RAHSIA
DALAM MAHKAMAH RAYUAN DI MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO: W-01-1-2010

Dalam perkara keputusan responden-responden bertarikh 7.1.2009 yang mengatakan bahawa permit penerbitan pemohon untuk tempoh 1.1.2009 sehingga 31.12.2009 adalah tertakluk kepada syarat bahawa pemohon dilarang menggunakan istilah/ perkataan "Allah" dalam "Herald-The Catholic Weekly" sehingga Mahkamah memutuskan perkara tersebut.

Dan

Dalam perkara Permohonan untuk Perintah Certiori di bawah Aturan 53, Kaedah 2 (1) Kaedah-Kaedah Mahkamah Tinggi

Dan

Dalam perkara Permohonan Deklarasi-Deklarasi di bawah Aturan 53, Kaedah 2 (2) Kaedah-Kaedah Mahkamah Tinggi 1980

Dan

Dalam perkara Roman Catholic Bishops (Incorporation) Act 1957

ANTARA

1. MENTERI KESELAMATAN DALAM NEGERI
2. KERAJAAN MALAYSIA
3. MAJLIS AGAMA ISLAM DAN ADAT MELAYU TERENGGANU
4. MAJLIS AGAMA ISLAM WILAYAH PERSEKUTUAN
5. MAJLIS AGAMA ISLAM NEGERI MELAKA
6. MAJLIS AGAMA ISLAM NEGERI JOHOR
7. MAJLIS AGAMA ISLAM NEGERI KEDAH

8. MALAYSIAN CHINESE MUSLIM ASSOCIATION
9. MAJLIS AGAMA ISLAM SELANGOR ... PERAYU-PERAYU

DAN

TITULAR ROMAN CATHOLIC ARCBISHOP OF KUALA LUMPUR ... RESPONDEN

[DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN
PERMOHONAN UNTUK SEMAKAN KEHAKIMAN NO. RI-25-28-2009

Dalam perkara keputusan responden-responden bertarikh 7.1.2009 yang mengatakan bahawa permit penerbitan pemohon untuk tempoh 1.1.2009 sehingga 31.12.2009 adalah tertakluk kepada syarat bahawa pemohon dilarang menggunakan istilah/ perkataan "Allah" dalam "Herald-The Catholic Weekly" sehingga Mahkamah memutuskan perkara tersebut.

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TITULAR ROMAN CATHOLIC ARCBISHOP
OF KUALA LUMPUR ... PEMOHON

DAN

1. MENTERI KESELAMATAN DALAM NEGERI
2. KERAJAAN MALAYSIA ... RESPONDEN-RESPONDEN]

KORAM:

MOHAMED APANDI BIN ALI, JCA
ABDUL AZIZ BIN ABDUL RAHIM, JCA
MOHD ZAWAWI BIN SALLEH, JCA

GROUNDS OF JUDGMENT

[1] This is an appeal by the appellants against the decision of the learned Madam Justice Lau Bee Lan of Kuala Lumpur High Court given on 31.12.2009.

[2] In her decision the learned judge had allowed the respondent's application for judicial review and ordered an Order of Certiorari to quash the decision of the 1st appellant, who was at the material time the Minister of the 2nd appellant in charge of Home Affairs and Internal Security in the Ministry of Home Affairs, which imposed a condition on the publication permit for the period 1.1.2009 until 31.12.2009 ("the said permit") issued to the respondent for the

publication of the respondent's Weekly known as "Herald – the Catholic Weekly" ("the Herald").

[3] At the onset it is pertinent to note that the 1st appellant had issued a directive dated 5.12.1986 ("the 1986 directive") to all Christian's publications in the Malay version prohibiting the publisher of such publications from using the following words: "Allah", "Kaabah", "Baitullah" and "solat" in their publications.

[4] The brief material facts for the purpose of this appeal are as follows: the respondent applied for the said permit under the Printing Presses and Publication Act 1984 ('Act 301') to publish the Herald.

[5] On 7.1.2009, the 1st appellant approved the said permit but subject to two conditions. The conditions are stated in the 1st appellant's approval letter dated 7.1.2009 and they are as follows:

"(i) Permohonan penerbitan dalam bahasa Melayu adalah dibenarkan namun demikian, penggunaan kalimah "ALLAH" adalah dilarang sehingga mahkamah membuat keputusan mengenai perkara tersebut.

(ii) Di halaman hadapan penerbitan ini, tertera perkataan "TERHAD" yang membawa maksud penerbitan ini adalah terhad untuk edaran di gereja dan kepada penganut Kristian sahaja."

[6] In plain English, the first condition means that the respondent is prohibited from using the word "Allah" in the Malay version of the Herald until the Court has made a decision on the matter and the

second condition means the circulation of the said publication is restricted to churches and to those who profess the Christian faith only.

