DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)

PERMOHONAN SEMAKAN KEHAKIMAN NO. R3(2)-25-43-2007

[redacted]

Dalam perkara Aturan 53 Kaedah-Kaedah Mahkamah Tinggi, 1980, Artikel-Artikel 5, 8, 10 Perlembagaan, Bab VIII Akta Relif Spesifik, 1950 dan remidi-remidi di bawah seksyen 25(2) dan perenggan 1 Jadual kepada Akta Mahkamah Kehakiman, 1964.

DAN

Dalam perkara Perintah Mesin Cetak dan Penerbitan (Kawalan Hasil Penerbitan Tak Diingini) (No. 15), 2006 yang dibuat pada 21 November 2006 di bawah seksyen 7(1) Akta Mesin Cetak dan penerbitan, 1984 berkenaan hasil penerbitan iaitu buku bahasa Tamil bertajuk "Mac 8" oleh Arumugam a/l/ Kalimuthu yang diterbitkan oleh Semparuthi Publications Sdn Bhd (409768-U).

DAN

Dalam perkara permohonan Arumugam a/l Kalimuthu untuk, antara lainnya, perintah-perintah deklarasi dan certiorari untuk membatalkan dan/atau mengenepikan Perintah Mesin Cetak dan Penerbitan (Kawalan Hasil Penerbitan Tak Diingini) (No. 15), 2006

ANTARA

ARUMUGAM A/L KALIMUTHU ... **PEMOHON**
(No. K/P: [redacted])

DAN

1. **MENTERI KESELAMATAN DALAM NEGERI**
2. **TIMBALAN MENTERI KESELAMATAN DALAM NEGERI**
3. **KERAJAAN MALAYSIA** ... **RESPONDEN-RESPONDEN**

GROUNDS OF DECISION

This application concerns the banning of a book in the Tamil language entitled "Mac 8" published sometime on 8th of April 2006, which book was banned by an order dated 21st of November 2006 in exercise of power conferred under section 7(1) of the Printing Presses and Publications Act 1984. This order was published in the Government Gazette dated 28th of December 2006. This particular order was signed by the Deputy Minister and according to it the book was banned for being "prejudicial to public order". The order is identified as Printing Presses and Publications (Control of Undesirable Publications) (Number 15) Order 2006.

The Applicant is the author of this book.

By this judicial review application, the Applicant seeks the following orders and reliefs:

(a) declaratory order that the Minister's order is invalid and null and void;

(b) an order of certiorari to quash and/or set aside the Minister's order;

(c) damages under order 53 rule 5 of the rules of the High Court 1980.

According to the Applicant's version of the facts, he came to know of the banning of the book only by reading an online news article in Malaysiakini.com sometime on 19th January 2007. He discovered about the gazetting only on or about 24th of January 2007.

The challenge mounted against the Minister's order is premised on four grounds, namely illegality, procedural impropriety, irrationality and proportionality, the grounds as stated **Council of Civil Service Unions** v **Minister for the Civil Service** [1984] All ER 935, and accepted in Malaysia in such cases as **Majlis Perbandaran Pulau Pinang** v **Syarikat Bekerjasama Serbaguna Sungai Gelugor** [1999] 1 MLJ 1. By way of summary, the Applicant argues that the order, being signed by the Deputy Minister of Internal Security for an on behalf and in the name of the Minister of Internal Security, is bad in law, being evidence of a fatal procedural defect. The powers conferred by section 7(1) of the Act is personal to the Minister and therefore cannot be exercised by the Deputy Minister. There was no evidence of the Minister's personal satisfaction as

a condition precedent or jurisdictional fact. It was strongly argued in this connection that the section 7 power can never be delegated. The case will be different if the satisfaction of the mind is of the Minister but the act of signing the order is done by the Deputy Minister. However, Applicant's counsel submitted there was no evidence of this personal satisfaction by the Minister himself. This argument touches on the ground of illegality. As for procedural impropriety, the Applicant argues there has been a breach of the rules of natural justice in that he was not accorded the right to be heard before the decision was made banning his book, and secondly, the Respondents had failed to give reasons for the decision. The decision is argued as having been made arbitrarily. As for the ground of "irrationality", looking at the contents of the book objectively, it cannot be properly described as being against public order. Indeed, it was argued, if read and understood properly, the book will be seen as promoting public order. As regards the "proportionality" ground, it is argued that the Minister's order was disproportionate to the objects sought to be achieved and was an unreasonable restriction on the right to free expression as guaranteed by Article 10 of the Federal Constitution of Malaysia.

