

**DALAM MAHKAMAH RAYUAN MALAYSIA  
(BIDANGKUASA RAYUAN)  
RAYUAN SIVIL NO. W-01-29-06**

**ANTARA**

1. **YAZID BIN SUFAAT**
2. **NIK ADLI BIN NIK ABDUL AZIZ**
3. **AHMAD YANI BIN ISMAIL**
4. **ZAINON BIN ISMAIL**
6. **ABU BAKAR BIN CHE DOI**
7. **MAT SAH BIN MOHD SATRAY**
8. **MD LOTFI BIN ARIFFIN**
9. **IDRIS BIN SALIM**
10. **MUHAMAD ZULKEPLI BIN MD ISA**
11. **MOHD SHA BIN SARIJAN**
12. **SOLEHAN BIN ABDUL GHAFAR**
13. **ABDUL MURAD BIN SUDIN**
14. **MOHD RAFI BIN UDIN**
15. **NORDIN BIN AHMAD**
16. **ASFAWANI BIN ABDULLAH @ AB WAHAB**
17. **ROSHELMY BIN MD SHARIF**
18. **ALIAS BIN NGAH**
19. **SUHAIMI BIN MOKHTAR**
20. **MUHAMAD ZULKIFLI BIN MOHAMAD ZAKARIA**
21. **MAT SALLEH BIN SAID**
22. **KHAIRUDDIN BIN SAAD** ..... **PERAYU-PERAYU**

**DAN**

**SURUHANJAYA PILIHAN RAYA MALAYSIA ... RESPONDEN**

**(Dalam perkara Permohonan Semakan Kehakiman No. R1-25-61-2004 dalam Mahkamah Tinggi Malaya di Kuala Lumpur (Bahagian Rayuan Dan Kuasa-Kuasa Khas) yang diputuskan pada 23 Februari 2006**

**ANTARA**

- 1. Yazid bin Sufaat**
- 2. Nik Adli bin Nik Abdul Aziz**
- 3. Ahmad Yani bin Ismail**
- 4. Zainon bin Ismail**
- 6. Abu Bakar bin Che Doi**
- 7. Mat Sah bin Mohd Satray**
- 8. Md Lotfi bin Ariffin**
- 9. Idris bin Salim**
- 10. Muhamad Zulkepli bin Md Isa**
- 11. Mohd Sha bin Sarijan**
- 12. Solehan bin Abdul Ghafar**
- 13. Abdul Murad bin Sudin**
- 14. Mohd Rafi bin Udin**
- 15. Nordin bin Ahmad**



## JUDGMENT OF LOW HOP BING, J.C.A.

### I. APPEAL

[1] For brevity and convenience, a reference in this judgment to an article is a reference to that article in the Federal Constitution.

[2] On 27 April 2004, 22 applicants sought judicial review and prayed for declarations that the respondent had violated the applicants' fundamental rights viz:

- (1) to vote in the 11<sup>th</sup> General Election ("the General Election") under article 119;
- (2) to freedom of speech and expression in the General Election under article 10(1)(a); and
- (3) to equality before the law and equal protection of the law under article 8.

[3] The applicants also included a prayer for an order of *certiorari* to quash the decision and action in the respondent's refusal, failure, denial and neglect to enable and allow them to vote in the General Election.

## **II. FACTUAL BACKGROUND**

[4] The applicants are Malaysian citizens. They were detained at the Kamunting Detention Centre, Perak (“the detention centre”).

[5] The respondent is the Election Commission (“EC”) established under article 114.

[6] When Parliament and the Legislative Assemblies (except Sarawak) were dissolved on 4 March 2004 to pave the way for the General Election, the applicants vide two letters dated 15 and 17 March 2004, informed the EC of their rights and intention to vote, and asked the EC to facilitate the casting of their votes during the General Election, scheduled for 21 March 2004.

[7] The applicants alleged that they were unable to cast their votes.

[8] The applicants were not registered as voters in the constituency where the detention centre is situated. Instead, they were registered in different constituencies throughout the country, not as postal voters, but as regular walk-in voters.

## **III. EC’S DUTIES**

[9] Learned counsel Mr. Edmund Bon Tai Soon (Ms Sunil Lopez and Mr. Nik Ikhwan with him) referred to, *inter alia*, the

South African case of **August and Another v Electoral Commission and Others (1999) SACLR LEXIS 1** to support their submission for the applicants that the learned judge had erred in law in failing:

- (1) to give a generous interpretation to articles 8, 10(1)(a) and 119 in favour of the applicants; and
- (2) to decide that articles 113 and 114 read with the Elections Act 1958 impose a duty on the EC to ensure that all Malaysians including the applicants cast their votes through rules and regulations, as guaranteed under article 119 and the EC had therefore breached that duty.