[7] The respondent has no objection to the second condition. However, the respondent was not satisfied with the first condition and had filed an application for a judicial review of the 1st appellant's decision to impose that condition vide an application for Judicial Review No. R1-25-28-2009 at Kuala Lumpur High Court. In the application the respondent seeks an order for certiorari to quash that decision and also for declaration that the decision was wrong in law, null and void. The respondent also seeks declarations (1) that Article 3 (1) of the Federal Constitution does not empower or authorize the 1st and 2nd appellants to prohibit the respondent from using the word "Allah" in the Herald; (2) that pursuant to Article 10 of the Federal Constitution the respondent has the constitutional right to use the word "Allah" in the Herald in the exercise of the respondent's right to freedom of free speech and expression; (3) that pursuant to Article 11 of the Federal Constitution the respondent has the constitutional right to use the word "Allah" in the Herald in the exercise of the respondent's freedom of religion which includes the right to manage its own religious affairs, and (4) that pursuant to Article 11 and 12 of the Federal Constitution the respondent has the constitutional right to use the word "Allah" in the Herald in the exercise of the respondent's right in respect of instruction and education of the catholic congregation in the Christian religion.

[8] The respondent grounded its application for judicial review on several grounds which can be stated briefly as follows: firstly, the 1st appellant had acted in breach of the rules of natural justice, procedural and substantive fairness and the duty to act fairly; secondly, the decision has violated the respondent's legal rights as provided in Articles 3, 10, 11 and 12 of the Federal Constitution, and thirdly, the decision was ultra vires Act 301.

[9] In this appeal the 1st and 2nd appellants raise three broad issues. Firstly, whether the 1st appellant had acted within his ministerial function and statutory power under Act 301. Secondly, whether the decision by the 1st appellant to prohibit the use of the word "Allah" in the Herald is in the interest of public safety and public order as it raises issues of religious sensitivities in this country and thirdly, whether the said decision is legal and reasonable as it was made pursuant to the 1986 directive and in compliance with the 'Enakmen-Enakmen Kawalan Dan Sekatan Pengembangan Agama Bukan Islam Kepada Orang Islam (Negeri-Negeri).

[10] The 3rd to the 9th appellants are the interveners in the application before the High Court. All of them have a common ground in this appeal and that is the decision of the 1st appellant is non justiciable.

[11] However, I think this appeal can be decided on two issues only. Firstly, whether the Minister's decision of 7.1.2009 is valid and lawful in that it has passed the test of Wednesbury principle of reasonableness in ***Associated Provincial Picture Houses Limited v Wednesbury Corporation [1984] 1 KB 223*** and that it has not contravened the

principles of illegality, procedural impropriety, proportionality and irrationality as enunciated in ***Council Of Civil Service Unions & Ors v Minister For The Civil Service [1985] 1 AC 374.*** Secondly, whether the decision of the 1st appellant has violated the respondent's constitutional rights under Articles 3, 10, 11 and 12 of the Federal Constitution.

[12] On the first issue, the applicable legal principles are well settled. It is trite that a judicial review is only concerned with the decision making process and not the decision itself. A judicial review is not an appeal. Therefore in any judicial review the Court cannot substitute the decision by the decision maker under review for its own decision. This principle has been laid down by the highest authorities: see ***Harpers Trading (M) Sdn Bhd v National Union Of Commercial Workers [1991] 1 MLJ 417*** FC and ***Minister of Labour v Lie Seng Fatt [1990] 2 MLJ 9*** SC.

[13] In this appeal it is not disputed that the 1st appellant's decision of 7.1.2009 imposing the conditions for publication of the Herald in Malay version is an exercise of administrative discretion under the relevant provisions of Act 301. The law as to the exercise of discretion as I understand it from the cases referred to above particularly the case of ***Wednesbury Corporation*** (supra) which was referred to in the case of ***Minister of Labour v Lie Seng Fatt*** (supra) is that so long as the discretion is exercised within the four corners of the principles I stated earlier, that discretion is absolute and cannot be questioned in any Court of law. It has also been said that in exercising a discretion, a fortiori an absolute discretion as in this case, the decision maker must consider matters required to be

considered and disregard irrelevant collateral matters and the decision must be within the perimeters of the statutory powers given to the decision maker on the matter. It goes without saying therefore if the decision is made in compliance with these principles and requirements such decision cannot be said to be unreasonable and is unassailable. But if the exercise of the discretion is made in contravention of any law or that the decision maker has taken into consideration irrelevant matters or that the decision maker has acted in excess of powers conferred upon him in respect of the matter which he decided or that the decision militates against the object of the statute, then the Court can intervene and strike down the decision as unreasonable and unlawful. [See ***Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serba Guna Sungei Gelugor Dengan Tanggungan [1999] 3 CLJ 65*** FC, ***Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ CA, Padfield and Ors v Minister Of Agriculture, Fisheries and Food & Ors [1968] 1 AER 64*** HC - referred to and quoted by the learned High Court judge in her judgment which discussed and lend support to this proposition].

[14] In this instant case the power to grant a publication permit is the absolute discretion of the 1st appellant under section 6 (1) of Act 301. Under section 12 of the same Act, the permit granted shall be subject to such conditions as may be endorsed therein. In this regard it is common ground in this appeal that the said permit granted to the respondent contained general conditions as shown in Form B in the First Schedule of the Printing Presses And Publications (Licenses And Permits) Rules 1984 ('the 1984 Rules'). There are 12 conditions attached to the permit issued to the respondent. For our purpose,

the most relevant conditions are condition 6 and condition 11 which reads:

Condition 6:

> *"The news paper shall not publish any material, photograph, article or other matter which is prejudicial to public order, morality, security, the relationship with any foreign country or government or which is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to the public interest or national interest."*

Condition 11

> *"The permit holder is required to comply with and not to contravene any directive from time to time issued by the Minister of Home Affairs."*

[15] Under these two conditions, the permit holder is prohibited from publishing not only materials which are otherwise prejudicial to public interest or national interest but also is prohibited from publishing materials **which are likely** to be prejudicial to the public interest or national interest. The permit holder is also required to comply with any directive from time to time issued by the 1st appellant which directive in my view would and should relate to matters of public interest, public order and national interest under the scheme of things envisage under Act 301 and the 1984 Rules.

