

IN THE COURT OF APPEAL OF MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO. W-01-112-2009

BETWEEN

DATO' DR ZAMBRY BIN ABD KADIR ... APPELLANT

AND

DATO' SERI IR. HJ MOHAMMAD NIZAR BIN JAMALUDDIN
... RESPONDENT

AND

ATTORNEY GENERAL OF MALAYSIA ... INTERVENER

[In The High Court of Malaya at Kuala Lumpur
(Appellate and Miscellaneous Powers Division)
Application for Judicial Review No. R6(R3)-25-25-2009

In the matter of Articles XVI(2), XVI(6) and
XVI(7) of the Perak State Constitution;

And

In the matter of an application under Order
53 of the Rules of the High Court 1980;

And

In the matter of remedies and reliefs under section 25(2) and paragraph 1 of the Schedule to the Courts of Judicature Act 1964;

And

In the matter of remedies and reliefs under sections 41, 44, 50, 51 and 52 of the Specific Relief Act 1950;

And

In the matter of Article 8 of the Federal Constitution;

And

In the matter of an application for, inter alia, declarations, *quo warranto* writ, injunction and damages;

And

In the matter of the legal dispute between Dato' Seri Ir. Hj Mohammad Nizar bin Jamaluddin and Dato' Dr Zambry bin Abd Kadir in respect of the post of the Chief Minister of Perak Darul Ridzuan.

BETWEEN

DATO' SERI IR. HJ MOHAMMAD NIZAR BIN JAMALUDDIN
... APPLICANT

AND

DATO' DR ZAMBRY BIN ABD KADIR
... RESPONDENT

AND

ATTORNEY GENERAL OF MALAYSIA
...INTERVENER

Coram: Raus Sharif, J.C.A.
Zainun Ali, J.C.A.
Ahmad Maarop, J.C.A.

JUDGMENT OF RAUS SHARIF JCA

1. This is an appeal by the appellant (“Zambry”) against the decision of the High Court at Kuala Lumpur delivered on 11 May 2009 allowing the respondent’s (“Nizar”) application for Judicial Review pursuant to Order 53 of the Rules of the High Court 1980.

Facts

2. The brief facts of this case are these. At the conclusion of the 12th General Election held on 8 March 2008, the political alliance of Pakatan Rakyat comprising members of Parti KeAdilan Rakyat (“PKR”), Parti Islam Semalaysia (“PAS”) and the Democratic Action Party (“DAP”) won 31 seats for the Perak State Legislative Assembly (“Legislative Assembly”). The other 28 seats were won by the Barisan Nasional. The composition of the seats in the Legislative Assembly as on 8 March 2008 were as follows.

PAKATAN RAKYAT		BARISAN NASIONAL	
Party	No. of Seats	Party	No. of Seats
PKR	7	UMNO	27
PAS	6	MCA	1
DAP	18	MIC	0
Total	31	Total	28

3. Based on the majority of seats won by Pakatan Rakyat in the Legislative Assembly, Pakatan Rakyat led by Nizar sought the consent of the DYMM Sultan of Perak to form the State Government. The DYMM Sultan of Perak gave His Royal Highness' consent. In accordance with the Laws of the Constitution of Perak ("Perak State Constitution") and pursuant to Article XII and XVI of Perak State Constitution, Nizar was appointed and took his oath of office as Menteri Besar on 17 March 2008.

4. Nizar's tenure as Menteri Besar did not last for long. On 6 February 2009, the DYMM Sultan of Perak appointed Zambray as the Menteri Besar. The events that led to the appointment of Zambray as Menteri Besar replacing Nizar, may be summarised as follows:-
 - 4.1 On 30 January 2009, it was announced by separate letters addressed to the Speaker of the Legislative Assembly ("Speaker"), that Behrang Assemblyman and Changkat Jering Assemblyman from PKR have resigned as members of the Legislative Assembly.

 - 4.2 On 1 February 2009, the Speaker announced that he had accepted the resignation of the two Assemblymen. He declared that the seats for Behrang (N59) and Changkat Jering (N14) vacant. The Speaker, accordingly informed the Election Commission of the vacancies.

4.3 However, on the same day, the Behrang and Changkat Jering Assemblymen, separately sent a letter to the DYMM Sultan of Perak, stating:

4.3.1 They did not issue any letter of resignation as alleged by the Speaker; and

4.3.2 They were still serving and carrying out their duties as the Assemblymen for the Behrang and Changkat Jering constituents respectively.

4.4 On the very same day, the Behrang and Changkat Jering Assemblymen, separately issued a letter to the Speaker, stating:

4.4.1 Any letter and/or notice purporting to contain their resignation as members of the Legislative Assembly whether dated before, on or after 1 February 2009 was invalid ab initio due to non-occurrence of an event;

4.4.2 At all material time, they had not tendered their resignation letter to the Speaker as alleged; and

4.4.3 The purported letter of resignation was not dated by them and the act of any person inserting the

date on the purported letter of resignation was done without their prior approval and/or consent.

4.5 The abovementioned letters dated 1 February 2009 were copied to the State Secretary, the State Legal Advisor, the Secretary of the Legislative Assembly and the Director of Election for the State of Perak.

4.6 On 2 February 2009, the Behrang and Changkat Jering Assemblymen separately lodged a police report at the Bentong and Shah Alam Police Stations respectively stating:

4.6.1 They did not tender the purported resignation letter to the Speaker;

4.6.2 At all material time, they were on medical leave; and

4.6.3 The purported resignation letter was invalid, fraudulent and issued in bad faith.

4.7 On the same day, at about 5.30 pm, Nizar had an audience with the DYMM Sultan of Perak at which he informed His Royal Highness on the resignation of the Assemblymen from Behrang and Changkat Jering.

