DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)
PERMOHONAN UNTUK SEMAKAN KEHAKIMAN NO.R2-25-09-2007

Dalam Perkara Aturan 53 Kaedah-Kaedah Mahkamah Tinggi 1980;

Dan

Dalam Perkara Bahagian II, Perlembagaan Persekutuan;

Dan

Kaedah Menteri-Menteri Kerajaan Persekutuan (No.2) 2004 (PU(A) 206/2004;

Dan

Perjanjian Konsesi bertarikh 15.12.2004 di antara Kerajaan Malaysia, Kerajaan Selangor dan Syarikat Bekalan Air Selangor Sdn Bhd;

Dan

Dalam Perkara Keputusan Bertarikh 4 Disember 2006

ANTARA

1. **MALAYSIAN TRADE UNION CONGRESS**
2. **SYED SHARIR BIN SYED MOHAMUD**

3. TENGKU NAZARUDDIN BIN TENGKU ZAINUDDIN

4. ARUMUGAM A/L KALIMUTUH

5. JUNAIDAH BTE HARUN

6. NORLAILA BTE ASLAH

7. CHARLES ANTHONY A/L R.SANTIAGO

8. LAWRENCE JOHN A/L SINNIAH

9. MOHAMED UMAR BIN PEER

10. LEE POH LIN

11. LIEW WEI BENG

12. KOH AI JOO

13. DARRYL CHONG EE FANN,
seorang kanak-kanak,
oleh CHONG FOOK MENG,
sahabat wakilnya

14. DHIWAN A/L SATHIVELOO,
seorang kanak-kanak,
oleh SATHIVELOO A/L KANNIAH,
sahabat wakilnya - PEMOHON-PEMOHON

DAN

1. MENTERI TENAGA, AIR DAN KOMUNIKASI

2. KERAJAAN NEGERI SELANGOR

3. KERAJAAN MALAYSIA - RESPONDEN-RESPONDEN

JUDGMENT

Introduction

On or about 15.12.04 the Government of Malaysia, Government of Selangor and Syarikat Bekalan Air Selangor Sdn Bhd (SYABAS) entered into a Concession Agreement . Prior to the concession agreement, the water tariff for Selangor State was determined by the Government of Selangor.With the execution of the concession agreement, the water tariff is now governed by the terms of the said agreement. Under the agreement, SYABAS is entitled to increase the water tariff only if they managed to achieve 5% reduction in the Non Revenue Water (NRW). It was revealed that Audit Report was produced to the Cabinet and which report confirmed SYABAS had achieved the 5% reduction in Non Revenue Water and thus entitled to increase the water tariff with effect 1.11.2006. In the meantime media reports surfaced to the effect that SYABAS will get 15% increase in water tariff. With water being a basic need of every living thing, the applicants here are concerned with the increase in water tariff and seek to access the documents mentioned above for them to see whether their rights to have access to a clean water at a price affordable by the public are protected or not.

Request

The 1st Applicant had sent a letter dated 7.11.2006 to the 1st Respondent seeking disclosure of the following documents:

(i) Concession Agreement dated 15.12.2004 between the 2nd Respondent, 3rd Respondent and Syarikat Bekalan Air Selangor Sdn Bhd (SYABAS); and

(ii) The Audit Report justifying an increase of 15% in the water tariff.

The impugned decision

The request was rejected by the 1st Respondent. The decision is contained in its letter of 4.12.2006 which reads :

> Untuk makluman pihak tuan, Kementerian ini berpendapat bahawa Perjanjian Konsesi di antara Kerajaan Persekutuan, Kerajaan Negeri Selangor dan pihak SYABAS serta Laporan Audit tidak sesuai untuk didedahkan kepada umum memandangkan dokumen berkenaan adalah dokumen berperingkat yang dikategorikan sebagai "SULIT" dan "RAHSIA" Kerajaan.

