IN THE COURT OF APPEAL OF MALAYSIA

Coram: Ahmadi Asnawi, JCA; Ong Lam Kiat Vernon, JCA; Abdul Karim Abdul Jalil, JCA

Kerajaan Negeri Selangor v Suruhanjaya Pilihan Raya and 2 Others

Citation: [2018] MYCA 241 **Suit Number:** Rayuan Sivil No. W-01(A)-486-12/2017

Date of Judgment: 23 July 2018

Administrative law – Judicial review – Section 4 Notice containing the proposed recommendations of the Election Commission's review of the division of the Federal and State constituencies in Selangor – Judicial review application by Selangor state government to impugn the Section 4 Notice

Constitutional law – Whether the proposed recommendations by the Election Commission violated Article 113(2) read together with paragraphs (c) and (d) of section 2 of the Thirteenth Schedule of the Federal Constitution as they allegedly malapportioned and gerrymandered constituencies in the state of Selangor – Whether the proposed recommendations of the Election Commission subject to judicial review – Whether the complaints of malapportionment and gerrymandering subject to judicial review

Administrative law – Judicial review – Whether the proposed recommendations based on the current electoral rolls as required by section 3 of the Thirteenth Schedule of the Federal Constitution – Whether the complaint that the Election Commission failed to use the 'current electoral rolls' justiciable – Whether the information provided by the Election Commission in its proposed recommendations inadequate, and if, whether such inadequate information violated the rules of natural justice and legitimate expectation of the voters, the local authorities and the government of the state

Litigation & court procedure – Whether the appellant state government has the locus standi to make the judicial review application under Order 53 of the Rules of Court 2012

JUDGMENT

INTRODUCTION

[1] On 15.9.2016, the EC published a "Notice of Proposed Recommendation for the Federal and State Constituencies in the States of Malaya as reviewed by the Election Commission in 2016" **('the Section 4 Notice')** pursuant to clause (2) of Article 113 of the **Federal Constitution** and section 4 of the **Thirteenth Schedule** therein.

[2] The Selangor State Government applied by way of judicial review to impugn the Section 4 Notice containing the proposed recommendations of the Election Commission's ('**EC**') review of the division of the Federal and State constituencies in Selangor. The application for judicial review was dismissed by the High Court on 7.12.2017. This is the Selangor State Government's ('**the appellant**') appeal against the decision of the High Court dismissing their application for judicial review.

[3] We heard arguments of counsel on 27.3.2018 and delivered our decision on 29.3.2018. The full grounds for our decision are set out hereunder.

AT THE HIGH COURT

[4] At the High Court, the appellants advanced four main grounds to challenge the Section 4 Notice:

(i) The proposed recommendations violated article 113(2) of the **Federal Constitution**, read together with paragraphs (c) and (d) of section 2 of the **Thirteenth Schedule** to the **Federal Constitution** as it has resulted in malapportioned and gerrymandered constituencies in the state of Selangor;

(ii) The proposed recommendations are not based on the current electoral rolls, as required by section 3 of the **Thirteenth Schedule**;

(iii) The electoral roll used by the EC in the delimitation exercise is defective as there are 136,272 voters on the electoral roll in respect of which there are no addresses on the record of the roll; and

(iv) there was inadequate information and insufficient particulars in the Section 4 Notice, which impaired the rights of voters to make meaningful representation in response to the notice and which made the right to make such representations merely illusory. As such, it violated the rules of natural justice and the legitimate expectation of voter in the State of Selangor, the local authorities and the government of the state.

