PENDOR ANGER & ORS A

v.

KETUA PENGARAH JABATAN ALAM SEKITAR & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
ALIZATUL KHAIR OSMAN J
[APPLICATION FOR JUDICIAL REVIEW NO: R2-25-292-07]
30 DECEMBER 2010

ADMINISTRATIVE LAW: *Judicial review - Application for leave - Applicants seeking to quash decision of Director General of Environmental Quality approving water transfer project - Limitation - Whether application filed out of time - Decision made pursuant to statutory provision of s. 34A(3) Environmental Quality Act 1974 - Whether application time-barred under s. 2 Public Authorities Protection Act 1948 (PAPA) - Whether PAPA as general law did not override specific law provided under O. 53 RHC* C D

LIMITATION: *Public Authorities Protection Act 1948 - Section 2(a) - Application for judicial review - Whether time-barred* E

The applicants applied for leave, amongst others, for an order of *certiorari* to quash the decision of the 1st respondent under s. 34A(3) of the Environmental Quality Act 1974 ('EQA') approving a Detailed Environment Impact Assessment Report ('DEIA Report') for a proposed raw water transfer project from the state of Pahang to the state of Selangor. The applicants were the indigenous people of Kampung Sungei Temir in Raub, Pahang who claimed to be affected by the said water project. The respondents objected to the application by the applicants on the ground that it was filed out of time under O. 53 Rules of the High Court 1980 ('RHC') and that it was time-barred under s. 2(a) of the Public Authorities Protection Act 1948 ('PAPA'). According to the respondents, the DEIA Report was approved on 24 February 2001 and that the applicants were informed of the approval on 15 April 2002 and on subsequent meetings held between the applicants and the respondents. The present application was filed only on 9 October 2007 and therefore there was an inordinate delay of five years when it was filed. Further, the decision the applicants were seeking to challenge was made by the 1st respondent pursuant to a statutory provision, namely, F G H I

A s. 34A EQA. Therefore, the provisions of PAPA which was an act designed to protect persons acting in that capacity applied. The applicants, on the other hand, denied that they were present on 15 April 2002. They claimed to have been only officially informed of the approval on 29 August 2007. As to the application of
B PAPA, the applicants claimed that it did not apply to applications for judicial review as such applications were governed by O. 53 RHC.

Held (allowing the application for leave):

C **(1)** The applicants were only officially informed of the date of approval of the DEIA Report by the 1st respondent on 29 August 2007. Therefore, based on the second limb of O. 53 r. 3(6) RHC, the applicants' application filed on 9 October 2007 was within time. (para 17)
D

(2) Order 53 RHC governed all applications seeking the relief specified in para. 1 of the Schedule to the Courts of Judicature Act 1964 ('CJA'). Paragraph 1 of the Schedule to the CJA dealt with the power of the court to issue, *inter alia*,
E writs or orders in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*. The power exercisable by the High Court in relation to the matters set out in para. 1 of the Schedule to the CJA was contained in s. 25(2) of the same. The proviso to s. 25(2) CJA made it very clear
F that in exercising the powers conferred on it by the Schedule, the High Court shall act in accordance with any written law or rules of court relating to the same. Section 2 PAPA was a general law providing for a period of limitation to file a suit against a public authority. It did not relate specifically to an
G application for the reliefs specified under para. 1 of the Schedule to the CJA. Therefore, it would not come within the phrase "written law or rules of court relating to the same" as found in the proviso to s. 25(2) CJA. Hence, the court was not obliged to act in accordance with s. 2 PAPA. (paras 26-
H 30)

(3) Order 53 r. 3(6) RHC as amended by P.U.(A) 342/2000 provided two time frames in which an applicant might apply for leave *viz* (i) within 40 days from the date when the
I decision first arose; or (ii) within 40 days after the decision was communicated to the applicant. Section 2 PAPA provided

only a single time frame, *ie*, within 36 months after the date the act complained of arose. An anomalous situation would arise if s. 2(a) PAPA was made applicable to the present case. That was because under O. 53 r. 3(6) RHC, an applicant could well be within the time frame to file an application for leave but would be time-barred under s. 2(a) PAPA. Such anomaly would result in injustice to the applicant. That would not have been the intention of the legislature. The better view would be to construe the proviso to s. 25(2) CJA to mean that the court when hearing an application for judicial review was obliged to act in accordance with O. 53 r. 3(6) RHC being the law relating to the same, and not s. 2(a) PAPA. In the circumstances, based on the second limb of O. 53 r. 3(6) RHC, the applicants were well within time when they filed their application for leave. (paras 33 & 37)

