Pertubuhan Kebajikan Rumah Bonda Kuala Lumpur (through its chairperson, Siti Bainun bt Ahd Razali) v Pengarah Jabatan Kebajikan Masyarakat Wilayah Persekutuan Kuala Lumpur & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–286–08 OF 2021
AHMAD KAMAL J
22 FEBRUARY 2022

Civil Procedure — Judicial review — Application for leave — Decision of respondent to seal unregistered care centre — Whether the applicant had failed to exhaust the remedy provided under the law — Whether the applicant fulfilled the criteria to obtain an order of mandamus — Rules of Court 2012 O 53 — Care Centres Act 1993 ss 16A, 22 — Specific Relief Act 1950 s 44

This was a leave for judicial review application pursuant to O 53 of the Rules of Court 2012 ('the ROC') against the decision of first respondent in sealing the applicant's care centre. The applicant was a society registered with the registrar of society ('ROS') under the Societies Act 1966. The applicant opened a care centre which aimed to provide protection to pregnant women out of wedlock, girls and women involved in social problems, temporary shelter to infants born out of wedlock and care for infants and children who were undergoing court cases. On 5 July 2021, there were news spread on the social media about the abuse of an OKU down syndrome teenager. The OKU teenager was placed under the custody of the chairman of the applicant pursuant to a court order since 14 July 2020. On 9 July 2021, the applicant was served with a notice of seal which was effective on 12 July 2021. The action to seal the applicant's care centre was made pursuant to s 16A of the Care Centres Act 1993 ('the Act 506') whereby the premise which was being used as a care centre was not registered under the Care Centres Act 1993. The issues in this leave application were: (a) whether the applicant had failed to exhaust the remedy provided under the law; and (b) whether the applicant did not fulfill the criteria to obtain an order of mandamus.

Held, dismissing the application:

(1) Based on s 22 of the Act 506, any person who was aggrieved by any decision of the Director General under Act 506 was to appeal to the minister in writing within 30 days from the notification of the decision or act. In the present case, instead of appealing in writing to the Minister, the applicant had taken a wrong step by filing the application for judicial review despite the availability of statutory remedy. Hence, the court was

of the view that the application herein was frivolous, vexatious and an abuse of process of court for failure to resort to the statutory domestic remedy (see paras 13 & 24–25).

(2) In order to issue to the order of mandamus, the applicant must show not only that he had a legal right to have the act performed but that the right must be so clear, specific and well defined as to be free from any reasonable controversy. The order could not be issued when the right was doubtful or was a qualified one or where it depended upon an issue of fact to be determined by the respondent. The failure to show the existence of any legal right to compel the performance of a legal duty casted upon the respondent would deny the order of mandamus (see para 32).

(3) The court was of the view that the applicant had failed to bring her case within the purview of s 44 of the Specific Relief Act 1950 ('the SRA') when she failed to satisfy the requirement of s 44(1)(a) and (d) of the SRA as follows: (a) the applicant was not a registered care centre under Act 506. Therefore, the applicant did not have the legal right to seek an order of mandamus to compel the respondents to open the seal of the premise; (b) based on s 16A(3) of Act 506, it was provided that the seal shall be removed if such person complies with the requirement of sub-s (2) ie produce the certificate of registration of the care centre (c) as the applicant was not a registered care centre under Act 506 and did not possess the certificate of the same, the applicant did not have legal right to compel the respondents for removal of the seal; and (d) the applicant had other remedy, other than by way of mandamus ie by appeal in writing to the Minister pursuant to s 22 of Act 506 (see para 33).

[Bahasa Malaysia summary

Ini adalah permohonan kebenaran semakan kehakiman menurut A 53 Kaedah-Kaedah Mahkamah 2012 ('KKM') terhadap keputusan responden pertama kerana menutup pusat jagaan pemohon. Pemohon adalah sebuah pertubuhan yang berdaftar dengan pendaftar pertubuhan ('ROS') di bawah Akta Pertubuhan 1966. Pemohon membuka pusat jagaan yang bertujuan untuk memberi perlindungan kepada wanita hamil di luar nikah, kanak-kanak perempuan dan wanita yang terlibat dalam masalah sosial, perlindungan sementara kepada bayi yang dilahirkan di luar nikah dan menjaga bayi dan kanak-kanak yang sedang menjalani kes mahkamah. Pada 5 Julai 2021, terdapat berita yang tersebar di media sosial mengenai kes penderaan seorang remaja sindrom down OKU di rumah kebajikan tersebut. Remaja OKU tersebut diletakkan di bawah jagaan pengerusi pemohon menurut perintah mahkamah sejak 14 Julai 2020. Pada 9 Julai 2021, pemohon telah diberikan notis yang dimeterai pada 12 Julai 2021. Tindakan penutupan pusat jagaan pemohon dibuat mengikut s 16A Akta Pusat Jagaan 1993 ('Akta 506') di mana premis yang dijadikan pusat jagaan tidak berdaftar di bawah Akta Pusat Jagaan 1993. Isu-isu dalam permohonan kebenaran ini adalah: (a) sama ada pemohon