In the course of submission, the translation of the book was furnished to this court and appears as Exhibit AS-1. Counsel for the Applicant explained that the book concerns the Kampung Medan incident. It contains 10 accounts by the victims of this racial disturbance in the area. These accounts were reproduced with permission from a PhD thesis available in the library of the University of Malaya. The book gives an account of the events preceding the attacks, an account of two incidents which the applicant believes have caused the clashes and it

narrates the first incident which eventually led to the racial disturbance. All these are produced from parts of the Ph.D. thesis. Thereafter the book traces the history of Kampung Medan and its economic development over time, followed by the author's comments and criticisms. In the final part of the book, translated into Bahasa Malaysia as "Pengajaran", the author submits on the lessons to be learnt from the whole incident, and in the closing paragraph it calls for elimination of all forms of discrimination. It is therefore argued by counsel for the Applicant that if the book is read in totality, it cannot fall anywhere near what can be deemed to be an undesirable publication, or as being against public order. In totality, the book is a reasoned criticism of government policy and has to be viewed as part of normal political discourse. As such, the decision to ban the book on the ground of public order has to be regarded as irrational.

It will be pertinent to examine closely the statutory formula under section 7 (1) of the Act, and this provision reads as follows:

> "If the Minister is satisfied that any publication contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is in anyway prejudicial to or likely to be prejudicial to public order ... he may in his absolute discretion by order published in the Gazette prohibit, either absolutely or subject to such conditions as may be prescribed, the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of that publication."

I emphasise the words "if the Minister is satisfied" and "he may in his absolute discretion by order". The statutory language used *prima facie* suggests the power being vested personally in the Minister.

Turning to the arguments for the Respondents, the affidavit in reply affirmed by Dato' Fu Ah Kiow, who was at the material time the Deputy Minister, states that the width of jurisdiction of the First Respondent (the Minister himself) and the Second Respondent (the Deputy Minister) is determined by the Constitution and the statute, and to that extent the averment of the Applicant that only the Minister could exercise the discretionary power under section 7 was expressly denied. The then Deputy Minister states:

> *"13. Saya telah meniliti syor dan ulasan yang dikemukakan oleh Bahagian Kawalan Penerbitan dan Teks Al Quran dan sebelum memutuskan untuk melarang penerbitan buku pemohon, saya telah mempertimbangkan perkara-perkara yang berikut:*
>
> > *13.1 Terdapat laporan dan aduan yang dikemukakan oleh ibu pejabat polis berdasarkan kajian mengenai kesan buku pemohon terhadap keharmonian kaum dan keselamatan Negara dan ketenteraman awam yang boleh meracuni fikiran dan minda orang awam yang membaca khususnya kaum India yang membaca buku Pemohon yang diterbitkan dalam Bahasa Tamil sahaja.*
> >
> > *13.2 Bahagaian Kawalan Penerbitan dan Teks Al Quran juga telah mengkaji isi kandungannya dan mendapati buku Pemohon menyiarkan isu-isu perkauman yang boleh memudaratkan ketenteraman awam dan keselamatan Negara.*

13.3 Saya telah mempertimbangkan kajian yang dikemukakan kepada saya dan pada 21 November 2006 saya telah bersetuju dengan syor yang dikemukakan. Memandangkan ini merupakan isu keselamatan Negara maka ia hendaklah ditangani dengan segera.

13.4 Tindakan yang saya ambil untuk mewartakan buku Pemohon sebagai buku yang dilarang pencetakan dan penerbitannya. Tindakan ini adalah selaras dengan bidang kuasa yang diberikan kepada saya bagi mengelakkan kejadian serupa dengan kejadian Kampung Medan dari berulang dan lebih ramai orang awam diracuni fikiran mereka oleh kata-kata yang ditulis dalam buku Pemohon."