Case(s) referred to:

Choo & Company v. Majlis Daerah Bentong; Lee Mok Fun & Anor (Interveners) [1998] 2 CLJ Supp 464 HC ***(refd)***

Majlis Peguam & Anor v. Tan Sri Dato' Mohamed Yusoff Mohamed [1997] 3 CLJ 332 SC ***(refd)***

Mersing Omnibus Co Sdn Bhd v. The Minister of Labour and Manpower & Anor [1983] 2 CLJ 7; [1983] CLJ (Rep) 266 FC ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Re Sarjit Singh Khaira [1990] 1 LNS 82 HC ***(refd)***

Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor [2007] 6 CLJ 245 FC ***(refd)***

Semantan Estate (1952) Sdn Bhd v. Collector of Land Revenue Wilayah Persekutuan [1987] 2 CLJ 199; [1987] CLJ (Rep) 329 SC ***(dist)***

Tan Siew Peng v. OCBC Bank (M) Bhd [1998] 2 CLJ 684 CA ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25(2)
Environmental Quality Act 1974, s. 34A(3)
Public Authorities Protection Act 1948, s. 2(a)
Rules of the High Court 1980, O. 53 rr. 1(1), 3(6)

For the applicants - Kamarul Hisham Kamaruddin; M/s Kamarul Hisham & Hasnal Rezua
For the respondents - Hjh Azizah Nawawi DPP

Reported by Usha Thiagarajah

JUDGMENT

Alizatul Khair Osman J:

[1] This is an application by the applicants for leave for the following orders:

(a) an order of *certiorari* to quash the decision of the 1st respondent under s. 34A(3) of the Environmental Quality Act, 1974 (EQA) dated 24 February 2001 approving the Detailed Environment Impact Assessment Report (the DEIA Report) for the proposed Raw Water transfer project from Pahang Darul Makmur to Selangor Darul Ehsan (the Water Project);

(b) a declaration that the 2nd and 3rd respondents in deciding to revoke the Warta No. 10, No. Pelan 3144, Daerah Raub, Mukim Gali dated 29 November 1976 had breached the fiduciary duties towards the applicants as the Orang Asli;

(c) a declaration that the 3rd respondent's approval of the Water Project had breached the fiduciary duties "untuk melindungi, memajukan dan memelihara kebajikan pemohon-pemohon sebagai orang asli Malaysia."

If required, an extension of time be given to the applicants under O. 53 r. 3(6) RHC 1980 to file this application.

An interim order issued against the respondents from proceeding with the Water Project until the hearing of this application.

[2] The grounds of the application are stated in para. 4 of the statement and reads as follows:

> Alasan-alasan dalam menyokong relif-relif dipohon adalah bahawa kelulusan EIA tersebut oleh Responden Pertama adalah tidak sah oleh kerana Responden Pertama telah meluluskan EIA tersebut di bawah seksyen 34A(3) Akta Kualiti Alam Sekitar 1974 apabila EIA tersebut telah gagal mematuhi ketetapan-ketetapan prosedur dan substantive yang diperuntukkan secara khusus di bawah Seksyen 34A(3) Akta Kualiti Alam Sekitar 1974.

[3] The applicants are the Orang Asli from Kampung Sungei Temir, Raub Pahang who claimed to be affected by the water project.

[4] The facts of this case are contained in the affidavits of Cham a/l Beng, Bedu bin An, Pendor bin Anger and Dr Rosli Omar filed in support of this application.

[5] At the outset of the hearing, learned Senior Federal Counsel, Puan Hajjah Azizah binti Nawawi (SFC), who appeared for the Attorney General and respondent 1 and 3 raised a number of objections *viz*, the application is out of time, the applicants do not have the necessary *locus standi* to file this application and the application is frivolous and vexatious.

[6] Her main objection however was that the applicants' application was filed out of time. Thus both parties' submission were confined to this issue. Her contention that the application was filed out of time was premised on two grounds, ie:

(i) the application is out of time under O. 53 RHC 1980 (O. 53) (ground 1); and

(ii) the application is time-barred under s. 2(a) of the Public Authorities Protection Act 1948 (PAPA) (ground 2).