telah gagal untuk menggunakan semua remedi yang diperuntukkan di bawah undang-undang; dan (b) sama ada pemohon tidak memenuhi kriteria untuk mendapatkan perintah mandamus.

Diputuskan, menolak permohonan:

(1) Berdasarkan s 22 Akta 506, mana-mana orang yang terkilan dengan keputusan ketua pengarah di bawah Akta 506 perlu merayu kepada Menteri secara bertulis dalam tempoh 30 hari daripada masa keputusan tersebut. Dalam kes ini, pemohon tidak merayu secara bertulis kepada Menteri, namun pemohon telah mengambil langkah yang salah dengan memfailkan permohonan semakan kehakiman walaupun terdapat remedi yang dinyatakan di dalam undang-undang tersebut. Oleh itu, mahkamah berpendapat bahawa permohonan di sini adalah remeh, menjengkelkan dan penyalahgunaan proses mahkamah kerana kegagalan untuk menggunakan remedi domestik statutori tersebut (lihat perenggan 13 & 24–25).

(2) Untuk memohon perintah mandamus, pemohon haruslah menunjukkan bukan sahaja bahawa dia mempunyai hak undang-undang untuk memohon perintah tersebut, tetapi permohonan tersebut haruslah jelas, spesifik dan bebas dari sebarang kontroversi yang munasabah. Perintah tersebut tidak boleh dikeluarkan apabila hak tersebut diragui atau berkelayakan bergantung kepada isu fakta yang akan ditentukan oleh responden. Kegagalan untuk menunjukkan kewujudan apa-apa hak undang-undang untuk perlaksanaan kewajipan undang-undang ke atas responden menyebabkan perintah mandamus tidak dapat diberikan (lihat perenggan 32).

(3) Mahkamah berpendapat bahawa pemohon telah gagal dalam membuktikan kesnya seperti yang diperuntukkan di bawah s 44 Akta Relief Spesifik 1950 ('ARS') apabila dia gagal memenuhi keperluan s 44(1)(a) dan (d) ARS seperti berikut: (a) pemohon bukanlah pusat jagaan yang berdaftar di bawah Akta 506. Oleh itu, pemohon tidak mempunyai hak undang-undang untuk mendapatkan perintah mandamus untuk memerintahkan responden membuka meterai premis; (b) berdasarkan s 16A(3) Akta 506, telah diperuntukkan bahawa kunci tersebut hendaklah dibuka sekiranya seseorang itu mematuhi sub-s (2) iaitu mengemukakan perakuan pendaftaran pusat jagaan; (c) oleh kerana pemohon bukan pusat jagaan berdaftar di bawah Akta 506 dan tidak memiliki perakuan tersebut, pemohon tidak mempunyai hak undang-undang untuk memerintahkan responden untuk membuka kunci tersebut; dan (d) pemohon mempunyai remedi lain, selain daripada perintah mandamus iaitu melalui rayuan secara bertulis kepada Menteri menurut s 22 Akta 506 (lihat perenggan 33).]

Cases referred to

Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association [1990] 3 MLJ 228; [1990] 1 MLRA 324; [1990] 1 CLJ Rep 33, SC (refd)

Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor [1998] 1 MLJ 224; [1997] 3 MLRH 293; [1997] 4 CLJ 725, HC (refd)

Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia [1989] 3 MLJ 298; [1989] 4 MLRH 408, HC (refd)

Ketua Pengarah Hasil Dalam Negeri (LHDN) v IBM Malaysia Sdn Bhd [2021] 2 MLJ 42; [2019] MLRAU 459; [2021] 1 CLJ 776, CA (refd)

Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 1 MLJ 563; [2017] 1 MLRA 251; [2017] 2 CLJ 1, FC (refd)

Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd [2017] 2 MLJ 197; [2017] MLRAU 80; [2017] 5 CLJ 283, CA (refd)

Ketua Pengarah Kastam dan Eksais v Coach Malaysia Sdn Bhd [2019] 2 MLJ 716; [2019] 2 MLRA 377; [2019] 4 CLJ 454, CA (refd)