[16] A publisher of any publication should not be allowed to use the approval given to publish a publication, as a licence to publish any

material under the sun without due regard to public order, morality, safety and sensitivity. It is true that Article 10 (1)(a) of the Federal Constitution guaranteed freedom of expression. But that freedom is not absolute. A freedom of expression used by one to scandalize another for example will be subject to the dictates of the law. This non-absolute nature of the freedom of expression and speech is apparent from the reading of Article 10(2) of the Federal Constitution which empowers Parliament to impose such restriction as necessary or expedient in the interest of, *inter alia*, the security of the Federation, public order or morality. In my opinion, public interest and national interest encompass public order, peace and harmony of the general public at large.

[17] With regard to the power of the 1st appellant to impose conditions on the said permit, the learned judge rejected the argument by the Senior Federal Counsel for the 1st and 2nd appellants that the exercise of that power is not subject to review because of the ouster clause in s.13A (1) of Act 301 as being misconceived. Section 13A (1) of Act 301 reads: *'[A]ny decision of the Minister to refuse to grant or to revoke or to suspend a licence or permit shall be final and shall not be called in question by any court on any ground whatsoever'*. The learned judge reasoned that section 13A (1) [which was inserted in 1987 by Act A684/87] applies only to refusal to grant, suspension or revocation of licence/permit. It does not apply to the power of the Minister to impose conditions. I think that is too narrow a view to take. The granting or approval of a permit comes with the conditions prescribed in the 1984 Rules in the permit itself and any such condition that the Minister may impose. [In any event the ouster clause in s.13A was deleted in 2012

by Act A1436/2012 with effect from 15.7.2012, though at the material times the ouster clause was still applicable].

[18] Instead the learned judge accepted the respondent's contention that the 1st appellant had not taken into consideration relevant factors (listed in paragraph 52 (i) to (xxii) of the respondent's affidavit in support of the judicial review application). These factors were reproduced by the learned judge in her judgement at paragraph 12 pg 36 of the appeal record vol. 1. The relevant factors that the learned judge said the 1st appellant did not or failed to take into consideration consist mainly of factors which the learned judge described as 'uncontroverted historical evidence' of the fact that for years or centuries the word 'God' has been translated and used in Bahasa Melayu translation of the Bible as "Allah" as well as in Bahasa Indonesia Bible and, also that the word "Allah" to identify the Christian God has been used by Bahasa Melayu speaking Christian natives of Peninsular Malaysia, Sarawak and Sabah.

[19] The learned judge also said that the 1st appellant had taken into account irrelevant considerations which she had listed in paragraph 13 of her judgment. Among the irrelevant factors or consideration taken into account by the 1st and 2nd appellants, according to the learned judge, is the position of Islam as the official religion of the Federation under Article 3 (1) of the Constitution, the allowance under Article 11(4) of the Constitution for laws to be passed to control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam and that several States in the Federation have passed laws to control or restrict propagation

of other religions or beliefs among Muslims, and the confusion that have ensued from the used of the prohibited words in Christian publications. Thus, relying on and applying the law as laid down in the cases cited in her judgement namely ***Minister of Labour & The Government of Malaysia v Lie Seng Fatt [1990] 1 CLJ (Rep) 195, Padfield and Ors v Minister of Agriculture, Fisheries And Food & Ors [1968] 1 AER 694*** (HL), ***Sagnata Investments Ltd v Norwich Corp [1971] 2 OB 614*** and ***Minister of Home Affairs, Malaysia v Persatuan Aliran Kesedaran Negara [1990] 1 CLJ (Rep) 186,*** the learned judge ruled that the decision taken by the 1st appellant in imposing the condition is invalid, null and void. All the cases cited by the learned judge in her judgment as stated above has one common trait that is in each of the cases the Court found that the respective relevant authorities in arriving at its decision in those cases had either no factual basis to do so or had taken into account irrelevant considerations and therefore the decision was declared null and void.

[20] Before the High Court and before us, Senior Federal Counsel for the 1st and 2nd appellants submitted that by virtue of rule 3 of the 1984 Rules read together with ss. 6 and 26 of Act 301, the decision by the 1st appellant to impose and attach conditions to the permit granted to the respondent is legal and in accordance with the law. First of all, I agree with the learned judge that the correct section on the powers to impose condition is section 12 and not section 26 of Act 301. However I think the learned judge got it wrong when she said, at paragraph 10.4 of her judgment at pg 34, vol 1 of the appeal record, that rule 3 of the 1984 Rules merely provides the mechanism by which conditions are imposed and that section 12 of Act 301 is the

enabling provision under Act 301 by which the Minister derives his power to impose conditions. She said all these, after she accepted the fact that the standard form of permit is in Form B of the First Schedule to the 1984 Rules and it contains the specified standard conditions on the reverse side of the permit. She accepted that Condition 1 to Condition 12 under heading "CONDITIONS OF PERMIT" on the reverse of Form B to the First Schedule to the 1984 Rules which is the standard form of permit for publication, are standard conditions imposed by law i.e. the 1984 Rules (which is a subsidiary legislation) made by the Minister i.e. the 1st appellant pursuant to the legislative power conferred on him by s. 26 of Act 301.

