IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPLICATION NO. 01 - 9 - 04 / 2012 (W)

BETWEEN

DR. MICHAEL JEYAKUMAR DEVARAJ … APPLICANT

AND

ATTORNEY-GENERAL … RESPONDENT

(In the matter of the Court of Appeal of Malaysia
Civil Appeal No. W – 01 – 215 – 2011

Between

ATTORNEY-GENERAL … APPELLANT

And

DR. MICHAEL JEYAKUMAR DEVARAJ … RESPONDENT

decided by the Court of Appeal of Malaysia on the 10th day of October 2011 by :

The Honourable Justice Datuk Wira Low Hop Bing, JCA
The Honourable Justice Datuk Abdul Wahab bin Patail, JCA
The Honourable Justice Anantham Kasinather, JCA)

APPELLANT'S SUBMISSIONS
[in respect of the Appeal]

Solicitors for the Appellant:

Messrs Sreenevasan
Ground Floor Block B
Kompleks Pejabat Damansara
Jalan Dungun, Damansara Heights
50490 Kuala Lumpur
(Our ref.: AS.2009.0720)

PREFACE

1. The Appellant is also the Applicant in the Judicial Review proceedings in the High Court. On 25.02.2011, the High Court granted the Appellant leave to apply for Judicial Review against the Respondents in the High Court.

2. The Attorney General (**"AG"**), who objected to the granting of leave, filed an appeal against the decision. On 10.10.2011, the Court of Appeal allowed the AG's Appeal and set aside the granting of leave to apply for Judicial Review.

3. On 08.03.2012, the Appellant was granted leave to appeal to the Federal Court. These are the submissions in support of his Appeal.

THE LEAVE QUESTIONS

4. The questions upon which leave to appeal was granted are as follows:-

(1) Whether an allegation that the decision or exercise of discretion sought to be reviewed under judicial review is based on policy considerations or management prerogative ought to be determined on an application for leave for judicial review, or whether the Issue ought to be determined by the court after hearing all the evidence at the substantive motion for judicial review.

(2) Whether a decision that is alleged to be based on policy considerations or management prerogative (**"non-statutory discretion"**) is *ex facie* non-justiciable, or whether the justiciability of such a decision is dependent on the existence, nature and extent of the non-statutory discretion and on the particulars facts of each case.

BACKGROUND FACTS

The Parties to the Judicial Review Application

5. The Appellant is the Member of Parliament (**"MP"**) for the Sungai Siput constituency in the State of Perak.

See: Affidavit in Support, para. 4 **[R/R (Jilid 3), p. 359]**

6. The Respondents in the High Court are as follows:-

6.1 The 1st Respondent is the Director-General of the Implementation Coordination Unit (**"ICU"**) of the Prime Minister's Department.

6.2 The 2nd Respondent is the Director of the Perak State Development Office ("*Pejabat Pembangunan Negeri Perak"*) (**"PPN Perak"**).

6.3 The 3rd Respondent is the Government of Malaysia.

See: Affidavit in Support, paras. 5 – 7 **[R/R (Jilid 3), pp. 359 - 360]**

To maintain consistency with the cause papers, the Respondents in the High Court proceedings will be referred to as the **"1st Respondent"**, **"2nd Respondent"**, **"3rd Respondent"** and collectively as **"the Respondents"**.

7. The Appellant's Judicial Review application is *inter alia*, to challenge the decision made by the Respondents in the exercise of the power and/or discretion vested in them (or any one of them) to allocate public monies from the Federal Consolidated Funds to parliamentary constituencies in

Malaysia (**"Special Constituency Allocation"**). By his application, Dr Jeyakumar also seeks the disclosure and determination of the manner upon which the power or discretion to allocate the Special Constituency Allocation is vested in and exercised by the said Respondents.

The Special Constituency Allocation

8. Since 1975, a Special Constituency Allocation has been allocated from the Federal Consolidated Fund in the annual Federal Budget (as "*Peruntukan Khas"* or *"Peruntukan Khas Perdana Menteri Untuk Kawasan Parlimen*") for every parliamentary constituency.

8.1 The amount allocated for the Special Constituency Allocation each year varies, for example RM550,000 for each constituency for the year 2005 and RM2,000,000 for each constituency for the year 2006.

8.2 The Special Constituency Allocation is requested from Parliament by the Prime Minister and allocated to the Prime Minister's Department where the power or authority to consider applications for disbursement of the funds is purportedly delegated or assigned to the 1st Respondent and/or the various State Development Offices ("*Pejabat-Pejabat Pembangunan Negeri*") (**"PPNs"**) of every State.

See:	**Affidavit in Support, paras. 9 – 13**	**[R/R (Jilid 3), pp. 360 - 362]**
	Exhibit MJD-1	**[R/R (Jilid 3), p. 414]**
	Exhibit MJD-2	**[R/R (Jilid 3), pp. 417 - 418]**
	Exhibit MJD-3	**[R/R (Jilid 3), pp. 421 - 422]**

Inconsistencies regarding who has power and authority to control and disburse the Special Constituency Allocation

9. There is contradictory information from the Respondents as to who has been vested with the power or authority to control and disburse the Special Constituency Allocation:-

9.1 Based on the Written Responses from the Prime Minister's Department to MP's questions in Parliament, it is alleged that the management and disbursement of the Special Constituency Allocation is delegated by the Prime Minister to the **Directors of the respective PPNs**, who appear to be authorised to consider and approve the applications for funds from the Special Constituency Allocation for constituencies within their State. However, **the specific statute, regulation or order for the delegation of such discretion is not specified**.

