IN THE FEDERAL COURT OF MALAYSIA

CIVIL APPEAL NO: 01(i)-3-2009(B)

BETWEEN

MAJLIS AGAMA ISLAM SELANGOR … APPELLANT

AND

1. BONG BOON
CHUEN DAN 146 YANG LAIN
148. MAJLIS BANDARAYA SHAH ALAM
149. HICOM GAMUDA DEVELOPMENT SDN BHD
150. TAN SRI DATO' SERI (DR) HAJI ABU HASSAN
BIN HAJI OMAR
151. NUR AZMAN BIN ANUARUL PERAI
(BERTINDAK BAGI DIRI MEREKA
DAN MEWAKILI 632
PENDUDUK KOTA KEMUNING
& KEMUNING GREENVILLE) ... RESPONDENTS

Corum: ZAKI TUN AZMI, CJ
ALAUDDIN DATO' MOHD SHERIFF, PCA
ZULKEFLI AHMAD MAKINUDIN, FCJ

JUDGMENT BY ZAKI TUN AZMI

1. I have read through the grounds of judgment of Dato' Zulkefli Ahmad Makinudin, FCJ in draft. I concur with his grounds and his conclusion.

2. I would like however to comment on the manner this case has been conducted.

3. The setting up of a burial ground to any religion is very important and when an issue is relating to it is raised, decisions should be made within the shortest possible time. However, in this case before us, this does not seem to be the situation. The neighbouring residents to the proposed Muslim burial ground objected to the approval by the local authority *viz* Majlis Bandaraya Shah Alam (Respondent 148) to allocate the land for that purpose. They filed an application to challenge that decision of the local authority. Instead of hearing and disposing of the application speedily, it dragged on for the last three years. This was as a result of the Appellant, claiming to act for the interest of the Muslims of Selangor, sought to be made a party to the review. When it was refused by the High Court, they chose to appeal to the Court of Appeal and thereafter, to this Court. In the meantime, the review at the High Court came to a standstill.

4. Now, the Court is blamed for the delay. The public gets frustrated. In my opinion, the Court could perhaps have just gone ahead and made a decision on the application for administrative review. The question of whether the Appellant should be made a party can be decided and appealed together if necessary. These delays have caused unnecessary anguish over the people for whom the Appellant is supposed to be acting for.

5. Courts should be more diligent in dealing with such cases. Parties expect speedy disposal of reviews. That is why applications for review of administrative decisions are provided by way of *certiorari* or *mandamus* instead of by way of a writ. The law provides for a simple way of disposing these cases. Instead of a speedy disposal of a review application, this case has taken as long as it would in a hearing of a writ. Delays such as this can also cause a hold up in the implementation of national development and losses to the people such as the developers when there is an application for review of planning permissions granted by public authorities.

6. In Kuala Lumpur, the Appellate and Special Powers Division or Bahagian Rayuan dan Kuasa-Kuasa Khas (better known as RKK) are speedily disposing of such review cases. I hope the other High Courts would also take note of this.

Dated: 3 SEPTEMBER 2009

(ZAKI TUN AZMI)
Chief Justice
Malaysia

Counsel:-

For the Appellant - Mubashir Mansur, Haji Abd Rahim Sinwan, Zainul Rijal Abu Bakar, Mohd Zulkhairi Abd Aziz; M/s Zainul Rijal, Talhar & Amir

For the Respondents 1 to 147 - Malik Imtiaz Sarwar & Cheah Poh Loon; M/s Thomas Philip

For the Respondent 148 - Haji Sulaiman Abdullah, Mohd Hakimi Abd Kadir; M/s Hakimi & Partners

For the Respondent 149 - Amir Mohd Salleh & Emelyn Alexander; M/s Kadir Andri & Partners

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(BERTINDAK BAGI DIRI MEREKA DAN MEWAKILI 632 PENDUDUK KOTA KEMUNING & KEMUNING GREENVILLE) ... RESPONDENTS

[In the matter of Civil Appeal No: B-01-53-2008
Court of Appeal at Putrajaya

Between

Majlis Agama Islam Selangor ... Appellant

And

1. Bong Boon Chuen Dan 146 Yang Lain
148. Majlis Bandaraya Shah Alam
149. Hicom Gamuda Development Sdn Bhd
150. Tan Sri Dato' Seri (Dr) Haji Abu Hassan
Bin Haji Omar
151. Nur Azman bin Anuarul Perai
(Bertindak bagi diri mereka dan mewakili 632
penduduk Kota Kemuning & Kemuning
Greenville Kemuning Greenville) ... Respondents]