Koon Hoi Chow v Pretam Singh [1972] 1 MLJ 180b; [1972] 1 MLRH 497 (refd)

Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641; [2008] 5 CLJ 321; [2008] 1 MLRA 705, FC (refd)

Pengarah Kastam Negeri Johor & Anor v Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd & Ors and another appeal [2014] 4 MLJ 377; [2014] 5 MLRA 324; [2014] 3 CLJ 733, CA (refd)

Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2011] 2 MLJ 457; [2010] 2 MLRA 571; [2010] 9 CLJ 505, FC (folld)

Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2006] 5 MLJ 60; [2006] 1 MLRH 507; [2006] 1 CLJ 927, CA (refd)

Legislation referred to

Care Centres Act 1993 ss 16A, 16A(2), (3), 22
Courts of Judicature Act 1964 Schedule, para 1
Rules of Court 2012 O 53, O 53 rr 1(2), 3(2)
Societies Act 1966
Specific Relief Act 1950 s 44, 44(1)(a), (1)(d), Part 2, Chapter VIII

Asiah bt Abd Jalil (Asiah Abd Jalil Law Chambers) for the applicant.
Nur Idayu bt Amir (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Ahmad Kamal J:

[1] The applicant had on 13 August 2021 filed an application for leave to commence judicial review proceedings pursuant to O 53 of the Rules of Court 2012 (the ROC) seeking, inter alia, the following orders:

(a) suatu perintah certiorari untuk membatalkan tindakan lak oleh responden pertama terhadap Pusat Jagaan Pertubuhan Kebajikan Rumah Bonda Kuala Lumpur beralamat di AF6, Jalan Kukuban, Taman Setapak, 53100 Setapak, Kuala Lumpur (selepas ini dirujuk sebagai 'Rumah Bonda') berkuatkuasa 12 July 2021 yang dimaklumkan kepada pemohon pada 9 July 2021 ('tindakan lak');

(b) suatu perintah deklarasi bahawa tindakan lak terhadap Rumah Bonda berkuatkuasa 12 July 2021 telah dilaksanakan dengan perintah, arahan dan/atau pengetahuan responden pertama dan responden kedua secara tidak adil, tidak rasional serta tidak mengikut prinsip pentadbiran dan undang-undang administratif yang wajar;

(c) suatu perintah deklarasi bahawa Rumah Bonda pada sepanjang masa material sedang dalam proses permohonan pendaftaran dengan Jabatan Kebajikan Masyarakat Wilayah Persekutuan Kuala Lumpur (selepas ini dirujuk sebagai JKM) dengan pengetahuan responden pertama dan responden kedua, oleh itu Rumah Bonda bukanlah sebuah rumah perlindungan dan/atau pusat jagaan haram;

(d) suatu perintah mandamus untuk mengarahkan responden pertama dan responden kedua melaksanakan dengan serta-merta seperti berikut:

(i) membuka lak terhadap Rumah Bonda bagi membolehkan pemohon memasuki dan mengakses Rumah Bonda untuk menyambung semula proses dan prosedur yang berbaki dalam permohonan pendaftaran dengan JKM;

(ii) menerima surat-surat sokongan dan kelulusan yang telah dimajukan oleh agensi-agensi berkaitan bagi menyokong permohonan pendaftaran Rumah Bonda di premis beralamat di AF6, Jalan Kukuban, Taman Setapak, 53100 Setapak, Kuala Lumpur;

(iii) memudahcara bagi pemohon dalam meneruskan usaha-usaha permohonan pendaftaran Rumah Bonda yang telah dilaksanakan setakat ini, termasuklah tetapi tidak terhad kepada pemeriksaan jabatan-jabatan dan agensi-agensi berkaitan, bagi Rumah Bonda didaftarkan sebagai pusat jagaan berdaftar di bawah Akta Pusat Jagaan 1993; dan

(iv) mendaftarkan Rumah Bonda sebagai sebuah pusat jagaan di bawah Akta Pusat Jagaan 1993 dengan syarat-syarat sebagaimana yang difikirkan layak, sesuai dan patut;

(e) selanjutnya atau secara (prohibition) bahawa alternatif, suatu perintah responden-responden larangan dalam menjalankan kuasanya di bawah Akta Pusat Jagaan 1993 tidak akan mengenakan apa-apa hukuman dan/atau penalti dan/atau kompaun terhadap pemohon berhubung dengan pengendalian dan pengurusan Rumah Bonda yang sedang dalam proses permohonan pendaftaran pada sepanjang masa material;

(f) bahawa kos permohonan ini dijadikan kos dalam kausa; dan/atau

(g) sebarang perintah lanjutan sedemikian dan/atau perintah-perintah lain dan/atau relif lanjut yang lain yang bersampingan, sebagaimana yang difikirkan adil, wajar dan suai manfaat oleh Mahkamah Yang Mulia ini.