[10] Ms Azizah Haji Nawawi learned senior federal counsel (Ms Suzana Atan with her) subscribed to a diametrically opposite view, contending that there was no breach of duty on the part of the EC. Reference was made to:

- (1) **Nordin bin Haji Zakaria & Anor v Mohd Noor bin Abdullah (2004) 2 MLJ. 777 FC,**
- (2) **Ghazi bin Mohd Sawi v Mohd Haniff bin Omar & Anor (1994) 2 MLJ 114 SC;**
- (3) **Article 113 (5);**

- (4) S.5 of the Elections Act 1958;
- (5) Elections (Conduct of Elections) Regulations 1981;
- (6) Elections (Registration of Electors) Regulations 2002;
- (7) Elections (Postal Voting) Regulations 2003;
- (8) **Election Commission Malaysia v Abdul Fatah bin Haji Haron (1987) 2 MLJ 716 SC**; and
- (9) **Loh Kooi Choon v Government of Malaysia (1977) 2 MLJ. 187 FC.**

[11] The learned judge upheld the contention presented for the EC.

[12] I would commence by stating that the EC, under article 114, is entrusted with the duties and responsibilities, *inter alia*, to conduct elections to the House of Representatives and the Legislative Assemblies of the States; to prepare and revise electoral rolls for such elections (see e.g. *Abdul Fatah bin Haji Haron, supra*, **Saman Gulam v Tan Sri Haji Mohd Sunoh Marso & Ors (1987) 2 MLJ. 718 SC**).

**[13]** S5 (1)(a) of the Elections Act 1958 (“S.5(1)(a)”) also sets out the duties of the EC to exercise control and supervision over the conduct of elections and registration of electors on the electoral rolls, and to enforce, on the part of all election officers, fairness, impartiality and compliance with Part VIII of the Federal Constitution, the Elections Act 1958 and all the regulations governing elections.

**[14]** Additional detailed duties of the EC under s5 (1) (a) are amplified in the Elections (Conduct of Elections) Regulations 1981; while the duties of the EC to prepare and revise the registration of voters on the electoral rolls are contained in the Elections (Registration of Electors) Regulations 2002 and the Elections (Postal Voting) Regulations 2003, respectively.

**[15]** In this judgment, I shall use the words “electors” and “voters” interchangeably. The Elections Act 1958, and all the regulations governing elections are collectively referred to as “the election laws”.

**[16]** Upon a proper perusal of the Federal Constitution and the election laws, I find that a voter’s right to vote at any election is manifested in an unfettered and untrammelled voluntary exercise which is left exclusively to the voter himself or herself. Our Federal Constitution and election laws do not provide for any sanction or punishment against a voter who chooses not to cast a vote. The EC has neither the duty nor the power:

- (1) to compel a registered voter to vote on polling day;  
or
- (2) to ensure that voters such as the applicants are provided with the necessary facilities to enable them to vote at their respective polling stations.

**[17]** Voters whose names are registered in the electoral roll of a particular polling station are allowed to enter and cast their votes. However, under reg. 15(1) of the Elections (Conduct of Elections) Regulations 1981, no person shall be admitted to vote at any polling station except the polling station to which that part of the electoral roll which contains his name has been assigned. In this regard, the applicants have not been prohibited by the EC from voting at the respective polling stations which contain their names in the electoral roll.

**[18]** For purposes of completeness, article 119 which regulates the qualifications of electors merits reproduction as follows:

**“Qualifications of electors:**

119. (1) Every citizen who –
- (a) has attained the age of twenty-one years on the qualifying date:

(b) is resident in a constituency on such qualifying date or, if not so resident, is an absent voter; and

(c) is, under the provisions of any law relating to elections, registered in the electoral roll as an elector in the constituency in which he resides on the qualifying date,

is entitled to vote in that constituency in any election to the House of Representatives or the Legislative Assembly unless he is disqualified under clause (3) or under any law relating to offences committed in connection with elections; but no person shall in the same election vote in more than one constituency.

(2) If a person is in a constituency by reason only of being a patient in an establishment maintained wholly or mainly for the reception and treatment of persons suffering from mental illness or mental defectiveness or of being detained in custody he shall for the purposes of Clause (1) be deemed not to be resident in that constituency.

(3) A person is disqualified for being an elector in any election to the House of Representatives or the Legislative Assembly if -

- (a) on the qualifying date he is detained as a person of unsound mind or is serving a sentence of imprisonment; or
- (b) having before the qualifying date been convicted in any part of the Commonwealth of an offence and sentenced to death or imprisonment for a term exceeding twelve months, he remains liable on the qualifying date to suffer any punishment for that offence.

(4) In this Article -

- (a) “absent voter” means, in relation to any constituency, any citizen who is registered as an absent voter in respect of that constituency;
- (b) “qualifying date” means the date on which a person applies for registration as an elector in a constituency, or the date on which he applies for the change of his registration as an elector in a different constituency,

in accordance with the provisions of any law relating to elections.”