Ground 1 - Application Out Of Time Under O. 53

[7] According to Pn Hajjah Azizah the DEIA Report was approved on 24 February 2001. The applicants were informed of the approval of the DEIA on 15 April 2002 and on subsequent meetings between the applicants and the respondents. (See the affidavit of IR Wang Chung). However this application was filed only on 9 October 2007. Hence, there has been in counsel's view, an inordinate delay of five years in making this application. Unless an extension of time is granted, this court does not have the jurisdiction to hear this application for leave. Learned SFC referred to O. 53 RHC and a slew of authorities in support of this contention - *Mersing Omnibus Co Sdn Bhd v. The Minister of Labour and Manpower & Anor* [1983] 2 CLJ 7; [1983] CLJ (Rep) 266; *Re Sarjit Singh Khaira* [1990] 1 LNS 82; *Choo & Company v. Majlis Daerah Bentong; Lee Mok Fun & Anor (Interveners)* [1998] 2 CLJ Supp 464.

[8] In this regard it is the learned SFC's contention that there are no good reasons and no sufficient facts disclosed to explain the inordinate delay of five years. She referred to the Court of Appeal decision in *Tan Siew Peng v. OCBC Bank (M) Bhd* [1998] 2 CLJ 684, where the court whilst acknowledging that the court has power at its discretion to extend time for the filing or service

of any document or the doing of any act under the Rules of the High Court, "it is trite that the burden is upon an applicant who seeks an extension of time to make available sufficient material upon which the court may exercise discretion in his favour."

Ground 2 - Application Time Barred Under s. 2(a) Of PAPA

[9] It is also learned SFC's contention that the applicant's application is barred by s. 2(a) of PAPA as the application is made 36 months after the act complained of, *viz*, the decision to approve the DEIA Report. The thrust of Pn Hajjah Azizah's argument is that, as the decision which the Applicant is seeking to quash is made under s. 34A (3) of the EQA, it is a decision pursuant to a statutory provision and hence the provisions of PAPA applies.

[10] In support of her argument she referred to the Federal Court case of *Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor* [2007] 6 CLJ 245 (*Selvaraju*).

[11] In reply to the learned SFC's submissions above, counsel for the applicant, En Kamarul Hisham contended as follows:

Ground 1

[12] According to learned counsel for the applicants the applicants had in their affidavit in support (which is the only material before this court since this is an *ex parte* application) strenuously denied that they were present on 15 April 2002 or that the 2nd and 3rd applicants were there in any representative capacity whatsoever. The affidavit relied on by the respondents in support of their assertion that the application is out of time is no longer before the court as it had been withdrawn by agreement of both parties. In any event even if the affidavit of Ir Wang Chang is accepted it remains a disputed fact which cannot be resolved at the *ex parte* stage.

[13] Further it is clear from the affidavits of the 1st, 2nd and 3rd applicants in particular para. 29 of the 3rd applicant's affidavit, that the applicants were only officially notified of the date of approval of the DEIA Report by the 1st respondent on 29 August 2007 (see exh. PA2 and PA3). As this application was filed on 9 October 2007 then in the applicants' view their application was clearly within time as envisaged under the 2nd limb of O. 53 r. 3(6) RHC.

Ground 2

[14] The main thrust of the applicants' argument on this issue is that the provisions of PAPA do not apply to applications for judicial review. Applications for judicial review are governed by O. 53. As there is a specific law governing applications for judicial review then based on the principle of law that the specific overrides the general it is the provisions of O. 53 that are applicable in the present case.

[15] Learned counsel further contends that, if the respondents' argument that s. 2(a) of PAPA applies to applications for judicial review is accepted, then an anomalous situation would arise whereby under O. 53 an application for judicial review may be made 40 days after the decision is made or after the decision is communicated to the applicant, whilst s. 2(a) of PAPA on the other hand restricts the time period for making such applications to 36 months after the decision of the public authority in question is made. Thus according to applicants' counsel the effect of the respondents' argument is that even though the provisions of O. 53 were expressly amended in the year 2000 to enable an applicant to file his application 40 days after the decision is communicated to him, the applicants in the present case would be deprived of such a right by virtue of s. 2(a) of PAPA which, following the respondents' argument would prevail over the provisions of O. 53.

Decision

[16] After hearing both parties' submissions, I agreed with the applicants' submission and I therefore granted leave to the applicant as prayed for in their application.