See:	**Affidavit in Support, paras. 17 & 18**	**[R/R (Jilid 3), pp. 367 - 369]**
	Exhibit MJD-4	**[R/R (Jilid 3), pp. 425 - 426]**
	Exhibit MJD-5	**[R/R (Jilid 3), pp. 429 - 430]**
	Exhibit MJD-6	**[R/R (Jilid 3), pp. 433 - 434]**
	Exhibit MJD-7	**[R/R (Jilid 3), pp. 437 - 438]**
	Exhibit MJD-8	**[R/R (Jilid 3), pp. 441 - 442]**
	Exhibit MJD-9	**[R/R (Jilid 3), pp. 445 - 449]**

9.2 On the other hand, the literature on the ICU website states that the **ICU (not the PPNs)** manages and distributes the Special Constituency Allocation, and that the PPNs report to the ICU.

See:	**Affidavit in Support, para. 19**	**[R/R (Jilid 3), p. 370]**
	Exhibit MJD-10	**[R/R (Jilid 3), p. 452]**
	Exhibit MJD-11	**[R/R (Jilid 3), p. 455]**
	Exhibit MJD-12	**[R/R (Jilid 3), p. 500]**

Lack of certainty / inconsistencies regarding the the criteria and projects / activities for which the Special Constituency Allocation is disbursed

10. In addition, the information provided by the Respondents also demonstrates an arbitrariness and inconsistency regarding the criteria and conditions (if any) that must be taken into consideration by them in order to disburse funds from the Special Constituency Allocation.

10.1 From the Prime Minister's Department's Written Responses to the questions posed by MPs in Parliament, it appears that the Directors of the PPNs have a discretion as to how to disburse the Special Constituency Allocation. However, these Written Responses do not clearly and definitively specify the criteria and conditions that the Directors of the PPNs must take into consideration before the funds may be disbursed. Instead, references are made to vague and unspecified "*Treasury regulations, guidelines, circulars or orders*" as being the basis upon which the discretion is to be exercised.

See:	**Affidavit in Support, paras. 16 & 18**	**[R/R (Jilid 3), pp. 366 - 370]**
	Exhibit MJD-3	**[R/R (Jilid 3), pp. 421 - 422]**
	Exhibit MJD-4	**[R/R (Jilid 3), pp. 425 - 426]**
	Exhibit MJD-5	**[R/R (Jilid 3), pp. 429 - 430]**
	Exhibit MJD-6	**[R/R (Jilid 3), pp. 433 - 434]**
	Exhibit MJD-7	**[R/R (Jilid 3), pp. 437 - 438]**
	Exhibit MJD-8	**[R/R (Jilid 3), pp. 441 - 442]**
	Exhibit MJD-9	**[R/R (Jilid 3), pp. 445 - 449]**

10.2 In any event, the said Written Responses in Parliament appear to conflict with literature / information available on the 1st Respondent's website which *inter alia*, states that the 1st Respondent **will approve** disbursements from the Special Constituency Allocation in, amongst others, the following situations:-

(a) projects carried out and coordinated by a committee or body and conducted through communal cooperation ("*gotong-royong*") which is cost-effective and beneficial;

(b) contributions towards the running of an organisation's / association's activities;

(c) contributions to victims of natural disasters, calamities and tragedies;

(d) contributions to disabled persons and welfare-related programmes.

See: Affidavit in Support, para. 20 [R/R (Jilid 3), pp. 370 - 371]
Exhibit MJD-13 [R/R (Jilid 4), pp. 562 - 563]

10.3 No mention is made in **MJD-13** referred to above of an applicant's need to comply with "*Treasury regulations, guidelines, circulars or orders*" before funds from the Special Constituency Allocation will be disbursed for the projects / activities stated above.

11. In summary, there are contradictory and inconsistent written and published averments by the Respondents regarding who has the power or discretion to disburse the Special Constituency Allocation and also the criteria or conditions for the same.

Historically and in practice, how the Special Constituency Allocation is disbursed

12. Apart from the inconsistencies as set out above, historically and in practice the Special Constituency Allocation has **not** been disbursed in accordance with the Respondents' written averments:-

12.1 The Written Responses in Parliament and the literature on the ICU website, state that **all parties** including all MPs can apply for funds from the Special Constituency Allocation for their constituencies.

See: Exhibit MJD-3 **[R/R (Jilid 3), pp. 421 - 422]**
Exhibit MJD-12 **[R/R (Jilid 3), p. 500]**

12.2 However, historically and in practice, the following seems to occur:-

(a) The Special Constituency Allocation is **not disbursed to MPs from the Parliamentary Opposition** Parliament (**"Opposition"**) or for projects applied for or endorsed by them.

(b) On the other hand, the Special Constituency Allocation is **disbursed to the MPs from the Barisan Nasional coalition** or for the projects applied for or endorsed by those MPs.

(c) In constituencies held by Opposition MPs, the Special Constituency Allocation appears to be disbursed for projects directly or indirectly **applied for or endorsed by the Barisan Nasional divisional branches or party members**.

See: Affidavit in Support, paras. 22 & 23 **[R/R (Jilid 3), pp. 372 - 373]**
Exhibit MJD-14A **[R/R (Jilid 4), pp. 578 - 582]**

13. In this regard, the **Deputy Prime Minister, a Minister in the Prime Minister's Department and MPs from Barisan Nasional** have openly stated that the **Special Constituency Allocation is their entitlement as of right as MPs of Barisan Nasional** and the **entitlement is not available to Opposition MPs**.