It is abundantly clear from this affidavit in reply that the subjective satisfaction exercised was that of the Deputy Minister, not the Minister himself. Exercising that subjective satisfaction, the Deputy Minister stated that he was satisfied it was necessary to gazette the book as an undesirable publication after considering the advice and report received from Police Headquarters (relying on studies conducted on the effects of the book on race relations, public order and national security), as well as the advice from Bahagian Kawalan Penerbitan dan Teks Al-Quran which had also studied the contents of the book and found that the book published racial issues that could prejudice public order and national security.

Since it is clear that it was the Deputy Minister who was the decision maker, the initial issue of whether the subjective satisfaction of the Minister under section 7(1) of the Act can be delegated to the Deputy Minister has first to be determined. In the course of argument, counsel for the Applicant stated that he was mindful that there were numerous

decisions in Malaysia in favour of the position that the powers of the Minister can be exercised by the Deputy Minister. Nevertheless counsel argued that in all these cases no reference was made to the explanation given by the Government when moving the amendment to the Federal Constitution to include article 43A. Article 43A(2), which is the relevant part for our purposes, reads:

> "(2) Deputy Ministers shall assist Ministers in the discharge of their duties and functions, and for such purpose shall have all the powers of Ministers."

The argument taken on behalf of the Applicant was on the basis that "assist" cannot be taken to mean "assume". In other words, a Deputy Minister while he can assist the Minister in carrying out the Minister's functions cannot himself assume the full width of power of the Minister. Reference was made to the Hansard, in which the following explanation from the then Prime Minister, Dato' Seri Dr Mahathir Mohamad, when moving on the amendment bill during the second and third reading, appears:

> "Pindaan ini akan membolehkan Timbalan Menteri dan Setiausaha Parlimen dengan arahan Menteri, mengemukakan Rang Undang-Undang tertentu dalam Dewan Rakyat dan Dewan Negara apabila Menteri berkenaan tidak dapat menjalankan tugasnya kerana sesuatu sebab. Ini tidak bermakna Timbalan Menteri dan Setiausaha Parlimen berkuasa seperti Menteri dan boleh mengganti Menteri dalam Jemaah Menteri atau mengendalikan tugas-tugas yang dihadkan kepada Menteri." (pp 8555 and 8556, Penyata Rasmi Parlimen 1.8.83).

The law permits reference being made to Hansard as an aid to interpretation and to assist to resolve any ambiguity in the statute. See **Chor Phaik Har** v **Farlim Properties Sdn Bhd** [1994] 4 CLJ 285. Nevertheless, in relation to Article 43A there does not appear any ambiguity in the language used. True enough in the first limb of the provision it provides Deputy Ministers shall assist Ministers in the discharge of the duties and powers, but in the second limb the provision goes on to say that for this purpose the Deputy Ministers shall have *all the powers* of the Ministers. This constitutional provision is reflected in section 6 (1) of the Delegation of Powers Act 1956 and which provides:

> "Subject to section 11 and of any written law expressly to the contrary all acts, orders or directions which could lawfully be done or given, in the exercise of any power or in the performance of any duty conferred on imposed by any written law, by a Minister ... may, subject to any directions given by him be validly and effectually done or given on his behalf and in his name by any officer under his administrative control and expressly or impliedly authorised by him generally or specially thereto or in the case of a Minister be done or given on his behalf and in his name by the Deputy Minister."

Further under the Ministerial Functions Act 1969 and the order made by the Yang Di-Pertuan Agong thereunder, the Deputy Minister of Internal Security is expressly authorised to perform, function and exercise powers under, *inter alia*, The Printing Presses and Publications Act 1984. See the Ministers of the Federal Government (No. 2) Order 2004 and the Ministers of the Federal Government (Amendment) (No. 2) Order 2006.