[5] The decision of the learned judge is premised on the following main grounds:

(i) The allegations of malapportionment and gerrymandering of the constituency boundaries have been made out by the appellant. However, the exercise of the discretion of the EC to frame recommendations to the Prime Minister in exercise of its responsibilities under the Constitution is non-justiciable on the authority of (**Peguam Negara Malaysia v Chan Tsu Chong** [2018] 1 MLJ

409 (CA); **M Kula Segaran v Suruhanjaya Pilihan Raya Malaysia** [2017] MLRAU 399 (CA)). The proposed recommendations issued by the EC did not have binding effect and that as such did not affect the rights of the appellant;

(ii) At the point when the review exercise commenced on 14.7.2016 the current electoral roll was the Principal Electoral Rolls for the Year 2015 **('the Principal Roll')** published on 13.5.2016. Neither the Supplementary Electoral Roll for the First Quarter of 2019 **('the First Supplementary Roll')** nor the Supplementary Electoral Roll for the First Quarter of 2016 (No. 2) **('the Second Supplementary Roll')** had been published yet as at that date;

(iii) The fact that the electoral roll relied upon by the EC for the purposes of its proposed recommendations in the Section 4 Notice did not record the addresses of all the electors in the state of Selangor is not in dispute. Nevertheless, the locality codes of an elector are sufficient in order for the EC to discharge its obligations under Part IV of the **Federal Constitution**. Under s 9A of the **Elections Act 1958 (EA 1958)** an electoral roll which has been certified or re-certified shall be deemed to be final and binding and shall not be questioned or appealed against or reviewed, quashed or set aside by, a court. Therefore, the correctness of an electoral roll even where the roll may not completely record the addresses of all the electors in a unit of review cannot be subject to any challenge in court (**Peguam Negara Malaysia v Chan Tsu Chong** (supra));

(iv) On the facts, the information provided by the EC in its proposed recommendations published pursuant to the Section 4 Notice was not inadequate as to warrant curial intervention.

SUBMISSION OF PARTIES

[6] On the first point relating to *locus standi* and justiciability learned counsel for the appellant argued that the learned judge having found that the allegation of malapportionment and gerrymandering was made out erred in holding that the actions of the EC were non-justiciable. Like all constitutional bodies, the EC is subject to law and must act within the mandate assigned to it under the Federal Constitution. The learned judge erred in following **Chan Tsu Chong** and **M Kula Segaran** (supra) (art. 113(1) of the **Federal Constitution**; **R v Boundary Commission Exp. Foot** [1983] 1 All ER 1099, 1102; **Mohinder Singh Gill v Chief Election Commissioner** AIR 1978 SC 851; **A C Jose v Sivan Pillai** AIR 1984 SC 321; **Digvijay Mote v Union of India** [1993] 3 SCC 175; **Election Commission of India v Ashok Kumar** AIR 2000 SC 2977; **Baker v Carr** 369 U.S. 186 (1962); **Wesbery et al v Sanders** 376 U.S. 1 (1964); **Reynolds v Sims** 377 U.S. 533 (1964); **Constituency Boundaries Commission v Baron** [2001] 1 LRC 25; **Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case** [2017] 3 MLJ 56 (FC); **Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals** [2018] MLJU 69 (FC)). The appellant has the locus standi as it is the part of the unit of review which is most affected by the delimitation exercise since 18 of its 22 parliamentary constituencies are subject to a redrawing of electoral boundaries and a mass shifting of voters within the affected constituencies including the state constituencies that fall within the parliamentary constituencies (O 53 of the **Rules of Court**

2012 (ROC 2010)).

[7] On the second point relating to the EC's failure to use the current electoral rolls, learned counsel argued that the learned judge got the cut-off date for the commencement of the delimitation exercise wrong. The meeting on 14.7.2016 was not a meeting of the EC. It was an internal meeting chaired by the Secretary of the EC; the Secretary of the EC is not one of the seven members of the EC under Article 114 of the **Federal Constitution**. The proper constitutional cut-off date is the date of the publication of the Section 4 Notice on 15.9.2017; as such the latest current electoral roll is the Second Supplementary Roll.