The Application

The application for judicial review was filed into court on 15.1.2007 and leave was obtained on 14.6.2007. By this application, the applicants seek for the following reliefs :

(i) a declaration that the Applicants and/or the general public have a right to have access to the Audit Report and the Concession Agreement;

(ii) alternatively, a declaration that the Audit Report and the Concession Agreement are public documents and not Official Secret Documents;

(iii) an order of Certiorari to quash the decision of the Respondents denying the Applicants access to the Audit Report and the Concession Agreement;

(iv) an order of Mandamus directing the Minister to disclose the contents of the Audit Report and the Concession Agreement to the Applicants and/or the general public.

The Grounds of the Application

In a statement pursuant to Order 53 Rule 3 of the High Court Rules 1980, the Applicants gave the following reasons to support the reliefs claimed:

(i) That the decision of the Minister denying access to the documents is unreasonable.

(ii) That the Minister had failed to take all relevant considerations.

(iii) That the Minister had considered irrelevant considerations.

(iv) That the Minister had violated Article 8, Federal Constitution which required the Minister to act reasonably in failing to give reasons for his decision.

(v) That the Applicants have a legitimate expectation that the Minister would act in a responsible manner as required by the Federal Constitution

Respondents' stand

In resisting the application, the Respondents alleged :

1. Perjanjian Konsesi tersebut dikategorikan sebagai "SULIT" berasaskan klausa 45 perjanjian itu yang menyatakan perjanjian tersebut hanya boleh didedahkan kepada pihak ketiga dengan persetujuan semua pihak kepada perjanjian.

2. Pemohon-Pemohon tiada hak untuk mendapat akses ke atas perjanjian tersebut kerana Pemohon-Pemohon tiada priviti kepada perjanjian.

3. Laporan Audit dikategorikan sebagai "RAHSIA" berdasarkan fakta bahawa ia telah dibentangkan dan diputuskan dalam Mesyuarat Jemaah Menteri yang bersidang pada 11.10.2006. Justeru itu, dokumen tersebut merupakan dokumen peringkat "RAHSIA" di bawah seksyen 2A Akta Rahsia Rasmi 1972.

4. Pemohon-Pemohon juga tidak mempunyai "locus standi" untuk mengambil tindakan ini terhadap responden-responden.

The Applicants' stand

In their affidavit in reply to the respondents' affidavit, the Applicants took the stand that:

1. Peruntukan sulit dalam Perjanjian Konsesi tidak mengenepikan atau menghadkan bidangkuasa Mahkamah ini dalam apa cara pun. Selanjutnya priviti kontrek bukanlah fakta yang relevan untuk dipertimbangkan.

2. Tiada bukti Laporan Audit dibentangkan di hadapan Kabinet pada tarikh berkenaan.

3. Laporan Audit tidak terletak di bawah lingkungan Jadual di bawah Akta Rahsia Rasmi 1972.

4. Penzahiran awam Laporan Audit dan segala maklumat yang terkandung di dalamnya tidak dapat membahayakan sekuriti Negara. Sebaliknya maklumat itu berhak diakses oleh warganegara kerana ia mempengaruhi kepentingan mereka.

5. Pemohon-Pemohon mempunyai locus standi atas alasan:

   (a) Pemohon-Pemohon tinggal dalam kawasan yang dibataskan oleh Perjanjian Konsessi.

   (b) Pemohon-Pemohon memerlukan dan menggunakan air untuk keperluan asas mereka.

   (c) Perjanjian Konsessi meletakkan hak pembekalan air yang dirawat secara eksklusif kepada "SYABAS".

   (d) Pemohon-Pemohon tidak mempunyai akses kepada air yang dirawat kecuali melalui SYABAS untuk keperluan hidup mereka. SYABAS telah memperolehi monopoli ke atas pembekalan air di dalam kawasan yang dibataskan. Dengan sendirinya, Pemohon-Pemohon adalah pelanggan yang berbayar bagi SYABAS.

Issues to be tried

Essentially there are two issues :

1. Whether the Applicants can be said to be adversely affected by the decision of the 1st Respondent and therefore have a locus standi to bring this action?

