion.

[172] In summary, the Ten Point Solution demonstrated the Cabinet's acceptance and acknowledgment that the usage of the word "Allah" is never an issue in Sabah and Sarawak and the Christians are allowed to use the word in the 2 States without restrictions. For that matter, in recognition of the large Christian community in Sabah and Sarawak, there are no conditions that are attached to the importation and local printing of

the Bible in all languages, including Bahasa Malaysia, Bahasa Indonesia and indigenous languages. However for West Malaysia, taking into account the interest of the larger Muslim community there, the Bibles in Bahasa Malaysia or Bahasa Indonesia imported or printed will have the words "Christian Publication" and the "cross" sign printed on the front covers. By doing this, one will not be confused that this is a Christian publication. The end result, as submitted by the learned SFC, is that the Ten Point Solution has in fact settled the qualms of the applicants and her fellow congregation.

[173] I have reason to believe, premised on the submissions of both parties, that the Ten Point Solution is an all encompassing religious tolerance initiated by the Cabinet that may provide the solution to end the long standing religious controversy as there seems to me to be a consensus between the parties in resolving rather than entering into religious debates and polemic on the use of the word "Allah".

[174] However, despite the strong commitment shown by the Cabinet, the impugned Directive was allowed to remain and has never been withdrawn till to date. Even after nearly a decade following its announcement, the uncertainty continues as to whether the Ten Point Solution would ever be effectively implemented. If the Cabinet had withdrawn the impugned Directive when the announcement on the Ten Point Solution was made, there would really be no serious dispute before this Court anymore.

[175] The Ten Point Solution certainly cannot remedy the illegality of the impugned Directive. As submitted by Encik Haniff Khatri, it has no force of law. The Ten Point Solution in my view has no bearing to this proceedings other than to show that it was devised not because of issues pertaining to public order or threat to public order. A closer look at the opening words of the Prime Minister's letter - " As we are all aware, the impounding of the Bible in Bahasa Malaysia/ Indonesia has triggered concerns and tensions within the country which we have to address urgently to prevent these from escalating any further." – clearly indicates that the concern of the Government then was over the impounding of the Bibles by the second respondent's officers. There could not be any issue of public order or threat to public order if the Cabinet alone that have access to the necessary information on national security, have taken a much more liberal approach in manning the religious issues compared to the position previously taken as demonstrated in P.U (A) 134/1982.

[176] To conclude on this issue of public order or threat to public order, I find that the evidence taken in totality show that the respondents' ground of public order for the issuance of the impugned Directive, is not supported. The first respondent's reliance on public order or threat to public order in making the impugned Directive is irrational and perverse.

Constitutional Issues

[177] I make a note that learned counsel for the applicant have undertaken extensive researches into the legislative history of the Merdeka Constitution of 1957 and subsequently of the Malaysian Constitution of 1963. The documents presented to this Court consists of the following: (a) the Report of the Federation of Malaya Constitutional Commission 1957; (b) the White Paper on the Constitutional Proposals for the Federation of Malaya; (c) the Malaysia and Sarawak dated 4.1.1962 (Government Paper) published by the authority of the Government of Sarawak; (d) the North Borneo and Malaysia dated 31.1.1962 (Government Paper) issued by the authority of the Government of North Borneo; (e) the Memorandum on Malaysia submitted by the Malaysia Solidarity Consultative Committee dated 3.2.1962; (f) the Report of the Commission of Enquiry, North Borneo and Sarawak, 1962 (Cobbold Commission Report); and (g) the Report of IGC set up to work out the constitutional arrangements for the new Malaysian Federation including safeguards for the special interests of Sabah and Sarawak. This is to demonstrate that the States of Sarawak and Sabah were guaranteed the freedom of religion before they joined the Federation. These are uncontroverted documents.

[178] The starting point on the issue of constitutionality of the impugned Directive is this question, whether the declaration sought ought to be granted in view of the fact that the impugned is a nullity from the inception, whether it would have served any purpose ?

[179] The remedy of declaration under section 41 of the Specific Relief Act is discretionary in nature. The Court of Appeal in *Sakkapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee)* [1998] 4 MLJ 651) held that while the power to make a declaration is almost unlimited yet, the remedy of declaration may be refused upon settled principles and there is a wide variety of circumstances in which declaratory relief may be denied in the exercise of discretion. Among others, upon an issue which is of no practical consequence (*Lim Kim Cheong v Lee Johnson* [1993] 1 SLR 313).