[2] The application is supported by a statement pursuant to O 53 r 3(2) of the ROC and an affidavit in support affirmed by Siti Bainun bt Ahd Razali on 6 August 2021.

[3] At the conclusion of the hearing, I dismissed the applicant's application (encl 1). The reasons for the decision are set down as below.

BRIEF FACTS

[4] The brief facts of the application, based on the applicant's affidavit are largely undisputed and can be summarised as follows:

(a) the applicant, Pertubuhan Kebajikan Rumah Bonda Kuala Lumpur is a society registered with the Registrar of Society (RoS) under Societies Act 1966 (Act 335). For purpose of this application, the applicant is represented by Siti Bainun Ahd Razali as the chairman, founder and manager of Rumah Bonda;

(b) the applicant opened a care centre known as 'Rumah Bonda' in early 2019. Rumah Bonda provides protection to pregnant women out of wedlock, girls and women involved in social problems, temporary shelter to infants born out of wedlock and care for infants and children who are undergoing court cases;

(c) on 5 July 2021, there were news spread on the social media about the abuse of an OKU syndrome down teenager named Bella. Bella was placed under the custody of Siti Bainun pursuant to a court order since 14 July 2020;

(d) on 9 July 2021, the applicant was served with notice of seal which was effective on 12 July 2021. The action to seal Rumah Bonda was made pursuant to s 16A of the Care Centres Act 1993 (Act 506) whereby the premise which is being used as a care centre is not registered under the Care Centres Act 1993; and

(e) the applicant then filed this application for leave for judicial review on 13 August 2021.

PRINCIPLES IN AN APPLICATION FOR LEAVE

[5] The law in relation to application for leave is under O 53 r 3(2) of the ROC. These principles are stated in the following cases:

(a) in the case of *Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor* [1998] 1 MLJ 224 at p 225; [1997] 3 MLRH 293; [1997] 4 CLJ 725, Visu Sinnadurai J (as he then was), held that:

> ... The court, in exercising its discretion that an application for leave be granted, must be convinced by the applicants that prima facie the application is genuine and there is some substance in the grounds supporting the application. The test's threshold is very low; a prima facie case of reasonable suspicion, an arguable case must be shown, not a prima facie case. *Additionally, an application will fail if it is frivolous, vexatious, misconceived, made by busybodies with misguided or trivial complaints of administrative errors, groundless, where there are more appropriate alternative remedies, and where the application for judicial review is inappropriate*. (Emphasis added.)

(b) in *Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia* [1989] 3 MLJ 298 at p 298; [1989] 4 MLRH 408, Judge Edgar Joseph J (as he then was) held that:

> ... the test in an application for leave is whether the applicant has an arguable case for review, a sufficient interest and whether there has been any undue delay.

(c) the Court of Appeal in *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60 at p 67; [2006] 1 MLRH 507; [2006] 1 CLJ 927 at p 929, held:

> Applications for leave under O 53 are made — and they must be made — through a two stage process. The High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous. If, for example, the applicant is a busybody, or the application is made out of time or against a person or body that is immunized from being impleaded in legal proceedings then the High Court would be justified in refusing leave in limine. So too will the court be entitled to refuse leave if it is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable, eg proceedings in Parliament (paras 5 & 10).

(d) further in the case of *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228 at p 229; [1990] 1 MLRA 324; [1990] 1 CLJ Rep 33 at p 33, the then Supreme Court had decided:

[2] In his grounds of judgment, the learned judicial commissioner had gone further than the leave stage and embarked on substantial issues on merit. This was not the right approach when application for leave to apply for an order of certiorari is made. The guiding principles ought to be that the applicants must show prima facie that the application is not frivolous, vexatious and that there is some substance in the grounds supporting the application.

PRELIMINARY OBJECTION (PO) BY THE ATTORNEY GENERAL'S CHAMBERS (AGC)

[6] During the hearing of the application, the learned senior federal counsel (SFC) raised a PO. The PO was premised on the following grounds:

(a) the application is frivolous, vexatious and an abuse of process of court as the applicant failed to exhaust the remedy provided under the law; and

(b) the applicant does not fulfil the criteria to obtain an order for mandamus.