[8] On the third point relating to the correctness of the electoral roll, learned counsel argued that it was wrong for the delimitation exercise to be conducted in the absence of addresses. The EC was also wrong to use the locality codes to conduct the delimitation exercises. Section 9A of the **EA 1958** is not applicable to preclude the appellant from challenging the EC's conduct in proceeding with the delimitation exercise without having the address of 136,272 voters and using locality codes instead.

[9] Lastly, learned counsel argued that the Section 4 Notice has inadequate and insufficient particulars for voters to make meaningful representations in response and this has rendered their rights to make representations illusory. The legal standard of disclosure of information in a consultative process pursuant to Articles 113 and 10(1)(a) of the **Federal Constitution** includes the right to receive information (**Sivarasa Rasiah v Badan Peguam Malaysia & another** [2010] 2 MLJ 333, 344; **Mat Shuhaimi bin Shafiei v PP** [2014] 5 CLJ 22, 39; **Port Louis Corpn v A-G of Mauritius** [1965] AC 111, 1124-1125 PC; **Regina v North and East Devon Health Authority, Ex parte Coughan** [2001] QB 213, 258 CA; **R (on the application of Moseley) v Haringey London Borough Council** [2015] 1 All ER 495, 507, 511 and 512; **Browne and others v Constituencies Boundaries Commission and others** [2014] 5 LRC 385, 400).

[10] In reply, learned senior federal counsel (SFC) argued that the appeal was academic as the EC's proposed recommendations incorporated into a report under s 8 of the **Thirteenth Schedule** has been submitted to the Prime Minister to be laid before the House of Representatives pursuant to s 9 of the **Thirteenth Schedule**. As such, the EC is no longer an affected party at this stage. The matter is within the exclusive jurisdiction of the Prime Minister and the House of Representatives. As for the other issues, the learned SFC supported the findings of the learned judge and argued that the appeal should be dismissed.

DECISION

[11] For convenience, we set out hereunder the grounds of our decision:

I. Locus Standi - O 53 ROC 2012

Pursuant to O 53 only a person who is (i) adversely affected by (ii) the decision, action or omission in relation to the (iii) exercise of a public duty or function shall be entitled to make the application for judicial review. Section 5 of the **Thirteenth Schedule** lists out 3 persons who are vested with locus to

object to the proposed recommendations and they include (i) the State Government or (ii) any local authority or (iii) a body of 100 or more persons. As such we are of the view that the appellant being a State Government has the locus standi to make the judicial review application.

II. Justiciability

(a) Whether the proposed recommendations of the EC are subject to judicial review?

We agree with the learned SFC that the Notice and the proposed recommendations are not amenable to judicial review as they do not fall within the ambit of O 53 r 2(4) **ROC 2012**.

(b) Whether the complaints of malapportionment and gerrymandering are subject to judicial review?

We agree with the learned SFC that the proper forums for the objections of such complaints are at the local inquiries pursuant to s 5 of the **Thirteenth Schedule**. As such, we do not think that the acts or omissions of the EC relating to these complaints are amenable to judicial review. We also hold that notwithstanding the non-disputed allegations of malapportionment and gerrymandering, by virtue of s 9A of the **Elections Act 1958**, the Principal Electoral roll is final and binding and not amenable to judicial review.

(c) Whether the complaint that the EC failed to use the 'current electoral rolls' is justiciable? If so, whether the complaint is made out.

We agree with the observations of the learned judge that it is important to distinguish between the various specific duties of the EC under Part VIII of the **Federal Constitution**. Where the discharge of those duties involves the formulation of proposed recommendations and the exercise of its discretion to take into account the principles pursuant to s 2 of the **Thirteenth Schedule**, the actions of the EC are non-justiciable.

However, in respect of other matters mandated by the terms of the Federal Constitution, such as the obligation to receive representations and objections from qualified persons and to hold local inquiries to hear and consider such representations and objections under s 5 of the **Thirteenth Schedule**, are subject to judicial review.