2. Whether disclosure of both the documents are detrimental to the national security or public interest?

Locus standi

Under Order 53 Rule 2(4) of the High Court Rule 1980, the applicants must establish that they have been adversely affected by the decision of the 1st respondent. In Council of Civil Service Unions v Minister for Civil Service (1984) 1 AC 374, the House of Lords held that for a decision to be susceptible to the court's reviewing powers, there must first be a decision by a decision maker or a refusal by him to make a decision, and, that decision must affect the aggrieved party by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy. As to the meaning of the word "aggrieved", I refer to the observation made by Hashim Yeop Sani SCJ in **Government of Malaysia v Lim Kit Siang & Another Case (1988) 1 CL J (Rep) 63** at page 88 :

> "It can hardly be disputed that there is no single authoritative definition of an aggrieved person but in general it can be said that a person "aggrieved" is not merely one who is dissatisfied with some act or decision but one who has been wrongly deprived of or has been refused something to which he is legally entitled. Any person can come to court for the protection or enforcement of his rights."

With regard to the issue of locus standi, in the case of **Tan Sri Haji Othman Saat v Mohamed bin Ismail (1982) 2 ML J 177**, the Supreme Court held :

> "The sensible approach in the matter of locus standi in injunctions and declarations would be that as a matter of jurisdiction, an assertion of an infringement of a contractual or a proprietory right, the commission of a tort, a statutory right or the breach of a statute which affects the plaintiff's interests substantially or where the plaintiff has some genuine interest in having his legal position declared, even though he could get no other relief should suffice."

The issue of locus standi was again discussed in the Court of Appeal case of **QSR Brands Bhd v Suruhanjaya Sekuriti & Anor (2006) 2 CL J 532**, wherein Gopal Sri Ram JCA states:

> By contrast, certiorari and the other prerogative remedies were classified as public law remedies which permitted a far more liberal threshold locus standi test to be met. Hence, Lord Wilberforce said in Gouriet v Union of Post Office Workers (1978) AC 435 that in an applications for prerogative writs in the environment of public law enforcement the courts have allowed applicants "liberal access under a generous conception of locus standi."

> It is to rid this dichotomous approach which often produced injustice that O. 53 in its present form was introduced. There is a single test of threshold locus standi for all the remedies that are available under the Order. It is that the applicant should be "adversely affected". The phrase calls for a flexible approach. It is for the applicant to show that he falls within the factual spectrum that is covered by the words "adversely affected".
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> At one end of the spectrum are cases where the particular applicant has an obviously sufficient personal interest in the legality of the action impugned.

To show they are aggrieved by the decision of the 1st respondent, the applicants have set out in paragraphs 3 and 4 of the statement pursuant to Order 53 their grievance and interest in subject matter. They are:

1. Akses kepada air adalah satu hak asasi. Ini termasuklah akses kepada air minuman yang selamat dan mampu diperolehi. Ia juga bermakna harga air mestilah sepadan dengan harga yang mampu dibayar oleh orang ramai.

2. Kerajaan sebagai fiduciary kepada pemohon-pemohon mempunyai kewajipan secara langsung atau tidak langsung untuk memastikan pemohon-pemohon mempunyai akses kepada air minuman yang selamat. Dalam melaksanakan kewajipan tersebut, kerajaan mesti mengambil langkah-langkah untuk mengawasi pasaran air untuk :

(a) memastikan semua orang boleh mempunyai akses kepada air minuman yang selamat; dan

(b) tiada pihak dibenarkan untuk secara tidak munasabah mengaut keuntungan daripada perkhidmatan yang berkaitan dengan bekalan air.

From the above statements, I agree with learned counsel for the applicants' contention that the applicants are persons "adversely affected" and not "busy bodies, cranks and other mischief makers" with the decision of the 1st respondent. Each and every applicant is a paying water consumer within the area covered by the concession agreement. With SYABAS now in monopoly over the distribution of treated water in the concession area, the applicants do not have an alternative access to treated water. If the water tariff is increased and they have to pay more money for water, they have no real choice to refuse to pay because there is no alternative supplier of water available. In addition thereto, water being essential for life is part of a constitutional right which can be implied under the Federal Constitution. On the facts and circumstances of this case, it is obvious that the applicants had a real and genuine interest in the subject matter. They are adversely affected by the increase in water tariff and in this regard there is a direct nexus with the decision of the 1st respondent's . I, therefore hold the applicants have established they had a locus standi to bring this action.