THE DECISION OF THE COURT

The applicant had failed to exhaust the remedy provided under the law

[7] It is the AGC's submission that the applicant seeks leave for judicial review for an order of certiorari to quash the respondent's notice of seal and an order of mandamus to compel the respondents to open the seal.

[8] According to the SFC, instead of appealing in writing to the Minister, the applicant had taken an irrelevant step by filing the application for judicial review despite the availability of statutory remedy. Hence, the SFC submits that the application herein is frivolous, vexatious and an abuse of process of court for failure to resort to the statutory domestic remedy.

[9] It is to be noted that the notice of seal was issued by the first respondent to the applicant pursuant to s 16A of Act 506.

[10] Section 16A of Act 506 reads as follows:

16A Power to seal

(1) Where the Director General or any authorized officer has reasonable cause to believe that any house, building, premise or other place is being used as a care centre which is not registered under the provisions of this Act, the Director General or the authorized officer may take such steps as he may deem necessary or by any means seal such care centre.

(2) The person using the house, building, premise or place as a care centre which has been seated shall —

A (a) within twenty-one days of such seal produce to the Director General or the authorized officer the certificate of registration of the care centre; and

(b) bear any cost incurred arising out of such action.

B (3) The seal shall be removed if —

(a) such person complies with the requirement of subsection (2) or

(b) an order of the court is obtained against such person for him to cease using the house, building, premise or place as a care centre, whichever is the earlier.

C (4) The Director General or the authorized officer acting under this section shall not be liable for any cost arising out of such action or damages to the house, building, premise or place sealed under this section unless such damage was willfully done.

D (5) Any action taken under this section of any house, building, premise or other place shall not prohibit the prosecution of any person using such house, building, premise or place as a care centre in contravention of this Act.

E **[11]** Based on the above, the director general or any authorized officer has a power to seal any house, building, premise or other place which is being used as a care centre without being registered under Act 506.

F **[12]** Section 22 of Act 506 provides:

22 Appeal to Minister

Any person aggrieved by any decision or act of the Director General under this Act may, within thirty days from the date he is notified of the decision or act, appeal in writing to the Minister, whose decision shall be final.

G **[13]** Based on s 22 of Act 506, any person who is aggrieved by any decision of the director general under Act 506 is to appeal to the Minister in writing within 30 days from the notification of the decision or act.

H **[14]** On this issue, there are a plethora of cases which decided that parties need to exhaust the internal remedy provided by the statute before bringing the matter to court including commencing with judicial review application.

I **[15]** In this regard, it is instructive to refer to the Federal Court case of *Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2011] 2 MLJ 457; [2010] 2 MLRA 571; [2010] 9 CLJ 505, where it states:

[16] The second question could better be described as a consequence of the first

question. Section 71A has provided a *remedial mechanism within the framework of the trade union legislation, that is a specific procedure whereby an appeal lies to the Minister. The second question relates to another matter*, that is since s 71A(1) is applicable to an employer does it still permit the employer to have an option not to appeal, and additionally, instead have recourse to a court of law in order to challenge the registration. *The declaratory orders sought by the appellant would have the effect of negating the decision of the first respondent. By praying for the declaratory orders the appellant is in effect appealing against the decision of the first respondent while a specific procedure has been lain down in the Act 262. By statute a second tier has been established whereby an appeal lies to the Minister*. The word used in s 71A(1)(b) is 'may'. In construing the word 'may' generally, it could be contended that the word is permissive in relation to the person who is given the right to appeal in the sense that it gives the person a choice to prefer an appeal against the decision of the registrar or not to. But *in relation to the person who is to be affected by the appeal we do not see this as directory. The declaratory orders sought seen to reverse the decision of the registrar. Hence in that sense if an employer wishes to refute recognition then it is the mandatory procedure that is laid down that has to be resorted to for the legislation has identified the specific procedure whereby any person who is dissatisfied is to seek further recourse with the Minister if that person wishes to negate the decision of the registrar*.

[17] *In our opinion the legislation by stipulating that the decision of the Minister is to be final is itself indicative that when there is already stipulated a second tier identified in the legislation, courts are not authorized to interfere for the statutory right that has accrued is not purely formal but mandatory. In other words, the statutory right has to be exhausted*. (Emphasis added.)