4.8 On 3 February 2009, both the Behrang and Changkat Jering Assemblymen separately wrote to the DYMM Sultan of Perak to inform His Royal Highness that they:

4.8.1 Have lost their confidence in Nizar as the Menteri Besar;

4.8.2 Will not support Nizar as the Menteri Besar; and

4.8.3 The Barisan Nasional now has a majority in the Legislative Assembly.

4.9 On the same day i.e. 3 February 2009, it was announced by the Speaker that he had received a letter of resignation from the Jelapang Assemblywoman as a member of the Legislative Assembly. The Speaker also announced that he had accepted her resignation and accordingly declared the seat for Jelapang (N31) as vacant. The Speaker informed the Election Commission of the vacancy.

4.10 However, on the same day, the Jelapang Assemblywoman, who is from DAP, issued a letter to the Speaker stating:

4.10.1 Any letter or notice of resignation purporting to contain her resignation as a member of the

Legislative Assembly and which do not bear her official stamp is void ab initio;

4.10.2 She has lost her confidence in DAP;

4.10.3 She is leaving DAP; and

4.10.4 Her declaration on leaving DAP does not operate as her resignation of a member of the Legislative Assembly.

4.11 On the same day, the Jelapang Assemblywoman wrote to the DYMM Sultan of Perak to inform His Royal Highness that she:

4.11.1 Has lost her confidence in Nizar as the Menteri Besar;

4.11.2 Will not support Nizar as the Menteri Besar; and

4.11.3 The Barisan Nasional now has the support of the majority of the members of the Legislative Assembly.

4.12 On 4 February 2009, the Jelapang Assemblywoman lodged a police report at Putrajaya Police Station stating:

4.12.1 She did not tender the purported resignation letter to the Speaker; and

4.12.2 The purported resignation letter was invalid, fraudulent and issued on bad faith.

4.13 On 4 February 2009, the Election Commission issued a statement that it was unable to establish that there was 'casual vacancy' for the 3 state seats i.e. Behrang, Changkat Jering and Jelapang.

4.14 On 4 February 2009 at about 3.00 pm, the DYMM Sultan of Perak received the letters from the Behrang and Changkat Jering Assemblymen and Jelapang Assemblywoman stating that they have lost their confidence in Nizar as the Menteri Besar and they are leaving their respective political parties but maintaining their positions as members of the Legislative Assembly representing their respective constituencies. They declared their support to Barisan Nasional.

4.15 On 4 February 2009 at about 5.30 pm, Nizar had an audience with the DYMM Sultan of Perak, in the present of the State Legal Advisor, at which he made a request to dissolve the Legislative Assembly. The DYMM Sultan of Perak informed Nizar that time was required in order to

consider the request for the dissolution of the Legislative Assembly.

4.16 On 5 February 2009 at about 10.00 am, the Deputy Prime Minister, Dato' Seri Mohd Najib bin Tun Abd Razak ("Dato' Seri Najib"), in his capacity as the Chairman of the Perak Barisan Nasional had an audience with the DYMM Sultan of Perak. At the audience Dato' Seri Najib informed DYMM Sultan of Perak that the Barisan Nasional had the command of the majority of the members of the Legislative Assembly and intended to form the Perak State Government. Dato' Seri Najib presented to DYMM Sultan of Perak the letter of support with signatures from 27 members from Barisan Nasional stating that they would support whoever that would be named by Dato' Seri Najib as the candidate for the new Menteri Besar. Dato' Seri Najib also presented to DYMM Sultan of Perak the letters of support for Barisan Nasional from the 3 independent members of the Legislative Assembly.

4.17 The DYMM Sultan of Perak informed Dato' Seri Najib that he would require proof that the Barisan Nasional had the command of the confidence of the majority of the members of the Legislative Assembly and wished to meet all the Assemblymen who supported the Barisan Nasional.

4.18 On the same day at about 11.15 am, Dato' Seri Najib brought in the 31 members of the Legislative Assembly to the Palace.

4.19 The DYMM Sultan of Perak met the 31 members of the Legislative Assembly, where upon they declared before His Royal Highness their support to Barisan Nasional.

4.20 The DYMM Sultan of Perak specifically interviewed the 3 independent members to ascertain whether they had indeed freely pledged their support to the Barisan Nasional and had lost confidence on Nizar. All 3 of them informed DYMM Sultan of Perak that they had signed and pledged their support to the Barisan Nasional voluntarily without any coercion of any party.

4.21 On the same day at about 1.00 pm, Nizar had an audience with DYMM Sultan of Perak at His Royal Highness' invitation. The State Legal Advisor was also present. At the meeting, the DYMM Sultan of Perak informed Nizar that:

4.21.1 His Royal Highness rejected the request for the dissolution of the Legislative Assembly;

4.21.2 Nizar no longer commanded the confidence of the majority of the members of the Legislative

Assembly as Barisan Nasional, in His Royal Highness' judgment had the support of 31 members of the Legislative Assembly; and

4.21.3 Under the Perak State Constitution, Nizar shall tender the resignation of the Executive Council and that includes himself.

4.22 Thereafter, Nizar informed the DYMM Sultan of Perak *inter alia* that he was not agreeable with the decision of DYMM Sultan of Perak.

4.23 Later on the same day, the DYMM Sultan of Perak, through His Royal Highness' Private Secretary, issued a press statement which states, *inter alia* as follows:-

4.23.1 Nizar was granted an audience by DYMM Sultan of Perak on 4 February 2009 seeking His Royal Highness' consent to dissolve the Legislative Assembly;

4.23.2 Dato' Seri Najib had also requested an audience with DYMM Sultan of Perak in his capacity as the Chairman of the Perak Barisan Nasional;

4.23.3 Dato' Seri Najib had informed DYMM Sultan of Perak that the Barisan Nasional and its

supporters, now comprising 31 State Assemblymen, had the majority in the Legislative Assembly;

4.23.4 On the order of DYMM Sultan of Perak to ascertain whether the information given was accurate, all the 31 State Assemblymen were to present themselves before DYMM Sultan of Perak;

4.23.5 After meeting with all the 31 State Assemblymen, the DYMM Sultan of Perak was convinced that Nizar had ceased the command the confidence of the majority of the members of the Legislative Assembly;

4.23.6 That DYMM Sultan of Perak had considered the request of Nizar for a dissolution of the Legislative Assembly and had invoked His Highness' Royal Prerogative under Article XVIII(2)(b) not to dissolve the Legislative Assembly;

4.23.7 Nizar was informed of the decision of DYMM Sultan of Perak and pursuant to Article XVI(6), Nizar and members of his Executive Council were to resign; and

4.23.8 If Nizar and members of his Executive Council did not resign, the post of the Menteri Besar and the Executive Council are deemed to be vacant.