[17] My reasons for doing so are as follows:

(i) Ground 1

On the first ground advanced by the respondents, that the application is out of time under O. 53, I agree with learned counsel for the applicant that based on the material before the court ie, the affidavits of the 1st, 2nd and 3rd applicant, in particular, para. 29 of the 3rd applicant's affidavit, the applicants were only officially notified of the date of approval of the DEIA Report by the 1st respondent on 29 August

2007. As such based on the 2nd limb of O. 53 r. 3(6), the applicants' application which was filed on 9 October 2007 is within time.

(ii) Ground 2

As for the respondents' second ground, that the application is time-barred by virtue of s. 2(a) of PAPA, this raises the interesting issue of whether the provisions of PAPA namely s. 2(a) applies to an application for judicial review under O. 53 read together with para. 1, s. 3. The case of *Selvaraju* referred to by learned SFC is not really applicable as it was not an application for judicial review but a suit filed by the Applicant against the Suruhanjaya Perkhidmatan Awam (Public Services Department) and the Government of Malaysia for a declaration that his dismissal from service was null and void on the ground that it was based on an invalid detention order. The High Court dismissed the appellant's action and his subsequent appeal to the court of Appeal was similarly dismissed. His appeal to the Federal Court was also unsuccessful. The Federal Court found that the appellant's action was time-barred (under s. 2(a) of the PAPA) as he was 30 days late when he filed the action.

[18] Section 2(a) of the PAPA reads as follows:

> 2. Where after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

[19] Learned SFC submitted that as the decision which the applicants are seeking to challenge here was made by the 1st respondent pursuant to a statutory provision namely s. 34A of the EQA, the provisions of PAPA which is an Act designed to protect persons acting in that capacity, should thereby apply.

[20] The same question raised here was raised before the Supreme Court in the case of *Semantan Estate (1952) Sdn Bhd v. Collector of Land Revenue Wilayah Persekutuan* [1987] 2 CLJ 199; [1987] CLJ (Rep) 329 (*Semantan*). The appellant *Semantan Estate*, sought leave to apply for an order of *mandamus* to direct the respondent to complete the acquisition procedure. Leave was granted and the appellant applied by notice of origination motion for an order of *mandamus*. The respondent then applied for the originating motion to be struck out. Harun J (as he then was) gave judgment in favour of the respondent on the ground that the institution of the suit was barred by virtue of s. 2(a) of the PAPA.

[21] Lee Hun Hoe CJ (Borneo) speaking for the Supreme Court said as follows:

> The main issue is whether the application for an order of *mandamus* is a suit, action or proceeding within the meaning of "the Act". There is no definition in "the Act" as to the meaning of suit, action or proceeding ...
>
> Numerous cases were cited in support of their contentions by the parties. We do not propose to go into all those cases. The submission of the appellant is that the principle emerging from the cases cited by her illustrates that *mandamus* does not come within the meaning of "action." The difficulty in supporting this contention is that in none of the cases could we find the reason why the application of the prerogative writ was not within the meaning of "action, prosecution or proceeding" of the Public Authorities Protection Act, 1893. There are also cases which went the other way.

[22] After hearing arguments from both parties on this issue, his lordship came to the following conclusion:

> We can see no good reason in giving the word 'suit' in "the Act" the restricted meaning which has been advanced. The fact that the word may be construed differently under a different legal system does not necessarily mean that we are not justified in giving the same word a different meaning in the light of local circumstances and development peculiar to our own legal system.

[23] The Supreme Court went on to hold the High Court was right in refusing leave not only because it was caught by 2(a) of PAPA in view of the subordinate delay in filing the application but also because the appellant had not exhausted his right of appeal against an earlier decision of the High Court in declining to act in respect of a reference brought before the court under the former Land Acquisition Enactment (Cap 140).

[24] The above case of *Semantan* was not cited to the court by either party, and as such the court did not have the benefit of counsel's submission on its implication to the present application in particular to the applicant as this is a decision of the Supreme Court and therefore binding on this court.

[25] However whilst it is true that *Semantan* being a decision of a superior court would ordinarily be binding on this court I am of the view that it can be distinguished from the present case on the following grounds:

[26] In *Semantan* the Supreme Court dealt with s. 2(a) of PAPA without considering O. 53 or the relevant provisions of the CJA. In addition the law prescribing the time-frame for filing an application for judicial review under O. 53 had yet to be amended at the time the case was heard. I will deal with this issue later. As regards O. 53, it states as follows:

> 1.(1) This order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes therein specified.