[180] In *Hassan Bin Marsom & Ors v Mohd Hady bin Ya'akop* [2018] 5 MLJ 141, the case which involved a custodial assault and police brutality against the respondent who was suspected to be involved in a crime which never was, the issue of when the court is said to seize with power to grant the declaration sought, was canvassed by the Federal Court. Balia Yusof FCJ made the following observation at page 182 – 184 that "the power to grant a declaration has been stated by Raja Azlan Shah Ag LP (as His Lordship then was) 'to be exercised with a proper sense of responsibility and after a full realization that judicial pronouncement ought not to be issued unless there are circumstances that properly call for their making' (see: *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1MLJ 29)."

[181] It is apparent that the applicant has enjoyed the freedom to import the AlKitab and other religion materials before the issuance of the impugned Directive. There is no evidence before this Court of any restriction.

[182] In *Hassan Bin Marsom, supra,* the Federal Court held that " The law wills that in every case where a man is wronged he must have a remedy. More so when his constitutional rights have been infringed..".

[183] Likewise, the applicant has been wronged by the respondents acting in excess of their jurisdiction and her constitutional rights have been infringed, a matter that will be discussed next. There is no reason for me to deny the applicant of the declaration that the impugned Directive is unconstitutional.

[184] The amended paragraph (c) and paragraph (d) are taken together.

[185] In the amended paragraph (c), the applicant sought a declaration that pursuant to Articles 11, 3, 8 and 12 of the FC, it is her constitutional rights to import the 8 CDs in the exercise of her right to practice her religion and her right to education.

[186] In paragraph (d), the applicant sought a declaration that pursuant to Article 8, she is guaranteed equality of all persons before the law and is protected from discrimination against citizen, on the grounds of religion in the administration of the law i.e. Act 301 and Act 235.

[187] It is not the applicant's contention that section 9 of Act 301 is in contravention of Article 8 of the FC and is therefore unconstitutional. The contention is that it is the application of section 9 (1) of Act 301 which purportedly empower the Minister to issue and enforce the impugned Directive, that is said to be unconstitutional. It is further contended that section 9(1) of Act 3012 does not authorize the Minister to intervene in religious freedom at all because it is not a general law affecting public order.

[188] On the issue of discrimination, the applicant said that she was discriminated on the ground of religion in the administration of Act 301. The claim for the discrimination arose from the exercise of powers under section 9 (1) of Act 301 based on the prohibition imposed by the impugned Directive.

[189] In gist, learned SFC's submission in opposing the declaratory reliefs sought are as follows. There cannot be any violation of religious freedom because the right to freedom of religion is not absolute as it is still subject to general law relating to public order pursuant to Article 11

(5) of the FC. It is here that Act 301 comes into play. Act 301 is a federal law provided for by Art 11 (5) that relates to public order.

[190] It was further submitted that Act 301 gives the power to the Minister to exercise his discretion when it comes to any publication which he feels is prejudicial to public order and which he did exercise in this case, by complying with the impugned Directive which was issued by the Government and which still stand until now.

[191] There is no issue of any discrimination in violation of Article 8 of the FC as section 9 (1) of Act 301 applies to all publications and everyone is still subject to the law. Under Act 301, regardless of whether you are a Muslim or a Christian, if the Minister feels that the publication will prejudice public order, the ban will be imposed. Learned SFC cited the case of *ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor; Kerajaan Malaysia & Anor (Intervener)* [2015] 8 CLJ 621 and *Mohd Faizal Musa v Menteri Keselamatan Dalam Negeri* [2018] 9 CLJ 496 which involved Muslims and their books were banned, in support of his argument that the applicant and her community are not discriminated on the ground of religion under Act 301.

[192] I have considered the facts and argument in totality. My analysis is as follows.

[193] Article 3 of the FC provides in Clause (1) that Islam is the religion of the Federation but other religions may be practiced in peace and harmony in any part of the Federation. It also provides in Clause (4) that nothing in this Article derogates from any other provision of the FC.

[194] Article 3 (1) does not override Article 11(1). Eminent author Prof Dr Shad Saleem Faruqi in his book Document of Destiny: The Constitution of the Federation of Malaya (Star Publications (Malaysia) Berhad, 2008) at page 346 mentioned that this means constitutional rights in Articles 10,11 and 12 are not extinguished despite the adoption of Islam as the religion of the Federation.