[16] Next, the Court of Appeal in the case of *Pengarah Kastam Negeri Johor & Anor v Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd & Ors and another appeal* [2014] 4 MLJ 377; [2014] 5 MLRA 324; [2014] 3 CLJ 733, had this to say on this issue:

[18] Having perused that provision, we would agree with learned SFC that *such recourse could only be had after the respondent taxpayer had exhausted the available remedy as provided for by Parliament within the four corners of the Sales Tax Act 1972*. That *would necessarily mean that the respondent taxpayer must have exhausted its appeal remedy* with the Director General of Customs in respect of the impugned notice as envisaged under s 68 of the Sales Tax Act 1972. *While s 141N seems to suggest that the aggrieved party go to the High Court, it does not expressly say that the aggrieved taxpayer may do so without first exhausting its remedy by appealing to the Director General*. (Emphasis added.)

[17] Apart from the abovementioned cases, the Court of Appeal in *Ketua Pengarah Kastam dan Eksais v Coach Malaysia Sdn Bhd* [2019] 2 MLJ 716; [2019] 2 MLRA 377; [2019] 4 CLJ 454, further explained this issue as follows:

[34] We further agreed with the learned senior federal counsel that the appeal should be allowed on another ground, and that is, *the respondent's application for judicial review was premature as there was an alternative remedy available to it under s 124 of the GST Act. The provision was couched in the following language*:

A

124 Application for review

1) Any person may apply to the Director General within thirty days from the date the person has been notified of any decision made by an officer of goods and services tax for the review of the decision and provided no appeal has been made on the same matter to the Tribunal or court.

B

2) Where an application has been made under subsection (1), the Director General shall make a decision and notify the person within sixty days from the date of the application is received or within the time practicable.

3) An application under subsection (1) shall be made in the prescribed manner and prescribed form.

C

[35] What the provision meant was that any person aggrieved by the decision of the DG may apply, within thirty days of the notification of the decision, for a review of the decision, provided no appeal was made to the tribunal or to the court within that period.

D

[36] This was not done by the respondent. *In our view the intention of the legislature then was clear, and that was for the person aggrieved by the decision of the DG to first exhaust the internal remedy before appealing to the tribunal or to the court*. (Emphasis added.)

E

[18] Likewise, in the Federal Court case of *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563; [2017] 1 MLRA 251; [2017] 2 CLJ 1, the same issue has been explained by Suriyadi Halim Omar (FCJ) (as he then was) in the following words:

F

[58] To dispel any fear of a taxpayer, merely because he has to face such an awesome body in the form of the government, Gill FJ in *Sun Man Tobacco Co v Government of Malaysia* [1973] 2 MLJ 163 had occasion to state:

G

> The doors of justice are not shut to him merely because its claimant is the Government, but he has to enter the doors of the Special Commissioners first to raise the plea of non-observance of the principle of natural justice or to establish that the Director General acted arbitrarily and in a non-judicial manner. *It is only after he has availed himself of that remedy as laid down by the law that he has a right to come to the courts*.

H

...

[60] *Had the respondents filed an appeal before the special commissioners, where the onus is on the respondents to establish their position, they will be accorded every opportunity to show where the appellant went wrong*. The respondents may request for the attendance of witnesses to give evidence on oath and request any witness to produce any books, papers or documents which is in his custody or his control necessary for purposes of the appeal. Therefore, *before the special commissioners, the respondents will have all the opportunity to ventilate his disgruntlement, with every opportunity to undo what the appellant determined* (see *Director-General of Inland Revenue v Lahad Datu Timber Sdn Bhd* [1978] 1 MLJ 203; [1977] 1 LNS 26).

I

[61] At the completion of the hearing of the appeal, the special commissioners shall give their decision in the form of an order known as a deciding order, and which in certain circumstances may be final. Either party to the proceedings before the special commissioners may appeal on a question of law against a deciding order, or may request the special commissioners to state a case (generally known as case stated) for the opinion of the High Court. Any dissatisfied party may appeal only up to the Court of Appeal (*Tio Chee Hing v United Overseas Bank (M) Bhd* [2013] 3 MLJ 212; [2013] 2 CLJ 910; *Koperasi Jimat Cermat dan Pinjaman Keretapi Bhd (now known as Koperasi Keretapi Bhd) v Kumar a/l Gurusamy* [2011] 2 MLJ 433; [2011] 3 CLJ 241; *Ketua Pengarah Hasil dalam Negeri v Syarikat Jasa Bumi (Woods) Sdn Bhd* (Civil Application No 8–31–99 (S) (Unreported).

[62] By filing an appeal before the Special Commissioners, the respondents would have had that opportunity to challenge the decision of the appellant as to whether the payments were indeed royalties. Likewise, the respondents would have had the chance to rebut s 15A of the ITA. Section 15A provides that certain income, including the likes of services rendered by the second respondent to the first respondent, shall be deemed to be derived from Malaysia.