See:	**Exhibit MJD-15**	**[R/R (Jilid 4), p. 588]**
	Exhibit MJD-16	**[R/R (Jilid 4), p. 591]**
	Further Affidavit, paras. 5 & 6	**[R/R (Jilid 3), p. 409]**
	Exhibit MJD-37	**[R/R (Jilid 4), p. 703]**
	Exhibit A-1	**[R/R (Jilid 2), p. 71]**

The Appellant's Application for the Special Constituency Allocation for Sungai Siput

14. Against this backdrop, in the years 2008 and 2009, the Appellant made written applications to the 2nd Respondent for funds from the Special Constituency Allocation for Sungai Siput for various projects, activities and purchases of equipment for schools, associations and communities in Sungai Siput. **None of the said applications (or any part thereof) was granted**.

See: Affidavit in Support, paras. 25 – 41 **[R/R (Jilid 3), pp. 374 - 382]**

15. Undeterred, in 2010, the Appellant once again applied for funds from the Special Constituency Allocation for Sungai Siput for various projects, activities and equipment for schools, associations and communities in Sungai Siput. In his application letter, the Appellant also requested specific details of the amount of funds already disbursed from the Special Constituency Allocation for Sungai Siput for 2010 (the **"2010 Application"**).

15.1 The funds applied for in the 2010 Application were as follows:-

No.	Body / Project	Amount (RM)
(a)	For victims of natural disasters (to be kept in the district office)	50,000
(b)	SMJK Shin Chung	25,000
(c)	SJK Methodist	25,000
(d)	Nurul Ihsan Orphanage	50,000
(e)	SJK(T) Mahatma Gandhi Kalasalai	25,000
(f)	SJK(T) Ladang Dovenby	25,000
(g)	SRJK(C) Shing Chung	25,000
(h)	Sg Buloh Old Folks' Home	25,000
(i)	Sg Siput-Kuala Kangsar Association for the Disabled	5,000
(j)	Small projects for traditional villages	160,000
(k)	Meetings with youth in recreational parks and villages	5,000
(l)	Anbu Nilayam Child Care Centre (for single mothers)	30,000
(m)	Small projects for *Orang Asli* villages	200,000
	TOTAL	**650,000**

See: Exhibit MJD-30 **[R/R (Jilid 4), pp. 677 - 680]**

15.2 By a letter dated 26.07.2010 from the 2nd Respondent, the Appellant was informed that as of 25.07.2010, 56 projects worth RM1.72 million were approved for the Sungai Siput constituency (but **not** on the Appellant's application). Insofar as the Appellant's application was concerned, the 2nd Respondent rejected the request for funds for

victims of natural disasters. For the remaining projects and activities for which funds were applied, the 2nd Respondent requested the Appellant to provide the names of the Parent-Teachers Associations for the various schools and the registered names for the other bodies, as well as their account details for the 2nd Respondent's consideration.

See: Exhibit MJD-31 **[R/R (Jilid 4), p. 683]**

15.3 The Appellant responded by his letter dated 24.08.2010[1]:-

(a) The Appellant requested clarification from the 2nd Respondent as to whether the 56 projects worth RM1.72 million mentioned in its letter dated 26.07.2010 were approved in 2010 only or since March 2008, and for details of the 56 projects.

(b) As requested by the 2nd Respondent in its letter of 26.07.2010, the Appellant also provided the names and account details of the Parent-Teachers Associations for the various schools and other bodies named in the 2010 Application.

(c) The Appellant also requested for a response from the 2nd Respondent by 14.09.2010.

See: Exhibit MJD-32 **[R/R (Jilid 4), pp. 686 - 687]**

[1] In this regard, the summarisation of the letter dated 24.08.2010 by the Court of Appeal in paragraph 7 of its Grounds of Judgment [R/R (Jilid 1), p. 31] is incomplete.

15.4 The Appellant did not receive a response from the 2nd Respondent by 14.09.2010 or within a reasonable time thereafter. Therefore by a letter dated 08.10.2010 to the 2nd Respondent, the Appellant informed the 2nd Respondent that in the event he did not receive a response to his application by 15.10.2010, he would assume that his application had been rejected.

See: Exhibit MJD-33 **[R/R (Jilid 4), p. 690]**

15.5 On or around 15.10.2010, the Appellant received a letter dated 12.10.2010 from the 2nd Respondent (the **"Written Decision"**). [2] The 2nd Respondent failed or refused to provide the details of the 56 projects worth RM1.72 million that were approved from the Sungai Siput Special Constituency Allocation for 2010. In respect of the Appellant's application for funds in the 2010 Application, this was the 2nd Respondent's response:-

No.	Body / Project	Response
(a)	For victims of natural disasters (to be kept in the district office)	[*Application rejected by PPN Perak's earlier letter dated 26.07.2010*.]
(b)	SMJK Shin Chung	The funds already approved in 2010 included contributions to organisations and associations such as the Parents Teachers Associations of SMJK Shin Chung and SJK Methodist, and Nurul
(c)	SJK Methodist	
(d)	Nurul Ihsan Orphanage	

[2] In this regard, the summarisation of the 2nd Respondent's letter dated 12.10.2010 by the Court of Appeal in paragraph 9 of its Grounds of Judgment [R/R (Jilid 1), pp. 31 - 32] is inaccurate.

		Ihsan Orphanage. As the allocation is limited, parties that have received such contributions will not be considered.
(e)	SJK(T) Mahatma Gandhi Kalasalai	The necessity of these proposed contributions will be assessed.
(f)	SJK(T) Ladang Dovenby	
(g)	SRJK(C) Shing Chung	
(h)	Sg Buloh Old Folks' Home	
(i)	Sg Siput-Kuala Kangsar Association for the Disabled	
(j)	Small projects for traditional villages	
(k)	Meetings with youth in recreational parks and villages	
(l)	Anbu Nilayam Child Care Centre (for single mothers)	
(m)	Small projects for *Orang Asli* villages	Application rejected. Advised to apply to the Department of *Orang Asli* Affairs.