[195] In the most recent pronouncement on Article 11 of the FC in *Ketua Pegawai Penguatkuasa Agama & Ors v Maqsood Ahmad & Ors* [2020] 10 CLJ 748, the Court of Appeal made the following observation:

> "[86] This right to freedom of religion is sacrosanct, and distinct from other fundamental liberties for several reasons. For one, Article 11 (1) unlike say Articles 9 and 10, applies to every 'person' as opposed to every 'citizen'. Further, Article 11 does not have a "derogation clause" (using the term loosely) similar to those contained in the phrase " save in accordance with law" common to Articles 5 and 13. Even Article 8(1) is subject to limits based on the reasonable classification test first propounded by the Federal Court in *Mohamed Sidin v Public Prosecutor* [1966] 1 LNS 107; [1967] 1 MLJ 106 read together with the express permissible exceptions enumerated in that Article permitting discrimination in certain situations.

[87] Indeed, even in international human rights law, the freedom of religion is generally considered a non-derogable right. Just to emphasise our point, the Human Rights Committee observed in respect of Article 18 of the International Covenant on Civil and Political Rights (ICCPR) in General Comment No.22 as follows, at paragraph 1:

> The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18.1 is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others. The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief. **The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4.2 of the Covenant.**
>
> (emphasis added)

[88] The same applies in Malaysia. So sacrosanct is the right that even Article 150 (6A) of the Federal Constitution prohibits Parliament from making laws which seek to curtail the freedom of religion even during times of emergency. The said Article reads:

> "Clause (5) shall not extend the powers of Parliament with respect to any matter of Islamic law or the custom of the Malays, or with respect to any matter of native law or customs in the State Sabah or Sarawak; nor shall Clause (6) validate any provision inconsistent with the provisions of this Constitution relating to any such matter or relating to religion, citizenship, or language."

[89] The only restrictions the Federal Constitution authorizes in respect of the freedom of religion is in Article 11(4) and 11 (5)..”

[196] Thus, there no such power to restrict religious freedom provided in Article 11 of the FC other than the restrictions set out in Clauses (4) and (5). Clause (4) provides that State legislatures may through State laws control or restrict the propagation of any doctrine or belief to persons professing Islam. Clause (5) provides that the religious rights conferred by Article 11 do not authorize any act contrary to any general law relating to public order, public health or morality. In this regard, there must be a general law that regulate public order, public health or morality.

[197] I am unable to agree with learned SFC that Act 301 is one of the laws that is envisaged by Article 11 (5) of the FC for reasons which has been alluded to earlier and I do not intend to repeat them.

[198] Freedom of religion is not subject to Article 149 and 150 powers. This means religious freedom is absolutely protected even in times of threats to public order. Prof Dr Shad Saleem Faruqi said in Document of Destiny, at page 331-332 the following:

“Limits on Article 149 powers: A preventive detention order cannot be issued on the ground that a convert out of Islam is involved in a programme for propagation of Christianity amongst Malays: Minister v Jamaluddin bin Othman.

This is because the Internal Security Act is derived from Article 149 . Under Article 149 Parliament is authorized to violate Article 5 (personal liberty), Article 9 (freedom of movement), Article 10 (freedom of speech, assembly and association) and Article 13 (right to property). Freedom of religion in Article 11 is not subject to the special powers under Article 149. The *Jamaluddin Othman* decision is a stirring affirmation of the limits of Article 149 powers and the sanctity of religious freedom.

Limits of Article 150 powers: Even in times of emergency when Parliament's powers are greatly enhanced, Article 150 (6A) provides that freedom of religion cannot be restricted by an emergency law under Article 150."

[199] In *Jamaluddin Othman v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* case [1989] 1 MLJ 418, the Supreme Court held that the detention of a person without trial is permitted under the Internal Security Act 1960 but the detention will however be unconstitutional when used against persons practicing their religion. The facts as appeared in the headnote show the following. The respondent was detained pursuant to an order made under section 8(1) of the Internal Security Act 1960. According to affidavit of the Minister of Home Affairs, he was satisfied that the detention of the respondent was necessary with a view to preventing him from acting in a manner prejudicial to the security of Malaysia. The ground for detention stated that the respondent was involved in a plan or programme to propagate Christianity among the Malays and it was also alleged that the activities of the respondent could give rise to tension and enmity between the Muslim community and the Christian community in Malaysia and could affect national security. On an application by the respondent for habeas

corpus, the trial judge took the view that the Minister has no power to deprive a person of his right to profess and practise his religion which is guaranteed under art 11 of the FC and therefore if the Minister acts to restrict the freedom of a person from professing and practicing his religion, his act will be inconsistent with the provision of art 11 of the FC and therefore any order of detention would not be valid. He therefore ordered the release of the respondent. The Minister appealed. The Supreme Court dismissed the appeal and held at page 419 and 420 –

> "Without hesitation we say that we agree wholeheartedly with the sentiment expressed by the learned judge. However, to get our perspective right we feel obliged to add a rider to what the learned judge said. His Lordship's ruling must be read subject to the following. The freedom to profess and practice one's religion should not be turned into a licence to commit unlawful acts or acts tending to prejudice or threaten the security of the country. The freedom to profess and practice one's religion is itself subject to the general laws of the court as expressly provided in cl (5) of art 11 of the Federal Constitution.....
>
> In the present case we are of the view that the grounds for the detention in this case read in the proper context are insufficient to fall within the scope of the Act. The guarantee provided by art 11 of the Constitution, i.e. the freedom to profess and practice one's religion, must be given effect unless the actions of a person go well beyond what can normally be regarded as professing and practicing one's religion."