In the circumstances and bearing in mind these various interlocking constitutional and statutory provisions, I see no valid or compelling reason to depart from the approach taken in the series of cases which have stated the view that a Deputy Minister can exercise the powers of the Minister. See the cases of **Nadarajan a/l Somasundram** v **Timbalan Menteri Hal Ehwal Dalam Negeri** [1994] 4 CLJ 728, **Su Yu Min v Ketua Polis Negara** [2005] 3 CLJ 875 and **Wong Fook Nyen** v **Timbalan Menteri Dalam Negeri** [1998] 2 CLJ (Rep) 543.

Since this court has taken the view that the Deputy Minister can exercise the powers of the Minister under section 7 for and on his behalf in the fullest sense, it remains to be considered whether the exercise of power was validly made. The section 7(1) power is couched as subjective discretionary power. It speaks of "he may in his absolute discretion" decide to prohibit the publication or circulation or distribution of a book on the ground of being prejudicial to public order. The preponderance of authority presently leans in favour of requiring the courts to ascertain whether objectively viewed that subjective satisfaction has been exercised properly in law, particularly where fundamental rights are in issue. See, for example, **Mohamad Ezam Mohd Nor** v **Ketua Polis Negara & Other Appeals** [2002] 4CLJ 309 (following **Chng Suan Tze** v **The Minister of Home Affairs & Ors** [1988] 1 LNS 162) where it was held, *interalia*, although the court will not question the executive's decision as to what national security requires, yet it may and will examine whether the executive decision is in fact based on consideration of national security (this was said in the context of s. 73(1) of the Internal Security Act).

Recently, I have had occasion to review two important Supreme Court decisions bearing on this issue in the case of **(R - 25 - 347 - 2008) SIS Forum (Malaysia)** v **Dato Sri Syed Hamid bin Syed Jaafar Albar.** In that decision I had stated the following:

> "As accepted by both parties, the discretion exercised by the honourable Minister is open to an objective assessment by this court in order to determine whether the pre-condition for its exercise has been satisfied on the facts. The decision of the Minister is, by our jurisprudence, not to be regarded as final although the statutory formula may appear to indicate so. Here, as in other provisions, the discretion is to be exercised is stated as being in the honourable Minister's "absolute discretion". But it must still stand the test of whether it has been properly exercised in law, since the question whether the decision has been taken on the ground of public order" is a question of law. See **Merdeka University Bhd** v **Government of Malaysia** where it was stated the correct view is "for an objective approach to the formula to be preferred and this means that the discretion would be reviewable and the deciding authority has in fact to have reasonable grounds and it is insufficient if he merely thinks he has reasonable grounds." This approach has been further emphasised by the Federal Court very recently in **Darma Suria bin Risman Shah** v **Menteri Dalam Negeri & 3 Ors** (2009) (Rayuan Jenayah No. 05-70-2009), where it is said:
>
> > "Applying this test which apart from being binding precedent is the correct statement of the law, in the present instance it is insufficient if the Minister thought he had reasonable grounds to be satisfied that the appellant

> had acted in a manner prejudicial to public order. The question that a court must ask itself is whether a reasonable Minister apprised of the material set out in the statement of facts would objectively be satisfied that the actions of the Appellant were prejudicial to public order."

In the course of submission, I was referred to another recent decision of the Federal Court, namely **Sivarasa Rasiah** v **Badan Peguam Malaysia dan Kerajaan Malaysia** (2009) (Rayuan Sivil No. 01-2006(W)). The highest court in the land has stated in no uncertain terms that "the fundamental liberties guaranteed under Part II must be generously interpreted and that a prismatic approach to interpretation must be adopted." The Federal Court further stressed that "provisos or restrictions that limit or derogate from a guaranteed right must be read restrictively". In the context of Article 10, such as the case here, "restrictions" must be read as qualified by the word "reasonable". The Federal Court opined:

> "Now although the Article says "restrictions", the word "reasonable" should be read into the provision to qualify the width of the proviso. The reasons for reading the derogation as "such reasonable restrictions" appear in the judgment of the Court of Appeal in **Dr Mohd Nasir Hashim** v **Menteri Dalam Negeri Malaysia** [2007] 1 CLJ 1 which reasons are now adopted as part of this judgment."