See: Exhibit MJD-34 **[R/R (Jilid 4), pp. 693 - 694]**

16. We submit that in coming to the Written Decision, the Respondents or any of them erred in law and acted in excess of or without jurisdiction and the decision is tainted with irrationality and procedural impropriety by reason *inter alia*, of the following[3]:-

[3] None of the factors stated in paragraphs 16.1 - 16.5 herein were referred to or taken into consideration by the Court of Appeal in its Grounds of Judgment, although these factors were pointed out to the Court.

16.1 The reason given by the 2nd Respondent for the rejection of the application for funds for SMJK Shin Chung, SJK Methodist and Nurul Ihsan Orphanage, is false or incorrect. On or around 18.10.2010, the Appellant contacted the heads of the schools and the management of the orphanage and was told by all of them that none of the institutions had received funds from the 1st or 2nd Respondents in the course of 2010. Therefore, the 2nd Respondent's decision was based on a false premise.

See: Affidavit in Support, para. 52.1 [R/R (Jilid 4), pp. 389 - 390]

16.2 The rejection of the application for funds for small projects for *Orang Asli* villages on the basis that the Appellant should apply to the Department of *Orang Asli* Affairs, is contradictory and capricious. The Special Constituency Allocation can and has been used to aid the *Orang Asli* and for projects involving *Orang Asli*, and this is admitted by the 2nd Respondent both in the Written Decision and in its earlier letter of 19.10.2009.

See: Exhibit MJD-34 [R/R (Jilid 4), p. 693]
Exhibit MJD-26 [R/R (Jilid 4), p. 664]

16.3 In respect of the other projects for which funds were applied under the 2010 Application, the Written Decision to "assess the necessity" of those projects instead of making a decision and approving them is an inordinate delay and therefore a failure to exercise the discretion conferred upon the 1st and 2nd Respondents or either of them. Such a decision is therefore indecisive, arbitrary and unjust.

16.4 In any event, **the projects under the 2010 Application are the kinds of projects for which funds from the Special Constituency Allocation are supposed to be granted and disbursed**, according to the Written Responses in Parliament and the ICU website, and for that reason ought to have been granted by the 1st and/or 2nd Respondents.

See:	**Exhibit MJD-13**	**[R/R (Jilid 4), pp. 562 - 563]**
	Exhibit MJD-20	**[R/R (Jilid 4), pp. 638 - 641]**
	Exhibit MJD-21	**[R/R (Jilid 4), pp. 644 - 646]**
	Exhibit MJD-22	**[R/R (Jilid 4), pp. 649 - 650]**
	Exhibit MJD-23	**[R/R (Jilid 4), pp. 653 - 654]**

16.5 Furthermore, merely by requesting in its letter dated 26.07.2010, for recipient / payment details for the bulk of the projects the Appellant had applied for funds under the 2010 Application, the 2nd Respondent had signified / represented that the provision of the requested details was all that was required for those funding applications to be granted. Based on the foregoing and paragraph 18.4 above, **the Appellant had a legitimate expectation** that the funds sought would be granted from the Special Constituency Allocation for Sungai Siput for 2010.

See: Affidavit in Support, paras. 57 & 58 [R/R (Jilid 3), pp. 392 - 393]

17. On 29.10.2010, the Appellant filed an application for leave to issue Judicial Review proceedings against the Respondents.

APPELLANT'S SUBMISSIONS IN RESPECT OF THE LEAVE QUESTIONS

18. In its Grounds of Judgment, the Court of Appeal held **as a fact** that the 1st or 2nd Respondents were exercising a discretion that is non-justiciable, and went on to extrapolate that applications for Special Constituency Allocations "*can only be decided by the [1st and/or 2nd Respondent] in line with policy considerations and management prerogative*" and are therefore non-justiciable.

See: Grounds of Judgment, paras. 32 – 37 **[R/R (Jilid 4), pp. 41 - 44]**

19. We respectfully submit that this finding is wholly untenable, for the following reasons:-

19.1 The allegation of the exercise of a non-justiciable discretion by the 1st or 2nd Respondents was not based on any findings of fact by the High Court or evidence tendered by the Respondents before either the High Court or the Court of Appeal.

19.2 The allegation of the exercise of a non-justiciable discretion was only raised by Senior Federal Counsel, and **in her submissions before the Court**. These submissions were made while Senior Federal Counsel was discharging the AG's role as guardian of the public interest and **not** as Counsel for the Respondents.

19.3 The Court of Appeal's finding was therefore made in the **absence of any evidentiary support**.

20. In any event, the mere allegation that an impugned decision is the "exercise of a discretion" is not equivalent to the saying that it involves policy considerations or management prerogative that are non-reviewable or non-justiciable, for the reasons set out in the paragraphs that follow.

21. Firstly, the question of whether the Respondents exercise their purported powers or discretion pursuant to a statute or prerogative is the subject matter of Prayer 1 of the Judicial Review Application, and it will be **for the Respondents in the High Court to prove the same** during the hearing of the substantive application.