Coram: Zaki bin Tun Azmi, CJ
Alauddin bin Dato' Mohd Sheriff,
PCA Zulkefli bin Ahmad Makinudin, FCJ

JUDGMENT OF ZULKEFLI BIN AHMAD MAKINUDIN, FCJ

Background

By an Order dated 17.8.2006 given by the Shah Alam High Court, the respondents 1 to 147, who are owners of residential units in Kota Kemuning and Kemuning Greenville, Shah Alam ["the housing estate"] were given leave under Order 53 Rule 3 of the Rules

of the High Court 1980 [“RHC”] to apply for judicial review of the decisions of the respondent 148, that is Majlis Bandaraya Shah Alam [“MBSA”] dated 19.4.2006 and 14.5.2006 respectively. MBSA under its planning laws had decided to allocate an approximately 13.84 acres of land in the housing estate as a Muslim burial ground [“the burial ground”]. The respondent 149, Hicom Gamuda Development Sdn Bhd [“Gamuda”] is the developer for the housing project in the said housing estate. Gamuda is named as a party by respondents 1 to 147 with a prayer for a claim of damages against it. The respondents 150 and 151 are Muslim individuals who are also residing in the housing estate. They were allowed by the Shah Alam High Court to intervene in the judicial review proceedings on behalf of themselves as well as other 632 Muslim residents in the housing estate.

The appellant, Majlis Agama Islam Selangor [“MAIS”] however was refused leave to intervene in the judicial review proceedings by the Shah Alam High Court on 14.3.2008. The learned Judge of the High Court held that Order 15 rule 6(2)(b) of the RHC is applicable to judicial review proceedings but went on to hold that MAIS has failed to satisfy the requirements of Order 15 rule 6(2)(b) of the RHC and that there is no necessity for MAIS to be joined as an intervener. The appellant’s appeal to the Court of Appeal was dismissed by majority **(Md Raus bin Shariff and Hassan bin Lah JJCA)** on 9.7.2008. **Abdul Malik bin Haji Ishak JCA** dissented. The majority judgment of the Court of Appeal were in agreement with the decision of the learned Judge of the High Court in dismissing MAIS’s application but

took another step further by holding that Order 15 rule 6(2)(b) of the RHC is not applicable to judicial review proceedings. The majority judgment held that under the RHC application for judicial review is governed by Order 53 of the RHC and there is a specific provision in Order 53 rule 8 of the RHC which caters for parties wanting to be heard on matters in issue in a judicial proceeding.

The Appeal

On 2.3.2009, this Court granted to the appellant leave to appeal against the decision of the Court of Appeal on the following questions:-

1. Whether Order 15 rule 6(2)(b) of the RHC 1980 applies to an application for intervention in judicial review proceedings.
2. Whether the applicant, which is a statutory body under sections 4 and 5 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 [Enactment 1/2003], qualifies to intervene in the judicial review proceedings under Order 15 rule 6(2)(b) of the RHC 1980 in the light of their duties and functions under Enactment 1/2003, in particular sections 4, 5, 6 and 7 thereof.

Learned Counsel for Gamuda indicated to us at the outset of the hearing of the appeal that Gamuda is taking the stand to oppose the application of the appellant to intervene as a party in the said

judicial review proceedings at the Shah Alam High Court. Learned Counsel for MBSA on the other hand indicated to us that MBSA does not object to the appellant's application to intervene. The respondents 150 and 151 are not represented at this appeal proceedings before us.

The Appellant's Contention

The appellant is established under section 4(1) of the Administration of The Religion of Islam (State of Selangor) Enactment 2003 ["the Enactment"] and amongst its objective is to aid and advise His Royal Highness the Sultan in matters relating to the religion of Islam. Section 6 of the Enactment provides as follows:-

> *"The Majlis shall aid and advise his Royal Highness the Sultan in respect of all matters relating to the religion of Islam in the State of Selangor except matters of Hukum Syarak and those relating to the administration of justice, and in all such matters shall be the chief authority in the State of Selangor after His Royal Highness the Sultan, except where otherwise provided in this Enactment."*

The appellant has the duty *inter alia* to promote, stimulate, facilitate and undertake the economic and social development of the Muslim community in the state of Selangor consistent with Hukum Syarak as provided for under sections 7(1) of the Enactment.