[21] It is clear that the standard conditions Condition 1 to 12 are imposed by law because rule 3 of the 1984 Rules provides that licence and permit granted under the Act shall be in the Form appearing in the First Schedule containing such conditions as are specified therein and such further conditions as may be endorsed therein by the Minister. Thus, the conditions are already incorporated into the permit by the Rules! In my opinion the learned judge's view as to the power of the Minister to impose condition is only true in relation to the imposition of *"such further conditions as may be endorsed therein by the Minister"* found in rule 3 of the 1984 Rules. However on the facts and evidence in this case, I do not think that the prohibitive conditions imposed by the 1st appellant in its letter of 7.1.2009 to the respondent comes within the category or class of 'such other conditions'. This is because the said conditions were already contained in the 1986 directive. In my view the contents of the 1st appellant's letter of

7.1.2009 does not go beyond re-stating the prohibitions which have been imposed by the 1986 directive, and by virtue of Condition II to the said permit, the respondent is required to comply with the 1986 directive.

[22] I have mentioned at the beginning of this judgement that in 1986 the 1st appellant had issued the 1986 directive to all Christian's publications as per the mailing list attached to the directive. The 2nd paragraph of the directive spelt out the words that are permissible to be used in all Christian publications whereas paragraph 3 of the same directive listed the words which are prohibited from usage in such publications. There are four words that are prohibited; and these are : "Allah", "Kaabah", "Baitullah" and "Solat". The reason for this prohibition is explained in paragraph 4 of the 1986 directive as follows:

> *"Tujuan kerajaan mengambil ketetapan berhubung dengan istilah/perkataan serta syarat-syarat di atas kepada penerbitan agama Kristian adalah semata-mata untuk menjaga ketenteraman awam dan mengelakkan berlakunya salah faham di antara umat Islam dengan penganut-penganut ugama Kristian. Oleh itu tuan/puan adalah dengan ini diingatkan supaya mematuhi arahan kerajaan dalam semua bentuk penerbitan agama Kristian yang diterbitkan."*

[23] Therefore it can be argued that as early as 1986, the 1st and 2nd appellants were already concerned with the possibility of public disorder and confusion or misunderstanding between the Muslims and the Christians if Christian's publications are allowed to use the prohibited words including the word "Allah" in any of their publication.

[24] The 1986 directive has never been withdrawn and still in force. Mr Porres Royan, learned counsel for the respondent was asked whether the respondent took any action to protest against or to challenge the 1986 directive. His response was that to the best of his knowledge there was none. Then he said (and this is from the Bar but without any objection from any of the appellants) at that time the Herald was not yet in publication and that the Herald until today has been in publication for 14 years. A simple arithmetic would therefore suggest that the Herald started publication only around 1999. Since the directive on the prohibition of the usage of the word "Allah" in any Christian publication has been around since 1986 and has not been withdrawn, the Court can take judicial notice that the respondent is aware of the 1986 directive when it started publishing the Herald because the 1986 directive was sent to all Christian's publications. In fact earlier than 5.12.1986, the 1st and 2nd appellants had also issued a directive prohibiting the use of the words "Allah", "Kaabah", "solat" and "Baitullah" in the publication of al-kitab by the Christian publication. These two directives were averred to and deposed in paragraph 9 of the 1st appellant's affidavit in reply affirmed on 6.7.2009 and the directives were exhibited as Exhibit DSHA-1 and DSHA-2.

[25] Puan Suzana Atan, Senior Federal Counsel for the 1st and 2nd appellants, submitted that the issuance of the permit with the attached conditions and subsequent directive issued to the respondent in the letter dated 7.1.2009 are within the 1st appellant's ministerial function and statutory power under the Act is valid and

in accordance with law. I agree with this submission for the following reasons. In the light of section 12 of Act 301 and rule 3 of the 1984 Rules and Condition II of the permit issued to the respondent, the 1st appellant had not acted in excess of his power or function in imposing the conditions stated in the letter of 7.1.2009. In fact it is incumbent upon the respondent to comply with the two directives under Condition II of the said permit.

[26] Whether a consideration is relevant or otherwise and whether there is a factual basis for the exercise of a discretion by the decision maker, has to be decided according to the facts of each particular case. In this appeal, the 1st appellant has affirmed an affidavit in reply dated 6.7.2009 deposing as to the facts and circumstances to justify his decision in imposing the conditions as in the letter dated 7.1.2009 (Exhibit MP-25 in respondent's affidavit in support of the application for judicial review affirmed by Tan Sri Datuk Murphy Nicholas Xavier A/L Pakiam). In his affidavit in reply, the 1st appellant has said in paragraph 6 as follows:

> *"(a) Pemohon telah dimaklumkan mengenai keputusan saya melalui surat Ketua Setiausaha Kementerian Dalam Negeri bertarikh 7.1.2009 yang telah ditandatangani bagi pihak oleh pegawai di kementerian saya iaitu Che Din bin Yusoh;*
>
> *(b) Dalam mencapai keputusan tersebut, saya berpuas hati bahawa penggunaan kalimah "ALLAH" dalam penerbitan majalah Herald – The Catholic Weekly akan mengancam keselamatan dan ketenteraman awam serta menimbulkan sensitiviti keagamaan di kalangan rakyat Malaysia."*

[27] In a letter dated 24.4.2007 to the respondent prohibiting the use of the word "Allah" in the Herald, the 1st appellant had said in paragraph 6 of that letter that the issue (i.e. the usage of the word "Allah" in the said publication) has become very sensitive and therefore it has been categorised as a security issue.