22. Secondly, regardless of whether the exercise of power or discretion by the Respondents involved policy considerations or a management prerogative, the exercise **remains justiciable on judicial review**. In the Supreme Court case of ***Government of Malaysia & Ors v Loh Wai Kong*** [1979] 2 MLJ 33, which concerned the Executive's exercise of the discretion in the granting of passports, the Court stated that:-

> "…in our judgment **when exercising this discretionary power the Executive is expected to behave in the same way as when exercising its other discretionary powers**. It must act bona fide, fairly, honestly and honourably, and if it does not, the aggrieved party will probably make a noise in the press, in Parliament and in public. What if he comes to court? **If it is established that Government has acted mala fide or has in other ways abused this discretionary power, the court may, in our judgment, review Government's action and make the appropriate order, and the principles which the court will apply are well-established…**" (emphasis added)

See: ***Government of Malaysia & Ors v Low Wai Kong***
[1979] 2 MLJ 33 **[IA(P) Jilid 2, TAB 12 @ p. 245]**

23. In fact, the subject matter in ***CCSU v Minister for Civil Service*** [1985] 1 AC 374, the watershed authority on judicial review, is the exercise of a non-statutory discretion/prerogative. In that case, the House of Lords held that the **established grounds for judicial review can be used to challenge the exercise of a non-statutory discretion or prerogative**.

See: ***CCSU v Minister for Civil Service*** [1985] 1 AC 374

[IA(P) Jilid 1, TAB 9 @ pp. 122E - 125H, 131E - 133C & 134D - F]

24. Thirdly, it is also pertinent that in administering and disbursing the Special Constituency Allocation, the 1st and 2nd Respondents (or either of them) are administrative and/or public bodies that exercise a public function in which they utilise public monies for public benefit or in the public interest. The exercise of their power and discretion is therefore susceptible to judicial review. As a consequence, in discharging such functions the 1st and 2nd Respondents or any of them must exercise their powers and duties:-

24.1 according to the law and for a proper purpose;

24.2 under clearly set out and disclosed guidelines and considerations;

24.3 applying the same guidelines and considerations to all applications equally and considering them fairly, in good faith and without bias;

24.4 transparently and with full disclosure and accountability to the public.

25. The following English authorities support our submissions above:-

25.1 In ***R v Criminal Injuries Compensation Board, ex parte Lain***, judicial review proceedings were brought against a criminal injuries compensation board that ran a criminal injuries compensation scheme using public funds allocated by Parliament to the executive government. The Board was not set up by statute but by appointment of the executive government, and the Board's authority therefore derived from a prerogative act of the executive government. The Court held that it had jurisdiction to supervise the discharge of the Board's functions, regardless of the fact that the Board was not set up by statute but by the executive government. In distributing "the bounty of the Crown" under executive instruction, the Board was held to be performing public duties.

See: ***R v Criminal Injuries Compensation Board, ex parte Lain***
[1967] 2 All ER 770
[IA(P) Jilid 1, TAB 10 @ pp. 147, 148 & 151 - 152]

25.2 In ***Laker Airways Ltd v Department of Trade***, the subject matter was the justiciability of the exercise of a Crown prerogative. Lord Denning MR reaffirmed that a prerogative is a discretionary power to be exercised by the government for the public good in certain spheres of governmental activity for which the law has made no provision. The court can set limits by defining the bounds of the activity, and it can intervene if the discretion is exercised improperly or mistakenly.

See: ***Laker Airways Ltd v Department of Trade***
[1977] 1 QB 643 **[IA(P) Jilid 1, TAB 11 @ pp. 217 - 218]**

26. The position in India is similar and is exemplified by the recent Indian Supreme Court case of ***Akhil Bhartiya Upbhokta Congress v State of Madhya Pradesh & Ors***, where, after reaffirming that the limits of the exercise of a discretion are reviewable, the Court held that in the exercise of discretion under a State policy, the policy must be implemented and executed in a non-discriminatory and non-arbitrary method:-

> "[50]……. **The exercise of power by political entities and officers / officials for providing different kinds of services and benefits to the people always has an element of discretion, which is required to be used in larger public interest and for public good**. In principle, no exception can be taken to the use of discretion by the political functionaries and officers of the State and/or its agencies / instrumentalities provided that this is done in a rational and judicious manner without any discrimination against anyone. In our constitutional structure, no functionary of the State or public authority has an absolute or unfettered discretion. **The very idea of unfettered discretion is totally incompatible with the doctrine of equality enshrined in the Constitution and is an antithesis to the concept of the rule of law**.
>
> [51] In his work *Administrative Law* (6th edn.) Prof. H.W.R. Wade highlighted the distinction between powers of public authorities and those of private persons in the following words:
>
> > **The common theme of all the authorities so far mentioned in that the notion of absolute or unfettered discretion is rejected.** Statutory power conferred for public purposes is conferred as it were upon trust, no [*sic*] absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. **Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms**.

Prof. Wade went on to say:

> … **The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good**.
>
> **There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed. Nor is this principle an oddity of British or American law; it is equally prominent in French law. Nor is it a special restriction which fetters only local authorities; it applies no less to ministers of the Crown**. Nor is it confined to the sphere of administration: it operates wherever discretion is given for some public purpose, for example where a judge has a discretion to order a jury trial. It is only where powers are given for a personal benefit of the person empowered that the discretion is absolute. Plainly this can have no application in public law.
>
> **For the same reasons there should in principle be no such thing as an unreviewable administrative discretion, which should be just as much a contradiction in terms as unfettered discretion. The question which has to be asked is what it the scope of judicial review, and in a few special cases the scope for the review of discretionary decisions may be minimal. It remains axiomatic that all discretion is capable of abuse, and that legal limits to every power are to be found somewhere**…..