Learned Counsel for the appellant submitted that as the appellant intends to intervene in the judicial review proceedings and to be made a party to the proceedings, the application for leave to do so was rightly made under Order 15 rule 6(2)(b) of the RHC. If leave to intervene in the judicial review proceedings is given, the appellant will become a party in the proceedings. The appellant will also be a party in the event of any appeal arising from the proceedings. As regards the applicability of the provision of Order 53 rule 8(1) of the RHC, learned Counsel for the appellant contended that the said provision would only allow the appellant to be heard in opposition to the respondents 1 to 147 application for judicial review but does not make the appellant a party to the proceedings. Learned counsel for the appellant further contended that we should also consider invoking the inherent powers of the Court in the interest of justice to allow the appellant to be admitted as a party to the judicial review proceedings in the event that Order 15 rule 6(2)(b) of the RHC does not apply.

The appellant conceded that the power to allocate burial grounds is vested in MBSA, as the local authority under section 94 of the Local Government Act 1976 [“LGA”]. However when MBSA decided to allocate the burial ground in question, the appellant contended that the interest of the appellant thereby arose under the Enactment. The appellant had at the time of the application also contended that the land on which the burial ground is to be established was wakaf land and had to that end instituted proceedings in the Syariah Court for a declaration to that effect.

The respondents 1 to 147 are also applying for a relief of *mandamus* in the judicial review proceedings for the relevant steps to be taken in order to remedy any allegedly illegal burial in this burial ground. To the appellant this means that if the relief sought for is granted in the judicial review proceedings, the bodies presently buried in this burial ground will have to be exhumed for re-burial elsewhere. It was submitted that such a consequence would have serious repercussions on the sensitivity of the Muslim community in particular those living in the housing estate for whose benefit this burial ground was set aside. Further, in the eyes of the Muslim community in Selangor as a whole and especially those in the two areas concerned, the appellant would be seen to have failed in their statutory duties and functions under the Enactment.

Decision

I shall first deal with Question 1. In answering the first question posed before this Court due consideration must be given to the fact that the RHC has specific rules dealing with Judicial Review as set out under Order 53 RHC 1980. Under Order 53 of the RHC, the following are specifically provided for:-

> *"(i) any person who is adversely affected by the decision of any public authority shall be entitled to make the application (Order 53 Rule 2(4) of RHC);*
> *(ii) the applicant shall serve a copy of the application and all supporting documents specified under the*

rules on all persons directly affected by the application; (Order 53 Rule 4(2) of RHC); and

(iii) *any person who desires to be heard in opposition to the application and appears to the Judge to be a proper person to be heard may be heard (Order 53 Rule 8(1) of RHC).”*

Based on the above well laid-out provisions in the RHC it is evident that the Rules Committee had intended to establish a specific framework for the determination of applications for judicial review. In my view Order 53 of the RHC was specifically drafted for that purpose. It has been revised over time, the last amendment to Order 53 of the RHC having taken place in the year 2000 by which it was substantially revised and amended *vide* PU(A) 342/2000. It is my judgment that Order 53 Rule 8(1) of the RHC specifically caters to persons claiming an interest in the proceedings and who wish to be heard in opposition. This is discernible from the language of the rule in particular the phrase *“…. appears to the Judge to be a proper person …”*. As a specific rule was put in place for judicial review proceedings, the more general basis for intervention under Order 15 Rule 6 (2)(b) of the RHC cannot be invoked. The maxim *“generalia special/bus non derogant”* would apply. The decision of the majority of the Court of Appeal in the present case that the appellant’s application must be brought under Order 53 rule 8(1) of the RHC in my view was therefore correct. Question 1 is therefore answered in the negative.

Notwithstanding that Question 1 has been answered in the negative I would proceed to answer Question 2. It is my view that the appellant does not have an interest in any event, either to satisfy Order 15 rule 6(2)(b) of the RHC or even Order 53 rule 8(1) of the RHC. Question 2 must be answered in the negative as well.