[28] Now to return to the affidavit in reply by the 1st appellant in response to the respondent's judicial review application, the 1st appellant had deposed in paragraphs 8 and 9 that the respondent had been issued with eight (8) admonition and prohibition letters on the usage of the word "Allah" in the Herald and that such admonition and prohibition is consistent with the 1986 directive.

[29] In paragraphs 9.4 and 11 of the same affidavit in reply, the 1st appellant had deposed that one of the reasons why the prohibition on the usage of the four words in the 1986 directive was imposed is to avoid any confusion in religious practice which may threaten public order and security and also which may contribute to a religious sensitivity among Malaysians. In the words of the 1st appellant's in paragraphs 9.4 and 11 of the affidavit in reply:

> *"9.4 Antara sebab larangan empat perkataan tersebut adalah untuk mengelakkan berlakunya sebarang kekeliruan beragama yang boleh mengancam keselamatan dan ketenteraman awam serta menimbulkan sensitiviti keagamaan di kalangan rakyat Malaysia;*

And

> *11. Selanjutnya, pemohon juga telah dimaklumkan bahawa antara sebab larangan tersebut adalah untuk mengelakkan berlakunya sebarang kekeliruan beragaman yang boleh mengancam keselamatan dan ketenteraman awan serta menimbulkan sensitiviti keagamaan."*

[30] However, the learned judge in this case had rejected this affidavit evidence by the 1st appellant by stating in paragraph 13.4 of her judgment that she agreed with the respondent that there is no factual basis for the 1st appellant to impose the impugned condition in view of the uncontroverted historical evidence averred in paragraph 52 of the respondent's affidavit in support of the judicial review application. The learned judge referred to the case of ***Sagnata Investments Ltd v. Norwich Corp [1971] 2 QB 614,*** cited by the respondent before her to justify this conclusion. Nevertheless, I think neither the historical evidence nor the fact that the word "Allah" appears in Al-Kitab (which is the Malay version of the Bible) is a sufficient justification for the 1st appellant not to consider imposing the prohibitive condition of the usage of the word "Allah" in the Herald. The Al-Kitab and the Herald are two publications of entirely different character. The Al-Kitab is the Malay version of the Bible – so, it is obvious that it meant only for Christians. Moreover the Ministry of Home Affairs had already specified the condition that the Al-Kitab is to be used in churches and among Christians only; and that the words "BUKAN UNTUK ORANG ISLAM" are to be printed clearly and conspicuously on the front page of the Al-Kitab. This condition is obvious from the Ministry's letter dated 24.4.2007 to the respondent – in paragraphs 10, 11 and 12. Whereas the Herald is a newsletter or in the same category as a newspaper (albeit with

restricted circulation) which is used or likely to be used as the mouthpiece for the Catholic church to disseminate informations on the activities of the Catholic church or Catholic congregations. It is acknowledged by learned counsel for the respondent that as of today the Herald is accessible online. This online accessibility means that the Herald can be read by anybody – be it Muslim or non-Muslim. For this reason, I am of the view that the permission given by the Ministry for the printing and publication of Al-Kitab in which the word "Allah" appears cannot be treated in the same manner as the printing and publication of the Herald with the usage of the word "Allah".

[31] At this juncture, I would like to recall that under s.6 of Act 301, the power to grant a publication permit was at the material time is an absolute discretion of the 1st appellant and in granting such permit the 1st appellant may impose conditions. In **Administrative Law of Malaysia and Singapore (Third Edition),** Professor MP Jain had opined at pg 413 that –

> *"... A discretionary power is a power which is exercisable in its discretion by the concerned authority. An official in whom discretionary power is vested has, to a greater or lesser extent, 'a range of option' at his disposal and he exercises a measure of personal judgment in making the choice. The officer has power to make choices between various courses of action; or even if he has to achieve a specific end, he has a choice as to how that end may be reached..."*

[32] What need to be considered is that whether the exercise of the discretion by decision maker is done in good faith and without

improper motive. In ***Minister of Labour, Malaysia v Lie Seng Fatt*** (supra) the then Supreme Court said at page 12 that:

> *"...So long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by court unless he had misdirected himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the object of the statute."*

[33] It is obvious from the affidavit in reply by the 1st appellant in this case that his decision to impose the impugned condition in the exercise of his discretion is neither actuated by any improper motive nor has he misdirected himself in law. The 1st appellant also has not in my view taken into account irrelevant matters. It is also evident in the 1st appellant affidavit in reply that the 1st appellant had considered the potential harm to public order and national security that may result in multi racial and multi religious society like ours arising from religious misunderstanding and religious sensitivity if the forbidden words are to be allowed to be used in a Christian publication like the Herald. Being the Minister in charge of Home Affairs and Internal Security, public order and public safety is very much the 1st appellant's concern.