[200] The sole basis for the confiscation by using the power under section 9 (1) of Act 301 was the reliance on the prohibition imposed by the impugned Directive. As the Minister had unlawfully issued the impugned Directive under Act 301, which has been found to be a nullity, the Minister had unlawfully exercised the power section 9 (1) of Act 301 to enforce the impugned Directive.

[201] In light of the judgment in *Jamaluddin bin Othman*, *supra,* in my view, the act of the respondents' officer to prohibit the importation of the 8 CDs on the ground of the impugned Directive would be inconsistent with the provision of Article 11 of the FC and would not be valid unless the applicant's action was shown to go well beyond what can normally be regarded as professing and practising her religion.

[202] There was no dispute that the 8 CDs were for her personal religious edification. There was no evidence whatsoever to indicate that her importation of the 8 CDs went well beyond what can normally be regarded as professing and practising her religion. Right to profess and practise one's religion should include right to the religious materials. In *Jones v Opelika* [1941] 316 US 584, it was held that the right to profess and practise one's religion encompasses the right to have access to religious materials.

[203] It is my judgment that the prohibition in the impugned Directive offends the provision of Articles 11 (1) of the Federal Constitution. Thus, the applicant is entitled to the declaration sought in the amended paragraph (c).

[204] It is also my finding that the applicant is entitled to the declaration sought in paragraph (d). The discrimination by the first respondent was apparent from the outset. The Cabinet's policy decision that had allowed the use of the 4 words subject to the specific conditions, was converted into an absolute prohibition for reasons best known to the Minister. Learned SFC's submission that the intention of the impugned Directive was to avoid conflict between the Christian and Muslim community and the confusion among the Muslims, taking into account the Muslim population in West Malaysia, and not meant to target the applicant because Christians in Sabah and Sarawak are not restricted to use the word "Allah", is of no consequence. The confiscation of her 8 CDs would not have taken place if that was the intention of the impugned Directive.

[205] I am unable to agree with learned SFC that the declaration sought by the applicant is hypothetical or premature as she has yet to be deprive of any such importation. She has been deprived before and there is no assurance that it may not happen again. The declaratory order will eliminate anxiety of the applicant having to live under a cloud of fear and uncertainty (see *Datuk Syed Kechik Bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101).

Conclusion

[206] Based on the foregoing, I grant the applicant the declarations sought in prayers (c) and (d) and (d) B. I made no order on the consequential order for reasons which I have set out earlier in this Judgment.

[207] In line with the standard judicial practice in cases concerning public interest cases, I made no order as to cost.

Dated 17 March 2021

SIGNED

NOR BEE BINTI ARIFFIN

JUDGE

Counsel

For the Applicant

Lim Heng Seng
Annou Xavier
Tan Hooi Ping

Azri, Lee Swee Seng & Co
Unit 210, Level 2, Block A
Pusat Dagangan Phileo Damasara 2
Jalan 16/11 off Jalan Damansara
43650 Petaling Jaya
Selangor

For the Respondents

SFC Shamsul bin Bolhassan

Peguam Negara Malaysia
45, Persiaran Perdana, Presint 4
62100 Putrajaya
Wilayah Persekutuan

Amicus Curiae

Hanif Khatri for MAIS & MIWP

No.26, Tingkat Atas,
Jalan Camar 4/3
Seksyen 4, Kota Damansara
47810 Petaling Jaya
Selangor

Zirwatul Hanan binti Abdul Rahman for MAIS

Azaine & Fakhrul
Unit No. C07/3
4th Floor, Block C, Garden City Business Centre
Taman Dagang
68100 Ampang
Selangor

Watching Brief

Dato' SC Lim on behalf of MCA with Chew Sin Chi
Rodney Koh on behalf of SIB Semenanjung
Andrew Khoo Chin Hock on behalf of Persekutuan Kristian Malaysia (Christian Federation of Malaysia)
Cyrus Tiv Foo Woei on behalf of Majlis Peguam Malayisa
Stanislars Cross on behalf of Catholic Lawyers' Society Kuala Lumpur