IN THE COURT OF APPEAL OF MALAYSIA

Coram: Tengku Maimun Tuan Mat, JCA; Abdul Rahman Sebli, JCA; Zaleha Yusof, JCA

P Maradeveran A/L Periasamy and 2 Others v Suruhanjaya Pilihan Raya and Another

Citation: [2018] MYCA 287 **Suit Number:** Civil Appeal No. W-01(IM)-65-02/2017

Date of Judgment: 03 September 2018

Administrative law – Judicial review – Limitation – Whether the application for judicial review filed after the expiry of the time prescribed by Order 53 rule 3(6) of the Rules of Court 2012 – Whether an extension of time should be granted

JUDGMENT

[1] This appeal arose from the decision of the Kuala Lumpur High Court dismissing the appellants' application for leave to commence judicial review proceedings against the respondents for the following reliefs:

(a) an order of *certiorari* to quash the decision of the Election Commission in altering the constituency of registered voters pursuant to the exercise carried out under Federal Government *Gazette* P.U.(B) 197 dated 29.4.2016 ("the *Gazette*"); or

in the alternative, an order of *certiorari* to quash the decision of the Election Commission in altering the constituency of registered voters from Batang Kali to Kuala Kubu Baharu and *vice versa* in the exercise carried out under the *Gazette*.

(b) an order of *certiorari* to quash the decision of the Election Commission in altering the constituency boundaries of Batang Kali and Kuala Kubu Baharu as reflected in *Pelan Warta* No. 1801 which was used in the exercise carried out under the *Gazette*.

[2] The application was dismissed on a preliminary objection raised by the respondents. We heard arguments on 3.7.2017 and allowed the appellants' appeal by a unanimous decision. Accordingly, we set aside the decision of the High Court and remitted the case to the High Court for the learned judge to hear the merits of the application. These are the grounds of our decision.

[3] The subject matter of the judicial review application was the decision of the Election Commission to carry out the following acts pursuant to section 7(2) of the **Elections Act 1958 ("the Elections Act")**:

(1) altering the constituency of about 5000 registered voters; and

(2) altering the constituency boundaries of Batang Kali and Kuala Kubu Baharu.

[4] The appellants' contention was that the Election Commission had exceeded its jurisdiction in altering the constituency boundaries as section 7(2) of **the Elections Act** only empowered it to alter polling districts and not constituencies. The provision reads as follows:

"(2) The division of a constituency into polling districts under subsection (1) may be altered by the Election Commission as occasion may require, and upon any such alteration being made, the Commission shall publish in the Gazette a notice specifying in relation to that constituency the particulars mentioned in paragraph (1)(*d*)."

[5] It was submitted that the alteration of the state constituency of registered voters from Batang Kali to Kuala Kubu Baharu was done in a gravely inconsistent manner, which resulted in voters having single IC addresses being registered in two state constituencies. This, according to the appellants was unconstitutional, *ultra vires*, unreasonable, procedurally improper and illegal.

[6] When the leave application came up for hearing before the learned High Court judge, the respondents raised two preliminary objections, one of which was that the appellants had filed for judicial review after the expiry of the time prescribed by O 53 r 3(6) of the **Rules of Court 2012 ("the Rules")**.

[7] In support of the objection, the learned Senior Federal Counsel cited the Federal Court case of **Wong Kin Hoong & Ors v Ketua Pengarah Jabatan Alam Sekitar & Anor** [2013] 4 MLJ 161 where the following pronouncement was made by the apex court:

"[30] In conclusion, we are of the view that the time frame in applying for judicial review prescribed by the Rules is fundamental. It goes to jurisdiction and once the trial judge had rejected the explanation for the delay for extension of time to apply for judicial review, it follows that the court no longer has the jurisdiction to hear the application for leave for judicial review. Whether the application has merits or not, is irrelevant."

[8] Limitation is therefore a jurisdictional issue that has to be cleared first before the court proceeds to hear the merits of the application. It was submitted by the learned Senior Federal Counsel that by the time the appellants filed the application on 21.10.2016, they were already out of time by 68 days. According to him, time began to run when the electoral roll was updated *vide* P.U.(B) 217 dated 13.5.2016. Therefore, the last date for filing the review application was on 12.8.2016.

[9] It was argued that 13.5.2016 was the date from which time was to be measured as this was the date the Election Commission updated the Principal Electoral Roll for the year 2015, which was the

electoral roll in force at the material time.

[10] The learned Senior Federal Counsel went on to submit that the reasons given by the appellants for not being aware of the *Gazette* publication were not good reasons as any voter would have known that his or her constituency had been changed when P.U.(B) 217 came into force and that the change was made under section 7(2) of **the Elections Act**.