[34] In ***Re Application of Tan Boon Liat @A Allen; Tan Boon Liat v Menteri Dalam Hal Ehwal Dalam Negeri, Malaysia & Ors [1976] 2 MLJ 83,*** Justice Abdoolcader said that 'the expression 'public order' is not defined anywhere but danger to human life and safety and the disturbance of public tranquillity must necessarily fall within the purview of the expression'. The learned judge in that case also attempted to define

'public order' to mean the tranquillity and security which every person feels under the protection of the law, a breach of which is an invasion of the protection which the law affords. Later in the same case, the learned judge by reference to the Indian Supreme Court case of ***Romesh Thappar v State of Madras AIR 1950 SC 124–127*** said that *"the maintenance of public order is equated with the maintenance of public tranquillity, that 'public safety' is part of the wider concept of public order..".*

[35] In ***Darma Suria Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors [2010] 1 CLJ 300*** the Federal Court, speaking through the judgment of Justice Gopal Sri Ram FCJ, held that an act is prejudicial to public order if it disrupts or has the potential to disrupt public safety and tranquillity.

[36] Before us the learned Senior Federal Counsel submitted that religious issues are sensitive issues which may cause disaffection or discontents in a cosmopolitan society, which in turn may lead to the disturbance of the current life of the community resulting in disturbance of public order. She cited ***PP v Pung Cheng Choon [1994] 1 MLJ 566*** for this proposition. She further submitted that the Muslim's community in this country is very sensitive on religious issues, especially on the use of the word "Allah". This is because, she said, if one refers to "Allah" it refers to God for Muslims. *Kalimah* "Allah", she further submitted, is sacred to the Muslims and is placed on the highest position and its sanctity must be protected. *Kalimah* "Allah" also refers to 'oneness' and cannot be part of the concept of Trinity of Father, Son and the Holy Ghost of the Christian faith. Thus she submitted the word "Allah" is not just a mere word or translation of the word God as described in the Herald but it is a special name for

the Muslim's God. The usage of the word "Allah" as interpretation of word God or the concept of God by the Herald may cause confusion, religious sensitivity and disharmony between the Muslims and the Christians. I accept this submission. In this regard it is pertinent to observe in the context of Muslims society in Malaysia the Arabic term "Allah" is used to refer to God in the religion of Islam without any translation or modification to its meaning. Therefore I agree that the use of word "Allah" in the Herald to describe or refer to God among the Christian would create confusion among the Muslims as the concept of God in Islam and in Christianity is world apart – in the former it refers to the concept of oneness of God whereas in the latter it refers to the concept of Trinity of God.

[37] Essentially the complaint by the respondent as to unreasonableness of the 1st appellant decision is that there is no basis for the 1st appellant to make the impugned decision. The respondent argued, and this is accepted by the learned trial judge, that the 1st appellant did not disclose or depose to any factual evidence to support his claim that the usage of the word "Allah" in the Herald would pose a threat to national security or public order. The respondent did not question the discretionary power of the 1st appellant to impose conditions on the said permit, but the impugned condition itself. There is also no allegation that the 1st appellant had misdirected himself on the law in the exercise of the discretion or that the discretion was exercise with improper motive. The fact that there is no allegation of improper motive or mala fide in the exercise of the discretion is in itself, in my view, shows that the respondent accepts

that the 1st appellant's concern with national security and public order arising from a potential religious sensitivity and misunderstanding if the word "Allah" is allowed to be used in Christian's publication for 'God' is genuine and real and not just an illusion.

[38] Prof. MP Jain in the passage cited earlier had said that an exercise of a discretionary power involves an exercise of some measures of personal judgment. The reluctance on the part of court of law to interfere with this exercise of personal judgment, as matter of principle, is well documented in the case law particularly so where it concerns national security or public order or simply on a question of policy. For example, in ***Council of Civil Service Unions & Ors v Minister of Civil Service [1985] AC 374,*** Lord Fraser said at page 402 para C that:

> *"...The decision whether the requirements of national security out-weight the duty to of fairness in any particular case is for the Government and not for the courts; the Government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security."*

[39] The subjective satisfaction test as to matters of national security or public order or policy, hence the reluctance to interfere with the exercise of discretion on those matters has also been accepted by our courts – see ***Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs) Malaysia [1969] 2 MLJ 129, Kerajaan Malaysia & Ors v Nasharuddin Nasir [2004] 1 CLJ 81.*** The primary reason for this approach is that the Government alone has access to the necessary information to form an opinion whether such matters are matters of