In our considered view, the question of whether the EC used the current electoral rolls relates to the latter and is therefore amenable to judicial review.

The appellant's argument is that the words 'current electoral roll' means the Principal Electoral Roll for year 2015 (the Principal Roll) which was gazetted on 13.5.2016 and includes the Supplementary Electoral Roll for the First Quarter of 2016 gazetted on 19.7.2016 and the Supplementary Electoral Roll for the First Quarter of 2016 (No. 2) gazetted on 20.7.2016 (jointly referred to as 'the 1st and 2nd Supplementary Rolls'). The determination of this issue turns on (aa) the meaning of the words 'current electoral rolls', and (bb) the date the EC's review exercise commenced.

(aa) the meaning of the words 'current electoral rolls'

The words 'electoral rolls' is defined under s 2 of the **Elections Act 1958** to mean an electoral roll prepared under s 9 which is as follows:

> "**9. Preparation, publication and revision of electoral rolls.**
>
> (1) Each Registrar shall prepare, publish and revise in the prescribed manner the prescribed electoral roll for the registration area for which he is appointed.
>
> (2) The electoral roll for Parliamentary electors and State electors, shall, unless the Election Commission shall otherwise direct, be combined in a single register."

Section 9 of the **Elections Act 1958** refers to a revision of electoral rolls. In this connection, s 15 empowers the EC to make regulations for the registration of electors and all matters incidental thereto; subsection 15(2)(c) provides for the time and procedure to be followed in preparation or revision of any electoral roll. In this connection, it is also pertinent to note that reg. 9 of the **Elections (Registration of Electors) Regulations 2002** promulgated pursuant to s 15 of the **Elections Act 1958** provides as follows:

> "**9. Electoral roll for the purpose of general election or by-election**
>
> For the purpose of a general election or a by-election, the Election Commission shall determine **the last certified principal electoral roll and the supplementary electoral roll** prior to the dissolution of parliament or a State Legislative Assembly or a vacancy occurring, to be used in the general election or the by-election." [emphasis added]

It is quite clear from the provisions of Reg 9 above that the electoral rolls include the last certified principal and supplementary electoral rolls. As it is the declared intention of the regulations that the last certified principal and supplementary electoral roll shall be used in general election or by-election, it follows that as the preparation of the electoral rolls is for the purpose of general election or by-election, any certified supplementary roll as at the commencement date of the review exercise should also be used. In the light of the foregoing, it is our considered view, the words 'current electoral rolls' includes the Principal Electoral Roll and the 1st and 2nd Supplementary Rolls.

(bb) the date the EC's review exercise commenced

Learned SFC submitted that the review commenced on 14.7.2016 when the meeting was held at the secretariat of the EC. Learned counsel for the appellant argued that the review commenced on the date of the publication of the Section 4 Notice. In our view this is quite a straight forward point because it is stipulated in clause 9 of Article 113 that the date of commencement of a review shall be the date of the publication in the Gazette of the s 4 Notice. Accordingly, we agree with the appellant that the commencement date of the review falls on 15.9.2016.

In this regard, learned SFC argued that it would be impracticable for the EC to use any supplementary electoral rolls which are published from time to time after the review exercise has commenced given the fact that the EC must in its Section 4 Notice set out the effect of their proposed recommendations and a copy of the same for inspection within the constituency. In short, at the date of the publication of the Section 4 Notice, the proposed recommendations must have been completed and open for inspection. In our view, this argument is not without merit.

Section 5 of the **Thirteenth Schedule** provides for the EC to receive representations and hold local inquiries to hear and consider the representations and objections. The timeline of 2 years under Article 113(2)(iii) runs from the date of the publication of the Section 4 Notice. Put another way, the EC is required to complete its task of receiving representations and objections and to hold local inquiries under ss 5, 6 and 7 of the **Thirteenth Schedule** within the 2 year timeline.