The Federal Court has now determined that the rights guaranteed by Part II which are enforceable by the courts of law, "form part of the basic structure of the Federal Constitution." It has also categorically stated that provisions of the Constitution "must be interpreted in keeping with the

doctrine of procedural and substantive fairness housed in Article 8(1)". It must additionally "meet the test of proportionality". Given its immediate relevance to our case here, I quote the pertinent passage in the Federal Court judgment (paragraph 19):

> "...when state action is challenged as violating a fundamental right, for example, the right to livelihood or the personal liberty to participate in the governance of the Malaysian Bar under Article 5(1), Article 8 will at once be engaged. When resolving the issue, the court should not limit itself within traditional and narrow doctrinaire limits. Instead. It should ask itself the question: is the state action alleged to violate a fundamental right procedurally and substantively fair. The violation of a fundamental right where it occurs in consequence of executive or administrative action must not only be in consequence of fair procedure but should also in substance be fair, that is to say, it must meet the test of proportionality housed in the second, that is to say, the equal protection limb of Article 8 (1)."

These are wide pronouncements of the Federal Court binding on this Court, and therefore, with due deference to precedent, I have to approach this present case on the same basis. Can it therefore be said, on the facts of this case, and applying the approach of reading encroachments on fundamental liberties restrictively, the honourable Minister has applied procedural and substantive fairness and acted with proportionality?"

Consistency demands that I adopt the same standards and tests, but placed against the factual matrix of this current application. Facts will

naturally differ from case to case. On the facts of this present case, can it be said that objectively viewed, the Deputy Minister's exercise of subjective satisfaction is procedurally or substantively flawed in law? The question posed in **Darma Surla bin Risman Shah** then become highly pertinent: "The question that a court must ask itself is whether a reasonable Minister apprised of the material set out in the statement of facts would objectively be satisfied that the actions of the Appellant were prejudicial to public order."

This present book is written on the Kampung Medan racial disturbance. That is a public order and national security issue in itself. True, major parts of the book are derived from a PhD thesis, but an academic work couched in rather sedentary and dispassionate language, and made accessible only to a select few at the university, cannot be equated with a book meant for general consumption, and targeted for the Indian community who are portrayed in the book as the victims. This court has to be also mindful of the social and cultural sensitivities of the respective communities in Malaysia and balance it against the need to preserve and protect human rights. Both the statutory and constitutional framework has to be objectively balanced against these sensitivities. In the final analysis, it has to asked and answered whether there were materials before the Deputy Minister on which he could decide as he did in exercise of the statutory objectives of the Act. Objectively viewed, I am of the view there were facts available for the Deputy Minister upon which he could conclude that the book would be prejudicial to public order. In exercise of its judicial review jurisdiction, this Court should not supplant the Minister's subjective satisfaction with its own, unless the bounds of legality, in the sense explained above, are clearly transgressed. On the

facts of this instant application, I do not believe the requirements of the standards of "illegality", "procedural impropriety", "irrationality" or "proportionality" have been satisfied to incline this Court to quash the Deputy Minister's decision. On the facts of this case, the limitation on the fundamental right conferred under Article 10 is "necessary in a democratic society, in the sense of meeting a pressing social need" and "the interference [is] proportionate to the legitimate aim being pursued", according to the standards stated in **R (Daly)** v **Home Secretary** [2001] 2AC 532 (per Lord Steyn at p. 548).

In the circumstances, I am dismissing this application for judicial review, but I make no order as to costs since this application concerns a matter of public interest.

(MOHAMAD ARIFF BIN MD. YUSOF)
HAKIM MAHKAMAH TINGGI MALAYA
BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS 3
KUALA LUMPUR

Dated 12th February 2010.

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CERTIFIED TRUE COPY

AMINAH BINTI HASHIM
Setiausaha kepada
Y.A. Tuan Mohamad Ariff Bin Md. Yusof
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Bhg. Rayuan & Kuasa-Kuasa Khas 3