[11] In any event, it was submitted that the appellants were presumed by law to have had notice of the *Gazette* notification. Reliance was placed on the Federal Court case of **Abdul Aziz bin Mohd Alias v Timbalan Ketua Polis Negara, Malaysia & Anor** [2010] 4 MLJ 1 where Zulkefli Ahmad Makinudin FCJ (as he then was) delivering the judgment of the court said:

> "[12] It is also to be noted that the 1993 Regulations is a federal law and duly gazetted under PU(A) 395. As it is a law duly gazetted, the public are deemed to have notice of the same. Therefore in our view in the present case the appellant as a public officer dismissed from service pursuant to reg 28(1) of the 1993 Regulations is presumed to know of his rights under the 1993 Regulations. On this point useful reference may be made to s 18(2) of the Interpretation Acts 1948 and 1967 ('the Interpretation Act') which states:
>
> > 18(2) Publication in the official *Gazette* of Malaysia shall constitute sufficient notice of any matter required to be published in the *Gazette* by or under any federal law or required to be published in the Sabah Government *Gazette* or the Sarawak Government *Gazette* by or under any enactment of those States which has been declared to be a federal law."

[12] In opposing the preliminary objection, Mr Gobind Singh Deo for the appellants argued that the objection raised by the respondents was not a preliminary objection *per se*, but was in fact grounds for opposing the leave application and should therefore be taken as such.

[13] To provide context, it is necessary to set out the chronology of events that led to the appellants' application for review. They are as follows:

(a) on 29.4.2016, the *Gazette* was published;

(b) on 13.5.2016, P.U.(B) 217 was published notifying that the Principal Electoral Roll 2015 had been updated, taking into account the *Gazette*;

(c) on 24.7.2016, the 1st and 2nd appellants discovered that their polling constituency had been altered from Batang Kali to Kuala Kubu Baharu, and they wrote to the Election Commission;

(d) the Election Commission responded by letters to each of the 1st and 2nd appellants dated 3.8.2016. The letters informed the 1st and 2nd appellants that the 1st respondent did not move voters. The relevant parts of the letters read as follows:

> "2. ...Untuk makluman tuan, tiada pemilih yang telah dipindahkan oleh SPR memandangkan pihak SPR melaksanakan pembetulan kedudukan kawasan lokaliti...

> 3. ...Walaupun alamat pada kad pengenalan tuan adalah merujuk kepada kawasan di Batang Kali, tetapi berdasarkan kepada semakan di lapangan yang dibuat oleh SPR, kedudukan tepat bagi alamat tersebut didapati terletak di bawah Kuala Kubu Baharu.
>
> 4. Untuk makluman tuan, urusan pengemaskinian Daerah Mengundi bagi pembetulan kedudukan lokasi tepat di lapangan dilaksanakan selaras dengan peruntukan di bawah Seksyen 7, Akta Pilihan Raya 1958 terhadap kawasan Daerah Mengundi, Pusat Mengundi dan Lokaliti..."

(e) on 14.9.2016, the 3rd appellant came to know of the Election Commission's letters dated 3.8.2016 after being informed by the Assemblywoman for Kuala Kubu Baharu;

(f) arising therefrom, the present judicial review application was filed by the appellants on 21.10.2016 in the High Court at Kuala Lumpur.

[14] O 53 r 3(6) of **the Rules** which prescribes the limitation period for the filing of an application for judicial review is couched in the following language:

> "An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant."

[15] So the rule requires the application to be made promptly but at the same time it provides for two cut off dates for the applicant to do so, and they are in the following alternatives:

(i) within three months from the date when the grounds of application first arose; or

(ii) within three months from the date the decision is first communicated to the applicant.

[16] The view that the learned judge took was that the three-month limitation period started to run from the date of publication in the *Gazette*, which fell on 29.4.2016. This was the date when the 1st respondent gave notice of the locality alteration exercise carried out under section 7(2) of **the Elections Act**.

[17] Although the learned judge did not say so in so many words, it is obvious that he considered 29.4.2016 to be the date "*when the grounds of application first arose*" within the meaning of O 53 r 3(6) of **the Rules**. This was how the learned judge dealt with the matter:

> "27. Accordingly, I was of the view that the applicants are out of time, as the judicial review application has been made after the lapse of the prescribed period of three months following the publication of the section 7(2) notice. The applicants in this case were deemed to have been given notice of the alteration made to the manner in which their constituency was divided into its constituent polling districts upon publication of the section 7(2) notice in the official Gazette. The time prescribed under order 53 rule 3(6) of the Rules of Court 2012 would therefore have expired

on 30 July 2016, taking into account the manner in which time is to be reckoned under order 3 of the Rules of Court 2012."