[65] What needs to be emphasised is that **the State and/or its agencies/ instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State**. Every action/decision of the State and/or its agencies / instrumentalities to give largesse or confer benefit **must be founded on a sound, transparent, discernible and well-defined policy, which shall be made known to the public by publication in the Official Gazette and other recognised modes of publicity and such policy must be**

> **implemented / executed by adopting a non discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy**. The distribution of largesse like allotment of land, grant of quota, permit licence, etc. by the State and its agencies/instrumentalities **should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion**, if any, conferred upon the particular functionary or officer of the State.
>
> [66] We may add that **there cannot be any policy, much less, a rational policy** of allotting land on the basis of applications made by individuals, bodies, organisations or institutions dehors an invitation or advertisement by the State or its agency / instrumentality. **By entertaining applications made by individuals, organisations or institutions for allotment of land or for grant of any other type of largesse the State cannot exclude other eligible persons from lodging competing claim.** Any allotment of land or grant of other form of largesse by the State or its agencies / instrumentalities by treating the exercise as a private venture is **liable to be treated as arbitrary, discriminatory and an act of favouritism and/or nepotism violating the soul of the equality clause embodied in art. 14 of the Constitution**." (emphasis added)

See: ***Akhil Bhartiya Upbhokta Congress v State of Madhya Pradesh & Ors***
[2012] 1 CLJ 1 **[IA(P) Jilid 2, TAB 21 @ pp. 480 - 481 & 489 - 490]**

27. In the circumstances, the exercise of the Respondents' purported discretion, whether statute or prerogative based, is susceptible to judicial review, and it is for the High Court to determine whether the exercise of the discretion is justiciable in the substantive judicial review application, after having had the benefit of evidence from all parties.

28. It is respectfully submitted that the Court of Appeal decision is contrary to the prevailing law on the legal burden imposed on parties in a judicial review, as the said decision allows the Respondents to 'escape' judicial review on a mere unsubstantiated allegation of a non-justiciable prerogative and without needing to satisfy the legal burden on them to prove the same.

See: ***Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia*** [2007] 1 CLJ 19 **[IA(P) Jilid 2, TAB 13 @ pp. 263 - 264]**

B.A. Rao & Ors v Sapuran Kaur & Anor [1978] 2 MLJ 146 **[IA(P) Jilid 2, TAB 14 @ pp. 273 - 274]**

29. The factors stated in paragraphs 21 to 25 above were brought to the attention of the Court of Appeal in the Appellant's written submissions and during the hearing of the AG's Appeal. However, as may be observed from the Court of Appeal's grounds of judgment, the court wholly failed to consider or take into account the Appellant's arguments in coming to its decision.

30. The Court of Appeal's treatment of the AG's allegation of a "non-justiciable discretion" ought to be compared to the manner in which the same allegation was dealt with by the learned High Court Judge in this case who, we respectfully submit, did so on the correct legal principles. We quote the following passages from Her Ladyship's Grounds of Judgment:-

> "To my mind the exercise of discretion in the evaluation of the qualifications or applications of the Special Constituency Allocation may well be based on policy considerations within the management prerogative but the Applicant contends that the Respondents' in the exercise of discretion with regard to the administration and

disbursement of the Special Constituency Allocation has acted capriciously, with bias and/or improper purpose, has failed to taken into account relevant factors and has taken into account irrelevant factors.

I am of the view that the mere assertion that this is a matter of management prerogative and therefore not reviewable by the court is insufficient. It is a question of evidence. Even where the executive asserts a particular decision in not susceptible to judicial review on the ground of national security, Lord Fraser of Tullybelton in C.C.S.U. v Minister for Civil Service (supra) said at p. 402 as follows –

> **The question is one of evidence**. The decision on whether the requirement of national security outweigh the duty of fairness in any particular case is for the Government and not 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. But if the decision is successfully challenged, on the ground that it has been reached by a process which is unfair, then the Government is under an obligation to produce evidence that the decision was in fact based on the grounds of national security.

In the same case Lord Roskill said at p. 420 as follows –

> My Lords, the conflict between private rights and the rights of the state is not novel either in our political history or in our courts. Historically, at least since 1688, the courts have sought to present a barrier to inordinate claims by the executive. But they have also been obliged to recognize that in some fields that barrier must be lowered and that on occasions, albeit with reluctance, the courts must accept that the claims of executive power must take precedence over those of the individual. Once such field is that of national security. The courts have long shown themselves sensitive to the assertion by the executive that considerations of national security must preclude judicial investigation of a particular individual grievance. **But even in that field the courts**

> **will not act on a mere assertion that questions of national security were involved. Evidence is required that the decision under challenge was in fact founded on those grounds.**"
>
> (emphasis added)

See: High Court Grounds of Judgment, paras. 14 & 15
[R/R (Jilid 2), pp. 185 - 186]

31. Based on the law and facts set out above, we respectfully submit that:-

31.1 In judicial review proceedings, the justiciability of a decision that is allegedly based on policy considerations or management prerogative (**"non-statutory discretion"**) depends on the existence, nature and extent of the non-statutory discretion and on the particulars facts of each case, and therefore evidence of those factors must be adduced before the justiciability of a non-statutory discretion can be determined.

31.2 Therefore, where it is alleged that the decision or exercise of discretion sought to be reviewed under judicial review is a decision based on policy considerations or management prerogative, such an allegation should not be disposed of on an application for leave to apply for judicial review, but should only be determined by the High Court after hearing the evidence at the substantive motion for judicial review.