It is necessary that we first ascertain whether on the facts available the intervener application of the appellant has itself satisfied the requirements of order 15 rule 6(2)(b) of the RHC. The Order reads as follows:-

> *"(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application:-*
>
> *(a) … … …;*
> *(b) order any of the following persons to be added as a party, namely:-*
> *(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or*
> *(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy*

claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized."

Under Order 15 rule 6(2)(b) of the RHC, the proposed intervener must establish under limb (i) that he ought to have been joined as a party or his presence before the court is necessary to ensure that all matters in dispute may be effectually and completely determined and adjudicated upon. Whilst under limb (ii) the proposed intervener has to establish that he has an interest in the subject matter of the action and the court considers just and convenient to determine the issue as between him and any party to the action as well as between the parties to the action within the same proceedings.

Based on the provisions of Order 15 rule 6(2)(b) of the RHC it is my considered view there is no necessity for the appellant to be joined as a party. The proceedings before the High Court at Shah Alam are aimed at reviewing the decisions of MBSA. The appellant was not involved in these decisions nor can it, at this stage, claim that it ought to have been involved. It is to be noted in judicial review proceedings, the court in exercising its supervisory jurisdiction would

only be concerned with the decision making process and not the decision itself. On this point I would like to refer to the case of *Pengarah Tanah Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 wherein Raja Azlan Shah Ag CJ (Malaya) (His Royal Highness as he then was) at page 149 had this to say:-

> *"... It is not the province of the courts to review the decisions of government departments merely on their merits. Government by judges would be regarded as an usurpation. That clear statement of principle has since been approved and applied by the appellate courts. In Associated Provincial Picture Houses Ltd, v. Wednesbury Corpn. (ante), Lord Greene M.R. in the course of a judgment since approved by the House of Lords in Smith v. East Elloe Rural District Council, and in Fawcett Properties Ltd, v. Buckingham County Council (ante), in dealing with the power of the court to interfere with the decision of a local authority which has acted unreasonably, said at page 868:-*
>
> > *'The power of the court to interfere in each case is not that an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting*

in excess of the powers which Parliament has confided in it.'

That is the reason for such cases to be remitted to the relevant authority for a fresh consideration and conclusion according to law. In Kingston-upon-Thames Royal London Borough Council v. Secretary of State for the Environment, the case was sent back to the Secretary of State for reconsideration; in R v. Hillingdon London Borough Council (ante), the Council was required to reconsider the application for planning permission and reach a conclusion on it according to law. In my opinion the appropriate order would be to remit the case to the Land Executive Committee for reconsideration and reach a conclusion on it according to law."

The requirement of limb (i) is therefore not satisfied.

The appellant has argued that the question of whether the burial ground can be established as wakaf land is relevant. However, this is not a question that the High Court at Shah Alam has jurisdiction to determine. Further, the question of the wakaf is entirely an irrelevant consideration as MBSA or Gamuda has never substantiated their position by reference to any wakaf. The question of wakaf is not one that is just and convenient to determine within the underlying judicial review proceedings. It is wholly unrelated to the core issue of whether the decisions made by MBSA were administratively sound. The appellant is, in effect attempting to

introduce an entirely independent and new cause of action into the proceedings and this is not permissible. In my view therefore the requirement of limb (ii) is therefore also not satisfied.

It is my view that the appellant at best has an indirect interest. In the affidavit in support of its application its interest (other than wakaf) is premised *inter alia* on the following points as spelled out under the provisions of sections 4 to 7 of the Enactment:-

> *"(i) It is a statutory body;*
> *(ii) It oversees the administration of Islam in the state of Selangor;*
> *(iii) It has a duty to promote and protect the interest of Muslims and the Islamic community in the state."*

It is my finding that the basis of the appellant's purported interest in the present judicial review proceedings has been stated in terms which would appear to go beyond the scope of the provisions of the Enactment relied upon. Matters of local government do not fall within the objects of MAIS. MAIS had nothing to do with the decisions under challenge in the judicial review proceedings. In any event, it is not directly affected by the decisions sought to be reviewed. For sufficient interest to justify intervention under Order 15 rule 6(2)(b) of the RHC a direct interest must be established. An indirect or commercial interest does not satisfy the requirement. MAIS clearly does not satisfy this requirement. On this point in the case of

Pegang Mining Co. Ltd v. Choong Sam & Ors [1969] 2 MLJ 52. Lord Diplock in delivering his speech at page 55 stated as follows:-