national security or public order. It the responsibility of the Government to formulate policy for the safety of the public. It was said in ***Liversidge v Sir John Anderson & Anor [1942] AC 206*** at page 253 that *"a decision on this question can manisfestly be taken by one who has both knowledge and responsibility which no court can share."* Suffian FJ in ***Karam Singh*** (supra) accepted the argument and reasoning that when the power to issue a detention order has been made to depend on the existence of a state of mind in the detaining authority, which is purely a subjective condition, so as to exclude a judicial inquiry into the sufficiency of the grounds to justify the detention, it would be wholly inconsistent to hold that it is open to the court to examine the sufficiency of the same grounds to enable the person detained to a representation. He went further to say that 'in making their decision, they have complete discretion and it is not for a court of law to question the sufficiency or relevance of these allegations of fact.". In ***Arumugam a/l Kalimuthu v. Menteri Keselamatan Dalam Negeri & Ors [2013] 5 MLJ 174,*** my learned brother Justice Mohamed Apandi Ali JCA (now FCJ) had the occasion of discussing the exercise of the 1st appellant's power under section 7 of the Act 301 to prohibit the printing, importation, production etc of any publication which contains materials prejudicial or likely to be prejudicial to public order and concluded that the test to the exercise of such power is a subjective satisfaction of the 1st appellant. The power, he said, is without doubt a subjective discretionary power of the Minister. Case law also has shown that in exercising this discretionary power and subjective satisfaction, the 1st appellant may also take into consideration whether the act or the publication that is to be regulated has the potential to disrupt the even tempo of the life of

the community that it would prejudice public order, public safety and tranquillity. The 1st appellant consideration is not limited or confined to actual disruption of public order or tranquillity – see ***Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors [2010] 1 CLJ 300; PP v. Khong Teng Khen & Anor [1976] 2 MLJ 166, 177.*** In other words the 1st appellant, as the Minister in charge of home security and public order need not wait for violence to break out before exercising his discretion to prevent such violence that likely to lead to lawlessness and public disorder.

[40] In this appeal it has been shown that since 1986 the 1st appellant when issuing the 1986 directive prohibiting the usage of four (4) words including *kalimah* "Allah" in any Christian publication had already assessed the potential harm to public order and safety it would cause if the usage had not been restricted. The learned High Court judge in this case does not appear to appreciate this concern. However, events that unfolded soon after the learned High Court judge pronounced her decision on the respondent's judicial review application showed that the concern of the 1st appellant on the potential harm to public order and safety had become a reality and not merely imaginary. These events, as submitted by the learned Federal Counsel for the 1st and 2nd appellants, were attacks on churches and mosques (which are places of worship for Christians and Muslims respectively), the street protests and inflammatory discussions and accusations on the subject, in the media and in the blogs. The attacks on churches and mosques were recorded and deposed to in three affidavits (filed after the pronouncement of the High Court's decision and for the purpose of this appeal) by the

journalists and reporters who covered the events. These affidavits were filed as Afidavit Wartawan 1, Afidavit Wartawan 2 and Affidavit Wartawan 3 by the 1st and 2nd appellants and the filing of these affidavits was not objected to by respondent. These affidavits were affirmed by Mohd Aizat bin Shariff Fisalluddin on 21.8.2013, by Mohd Turmadzi bin Madun on 27.8.2013 and by Marhalim bin Abas also on 27.8.2013 respectively. Therefore I am of the view that the 1st appellant indeed have a reasonable basis for exercising his subjective satisfaction of his discretionary power to impose the impugned condition.

[41] I am also of the view that it is not unreasonable for the appellant to take into consideration (in making his decision to impose the impugned condition) the special position of Islam as the religion of the Federation as provided under Article 3(1) of the Federal Constitution. I will say more on this when I discuss the second issue in this appeal.

[42] Therefore having given my utmost consideration to the law applicable to the exercise of the discretion in this case and the cases on this point as well as the explanations and reasons given by the 1st appellant in his affidavit in reply in respect of the decision that he had made, I would answer the first issue in the affirmative that is the Minister's decision of 7.1.2009 is valid and lawful in that it has passed the test of Wednesbury principle of reasonableness in ***Associated Provincial Picture Houses Limited v Wednesbury Corporation [1984] 1 KB 223*** and that it has not contravened the principles of illegality, procedural impropriety, proportionality and irrationality as

enunciated in ***Council Of Civil Service Unions & Ors v Minister For The Civil Service [1985] 1 AC 374.***

[43] The second issue to be considered in this appeal is whether the decision of the 1st appellant has violated the respondent's constitutional rights under Articles 3, 10, 11 and 12 of the Federal Constitution. These Articles are about the position of Islam as the religion of the Federation, freedom to practice one own's religion, freedom of speech and expression and the right to propagate one own's religion except that propagation of other religions (save for Islam) among the Muslims is prohibited, rights to education and also about non-discrimination on the grounds of religion, race, descent or place of birth.

[44] The Court is to interpret the Constitution and to uphold its provisions without fear or favour. In interpreting the Constitution, the Court must carefully consider the language used in the relevant provisions particularly and in the whole, of the Constitution generally. Any particular provision of the Constitution should not be interpreted in isolation or compartmentalised; but must be looked at in relation to the other provisions of the Constitution so as to arrive at an harmonious interpretation and to give effect to the basic structures of the Constitution as drafted by its framers. To achieve this, the provisions of the Constitution must be construed broadly and not in a pedantic way. Thus the normal rules of interpretation do not always necessarily apply to the interpretation of the Constitution – see the judgment of Raja Azlan Shah Ag. L.P.: in ***Dato***

Menteri Othman bin Baginda & Anor v. Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29, at pg 32.

[45] Having said briefly on the basic rule of interpretation of the Constitution, let us examine whether the decision of the 1st appellant in the letter of 7.1.2009 has violated the respondent's constitutional right under those relevant provisions.