4.24 Nizar, on the same day, wrote a letter to DYMM Sultan of Perak and once again requested for His Royal Highness to dissolve the Legislative Assembly.

4.25 On 6 February 2009, the DYMM Sultan of Perak in accordance with Article XVI(2) of the Perak Constitution, appointed Zambry as the Menteri Besar of Perak.

Judicial Review

5. On 13 February 2009, Nizar filed the application for Judicial Review pursuant to Order 53 of the High Court Rules 1980. Basically Nizar was claiming that:-

5.1 He had not resigned as the Menteri Besar of Perak and therefore continued to hold office of the Menteri Besar;

5.2 No motion of confidence had been tabled against him in the Legislative Assembly to establish that he no longer commanded the confidence of the majority of the members of the Legislative Assembly; and

- 5.3 Since there was no dissolution of the Legislative Assembly, despite his request in his capacity as the Menteri Besar, the DYMM Sultan of Perak was not entitled to declare the position of Menteri Besar vacant pursuant to Article XVI(6) of the Perak State Constitution especially as he contends that his application for dissolution was made under Article XXXVI(2).
6. Nizar also contended that he did not hold the office of Menteri Besar at the pleasure of DYMM Sultan of Perak and therefore His Royal Highness could not dismiss him. He further contended that only the Legislative Assembly could decide his fate as the Menteri Besar and it had to be by a vote of no confidence.
7. On 11 May 2009, the learned High Court Judge allowed Nizar's application for judicial review. He granted the following orders:-
- 7.1 A declaratory order that Nizar at all material times was and is the Menteri Besar of Perak;
- 7.2 A declaratory order in respect of Article XVI(6) of the Perak State Constitution that in circumstances where:
- 7.2.1 The Menteri Besar wished, and had advised for the dissolution of the Legislative Assembly;

7.2.2 There was no dissolution of the Legislative Assembly;

7.2.3 There was no motion of confidence taken, and adopted in by the Legislative Assembly against the Menteri Besar;

7.2.4 There was no resignation from the post of Menteri Besar of Perak;

whether the post of Menteri Besar may be and/or had been vacated.

7.3 A quo warranto writ be issued against Zambry ordering Zambry to show cause and to provide information as to how and under what basis or power or authority is Zambry entitled to hold the post of Menteri Besar and to perform and/or carry out and/or discharge the obligations, functions and duties as the Menteri Besar.

7.4 A declaratory order that Zambry is not entitled to and/or does not hold the post of the Menteri Besar and was and is not the Menteri Besar.

7.5 An injunction to restrain Zambry and/or his agents and/or servants from performing and/or carrying out and/or

discharging the obligations, functions and duties of the Menteri Besar.

8. The reasoning of the learned Judge in granting the above orders can be summarised as follows:-

8.1 The request for the dissolution of the Legislative Assembly by Nizar was made pursuant to Article XXXVI(2) and not pursuant to Article XVI(6) of the State Constitution;

8.2 If Nizar had lost the confidence of the majority of the members of the Legislative Assembly only the Legislative Assembly could determine the issue by a vote of no confidence in the Legislative Assembly. And the DYMM Sultan of Perak was not entitled to interview the members of the Legislative Assembly to ascertain who commanded the majority in the Legislative Assembly.

8.3 Nizar did not hold the office of Menteri Besar at the pleasure of DYMM Sultan of Perak and hence he could not be dismissed and the press statement of 5 February 2009 issued by the Private Secretary of DYMM Sultan of Perak, amounted to the dismissal of Nizar.

8.4 On a true construction of the provisions of the Perak State Constitution and on the facts of the case the DYMM

Sultan of Perak was wrong in appointing Zambry as the Menteri Besar as Nizar had not been dismissed and therefore Nizar was entitled to a writ of quo warranto.

- 8.5 That the evidence of Nizar was to be preferred to that of the evidence of the Perak State Legal Advisor as to what transpired on 4 February 2009 and 5 February 2009.

Issues

9. The decision and the reasoning of the learned Judge raised three major issues:
- 9.1 Whether the learned Judge was right in holding that the request for the dissolution of the Legislative Assembly by Nizar was made under Article XXXVI(2) and not under Article XVI(6) of the Perak State Constitution.
- 9.2 Whether the learned Judge was right in holding that there must be a motion of no confidence passed in the Legislative Assembly against Nizar before Nizar ceased to command the confidence of the majority of the members of the Legislative Assembly.
- 9.3 Whether the learned Judge was right in holding that the DYMM Sultan of Perak was wrong in appointing Zambry as the Menteri Besar.

Findings

Whether the request for the resolution of the Legislative Assembly was made under Article XXXVI(2) or Article XVI(6) of the Perak State Constitution.

10. Under the Perak State Constitution, the request for dissolution of the Legislative Assembly is found in Article XXXVI(2) and Article XVI(6). It reads as follows:

Article XXXVI(2)

“(2) His Royal Highness may prorogue or dissolve the Legislative Assembly.”