The Concession Agreement

The Concession Agreement is a tripartite agreement. It was revealed in the written submission of the 1st and 3rd respondents that clause 45 of the said agreement restraint disclosure to any third party without prior mutual agreement of the parties unless disclosure is required by law or the rules of any stock exchange. It is also evident from the 2nd respondent's written submission that they have no objection to disclose the concession agreement to the applicants. Vide their letter of 14.4.2010 addressed to the applicants' Solicitors, SYABAS has categorically stated that they also have no objection to the disclosure of the concession agreement. Be that as it may, with the consent of all the parties concerned to which I am very thankful, I chose to solve the issue of whether disclosure should be made or not by having sight at both the documents. Both the documents were handed to me by the learned Federal Counsel for the 1st and 3rd respondents on 18.6.2010. By adopting this approach, it would assist me in determining these two factors :

1. Whether both the documents contain information detrimental to the national security or public interest; and

2. Whether the Audit Report contains information relevant to the Concession Agreement, and in particular relevant to the increase in water tariff.

Having read through both the documents, in particular the Concession Agreement, **I had no doubt that it contains no information detrimental to the national security or public interest**. But I could foresee its disclosure may lead to public discussion and criticism against the government. At this juncture, I think it is only appropriate for me to mention that even though the concession agreement was not disclosed yet, informations on Non Revenue Water (NRW) and its percentage of reduction, formula for the increased in tariff, period of review and payment of compensation to SYABAS have already been in circulation by the medias and other third party. In that sense, it can no longer be treated as confidential document because these are the major issues. In the first place the concession agreement is not a private agreement. It was executed with public interest in mind. The public rely on the good conscience and governance of the government to protect their interest. Therefore it is in the public interest also the agreement should be disclosed. What could possibly be wrong if what the public want to know is was the deal a win win situation or a one sided agreement benefiting one party only? Until and unless the concession agreement is disclosed to the public, it will cause more anxiety to the public in wanting to know matters that affect their basic need. In this era where transparency, accountability and priority is given to the needs of the rakyat, it is only fair that the concession agreement be made public. I was of the view that court should lean in favour of the aggrieved party in matters involving public interest.

Even if I am wrong in coming to the conclusion, I still think there is no detriment to national security following the principle of law in The Commonwealth of Australia v John Fairfax & Sons Ltd (1980) 147 CLR 39 at page 52, where it was held :

> "....it can be scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.
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> Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected. The court will not prevent the publication information which merely throws light on the part workings of government, even if it be not public property, so long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs."

Applying the above principles to the facts of this case, I would say the disclosure of the concession agreement will serve the public interest in keeping the public informed of the working of the government as well as promote discussion of public affairs.

The Audit Report

By its title alone, one can envisage the contents of an audit report, irrespective of its subject matter. Normally such a report contain information on the findings made and suggestion to overcome any shortcomings. Having read the Audit Report myself, I had this to say. The report contains information relevant to the Concession Agreement, in particular to the increase in water tariff. But, I was of the view that the report did not contain information detrimental to the national security or public interest. As with the Concession Agreement, here also I could foresee there will be public discussion and criticism against the government. Logically, if the concession agreement is to be disclosed, then the audit report had to be made public also because the audit report made reference and comments on certain provisions in the concession agreement. Although the 1st and 3rd respondents argued the audit report is classified as "Rahsia", its classification does not in any way bar this court from looking at the document as a whole to see whether its disclosure would be detrimental to the national security or public interest. This must be the only test to be applied by this court. It is nonsensical to say any document put before the Cabinet is automatically to be treated as "RAHSIA" under Section 2A of the Official Secret Act 1972. This is in line with the decision made by Richard Malanjum J (as he then was, now CJ Sabah & Sarawak) in **Takong Tabari v Government of Sarawak & 3 Ors (1995) 1 CL J 403**, wherein His Lordship states :

> "In my view the Official Secrets Act deals mainly with the prevention of unauthorized disclosure of official secrets and thus created offences for any such infringement. I do not think it is intended to be used to avoid any liability or to defeat any claim regardless of the culpability of the party relying on it. It is obvious that the primary goal of the Act is to protect classified documents or information which by such disclosure would be detrimental to the national security or public interest."