[46] The learned High Court judge, in concluding that it was so, agreed with the submission of the respondent that the 1st appellant had taken into account irrelevant consideration in that Islam being the religion of the Federation in Article 3(1). It was argued for the respondent, reading Article 3(1) together with Article 11(1) of the Federal Constitution it allows other religions including that of the respondent to be practiced alongside Islam in peace and harmony. However when comes to propagation of religion one must be mindful of the restriction imposed by Article 11 (4) which in plain English means that propagation of other religions among Muslims is prohibited and the relevant State Authorities responsible for the administration of Islam in the respective States may resort to legislative measures in the States (and the Parliament in the case of States where the Agong is the Head of Islam) to curb such propagation.

[47] On this issue I have had the opportunity to read the judgment of my learned brother Justice Mohamed Apandi Ali in draft. I wholeheartedly agree with his analysis of the historical background and interplay of Articles 3(1) and 11(1) and 11(4) in that Article 3(1)

was a by-product of the social contract entered into by our founding fathers of the Federal Constitution and the introduction of Article 11 (4) was to protect the sanctity of Islam as the religion of the Federation and to protect it against any threat of propagation of other religions to the followers of Islam.

[48] I would add however that the position of Islam as the religion of the Federation, to my mind imposes certain obligation on the power that be to promote and defend Islam as well to protect its sanctity. In one article written by Muhammad Imam, entitled Freedom of Religion under Federal Constitution of Malaysia – A Reappraisal [1994] 2 CLJ lvii (June) referred to by learned counsel for the 8th appellant it was said that : *"Article 3 is not a mere declaration. But it imposes positive obligation on the Federation to protect, defend, promote Islam and to give effect by appropriate state action, to the injunction of Islam and able to facilitate and encourage people to hold their life according to the Islamic injunction spiritual and daily life."*

[49] It is also relevant to note that scholars such as Professor Andrew Harding and Prof. Dr. Shad Saleem Faruqi who have studied and analysed Article 3 and Article 11 of the Federal Constitution, and whose views have been referred to and quoted extensively by my learned brother Justice Mohamed Apandi Ali in his judgment, have said that freedom of religion is specifically safeguarded in the Federal Constitution and the restriction of proselytism under Article 11(4) has more to do with the preservation of public order than with religious priority. In fact Prof. Harding is of the view that Article 11(4) was inserted because of public order considerations – see Prof. Andrew

Harding - ***Law, Government and the Constitution in Malaysia*** (1996 at pg 201) and Prof. Dr. Shad Saleem Faruqi - ***Document of Destiny the Constitution of the Federation of Malaysia*** (2008 – at pp. 138-139).

[50] Given the circumstances of the case and the views expressed by scholars on the issue, I hold that it is nothing unreasonable or irrelevant for the 1st appellant to take into consideration of Islam as the religion of the Federation under Article 3(1) and the restriction on proselytism under Article 11(4) to impose the impugned condition that he did in respect of the publication of the Herald. There is nothing unconstitutional about it.

[51] The next constitutional issue to be considered is whether the 1st appellant decision has infringed the respondent's constitutional rights to profess, practice and propagate its religion. My view is that it does not. In its letter of 7.1.2009, the 1st appellant did not state anywhere in the letter that the respondent is prohibited from practising or propagating its religion. The letter also did not prevent the respondent from publishing the Herald; but restricting its circulation to churches and those who profess Christianity only. There is also no restriction for the Herald to be circulated to other non-Muslims besides the Christians.

[52] The 1st appellant's letter of 7.1.2009 only prohibits the respondent from using the word "Allah" for God in the Herald. I do not think this prohibition is unconstitutional and inhibits the respondent, which represents the Christians community, to practice their religion. It has been shown above that such prohibition is consistent with

obligation of the 1st appellant to have regard to Islam as the religion of the Federation in Article 3(1) and its protection pursuant to Article 11(4). Indian cases have shown that the constitutional protection afforded to the practice of one's own religion is confined to religious practice which forms an essential and integral part of the religion – see ***Javed v. State of Haryana AIR 2003 SC 3057; Commissioner of Police v. Acharya Jagadishwaranada Avadhuta [2004] 2 LRI 39 AR.*** I have read the illuminating judgment by my learned brother Justice Mohd Zawawi Salleh JCA in draft which discussed this issue in detail and in scholarly manner. I equally agree that the word "Allah" is not an essential and integral part of the Christian religion.

[53] One final point which I would like to touch on is that in this appeal the 3rd to the 9th appellants have also raised the argument that the decision of the 1st appellant is non justiciable because the State Enactments which were passed by the respective State Legislature pursuant to the provision of a federal law make under Article 11 (4) of the Federal Constitution to curb the propagation of other religions among the Muslims is an exercise of discretion by the respective Rulers of the respective States who are the Head of Religion of Islam for the relevant States.

[54] I do not find this argument relevant. In my view what is being questioned here is not the exercise of the discretion or prerogatives of the Rulers as Head of Religion of Islam but the discretion by the Minister i.e. the 1st appellant pursuant to a statutory power given to him.

[55] For the above reasons, I too would allow the appeal; and as agreed between parties there shall be no order as to cost.

Dated: 14th October 2013

sgd.
(DATO' ABDUL AZIZ BIN ABDUL RAHIM)
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