Article XVI(6)

“(6) If the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then, unless at his request His Royal Highness dissolves the Legislative Assembly, he shall tender the resignation of the Executive Council.” (emphasis added)

11. At the outset, it must be stated that the DYMM Sultan of Perak has the absolute discretion to withhold the consent for a request for the dissolution of the Legislative Assembly,

irrespective of whether the request is made under Article XXXVI(2) or Article XVI(6) of the Perak State Constitution. The absolute discretion of His Royal Highness is found in Article XVIII(2)(b). It reads:-

“(2) His Royal Highness may act in His discretion in the performance of the following functions (in addition to those in the performance of which He may act in His discretion under the Federal Constitution) that is to say –

- (a) the appointment of a Menteri Besar;
- (b) the withholding of consent to a request for the dissolution of the Legislative Assembly ...”

12. There is a string of authorities which hold that the withholding of consent to a request for the resolution of Parliament or the Legislative Assembly is a Royal Prerogative and is not justiciable. Suffice, that the wise words of Lord Roskill in **Council of Civil Service Union & Ors v Minister for the Civil Service [1984] 3 All ER 935** be reproduced as a reminder. It reads:-

“... Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grants of honours, the

dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter is such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces, disposed in a particular manner or Parliament dissolved on one date rather than another.”

13. Even Tuan Hj. Sulaiman, the learned counsel for Nizar conceded that the withholding of consent to a request for the resolution of the Legislative Assembly is a Royal Prerogative and is not subject to judicial review. But he insisted that the request by Nizar to dissolve the Legislative Assembly was made under Article XXXVI(2) and not under Article XVI(6) of the Perak State Constitution. His insistence is obvious as a request under Article XXXVI(2) does not call for immediate resignation of the Menteri Besar and the Executive Council.
14. The learned Judge agreed with Tuan Hj. Sulaiman. He held that it would be reasonable to think that Nizar was seeking His Royal Highness to exercise His Royal Highness Royal Prerogative under Article XXXVI(2) of the Perak State Constitution to dissolve the Legislative Assembly. He thought it was reasonable because the said Article was a general provisions for dissolution of the Legislative Assembly and also

because Nizar's leadership of the Government was never challenged on a vote of no confidence in the Legislative Assembly up to February 2009. Further, he preferred the evidence of Nizar to that of the State Legal Advisor as to what transpired on 4 February 2009 and 5 February 2009.

15. It is not in dispute that the State Legal Advisor was present when Nizar was having an audience with His Royal Highness on 4 February and 5 February 2009. The State Legal Advisor in his affidavit affirmed on 8 April 2009 deposed that Nizar had informed His Royal Highness that two assemblymen and one assemblywoman have left the Pakatan Rakyat and that there was a political uncertainty as to whether Pakatan Rakyat or Barisan Nasional has the command of the majority of the members of the Legislative Assembly. The State Legal Advisor also deposed that Nizar had requested that the Legislative Assembly be dissolved under Article XVI(6) of the Perak State Constitution. And at the same time Nizar handed to His Royal Highness a proclamation for that purpose to be assented to by His Royal Highness. The State Legal Advisor further deposed that His Royal Highness informed Nizar that His Royal Highness required some time to consider the request by Nizar to dissolve the Legislative Assembly pursuant XVI(6) Perak State Constitution and did not assent to the Proclamation on that day.

16. Nizar disputed the deposition of the State Legal Advisor. In his affidavit in reply affirmed on 20 April 2009, Nizar averred that during the audience with the Royal Highness on 4 February 2009, he never stated, informed or proposed to His Royal Highness that he had lost the confidence of the majority of the Legislative Assembly and he had never proposed to His Royal Highness for the dissolution of Legislative Assembly pursuant to Article XVI(6) of the Perak State Constitution. Nizar further deposed that the issue as to loss of confidence and the issue of dissolution of the Legislative Assembly pursuant to Article XVI(6) of Perak State Constitution was never discussed during the brief audience. Nizar further reiterated that during the audience, he informed His Royal Highness that because of the resignation by the three independent Assemblymen, they were no longer members of the Legislative Assembly and had no right to get involved with the business or matters that concern the Legislative Assembly and that all three of them could not be contacted and were “missing”. He further averred that he requested His Royal Highness to dissolve the Legislative Assembly as he considered it appropriate and proper to have an election for the Legislative Assembly to overcome the deadlock.

17. Obviously, there was a conflict between the affidavit evidence of the State Legal Advisor and that of Nizar. To resolve the conflict, the parties agreed to have the State Legal Advisor and Nizar to be cross-examined on their depositions and averments

in their respective affidavits. Both Nizar and the State Legal Advisor during the cross-examinations stood their grounds.

18. The learned Judge preferred the version by Nizar that the request for the dissolution on 4 February 2009 was made pursuant to Article XXXVI(2) and that the issue of loss of confidence in the Legislative Assembly was never raised or became an issue when Nizar had the audience with the DYMM Sultan of Perak. In rejecting the State Legal Advisor's evidence, the learned Judge stated as follows:-

“However with regard to the State Legal Advisor neutrality in relation to the case, I will take that with a pinch of salt. By his own admission, the State Legal Advisor said that he was instructed to swear the affidavits; and the instruction was from the solicitors who had taken over the respondent case because the solicitors were aware of his knowledge about the events on 4th-6th February 2009. The word ‘instruct’ or ‘instructed’ is a strong word. It connotes that when one is under instruction one is under the control or command of another who is more superior. Thus, whatever one does under such instruction may not be out of one freewill. The State Legal Advisor is a very senior and experienced official and also trained in law. Surely he could have a better choice of word when