I further found support in the case of Shri Dinesh Trivedi, MP & Ors v Union of India & Ors (1997) 4 SCC 306 at page 313 which held :

> "In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which having been elected by them, seeks to formulate sound policies of governance aimed at their welfare."

Before me, learned counsel for the applicants submit the Audit Report was produced before the Cabinet on or about 11.10.06. But there was nothing in the respondents' affidavit to show that prior to the above date, the Audited Report is classified or gazette as an Official Secret. The 1st and 3rd respondent also failed to show how disclosure of the Audit Report would be detrimental to the national security or public interest. Thus, it is submitted that the document does not fall

within the Schedule to Section 2A of the Official Secret Act 1972 (OSA). I agree entirely with the applicants contention simply because the evidence thus far adduced in the respondents' affidavit merely says the Audit Report was "RAHSIA" because it was presented before the Cabinet. That reasoning alone is not convincing enough to justify protection under the Schedule to Section 2A of the OSA. To accede to the 1st and 3rd respondents' argument is akin of saying any document labelled as "RAHSIA" can claim protection and that is the end of the matter. I believe there must be an explanation or purpose as to why any particular document is classified as "RAHSIA". It also cannot be the spirit of OSA to extend protection in cases where the government believed there will be public discussion and criticism against the government 's action.

In the alternative, it was further submitted, even if OSA can be invoked, it was invoked in bad faith to avoid liability and with a purpose of defeating the claim of the applicants. It was never heard before that disclosure of the Audit Report would be detrimental to the national security or public interest. I am not in a position to comment whether there was bad faith or not. But one thing I am certain here and that is I am not convinced the Audit Report is classified as "RAHSIA" because its disclosure is detrimental to national security or public interest. In fact I was of the opinion that the truth is the contrary. The disclosure of the Audit Report is not detrimental to the national security or public interest.

To sum up, the 1st respondent's refusal to disclose the Concession Agreement and the Audit Report was made without taking into consideration the legitimate expectation of a member of the public who are affected in the decision making process to be treated fairly. The respondents' decision to allow privatization of water service and arbitrary increases to the tariff and at the same time invoking the Official Secret Act is disproportionate not only to the aim of the Official Secret Act but also runs counter to the principle of good governance, accountability, transparency and "the interest of the rakyat should come first". Failure to comply with these principles will inevitably result in this court giving an order compelling the respondents to do so.

For those reasons, I allowed this application with cost.

Dated 28 June 2010.

Hadhariah bt Syed Ismail

Judicial Commissioner

High Court

Kuala Lumpur.

For the Applicants:

En Malik Imtiaz; En Ang Hean Leng; Messrs Thomas Philip

For the 1st & 3rd Respondents:

En Shamsul; Senior Federal Counsel

For the 2nd Respondent:

Datin Paduka Zauyah Bee Loth Khan; State Legal Adviser Of Selangor

Cases referred to :

1. Civil Service Unions v Minister of Civil Service (1984) 1 AC 374.
2. Government of Malaysia v Lim kit Siang & Anor Case (1988) 1 CL J (Rep) 63.
3. Tan Sri Haji Othman Saat v Mohamed bin Ismail (1982) 2 ML J 177.
4. QSR Brands Bhd v Suruhanjaya Sekuriti & Anor (2006) 2 CL J 532.
5. The Commonwealth of Australia v John Fairfax & Sons Ltd (1980) 147 CL R 39.
6. Takong Tabari v Government of Sarawak & 3 Ors (1995) 1 CL J 403.
7. Shri Dinesh Trivedi, MP & Ors v Union of India & Ors (1997) 4 SCC 306.