[27] Paragraph 1 of the Schedule to the Courts of Judicature Act 1964 (CJA) stipulates thus:

> Prerogative Writs
>
> 1. Power to issue to any person or authority directions, order or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights compared by Part II of the Constitution, or any of them, for any purpose.

[28] The power exercisable by the High Court in relation to the matters set out in para 1 of the Schedule to the CJA is contained in s. 25(2) of the CJA which reads as follows:

> Without prejudice to the generality of subjection (1) the High Court shall have the additional powers set out in the Schedule.
>
> **Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same**.
>
> (emphasis added)

[29] In my view the proviso to s. 25(2) of the CJA makes it very clear that in exercising the powers conferred on it by the Schedule, the High Court shall act in accordance with any written

law or rules of court relating to the same. Paragraph 1 of the Schedule deals with the power of the court to issue, *inter alia*, writs or orders in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*. The written law or rules of court relating to these prerogative writs are contained in O. 53. This is clearly seen from the opening words of O. 53 r. 1(1) that expressly states that "This order shall govern all applications seeking the relief specified in para. 1 of the Schedule to the Courts of Judicature Act 1964 ... ". As such the court in exercising its powers to grant any of the reliefs specified therein, is obliged to act in accordance with the provisions of O. 53, in particular O. 53 r. 3(6), which is the relevant provision for the purpose of the present application. Order 53 r. 3(6) prescribes the period of time within which an applicant must file his leave application.

[30] Section 2(a) of PAPA is a general law providing for a period of limitation to file a suit against a public authority? It does not relate specifically to an application for the reliefs specified under para. 1 of the Schedule to the CJA. As such it would not come within the phrase "written law or rules of court relating to the same" and hence the court is not obliged to act in accordance with its provisions.

[31] In the case of *Majlis Peguam & Anor v. Tan Sri Dato' Mohamed Yusoff Mohamed* [1997] 3 CLJ 332, the Supreme Court opined, in relation to the proviso to s. 25(2) of the CJA, as follows:

> In our opinion, what is plainly intended by Parliament is merely that **the mode of exercising the power must be in accordance with any existing written law or rules of Court** and not with any written law or rules to be enacted in the future. (emphasis added)

[32] The same view was expressed earlier by the Federal Court in the case of *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 in which Edgar Joseph Jr, FCJ speaking on behalf of the Federal Court had this to say regarding the proviso to s. 25(2), of the CJA:

> Next, in my view, the words "in accordance with any written law", are the equivalent of "not repugnant to", "not in conflict with" or "not inconsistent with" statute law ... (emphasis added)

[33] In 2000, O. 53 r. 3(6) was amended (*vide* PU(A)342/2000) to enable an applicant to file leave for application for judicial review within 40 days from the date when the decision was first communicated to the applicant. This is another factor which distinguishes *Semantan* from the present case as O. 53 r. 3(6) now provides for two time frames in which an applicant may apply for leave *viz*:

(i) within 40 days from the date when the grounds for the application (ie, the decision) first arose; or

(ii) within 40 days after the decision was communicated to the applicant.

[34] Section 2(a) of PAPA on the other hand provides only a single time frame ie, within 36 months after the date the act complained of arose.

[35] As submitted by learned counsel for the applicants, an anomalous situation would arise if, as contended by the respondent, Section 2(a) of PAPA is made applicable to the present case. This is because under O. 53 r. 3(6) an applicant could be well within time to file their application for leave (as in the present case) but would be time-barred under s. 2(a) of PAPA as the latter does not provide for a suit etc to be filed 36 months after the act (or decision) complained of was communicated to him.

[36] Such an anomaly would result in an injustice to the applicants as they would be deprived of their right to file such application even though the law, in the form of O. 53 r. 3(6), allows them to do so. That in my view cannot be the intention of the legislature. The better view as said earlier, would be to construe the proviso to s. 25(2) of the CJA to mean that the court when hearing an application for judicial review, is obliged to act in accordance with O. 53 r. 3(6) being the law relating to the same and not s. 2(a) of PAPA.

[37] In the circumstances based on the second limb of O. 53 r. 3(6) the applicants were well within time when they filed their application for leave and leave was accordingly granted by the court.