answering the question by counsel for the applicant whether he i.e. the State Legal Advisor was requested to affirm the affidavit or whether he volunteered to affirm the affidavit because he has knowledge of the events on 4th-6th February 2009. But he choose to tell the Court that he was instructed. To me, that means the State Legal Advisor in affirming the affidavits on instruction of someone else is not completely neutral or impartial. Whatever he deposed in the affidavit would, I think, to certain extend coloured by the instructions that he received. In another words in the circumstances the State Legal Advisor may not have applied his independence mind and judgment as to the facts he disposed in his affidavits. I am of the view because the State Legal Advisor testified under cross examination when he was given the draft proclamation for the dissolution of the State Legislative Assembly soon after the audience with his Royal Highness, he did not make any effort to contact the applicant to correct the proclamation. This fact is important. The State Legal Advisor testified he read the draft proclamation (Exhibit PSLA-1 in his affidavit Enclosure 28A) after it was given to him and by then he should have realised that in Exhibit PLSA 1 – the applicant made no reference to Article XVI(6), instead the provision of

the Perak's State Constitution that was mentioned in Exhibit PSLA 1 was Article XXXVI(2). In the light of the State Legal Advisor averment in his affidavit that the applicant had requested the dissolution under Article XVI(6) Perak's State Constitution I would think that he would have contacted the applicant to point out the mistake in the draft Proclamation and to suggest correction to it so that it would be in accord with the applicant's request for dissolution before His Royal Highness. What is strange is that the State Legal Advisor testified that he did not take that course of action because His Royal Highness had not decided on the applicant request for dissolution. I consider it strange because as Legal Advisor to the state, it is his duty, as provided under Article XXXVI(2) Perak's State Constitution, to advice on all legal matters referred to him by His Royal Highness or the State Government. That, I think, includes to advice the applicant who was then still the Menteri Besar Perak and the Chief Executive of the State of Perak on the draft Proclamation."

19. With utmost respect, the learned Judge's criticism that the State Legal Advisor had failed to advise Nizar on the draft Proclamation is completely unfounded. On the facts, there was no reason for the State Legal Advisor to examine, correct or

take any action on the draft Proclamation at that point in time or thereafter, as His Royal Highness had not decided on the Nizar's request for the dissolution. Under Article XXXVI(2)(b) of the Perak State Constitution, 'the State Legal Advisor shall advice on legal matters referred to him by His Royal Highness or the State Government'. In this case, there is no question of the State Legal Advisor failing to do his duty to the Government of the day as the draft Proclamation was never referred to him. Nizar himself in his evidence during cross examination agreed that he had not sought the advice of the State Legal Advisor in preparing the draft Proclamation. When he was questioned of who prepared the draft Proclamation, his response was:-

“Q. You presented to the Sultan with draft Proclamation, who drafted it?

A. Saya tak tahu siapa drafted it, ia standard form.

Q. You know what circumstances such proclamation used for.

A. Saya hanya tahu pengisytiharan itu perlu perkenan Sultan untuk bubar DUN.

Q. Did you give Penasihat Undang-Undang a copy of the draft before submitting it to the Sultan prior to the audience on 4.2.2009.

A. Tidak.”

Thus, if Nizar did not think it fit to consult the Perak State Legal Advisor on the draft Proclamation how could the State Legal Advisor possibility tender his advice? Clearly, the learned Judge’s finding on this issue is perverse and wrong. At the end of it, the draft Proclamation is of not much of a value because Nizar merely picked up a standard form that had not been vetted by the State Legal Advisor.

20. The learned Judge’s further criticism on the issue that because the State Legal Advisor used the word ‘instructed’ to swear the affidavits presumably meant that the State Legal Advisor was instructed by a higher authority is again, a perverse finding. The mere usage of the word ‘instructed’ to affirm the affidavit cannot be used as the basis of doubting the evidence of a witness and in this case, the State Legal Advisor. What is required of the learned Judge is for him to evaluate the evidence of this case as a whole. The conflicting evidence of Nizar and the State Legal Advisor must be tested against the uncontroverted documentary evidence adduced in this case.

21. It is trite law that when there is a conflict between the evidence of two witnesses, the court would resolve the conflict by relying on the uncontroverted documentary evidence which is neutral in nature. In **Tindok Besar Estate Sdn Bhd v Jujur Co [1979] 2 MLJ at pg 234**, Chang Min Tat FJ has this to say:-

“For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with the purpose of his own to serve and if it did not account for the statements in his documents and writing. Judicial reception of evidence requires that oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity ..”

22. In **Graze Shipping Inc & Anor v CF Sharp & Co (Malaya) Pte Ltd [1987] 1 MLJ 257**, Lord Goff of Chiveley in delivering the judgment of the Privy Council, speaking on the same subject held that it is of crucial importance for judges to have regard to the contemporary documents and to the overall probabilities when facing the task of assessing the evidence of witnesses. (See also **Tay Bok Choon v Tahansan Sdn Bhd [1987] 1**

MLJ 433, Eastern & Oriental Hotel [1951] Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35, Tan Sooi Shin @ Tan Sooi Shin v Kow Kek Hing [1991] 3 CLJ 1985 and Kumagai Gumi Co Ltd v Zenecon – Kumagi Sdn Bhd [1994] 2 MLJ 789).

23. In the present case, the letter dated 5 February 2009 authored by Nizar himself and the media statement by the office of His Royal Highness bear out the undisputed fact that Nizar's request for dissolution was made because he had lost the command and support of the majority members of the Legislative Assembly. Both documents lend support to the State Legal Advisor's evidence that Nizar had sought the dissolution of the Legislative Assembly under Article XVI(6) of the Perak State Constitution.
24. The pertinent part of Nizar's letter to His Royal Highness dated 5 February 2009 reads as follows:-

“... Patik mohon izin untuk menyembahkan beberapa perkara:

1. Artikel XVI(6) Undang-Undang Perlembagaan Negeri Perak menyatakan bahawa “If the Menteri Besar ceases to command the confidence of the majority of the Legislative Assembly, then, unless at his request His

Royal Highness dissolves the Legislative Assembly, he should tender the resignation of the Executive Council". Ini bermakna sokongan Menteri Besar itu perlu diputuskan oleh Persidangan Dewan Undangan Negeri.