[18] What is clear from the passage above is that the learned judge's focus was on the first alternative cut off date, which was three months from the date "*when the grounds of application first arose*". In doing so it would appear that he ignored completely the second alternative date, which period was to commence three months from the date "*when the decision is first communicated to the applicant*".

[19] There is a vital difference between the date "*when the grounds of application first arose*" and the date "*when the decision is first communicated to the applicant*". The factual element that underlies the first alternative date is the "grounds of application" whereas the factual element that underlies the second is "communication" of the decision.

[20] In the present case there is no dispute that there was a "communication" of the "decision" to the appellants, the decision being the decision of the Election Commission to carry out the locality alteration exercise pursuant to section 7(2) of **the Elections Act**, which decision was communicated to the appellants through the respondents' letters dated 3.8.2016.

[21] The significance of the difference in the two cut off dates is that it provides for two different timelines for the filing of a judicial review application. On the premise that the two cut off dates were intended by the Rules Committee to operate in the alternative by the use of the disjunctive "or" in O 53 r 3(6), it is safe to say that the two dates apply independently of each other and the first is not intended to supersede the second and *vice versa*. What the court needs to do to determine the commencement date of the limitation period is to determine which of the two dates applies on the facts and circumstances of the case.

[22] Learned counsel for the appellants contended that time could not run from the date of the *Gazette* notification because the *Gazette* in and of itself contained no grounds that could give rise to a judicial review, having regard to the following:

(a) one cannot discern from the *Gazette* itself how one's polling station, polling district or locality has changed;

(b) one cannot discern from the *Gazette* how the boundaries of their constituencies have changed;

(c) the *Gazette* does not speak of the locality correction exercise that the respondents alluded to in the respondents' letters.

[23] Thus, according to learned counsel, time to file the judicial review application could only begin to run from the date the decision was first communicated to the appellants, and this was when the appellants had actual knowledge of the alteration of the constituency boundaries through the respondents' letters dated 3.8.2016.

[24] We were referred to the Federal Court case of **Tunku Yaacob Holdings Sdn Bhd v Pentadbir Tanah Kedah & Ors** [2016] 1 MLJ 200 where it was held as follows at paragraph [60]:

> "[60] In the present case before us we are interpreting O 53 r 3(6) of the RHC 1980, where the key words under consideration are 'when the decision is first communicated to the applicant'. The wordings of the Order must be read together with the specific mandatory provisions in the LAA, particularly ss 10, 11, 52 and 53, relating to service of notification or declaration on acquisition of land by the state authority in Form E on the registered proprietor, the occupier of such land, or any interested persons. The clear effect of those provisions is that the relevant notice or declaration relating to acquisition must be brought to the actual knowledge (as opposed to constructive notice by way of a publication in the *Gazette*) of the persons concerned; only then, the interested persons can exercise their right to challenge the acquisition decision by way of judicial review proceedings under O 53 r 3(6) of the RHC 1980 within the prescribed time period."

[25] It was a case on the **Land Acquisition Act 1960**, but in our view it is relevant for the purposes of the present appeal as it dealt directly with O 53 r 3(6) of **the Rules**. We were therefore unable to accede to the learned Senior Federal Counsel's argument that the case has no application and should be disregarded.

[26] It was further argued by learned counsel for the appellants that in any event, the fact that the 1st and 2nd appellants' voting constituencies were moved pursuant to an alleged locality correction exercise under the *Gazette* was only known, or, in the words of O 53 r 3(6) "*first communicated*" to the appellants through the respondents' letters dated 3.8.2016.

[27] Learned counsel drew our attention to the distinction between "publication" and "communication", citing the Indian case of **Gurbachan Singh v SM Jagiro** 1956 AIR Vol 43 Punjab Section, page 254. In that case Bhandari CJ ruled that the expression "communicate" is not synonymous with the expression "publish" which means "to make public" whereas "communicate" means "to bestow, convey, make known, recount, to impart as to communicate information to anyone".

[28] It was submitted that the effect of the *Gazette* notification was only to notify the general public of the alterations that had already been made to the polling districts and nothing more, and certainly not to "communicate" the decision to the appellants, being the applicants in the judicial review application. This, according to learned counsel, is clear from the wording of section 7(2), which for ease of reference we reproduce again below:

> "(2) The division of a constituency into polling districts under subsection (1) may be altered by the Election Commission as occasion may require, and upon any such alteration being made, the Commission shall publish in the Gazette a notice specifying in relation to that constituency the particulars mentioned in paragraph (1)(*d*)."