[63] By circumventing the special commissioners, from resolving these issues, and unwittingly leaving the deeming provision unrebutted, the first respondent's payments to the second respondent are thus income derived from Malaysia ... (Emphasis added.)

[19] Zainun Ali FCJ (as she then was) has also held on the same note that:

[127] A party who is dissatisfied with an assessment or administrative decision issued by the Revenue under ss 109 and 109B is not left without any remedy. In the circumstance of this case, *if it is dissatisfied with assessment or notice of assessment issued by the appellant, the first respondent ought to have exercised its right to appeal under s 99 of the Act. Before the special commissioners, the first respondents would have an opportunity to make known its dissatisfaction*. It will have the opportunity to tender exhibits and give evidence if necessary. (Emphasis added.)

[20] In the case of *Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd* [2017] 2 MLJ 197; [2017] MLRAU 80; [2017] 5 CLJ 283 the Court of Appeal held that:

[22] *The principle that the court retained the power to judicially review the decision of a public authority, but where there was an alternative remedy of appeal, leave to bring judicial review proceedings would only be granted in exceptional circumstances would entail the necessity on the part of the respondent to show to our satisfaction the existence of such exceptional circumstances*. The effect of the failure by the respondent to establish special circumstances necessarily followed that the legal precept that an alternative remedy was available and yet to be exhausted would therefore return to the forefront for considerations (*Ta Wu Realty Sdn Bhd*). The decision in *Jagdis Singh* thus laid down a lucid and authoritative guilding principles enunciated by none other than the highest court of the land which this court was bound to follow. Therefore, the principle remains a good law here that the way is open for this court

to hold that the above case authorities deal specially in revenue matters where an alternative and specific remedy is expressly provided under s 109H of Act 53. *It is beyond question that this position is not an option but the law that ought to be complied with and applied to the instant application*.

[24] ... The court should not be influenced by the fact that the process by way of judicial review could be resorted to when Act 53 had provided for a specific remedy in the form of an appeal process under s 109H, Chapter 2 of Part VI and Schedule 5 thereof. The Act has specifically provided comprehensive provisions on the right and procedure of appeal for the taxpayers to avail themselves to in the event they were aggrieved by the act of the appellant. *Parliament would not have enacted in vain without any real significance such comprehensive provisions on appeal. It is indeed an alternative remedy within the legislative scheme of income tax legislation that allows any person aggrieved by an assessment to appeal before a body which is dedicated specifically to hear such appeal. It would indeed be an exercise in futility to create such mechanism of appeal if it is not to be complied with*. (Emphasis added.)

[21] Further, in *Ketua Pengarah Hasil Dalam Negeri (LHDN) v IBM Malaysia Sdn Bhd* [2021] 2 MLJ 42; [2019] MLRAU 459; [2021] 1 CLJ 776 the Court of Appeal held that:

[58] It is established law that remedy by way of judicial review is not to be available where an alternative remedy exists except in very exceptional cases. In *Government of Malaysia & Anor v. Jagdis Singh* [1987] 2 MLJ 185; [1987] CLJ Rep 110, the Federal Court held:

> A clear principle is reiterated here ie it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. Judicial review is always at the discretion of the court but where there are other avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances. In *Re Preston* was a tax case. It was quite clear from the speeches of their Lordships in the House of Lords that the Inland Revenue Commissioners were not immune from the process of judicial review. But what was also made clear is that remedy by way of judicial review is not to be available where an alternative remedy exists except in very exceptional case.

[59] In *Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd* [2017] 2 MLJ 197 (CA), it was held:

> (3) The respondent failed to show any special or exceptional circumstances for judicial review. It was not justified in choosing the court as a forum to ventilate its grievance when there was in existence the specific remedy of appeal before the Special Commissioners of Income Tax (SCIT) under s 109H (10) of the ITA.

[60] The main grievance of the respondent against the advance ruling is the treatment of distribution fee payable by the respondent to a non-resident as royalty. It is a matter of interpretation of law, which is not a special circumstance to allow a judicial review application.

[61] We have noted that both parties submitted extensively on the issue whether the distribution fee payable by the respondent to POL is a royalty. Suffice it to say that

in our view, the proper forum to ventilate this issue is before the special commissioners by filing an appeal against the assessment or notice of assessment.

[62] *It is as clear as daylight that by coming to the court as a forum to address its grievance in respect of the advance ruling, the respondent was using the backdoor to appeal against the advance ruling which is final and unappealable and it is also circumventing the function of the Special Commissioners. This is an abuse of the court process and ought not be allowed*. (Emphasis added.)