2. Jumlah Ahli Dewan Undangan Negeri Pakatan Rakyat dan Barisan Nasional adalah sama iaitu 28 orang. Adalah kurang tepat andaian Barisan Nasional mempunyai majoriti. YB Yang Di Pertua Dewan Undangan Negeri Perak telah memutuskan bahawa ADUN bagi kawasan Behrang, Changkat Jering dan Jelapang bukan lagi ADUN. YB Yang Di Pertua Dewan Undangan Negeri Perak dan Kerajaan Negeri Perak juga telah memfailkan satu permohonan untuk satu pengisytiharan bahawa ketiga-tiga ADUN berkenaan bukannya ADUN untuk kawasan-kawasan tersebut di Mahkamah Tinggi pada pagi ini. Sewajarnya kita menunggu keputusan Mahkamah dalam kes tersebut.

Ampun Tuanku,

Atas alasan di atas dan berdasarkan prinsip demokrasi dan Raja Berperlembagaan Patik

dengan ini merafa' sembah memohon agar Dewan Undangan Negeri dibubarkan bagi membolehkan rakyat memilih semula kerajaan yang dikehendaki mereka.”

25. The media statement issued by the office of His Royal Highness on 5 February 2009 *inter alia* reads as follows:-

“YAB Dato' Seri Ir Haji Mohammad Nizar bin Jamaluddin telah dititah mengadap Baginda untuk dimaklumkan mengenai keputusan Baginda tidak membubarkan Dewan dan selaras dengan Peruntukan XVI(6) Undang-Undang Tubuh Kerajaan Perak Darul Ridzuan, DYMM Paduka Seri Sultan Perak menitahkan YAB Dato' Seri Ir Mohammad Nizar bin Jamaluddin meletak jawatan sebagai Menteri Besar Perak bersama-sama ahli-ahli Majlis Kerajaan (MMK) berkuatkuasa serta merta.”

26. It is clear from the above uncontroverted documentary evidence that the request for the dissolution of the Legislative Assembly must have been made under Article XVI(6) of the Perak State Constitution. Moreover, state of events that led to the decision of His Royal Highness not to dissolve the Legislative Assembly, does not support Nizar's claim that he had requested the

dissolution of the Legislative Assembly under Article XXXVI(2) of the Perak State Constitution.

27. It is an undisputed fact that the Pakatan Rakyat Government at its formation had a 3 seat majority in the Legislative Assembly. Thus, when the two Assemblymen of Pakatan Rakyat from PKR on 1 February 2009 declared that they were leaving the party and crossing support to the Barisan Nasional, Nizar must be concerned of his position. Nizar quickly had an audience with His Royal Highness on 2 February 2009, to inform His Royal Highness that the two Assemblymen had in fact resigned. But by that time the two Assemblymen had openly disputed the fact they have resigned as members of the Legislative Assembly.
28. On 3 February 2009, another bombshell hit Nizar. This time an Assemblywoman from DAP announced her decision to leave DAP, a political party aligned to Pakatan Rakyat. She too had disputed the claim by the Speaker that she had resigned as a member of the Legislative Assembly. She openly declared that she no longer supported Nizar as the Menteri Besar, instead she was supporting Barisan Nasional.
29. The above was the state of affairs when Nizar had an audience with His Royal Highness at 5.30 pm on 4 February 2009, where he made the request to dissolve the Legislative Assembly. At that time he could not credibly dispute the fact that he had lost

the support of the majority of the members of the Legislative Assembly as the Barisan Nasional consisting 28 members with the support of 3 independent members had a total of 31 members, while Pakatan Rakyat had 28 members. On these undisputed facts, how could he possibly claimed that his request to dissolve the Legislative Assembly was under Article XXXVI(2) the Perak State Constitution.

30. Article XXXVI(2) is a general provision. A request for dissolution under this Article, have to be in relation to the conclusion of the five years term of the Legislative Assembly when a General Election is contemplated. It is a well known fact that the General Election had been held barely one year ago. Hence, the learned Judge's finding that the request by Nizar for the dissolution of the Legislative Assembly was under Article XXXVI(2) cannot be supported. On the facts of this case, the request could only have been made in accordance to Article XVI(6) of the Perak State Constitution.

Whether the learned Judge was right in holding that there must be a motion of no confidence passed in the Legislative Assembly against Nizar before Nizar ceases to command the confidence of the majority of the Legislative Assembly.

31. This is the crucial issue. The learned Judge held that the loss of confidence of the majority of the members of the Legislative

Assembly on the Menteri Besar could only be determined by a vote of no confidence in the Legislative Assembly. He said it in the following words:-

“In this case it is very easy to be swayed by the fact that His Royal Highness has satisfied himself as to whom has command of the majority in the State Legislative Assembly and to conclude that the applicant has ceased to command the confidence of the majority in the State Legislative Assembly. But the stark fact is that there never was any vote of no confidence taken against the applicant in the State Legislative Assembly and the applicant had not come to His Royal Highness to request dissolution because he had lost command of the majority. So how could one say that the applicant has ceased to command the confidence of the majority in the State Legislative Assembly for the purpose of Article XVI(6) Perak’s State Constitution.”

32. With utmost respect, I disagree. Under Article XVI(6) there is no mandatory and/or express requirement that there must be a motion of no confidence passed in the Legislative Assembly against a Menteri Besar before he ceases to command the confidence of the majority of the members. The fact that a Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly can be

established by other means. It cannot be solely confined to the vote taken in the Legislative Assembly.

33. In this respect I am in agreement with the decision of Kadir Sulaiman J (as he then was) in **Datuk (Datu) Amir Kahar bin Tun Dato' Haji Mustapha v Tun Mohd Said bin Keruak & 8 Ors [1995] 1 CLJ 184 (Amir Kahar)**. What happened in that case was this. Following the February 1994 state election in Sabah, Parti Bersatu Sabah (PBS) under Pairin was returned with 25 of the 48 seats in the State Legislative Assembly. Barisan Nasional under Sakaran Dandai won the other 23 seats. Pairin was appointed as the Chief Minister, and shortly thereafter his Cabinet was also appointed.