> *"It has been sometimes said as in Moser v. Marsden and in In re I.G. Farbenindustrie A.G. that a party may be added if his legal interests will be affected by the judgment in the action but not if his commercial interests only would be affected. While their Lordships agree that the mere fact that a person is likely to be better off financially if a case is decided one way rather than another is not a sufficient ground to entitle him to be added as a party, they do not find the dichotomy between* legal' *and* 'commercial' *interests helpful. A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?'*

I am of the view the use of the phrase *"proper person"* in Order 53 rule 8(1) of the RHC must be read as referring to persons with a direct interest. In this regard the test for joinder as a party in judicial review was considered by the House of Lords in *R v. Rent Officer Service, ex parte Muldoon*: *R v. Rent Officer Service, ex parte Kelly* [1996] 3 All ER 498. It was concluded in that case that an indirect interest, even on the part of the Secretary of State, was not sufficient to justify joinder. I am of the view the same test would apply to the appellant in the present case. Unlike the position under the UK

Civil Procedure Rules ["CPR"], the right of *"any person to be heard in opposition"* in our Order 53 rule 8(1) of the RHC is qualified by the requirement of that person being a *"proper person"*. Rule 54.17.1 of the CPR states *"any person may apply to file evidence or make representation at the hearing of the judicial review."* There is therefore a significant qualification under our Order 53 rule 8(1) of the RHC 1980 which indicates some level of interest. It does not stand to reason for a party not having any direct interest to be allowed to be joined as a party, more so in the light of the nature of the jurisdiction being exercised in judicial review proceedings.

Ancillary Issues

I would also like to deal with other ancillary issues raised by learned Counsel for the appellant as follows:-

On the appellant's contention that this Court can invoke its inherent jurisdiction to allow the applicant to come in as a party to the judicial proceedings in the event that the Court finds Order 15 rule 6(2)(b) of the RHC to be inapplicable, I am of the view that such a contention is untenable in the circumstances of this case. There is a specific provision in Order 53 rule 8(1) of the RHC. The inherent jurisdiction of the High Court cannot be invoked to override the application of a specific rule. On this point in the case of *Permodalan MBF Sdn Bhd v. Tan Sri Dato' Seri Hamzah bin Abu Samah & Ors* [1988] 2 MLJ 178 the Supreme Court had this to say:-

"It follows that where the rules contain provisions making available sufficient remedies, the Court will not invoke its inherent powers".

Learned Counsel for the appellant has strenuously argued that the appellant has a statutory duty under the Enactment to look after the interest of the Muslim community in Selangor as a whole and especially those in the two areas concerned and it is for this reason that it is making the application to be joined as a party. Having concluded that the appellant has not shown that it has a direct interest in the said judicial review proceeding, I would hasten to state here that any views or stand to be taken by the appellant in relation to the location of the burial ground can still be forwarded to MBSA and duly considered by MBSA in presenting and defending *MBSA*'s case in the judicial review proceedings. In fact MBSA in the judicial review proceedings before the Court had already indicated that it does not object to the appellant's application to be joined as a party.

Conclusion

For the reasons above stated I would dismiss the appellant's appeal with cost. The majority decision of the Court of Appeal is hereby affirmed. Deposit is to be paid to the respondents 1 to 147 and respondent 149 [Gamuda] on account of taxed costs.

My learned brothers Zaki Tun Azmi, CJ and Alauddin Mohd. Sheriff, PCA have seen this judgment in draft and have expressed their agreement with it.

(DATO' ZULKEFLI BIN AHMAD MAKINUDIN)
Judge
Federal Court

Dated: 3 SEPTEMBER 2009

Counsel:-

For the Appellant - Mubashir Mansur, Haji Abd Rahim Sinwan, Zainul Rijal Abu Bakar & Mohd Zulkhairi Abd Aziz; M/s Zainul Rijal, Talhar & Amir

For the Respondents 1 to 147 - Malik Intiaz Sarwar & Cheah Poh Loon; M/s Thomas Philip

For the Respondent 148 - Haji Sulaiman Abdullah & Mohd Hakimi Abd Kadir; M/s Hakimi & Partners

For the Respondent 149 - Amir Mohd Salleh & Emelyn Alexander; M/s Kadir Andri & Partners