[29] We found merit in the argument. Since the decision by the Election Commission to alter the constituency boundaries was only conveyed to the appellants through the respondents' letters dated 3.8.2016, time must begin to run from this date and not from the date of the *Gazette* notification. This has to be so because this was the date when the decision was "*first communicated*" to the appellants.

The three-month limitation period therefore began to run from 3.8.2016.

[30] The notification in the *Gazette* was not "communication" of the decision to the appellants within the meaning of O 53 r 3(6) of **the Rules**. In the first place, there was no mention of the locality alteration exercise at all in the *Gazette*. What was not in the *Gazette* could not have been "*communicated*" to the appellants at any point of time.

[31] The distinction between the two cut off dates is important in the context of the present appeal because the issue was not when the "*grounds of application first arose*". The issue was when was the decision "*first communicated*" to the appellants. The Election Commission may have made a decision on any matter under the Elections Act, but unless and until that decision is communicated to the person affected by the decision, the cause of action will not have arisen. It will only arise after the decision is communicated to him.

[32] Given the fact that the appellants had filed the application for review within the limitation period of three months from the date when the decision was "*first communicated*" to them, it was futile for the respondents to argue that the appellants were presumed by law to have had notice of the *Gazette* dated 29.4.2016.

[33] In so submitting, the learned Senior Federal Counsel was no doubt suggesting that the appellants' ignorance of the *Gazette* notification provided no answer to their failure to file the review application within three months from the date of the *Gazette* as they were presumed by law to have been notified of the alteration exercise.

[34] With due respect, the argument would only be tenable if the appellants had run out of time, which they were not since their cause of action only arose on the date the decision was communicated to them.

[35] On this score alone, the appellants' application for leave ought to have been granted by the learned judge. In an abundance of caution however, the appellants prayed for an extension of time under O 53 r 3(7) of **the Rules**. This was refused by the learned judge as he found that there were no good reasons for doing so. O 53 r 3(7) provides as follows:

> "The Court may, upon an application, extend the time specified in rule 3(6) if it considers that there is a good reason for doing so."

[36] One good reason is good enough for the grant of an extension of time under O 53 r 3(7). Assuming the learned judge was right in ruling that the appellants' application for judicial review was filed out of time on the basis that the *ejusdem generis* rule applies in interpreting O 53 r 3(6), i.e. that the first and second cut off dates are "of the same kind", the question that we had to consider next was whether the learned judge had properly and adequately applied his mind to the question whether the appellants had provided "good reason" to entitle them to an abridgement of time.

[37] We reproduce below the principal ground given by the learned judge for refusing to grant an

extension of time:

> "28. I declined to grant the extension of time, as to do so would in my view undermine the effect of Gazette publications, which is intended to put the citizenry on notice of changes in law and other changes that the law deems important that notice ought to be given to the public. This is a fundamental underpinning of the law-making and administration process of our country, and departures from the principle ought only to be sparingly allowed. One such instance is that set out in *Tunku Yaacob's* case."

[38] Whether or not to grant an extension of time under O 53 r 3(7) of **the Rules** is a matter of discretion. It is a principle of great antiquity that an appellate court does not interfere with the exercise of discretion at the drop of a hat. It will only interfere if the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there had been a miscarriage of justice: see **Ratnam v Cumarasamy & Anor** [1965] 31 MLJ 228 PC; **Non-Metallic Mineral Products Manufacturing Employees Union v Malaya Glass Factory Bhd** [1985] 1 MLJ 129 FC.

[39] Whether "good reason" exists is primarily a question of fact for the presiding judge to determine having regard to the material before him. In the appeal before us and bearing in mind the principle involved, we were persuaded that this was a fit and proper case for appellate interference as the learned judge did not address his mind at all to the "good reason" test. There is no mystery to the phrase "good reason". It means correct or proper reason.

[40] Had the learned judge applied the test, he would, in all probability, have exercised the discretion in favour of granting an extension of time as on the facts and circumstances of the case, good reasons had been shown by the appellants.

[41] First, after being alerted of the *Gazette* notification, the appellants acted with promptitude and filed the action as quickly as possible and within 3 months from the date the decision was "*first communicated*" to them. They were far from being indolent. We accepted learned counsel's argument that in such situation, the justice of the case must give way to the technicalities of the rules, if at all there had been any transgression of the rules by the appellants.