34. Soon after his appointment, moves were began to unseat Pairin. On 13 March he learnt of the defection of three PBS Assemblymen, which turned his majority of the elected members into a minority. On the same day, he requested the Yang di-Pertua Negeri for the dissolution of the Assembly. The Yang di-Pertua Negeri refused. Subsequently 30 members of the Assembly presented a signed petition to the Yang di-Pertua Negeri, stating that they had no confidence in Pairin. Pairin resigned, without having been any vote or motion of no confidence passed against him in the Assembly. By that time he had only 21 votes in the Assembly as against 27 for the Barisan Nasional. Sakaran Dandai was accordingly appointed the Chief Minister and a new Cabinet was also appointed.

35. In his judgment, Abdul Kadir Sulaiman J in interpreting the relevant provisions of the Sabah State Constitution including Article 7(1) which is in pari materia with Article XVI(6) of the Perak State Constitution held at pg 197 that:-

“... the evidence that a Chief Minister ceases to command the confidence of the majority of members of the Assembly for the purpose of Article 7(1) of the Sabah Constitution, may be found from other extraneous sources and are not confined to the votes taken in the Assembly provided that, that extraneous sources are properly established. In this case, that extraneous source is to be found in the clear expression contained in the petition by the 30 members to the 1st defendant and the admission of that fact by Datuk Pairin. This clear expression suffices for the 1st defendant to exercise his discretion under Article 6(3) to appoint the 2nd defendant as the new Chief Minister to replace Datuk Pairin which issue in any event is not contested by the plaintiff. The expression of loss of confidence is not, therefore, confined to the vote taken in the Assembly but depending on the circumstances which are capable of contributing sufficient evidence to indicate such lack of confidence. After all there is nothing in the Constitution of Sabah which can be construed as

requiring that the test of confidence or lack of it must be by way of vote taken in the Assembly itself. If it is the intention of the framers of the Constitution that it be so then an express provision to that effect would have been so provided.”

36. Similarly, in the present case there is nothing in the Perak State Constitution which can be construed as requiring that the test of confidence or lack of it must be by way of vote taken in the Legislative Assembly. Of course, actual voting in the Legislative Assembly is ideal but interpreting Article XVI(6) to require the loss of confidence to be established only by voting in the Legislative Assembly would lead to absurdity as the Menteri Besar who may have lost support will not be too eager to summon it. Thus, as rightly stated by Kadir Sulaiman J in **Amir Kahar** that there must be other circumstances, which are capable of contributing sufficient evidence to such lack of confidence in Chief Minister or the Menteri Besar.
37. In the present case, the circumstances clearly shows that on the 5 February 2009 Nizar no longer had the confidence of the majority of the members of the Legislative Assembly. There were signed letters from 31 members of the Legislative Assembly pledging support to the Barisan Nasional which were presented to the DYMM Sultan of Perak. The 31 members presented themselves before His Royal Highness, whereby

they personally informed His Royal Highness of their support to the Barisan Nasional.

38. It is an undisputed fact that His Royal Highness interviewed the 3 independent members separately in order to ascertain whether they were really supporting Barisan Nasional. They informed His Royal Highness that they no longer supported Nizar as the Menteri Besar. Instead they declared their support to Barisan Nasional. At the end of it, His Royal Highness was satisfied that with the 31 members of the Legislative Assembly supporting the Barisan Nasional, Nizar no longer command the confidence of the majority of the members of the Legislative Assembly.
39. The learned Judge however in holding that the phrase 'cease to command the confidence of the majority of the members of the Legislative Assembly' under Article XVI(6) 'ought to be construed as to have ceased to command the confidence of the majority after a vote of no confidence had been taken in the Legislative Assembly' chose to follow and adopt the case of **Stephen Kalong Ningkan v Tun Abang Haji Openg and Tawi Sli [1966] 2 MLJ 187 (Ningkan)**.
40. In **Ningkan**, twenty-one of the 42 assemblymen petitioned to the Sarawak Governor that they no longer had confidence in Ningkan as the Chief Minister of Sarawak. The Governor then asked Ningkan to resign. Ningkan refused to resign. The

Governor then declared Ningkan and all the members of the Supreme Council as having ceased to hold office. A new Chief Minister was appointed by the Governor.

41. The case ended up in the High Court. The High Court held that:-

41.1 the Governor could not dismiss the Chief Minister;

41.2 the only way for a Chief Minister to be dismissed was by way of a vote of no confidence in the Council Negeri; and

41.3 a Governor could not appoint a second Chief Minister while there was still one in office.

42. It was submitted by Tuan Haji Sulaiman, that since the issues in the present case as well as the relevant provisions in the Perak State Constitution were substantially identical to that of **Ningkan**, the learned Judge was right to adopt and apply the decision of **Ningkan** to the present case.

43. With utmost respect, I disagree. Though Article 7(1) of the Sarawak Constitution is in pari materia with XVI(6) of the Perak State Constitution, I take a different view. To me, Article XVI(6) is entirely clear and free of ambiguity. The Article requires the Menteri Besar to tender the resignation of the Executive Council (which by definition, includes himself) if the Menteri

Besar 'ceases to command the confidence of the majority of the members of the Legislative Assembly'. There is no option for the Menteri Besar, who does not command the confidence of the majority of the members of the Legislative Assembly to remain in office. He shall tender his resignation and the resignation of the Executive Council.

44. The word 'shall' in Article XVI(6) of the Perak State Constitution must be interpreted as being 'mandatory'. Any other meaning would create an absurdity to parliamentary democracy, as it would permit an individual such as Nizar to remain in office notwithstanding that he had ceased to command the confidence of the majority of the members of the Legislative Assembly.