We agree with the view posited by learned SFC as a contrary view would lead to an absurdity in that on the date of the publication of the Section 4 Notice the EC must have started the review process and at the same time publish its first set of proposed recommendations. As such, we agree with learned SFC that the actual review process began much earlier-on 14.7.2016 on which the meeting was held at the secretariat of the EC. It would have been a practical impossibility for the EC to 'commence the review' and publish the s 4 Notice on 15.9.2016. As at that date the actual review commenced on 14.7.2016 the certified 1st or 2nd Supplementary Electoral Rolls had not yet come into existence; the current electoral rolls was the Principal Electoral Roll. Accordingly, we find no merit in the appellant's argument that the EC was bound to use the Principal, 1st and 2nd Supplementary Electoral Rolls.

III. Use of Invalid Roll and Insufficiency of Information in the s 4 Notice

In respect of these 2 issues, we are in agreement with the decision of the learned judge that pursuant to s 9A of the **EA 1958** the correctness of an electoral roll cannot be subject to any challenge in court even when the roll may not completely record the addresses of all the electors in a unit of review.

We are also in agreement with the findings of the learned judge that the information provided by the EC in its proposed recommendations published under s 4 Notice was not inadequate as to warrant curial intervention.

IV. Whether the appeal is academic?

Having addressed and given careful consideration to the issues raised and in view of the foregoing, we do not think it is necessary to address this issue.

The appeal is thereby dismissed.

sgd

Vernon Ong

Judge
Court of Appeal
Malaysia

Dated: 23rd July 2018

COUNSEL

For the Appellant: Cyrus Das (Latheefa Koya with him), Messrs Daim & Gamany

For the Respondent: Amarjeet Singh (Alice Loke, Suzana Atan, Shamsul Bolhassan, Azizan Md Arshad and Nik Azrin Zairin with him), Jabatan Peguam Negara, Putrajaya

LEGISLATION REFERRED TO:

Elections (Registration of Electors) Regulations 2002, Regulation 9

Elections Act 1958, Section 9, 9A, 15, 15(2)(c)

Federal Constitution, Articles 10(1)(a), 113, 114; Sections 2, 4, 5, 6, 7, 8 and 9 of Schedule Thirteen

Rules of Court 2012, Order 53, Order 53 Rule 2(4)

JUDGMENTS REFERRED TO:

A C Jose v Sivan Pillai AIR 1984 SC 321

Baker v Carr 369 U.S. 186 (1962)

Browne and Others v Constituencies Boundaries Commission and Others [2014] 5 LRC 385, 400

Constituency Boundaries Commission v Baron [2001] 1 LRC 25

Digvijay Mote v Union of India [1993] 3 SCC 175

Election Commission of India v Ashok Kumar AIR 2000 SC 2977

Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals [2018] MLJU 69 (FC)

M Kula Segaran v Suruhanjaya Pilihan Raya Malaysia [2017] MLRAU 399 (CA)

Mat Shuhaimi bin Shafiei v PP [2014] 5 CLJ 22, 39

Mohinder Singh Gill v Chief Election Commissioner AIR 1978 SC 851

Peguam Negara Malaysia v Chan Tsu Chong [2018] 1 MLJ 409 (CA)

Port Louis Corpn v A-G of Mauritius [1965] AC 111, 1124-1125 PC

R (on the application of Moseley) v Haringey London Borough Council [2015] 1 All ER 495, 507, 511 and 512

R v Boundary Commission Exp. Foot [1983] 1 All ER 1099, 1102

Regina v North and East Devon Health Authority, Ex parte Coughan [2001] QB 213, 258 CA

Reynolds v Sims 377 U.S. 533 (1964)

Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and Another Case [2017] 3 MLJ 56 (FC)

Sivarasa Rasiah v Badan Peguam Malaysia & Another [2010] 2 MLJ 333, 344

Wesbery et al v Sanders 376 U.S. 1 (1964)