[42] The following observations by Woolf LJ in **R v Commissioner for Local Administration, ex parte Croydon London Borough Council and another** [1989] 1 All ER 1033 at page 1046 are relevant:

> "While in the public law field, it is essential that the courts should scrutinize with care any delay in making an application and a litigant who does delay in making an application is always at risk, the provisions of RSC Ord 53, r 4 and s 31(6) of the Supreme Court Act 1981 are not intended to be applied in a technical manner. As long as no prejudice is caused, which is my view of the position here, the courts will not rely on those provisions to deprive a litigant who has behaved sensibly and reasonably of relief to which he is otherwise entitled."

[43] Secondly, the subject matter of the judicial review application relates to the fundamental rights of the appellants to vote in a constituency where they were resident, as provided in Article 119 of the **Federal Constitution**. This, in addition to the fact that they had pursued the action with vigour upon being informed that their constituency had been altered from Batang Kali to Kuala Kubu Baharu provides, in our view, "good reason" for the grant of an extension of time.

[44] In **Ramachandra Shankar Deodhar v The State of Maharashtra AIR** [1974] SC 259 it was held by the Indian court that where fundamental rights are violated and the delay is not directly attributable to the party seeking relief, the court would be justified in granting the relief sought and cannot easily allow itself to be persuaded to refuse relief solely on the ground of laches, delay or the like.

[45] We appreciate of course that the court in that case was not dealing with a provision that is equivalent to O 53 r 3(7) of **the Rules**, but in our view the principle that the court laid down on the exercise of a discretion where it involves issues of fundamental rights is a principle of universal application and is equally applicable to the facts and circumstances of the present case.

[46] With due respect to the learned judge, the following factors that he took into account in refusing to abridge time were irrelevant for the purposes of determining whether "good reason" existed:

(a) to grant an extension of time would undermine the effect of *Gazette* publications;

(b) the 1st and 2nd appellants should have checked sooner the change in their constituencies.

[47] We agree with learned counsel for the appellants that to refuse an extension of time for the reason that it would undermine the effect of a *Gazette* publication would effectively mean that no extension of time could ever be granted for judicial review to challenge a *Gazette*.

[48] That cannot be right as it will defeat the object behind O 53 r 3(7) of **the Rules**, which is to give the court the discretion to grant an extension of time if "good reason" is shown. There is no law, as far as we are aware, to say that O 53 r 3(7) has no application in an application for leave to challenge a *Gazette* notification. In our view it applies to all applications for judicial review, irrespective of what the cause of action is.

[49] Whether on the merits of the case a challenge could be mounted against the *Gazette* is an entirely different matter. That is to be decided on another day once leave has been granted. We need only say in passing that the threshold for the grant of leave is low: See the Privy Council case of **IRC v National Federation of Self Employed and Small Businesses Ltd** [1982] AC 617 where Lord Diplock in his speech said at page 643:

> "The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the

relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief."

[50] As for the second reason that the appellants should have checked sooner, we do not think that this constituted a valid reason to refuse an extension of time if otherwise the appellants had shown "good reason" to entitle them to an extension of time.

[51] It was for all the reasons aforesaid that we allowed the appellants' appeal with costs and remitted the case to the High Court for hearing on the merits.

Signed

ABDUL RAHMAN SEBLI
Judge
Court of Appeal Malaysia

Dated: 3 September 2018

COUNSEL

For the Appellants: Gobind Singh Deo, Joanne Chua and Vivian Kuan of Messrs Daniel & Wong

For the Respondents: Dato' Amarjeet Singh a/l Serjit Singh, Senior Federal Counsel and Nik Azrin binti Nik Abdullah, Senior Federal Counsel of the Attorney General's Chambers

LEGISLATION REFERRED TO:

Elections Act 1958, Section 7(2)

Federal Constitution, Article 119

Land Acquisition Act 1960

Rules of Court 2012, Order 53 Rule 3(6), Order 53 Rule 3(7)

JUDGMENTS REFERRED TO:

Abdul Aziz bin Mohd Alias v Timbalan Ketua Polis Negara, Malaysia & Anor [2010] 4 MLJ 1

Gurbachan Singh v SM Jagiro 1956 AIR Vol 43 Punjab

IRC v National Federation of Self Employed and Small Businesses Ltd [1982] AC 617

Non-Metallic Mineral Products Manufacturing Employees Union v Malaya Glass Factory Bhd [1985] 1 MLJ 129 FC

R v Commissioner for Local Administration, ex parte Croydon London Borough Council and Another [1989] 1 All ER 1033

Ramachandra Shankar Deodhar v The State of Maharashtra AIR [1974] SC 259

Ratnam v Cumarasamy & Anor [1965] 31 MLJ 228 PC

Tunku Yaacob Holdings Sdn Bhd v Pentadbir Tanah Kedah & Ors [2016] 1 MLJ 200

Wong Kin Hoong & Ors v Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 MLJ 161