[19] In the South African case of *August and Another, supra*, on which the applicants relied, a sentenced prisoner and a remand prisoner commenced an action against the South African Electoral Commission, seeking declaratory orders that they are entitled to vote and to require the Electoral Commission to make all necessary arrangements to enable them to vote. The Constitutional Court there granted the application.

[20] Learned counsel for the applicants in the instant appeal had not been able to confirm that the relevant provisions of the South African Constitution and election laws under consideration therein are *in pari materia* with our Federal Constitution and election laws. Be that as it may, it is abundantly clear to me that *August and Another, supra*, is not concerned with the interpretation of laws regulating preventive detainees, as is the case in the instant appeal. I am of the view that the judgment in *August and Another, supra*, must be read and construed in the context of the South African environment. It does not enjoy any binding quality in our Courts. That being the case, I hold that it is of no assistance to the applicants herein.

[21] Support for my view is to be found in *Loh Kooi Choon, supra*, in which references were made to the Constitution of India to garner support for the contention that the amendments to our article 4(5) were unconstitutional and invalid. In

rejecting that contention, Raja Azlan Shah FJ (now HRH the Sultan of Perak) at pp 188 to 189 stated succinctly as follows:

“ Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and this wording ‘can never be overridden by the extraneous principles of other Constitutions’ – see **Adegbenro v Akintola & Anor (1963) 3 All ER 544, 551**. Each country frames its constitution according to its genius and for the good of its own society. We look at other Constitutions to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law”.

[22] *Loh Kooi Choon, supra*, was followed recently by the Federal Court in **PP v Kok Wah Kuan (2008) 1 MLJ 1**. Abdul Hamid Mohamad PCA (later CJ Malaysia) observed in para [27] thereof that judgments from other jurisdictions, while they are useful comparisons, should not be treated as if they are binding on our Courts.

#### **IV. THE RIGHT TO VOTE**

[23] The applicants complained that the learned judge had failed to consider that the applicants, being detainees under the Internal Security Act 1960 (“ISA”), were not allowed to

leave the detention centre, and the EC had not performed its duty or exercised the power to register them as postal voters, as the EC has a very wide and unlimited discretion to make rules and regulations to enable the applicants to vote.

**[24]** The EC took the view that the trial judge was correct in concluding that pursuant to article 119, a citizen is entitled to vote only if he is registered in the electoral roll as an elector in the constituency in which he resides on the qualifying date and that he is not being disqualified as an elector at the material time.

**[25]** In my judgment, the applicants (who are registered voters and who are not convicted prisoners serving sentences) have the constitutional right under article 119 to vote in the constituency where they have registered respectively ie the constituency in which they reside on the qualifying date.

**[26]** However, the applicants' constitutional right to vote under article 119 allows each of them to vote only in his own particular constituency and at the particular polling station where his name has been registered as an elector.

**[27]** The applicants' status as ISA detainees and the prohibition against them to leave the detention centre is an entirely different matter which is obviously beyond the EC's jurisdiction, powers, duties and responsibilities. The EC does

not and cannot exercise any jurisdiction over the applicants as ISA detainees. The EC is in no position whatsoever to allow or refuse the applicants to leave the detention centre, either for the purpose of casting their votes in the General Election or for any other purpose. That jurisdiction is conferred on the Ministry charged with the responsibility for the detention centre. As that Ministry is not a party herein, the issue relating to the applicants' status as ISA detainees is irrelevant to this appeal.

**[28]** The EC's powers to make rules pertaining to elections are enshrined in article 113 (5). These powers are not unlimited. The EC may make rules thereunder, so far as may be necessary for the purposes of its functions under this article. However, such rules shall have effect subject to federal law. One such federal law is the ISA. That being the case, the rules made by the EC may give effect to the constitutional right of voters but, being subject to federal law, must not override the ISA. That constitutional right to vote is only to be exercised in the respective constituency where he has registered as a voter under article 119. To enact rules in order to allow the applicants to vote e.g. in the detention centre or at any other place where they were not registered as voters, would contravene article 119.

**[29]** Further, for the applicants to cast their votes as postal voters, they have to come within the purview of Reg. 3 (1) and (2) of the Elections (Postal Voting) Regulations 2003. Under

this regulation, six categories of persons are entitled to vote as postal voters, as stated in the following provisions:

**“Persons entitled to vote as postal voters**

3. (1) Any person who has registered as a Parliamentary or State elector under the Elections (Registration of Electors) Regulations 2002, and is –

- (a) an absent voter;
- (b) a person certified by the Election Commission to be an election officer and liable for duties on polling day;
- (c) a member of any police force established by any written law in force in Malaysia, other than a member of the Police Volunteer Reserve Force;
- (d) a member of any of the public services who on polling day is employed full-time in a post outside Peninsular Malaysia or Sabah or Sarawak;

- (e) a member of the Election Commission appointed under Article 114 of the Federal Constitution; or
- (f) a member of any category of persons designated as postal voters by the Election Commission from time to time by notification in the Gazette,

shall, on receipt of a postal ballot paper, be entitled to vote as a postal voter at an election in accordance with these Regulations.