45. I am also constrained not to follow **Ningkan** as it is distinguishable from the facts of the present case. First, in **Ningkan**, the Assembly was in session. On 14 June 1966, two days before the dismissal of Ningkan by the Governor, Bills were passed in the House without opposition. A motion of no confidence was never introduced in the House. And there was no request for dissolution by Ningkan of the Council Negeri. But in the present case the Legislative Assembly was not in session and there was a request by Nizar for the dissolution of the Legislative Assembly. Thus, a vote on the floor of the Legislative Assembly was therefore, not possible.

46. Secondly, in **Ningkan**, the Governor made his judgment based on a letter signed by 21 members of the Assembly. The said letter was marked 'Top Secret' with the 21 names in the list attached to the said letter. Against the 21 names were signatures, and in one case the signature was just a chop. This indicates bad faith. In the present case, besides the letters of support to the Barisan Nasional by the 31 Assemblymen, the DYMM Sultan of Perak had personally on 5 February 2009 interviewed all the 31 members of the Legislative Assembly, who had pledged their support to the Barisan Nasional. In fact, His Royal Highness thereafter met with the 3 independent members separately to satisfy His Royal Highness that these 3 individuals had freely pledged their support to the Barisan Nasional. The 3 independent members had clearly indicated to His Royal Highness that they no longer support Nizar as the Menteri Besar. With the 3 independent members shifting their support to Barisan Nasional, Nizar lost his majority in the Legislative Assembly.
47. For the above reasons, I find that the learned Judge had erred in law in concluding that the only manner in which the loss of confidence of the majority of members of the Legislative Assembly could only be ascertained by way of motion to be passed in the Legislative Assembly. Such a finding is contrary to the provisions of Article XVI(6) of the Perak State Constitution which make no reference to such a motion having to be tabled.

Whether the learned Judge was right in holding the
DYMM Sultan of Perak was wrong in appointing
Zambry as the new Menteri Besar of Perak.

48. The appointment of Menteri Besar is provided for under Article XVIII(2)(a) of the Perak State Constitution which provides as follows:-

“(2) His Royal Highness may act in his discretion in the performances of the following function (in addition to those in the performance of which he may act in his discretion in the Federal Constitution) that is to say –

(a) the appointment of a Menteri Besar;

(b)

49. Literally, it means that His Royal Highness has the right to appoint an individual who in His Royal Highness’ judgment, has the command or support of the majority of the members of the Legislative Assembly. From the facts of this case as narrated earlier, the Barisan Nasional led by Zambry had the command or support of the majority of the members of the Legislative Assembly. Hence, his appointment as the Menteri Besar of Perak by the DYMM Sultan of Perak was in accordance with the Perak State Constitution.

50. The question of Perak having two Menteri Besars does not arise. Article XVI(6) of the Perak State Constitution and established convention, demand that once the Menteri Besar is made to know that he has lost the confidence of the majority of the members of the Legislative Assembly, he should take the honourable way out by tendering his resignation and the resignation of the Executive Council. If the Menteri Besar refuses or does not tender his resignation and the resignation of the Executive Council, as had happened in this case, the fact remains that the Executive Council is dissolved (which include the Menteri Besar) on account of the Menteri Besar losing the confidence of the majority of the members of Legislative Assembly. Therefore, it is not necessary for the DYMM Sultan of Perak to remove the Nizar and the other members of the Executive Council. The DYMM Sultan of Perak in exercise of His Royal Prerogative under Article XVI(2)(a) of the Perak State Constitution is at liberty to appoint another Menteri Besar to replace Nizar. But His Royal Highness must appoint someone who has the command and the confidence of the majority of the members of the Legislative Assembly. In the present case, there is no doubt that Zambray has the majority support of the members of the Legislative Assembly. He has the support of 31 members from 59 members of the Legislative Assembly.
51. Thus, in the circumstances of this case, the appointment of Zambray as the Menteri Besar of Perak was made in accordance

to Perak State Constitution and established democratic practice and convention.

Conclusion

52. As demonstrated above, the learned Judge had clearly erred in his interpretation of the relevant provisions of the Perak State Constitution in particular Article XVI(6). The law on interpretation of our Constitution is well settled. Raja Azlan Shah J (as His Royal Highness then was) in **Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187** held that:-

“Whatever may be said of other Constitution, 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 applied and this wording ‘can never be overridden by the extraneous principles of other Constitutions – see Adengbenro v Akintola & Anor. 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 the fundamental law.”

53. The above sentiment was echoed by Abdul Hamid Mohamad PCA (as he then was) in the Federal Court case of **Public Prosecutor v Kok Wah Kuan [2008] 1 MLJ 1** where he said:-

“So, in determining the constitutionality or otherwise of the statue under our Constitution by the court of law, it is the provision of our Constitution that matters, not a political theory by some thinkers. As Raja Azlan Shah FJ (as His Royal Highness then was) quoting Frankfuther J said in Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, ‘The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it’.”

54. The learned Judge did refer to the above two judgments but failed to apply the principles. He completely failed to give effect to the plain, ordinary and unambiguous meaning of the provisions of the Perak State Constitution, in particular Article XVI(6).
55. It is also abundantly clear, from the grounds of judgment of the learned Judge, that he failed to properly and adequately appreciate the evidence adduced before him. He had also failed to appreciate the undisputed facts and the chronology of events as illustrated in the early part of this judgment which led

to the appointment of Zambry as the Menteri Besar by the DYMM Sultan of Perak.

56. The failure of the learned Judge as stated above had resulted that his judgment being plainly wrong. In the circumstances, the appeal by Zambry must be allowed. The orders of the High Court is therefore set-aside. As Zambry is not pressing for costs, there is no order as to costs. But the deposit of this appeal is to be refunded to Zambry.

Dated this 2nd day of June 2009.

Raus Sharif
Judge
Court of Appeal Malaysia

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