THE COURT OF APPEAL'S OTHER GROUNDS FOR SETTING ASIDE LEAVE TO ISSUE JUDICIAL REVIEW, ARE WRONG IN LAW AND ON THE FACTS

The Court of Appeal failed to apply the correct test in an application for leave to apply for judicial review when it* inter alia*, required the Appellant at leave stage to prove his entitlement to the reliefs claimed

32. A reading of the Court of Appeal decision will show that the Court imposed a heavy burden on the Appellant merely at the stage of applying for leave to issue judicial review proceedings. The conclusions from the Court of Appeal decision are amongst others, that:-

    32.1 The Appellant must establish his entitlement to the reliefs he has claimed even at leave stage.

    32.2 If he fails to do so, leave must be refused.

33. We submit that these conclusions are in conflict with established principles of law and set a dangerous, contrary precedent:-

    33.1 To obtain leave under Order 53 RHC, an applicant needs only show that he has a *prima facie* arguable case. In showing a *prima facie* an arguable case (an application that is not frivolous or vexatious), an applicant, as stated by the Supreme Court, merely has to show "*that there is some substance in the grounds supporting the application*".

    See: ***Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Bank Association*** [1990] 3 MLJ 228
    [IA(P) Jilid 1, TAB 7 @ p. 77]

33.2 In this regard, the Court ought not to go into the matter in any depth and should only subject the material to a quick perusal to ascertain whether it discloses what might on further consideration turn out to be an arguable case in favour of granting the applicant the relief claimed.

See: ***QSR Brands Bhd v Suruhanjaya Sekuriti & Anor***
[2006] 2 CLJ 532 **[IA(P) Jilid 1, TAB 8 @ p. 86]**

33.3 Even if the applicant is unable to establish his entitlement to the reliefs he has claimed, the High Court has the power and jurisdiction in judicial review proceedings to **fashion appropriate reliefs of its own in place of the reliefs pleaded, when it hears the substantive motion**.

See: ***Sivarasa Rasiah v Badan Peguam Malaysia & Anor*** [2002] 2 CLJ 697 **[IA(P) Jilid 2, TAB 19 @ pp. 427h – 428i]**

Order 53 rule 2(3) RHC **[IA(P) Jilid 1, TAB 1 @ p. 2]**

34. We respectfully submit that the Court of Appeal placed an unduly heavy burden on the Appellant at leave stage to prove his entitlement to the reliefs sought, and ignored the principles set out above, although they were brought to the Court's attention *vide* the Appellant's submissions.

35. In any event, the Court of Appeal failed to recognise that a mere dismissal of the Appellant's entitlement to the reliefs of *Quo Warranto* and Mandamus does not warrant a refusal to grant the Appellant leave to apply for Judicial Review, as there were Declaratory reliefs sought in the Appellant's Judicial Review application that remained unchallenged and continued to subsist.

Whether a remedy of* Quo Warranto *may lie where there is conflicting evidence or representations as to which public or government body holds the power or discretion to manage and disburse monies allocated under the Federal consolidated Fund under Article 97(1) of the Federal Constitution

36. With respect to the relief of *Quo Warranto* sought by the Appellant in his Judicial Review application, the Court of Appeal stated that in order to succeed in an application for a Writ of *Quo Warranto*, the Appellant must satisfy 3 pre-conditions, namely:-

    (a) the office in question has been created by written law;
    (b) the office is a public office; and
    (c) the person proceeded against is not legally or properly qualified to hold the office.

    See: Grounds of Judgment, paras. 11 - 20 [R/R (Jilid 1), pp. 32 - 35]

37. The above test was postulated in the AG's written submissions and accepted by the Court of Appeal without any legal authority cited in support.

38. The Court of Appeal proceeded to hold that the Appellant had failed to discharge the 3rd pre-condition to challenge "*the qualifications and appointments of the [1st Respondent] and [2nd Respondent] or any legal flaw in the qualifications and appointment*". On this basis, the Court of Appeal held that prayer 1 of the Appellant's Judicial Review Application was outside the scope of a Writ of *Quo Warranto*.

39. In actual fact, the Appellant **had** challenged the appointment or the legality thereof of the 1st and 2nd Respondents, by pointing out with the support of documentary evidence, the inconsistent averments by the parties as to whether the 1st or 2nd Respondent has been vested with the power / discretion to manage and disburse the Special Constituency Allocation. We refer to paragraph 9.1 and 9.2 above, which points to the relevant paragraphs and documentary exhibits in the Appellant's Affidavit in Support in the High Court.[4]

40. Nevertheless, we submit that where there is conflicting evidence as to which public body holds power / discretion to manage and disburse public monies under Article 97(1) of the Federal Constitution, a relief of *Quo Warranto* must surely lie:-

    40.1 There will be a myriad of situations where a member of the public may not have access to documentation or evidence that shows to a certainty that a particular 'public officer' is not legally or properly qualified to hold his office.

    40.2 A member of the public may only have, as in Dr Jeyakumar's case, such documentation as is available in the public domain that shows **inconsistent representations between two or more parties** about

[4] In this regard, in paragraph 12 of its Grounds of Judgment [R/R (Jilid 1), p. 33] the Court of Appeal appears to suggest that Counsel for the Appellant did not refer to the Writ of *Quo Warranto* at the hearing of the AG's Appeal. This is incorrect. As its written submissions before the Court of Appeal demonstrate, extensive submissions were put forward by Counsel for the Appellant on the issue [R/R (Jilid 1), pp. 112 – 114 & 148 – 149], none of which were taken into account by the Court in coming to its decision.

their legal qualification to hold the same office or discharge the same public function.

40.3 The very purpose of Writs of *Quo Warranto* are for the parties challenged on judicial review to come and show their due legal qualification or authority. Such purpose would be defeated if the challenger must first be required **at leave stage** to prove the public officer's non-qualification.