- (2) A person referred to in paragraphs (1) (b), (d), (e) and (f) desiring to vote by post shall apply to do so by using Form 1 in the Schedule.”

**[30]** As ISA detainees, the applicants may, where appropriate, invoke Reg. 3(2) above, and apply to vote by post, by using Form 1 in the Schedule thereto. However, the applicants did not invoke Reg.3(2). As alluded to above, they have instead written letters dated 15 and 17 March 2004 to the EC to treat them as postal voters. These letters were written well after 13 March 2004 which was the nomination day for the General Election. That is significant. Reg. 14A of the Elections (Conduct of Elections) Regulations 1981 provides that the electoral rolls which are submitted to the candidates on the

day of nomination shall be the authoritative texts of the electoral rolls which will be used by the returning officer and the presiding officer of a polling station on polling day. Reg. 14A therefore requires the authoritative texts of the electoral rolls to be submitted to the candidates on the day of nomination ie 13 March 2004. As the applications' letters dated 15 and 17 March 2004 were written to the EC well after the nomination day ie 13 March 2004, it is abundantly plain that the applicants cannot legally be included in the electoral rolls in order to become postal voters for the General Election. The applicants remain as walk-in voters who have to be personally present at the respective constituencies to cast their vote. However, their inability to cast their votes as walk-in voters was not caused by the act or omission of the EC.

[31] In the circumstances, the applicants' complaint of the violation of their rights to vote as walk-in or postal voters is wholly without merits.

## **V. ARTICLE 8**

[32] The final issue raised for the applicants is based on the allegation that as there are no rules or regulations to enable them to vote either as regular walk-in or postal voters under article 119, there was discrimination against them, in violation of article 8.

**[33]** The EC denied any discrimination against the applicants' right to vote.

**[34]** In my judgment, the short answer is to be found in article 113(5), pursuant to which the EC has through the election laws made it possible for the applicants as registered voters to cast their votes under article 119 in the respective constituency where they have registered as voters. The EC had never deprived them of the right to vote, nor was there any discrimination against them. Discrimination may well arise if e.g. other ISA detainees were accorded facilities to cast their votes and the applicants were denied or refused such facilities. However, that was not the case here, as all ISA detainees by way of reasonable classification were treated equally in so far as the exercise of their constitutional rights under article 119 is concerned. There is no discrimination whatsoever.

**[35]** The applicants' detention in the detention centre pursuant to ISA has nothing to do with the EC. The applicants' grievances, if any, should have been ventilated by them in the proper forum ie the Ministry concerned. As alluded to above, that is certainly not relevant to these proceedings for judicial review against the EC.

**[36]** The learned judge had correctly stated in para. 18 of his judgment that it is not the EC's responsibility to ensure that all

registered voters cast their votes on polling day, as voting is not compulsory in Malaysia.

**VI. CONCLUSION**

[37] On the foregoing grounds, I hold that the learned judge has correctly dismissed the applicants' application. Their appeal, being devoid of merits, is dismissed with costs. I affirm the orders made in the Court below. Deposits to the EC on account of taxed costs.

**DATUK WIRA LOW HOP BING**

Judge

Court of Appeal, Malaysia

**PUTRAJAYA**

Dated this 16 day of January, 2009

### **Counsel for the Appellant**

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**PUTRAJAYA.**

## **REFERENCES:**

- (1) Nordin bin Haji Zakaria & Anor v Mohd Noor bin Abdullah (2004) 2 MLJ. 777 FC,**
- (2) Ghazi bin Mohd Sawi v Mohd Haniff bin Omar & Anor (1994) 2 MLJ 114 SC;**
- (3) Article 113 (5);**
- (4) S.5 of the Elections Act 1958;**
- (5) Elections (Conduct of Elections) Regulations 1981;**
- (6) Elections (Registration of Electors) Regulations 2002;**
- (7) Elections (Postal Voting) Regulations 2003;**
- (8) Election Commission Malaysia v Abdul Fatah bin Haji Haron (1987) 2 MLJ 716 SC;**
- (9) Loh Kooi Choon v Government of Malaysia (1977) 2 MLJ. 187 FC.**
- (10) Saman Gulam v Tan Sri Haji Mohd Sunoh Marso & Ors (1987) 2 MLJ. 718 SC).**
- (11) Adegbenro v Akintola & Anor (1963) 3 All ER 544, 551.**
- (12) PP v Kok Wah Kuan (2008) 1 MLJ 1.**