[22] Having perused the cause papers, I am of the considered opinion that the applicant had failed to demonstrate special or exceptional circumstances that warrant this court to grant leave to the applicant.

[23] I am of the view that to ignore the specific appeal machinery under Act 506 and replace it with judicial review would be a mockery of the appeal provisions under Act 506 and would render the Act of the Parliament to be in vain.

[24] In the present case, instead of appealing in writing to the Minister, the applicant had taken a wrong step by filing the application for judicial review despite the availability of statutory remedy.

[25] Hence, I view that the application herein is frivolous, vexatious and an abuse of process of court for failure to resort to the statutory domestic remedy.

The applicant does not fulfil the criteria to obtain an order of mandamus

[26] The applicant in its judicial review application is seeking for the mandamus order to compel the respondents to open the seal. The question is should this court grant an order for mandamus against the respondents.

[27] The Federal Court in *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641; [2008] 5 CLJ 321; [2008] 1 MLRA 705, held that an order of mandamus can be granted either:

(a) under s 44 of the Specific Relief Act 1950 (the SRA); or

(b) the additional powers of the High Court provided by para 1 of the Schedule to the Courts of Judicature Act 1964 (the CJA).

[28] It is also to be noted that O 53 r 1(2) of the ROC 2012 provides that this order (O 53) is subject to the provisions of Chapter VIII of Part 2 of the SRA.

[29] Therefore, any application for an order of mandamus made by way of judicial review proceedings must comply with the requirement of s 44 of the

A SRA.

[30] Section 44 of the SRA reads as follows:

ENFORCEMENT OF PUBLIC DUTIES

B 44 Power to order public servants and others to do certain specific acts

(1) A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:

C Provided that —

(a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

D (b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;

(c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;

E (d) the applicant has no other specific and adequate legal remedy; and

(e) the remedy given by the order applied for will be complete.

(2) Nothing in this section shall be deemed to authorize a Judge —

F (a) to make any order binding on the Yang di-Pertuan Agong

(b) to make any order on any servant of any Government in Malaysia, as such, merely to enforce the satisfaction of a claim upon that Government; or

G (c) to make any order which is otherwise expressly excluded by any law for the time being in force.

[31] In *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180b; [1972] 1 MLRH 497, Sharma J had outlined four prerequisites essential to the issue of

H an order under s 44 of the SRA or of a mandamus:

(a) whether the applicant has a clear and specific legal right to the relief sought;

(b) whether there is a duty imposed by law on the respondent;

I (c) whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the respondent; and

(d) whether the applicant has any remedy, other than by way of mandamus, for the enforcement of the right which has been denied to him.

[32] Based on the case, in order to issue to the order of mandamus, the applicant must show not only that he has a legal right to have the act performed but that the right must be so clear, specific and well defined as to be free from any reasonable controversy. The order cannot be issued when the right is doubtful, or is a qualified one or where it depends upon an issue of fact to be determined by the respondent. The failure to show the existence of any legal right to compel the performance of a legal duty cast upon the respondent will deny the order of mandamus.

[33] Based on the above, I take the view that the applicant has failed to bring her case within the purview of s 44 of the SRA when she failed to satisfy the requirement of s 44(1)(a) and (d) of the SRA as follows:

(a) the applicant is not a registered care centre under Act 506. Therefore, the applicant does not have the legal right to seek an order of mandamus to compel the respondents to open the seal of the premise.

(b) based on s 16A(3) of Act 506, it is provided that the seal shall be removed if such person complies with the requirement of sub-s (2) ie produce the certificate of registration of the care centre.

(c) as the applicant is not a registered care centre under Act 506 and does not possess the certificate of the same, the applicant does not have legal right to compel the respondents for removal of the seal; and

(d) further, as has been mentioned above, the applicant has other remedy, other than by way of mandamus ie by appeal in writing to the Minister pursuant to s 22 of Act 506.

CONCLUSION

[34] In conclusion, based on the above, I am of the considered view that leave for judicial review should be refused by this court because:

(a) the applicant had failed to exhaust statutory remedy pursuant to s 22 of Act 506; and

(b) the applicant also does not fulfil the requirement of s 44(1)(a) and (d) of the SRA to obtain an order for mandamus.

[35] As such, the applicant's application for leave to commence judicial review proceedings (encl 1) is dismissed with no order as to costs.

Application dismissed with no order as to costs.

Reported by Muhamad Azham Marwan