41. We submit that it is imperative not only for the parties that can apply for funds from the Special Constituency Allocation to know who the proper authority deciding their application is, but also for the public to know the same, given that the Special Constituency Allocation utilises public monies.

See: Administrative Law of Malaysia and Singapore (3rd Ed) MP Jain **[IA(P) Jilid 2, TAB 15 @ pp. 281 - 282]**

Lim Cho Hock v Government of the State of Perak & Ors [1980] 148 **[IA(P) Jilid 2, TAB 16 @ p. 286]**

42. In the circumstances, the judgment of the Court of Appeal on the test to be applied for the issuance of Writs of *Quo Warranto,* if left unrevised, may stand as binding precedent for the Courts below and will, for the reasons stated above, create injustice and inequity for applicants in judicial review proceedings.

The Court of Appeal's decision that a remedy of Mandamus must in all cases satisfy the conditions under section 44 of the Specific Reliefs Act 1950, contrary to prevailing legal precedent

43. In respect of the orders of Mandamus sought by the Appellant in his Judicial Review application, the Court of Appeal held that the Appellant was not entitled to claim such a relief, as he had failed to comply with section 44 of the Specific Reliefs Act 1950 in that he had not shown that there is a legal or statutory duty on the part of the 1st and/or 2nd Respondent to approve his 2010 Application.

See: Grounds of Judgment, paras. 21 - 31 [R/R (Jilid 1), pp. 35 - 41]

44. With respect, this position taken by the Court of Appeal is contrary to law:-

44.1 There is a distinction between a **writ of Mandamus** and an **order of Mandamus**, and the requirements of sections 44 and 45 of the Specific Reliefs Act **apply to the former and not the latter**.

44.2 Apart from the Specific Reliefs Act, Order 53 of the Rules of the High Court 1980 and Paragraph 1 of the Schedule to the Courts of Judicature Act 1964 also confer power upon the courts to issue Mandamus, and a litigant may resort to **either** of these enabling provisions in applying for an order of Mandamus.

44.3 Therefore, an applicant who applies for an order of Mandamus under either Order 53 of the Rules of the High Court 1980 or Paragraph 1 of the Schedule to the Courts of Judicature Act 1964 **does not have to comply with section 44 of the Specific Reliefs Act**.

See: ***Hong Leong Equipment Sdn Bhd v Liew Fook Chuan***
[1997] 1 CLJ 665 **[IA(P) Jilid 2, TAB 17 @ pp. 361 - 363]**

Minister of Finance, Sabah v Petrojasa Sdn Bhd
[2008] 5 CLJ 321 **[IA(P) Jilid 2, TAB 18 @ pp. 406 - 407]**

45. The Appellant here therefore is entitled to pray for orders of Mandamus under Order 53 of the Rules of the High Court or Paragraph 1 of the Schedule to the Courts of Judicature Act. Notwithstanding this, the Court of Appeal was of the view that the Appellant was still required to comply with section 44 of the Specific Reliefs Act 1950.

46. We respectfully submit that the Court of Appeal's decision on this point should not be allowed to stand. Apart from the fact that it is contrary to law, the Court of Appeal's finding may be used to bar the Appellant from seeking his reliefs of Mandamus, even if he were to succeed on his Appeal before the Federal Court and the matter reverts back to the High Court for disposal of the substantive application for judicial review.

THE OBJECTIONS RAISED BY THE ATTORNEY GENERAL AGAINST THE APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ARE NOT OBJECTIONS IN THE PUBLIC INTEREST

47. Under Order 53 rule 3 RHC, an application for leave is made *ex parte*, but the AG is required to be served with the cause papers beforehand and entitled to attend the hearing and make representations. However, in that role, the AG appears in his capacity as the guardian of the public interest, and not as a representative of any public or government body that may become a respondent to those proceedings. In carrying out this dual role, it is obvious that the AG must separate his obligation to the public interest in the first instance, from his possible later obligation to represent and defend any respondent in the proceedings, as both roles could place him in a position of conflict. For example, the protection of the public interest may require the AG to support an application for leave to issue judicial review proceedings but this would likely not be in the interest of the public / government body that might subsequently become a respondent to those proceedings.

See: ***Kanawagi a/l Seperumaniam v Dato' Abdul Hamid bin Mohamad*** [2004] 5 MLJ 495 **[IA(P) Jilid 2, TAB 20 @ pp. 436 - 438]**

48. In the present case, we respectfully submit that none of the AG's objections to the application for leave in the High Court or the Court of Appeal appear to be to protect the public interest. The objections instead appear to be the sort of objections that the Respondents would raise in opposing judicial review proceedings once leave is granted.

49. It is our submission that the AG ought to have in fact supported the Appellant's application for leave to apply for judicial review. The application involves the disbursement of vast sums of public monies by public bodies and the controls / limits of discretion imposed on those bodies in the exercise of their functions. It cannot be gainsaid that judicial scrutiny and review of any wrongdoing or excess of power would therefore be in the public interest and for the public benefit.

CONCLUSION

50. In the sum totality of the matters set out above, we ask that the Appeal be allowed, the order dated 10.10.2011 of the Court of Appeal be set aside and the Order dated 25.02.2011 of the High Court be restored.

Dated this 2nd day of August, 2012.

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Solicitors for the Appellant

These **Applicant's Written Submissions** are prepared by Sreenevasan, solicitors for the abovenamed Applicant whose address for service is at Ground Floor, Block B, Kompleks Pejabat Damansara, Jalan Dungun, Damansara Heights, 50490 Kuala Lumpur.
[Ref No : AS.2009.0720]
[Tel No: 2055 2122 Fax No: 2095 1322]