

DECISION

(1) PA-24NCvC-707-10/2020

**Zulkifli Bin Ibrahim And Dewan Undangan Negeri Pulau Pinang & ANOTHER
[Enclosure 13]**

(2) PA-24NCvC-708-10/2020

**AFIF BIN BAHARDIN And DEWAN UNDANGAN NEGERI PULAU PINANG &
ANOTHER
[Enclosure 15]**

(3) PA-24NCvC-709-10/2020

**KHALIQ MEHTAB BIN MOHD ISHAQ & ANOTHER And DEWAN UNDANGAN
NEGERI PULAU PINANG & ANOTHER**

[Enclosure 19]

Broad reasons

[1] This is the Defendant's application to refer the following question to the Federal Court:

Whether the Article 14A of the State Constitution of Penang is void for being inconsistent with the Article 10(c) of the Federal Constitution

[2] For a referral to be made under s 84 of the CJA, the following basic requirements must be satisfied, namely:

- (a) the question to be referred must arise in any proceedings in any High Court;
- (b) the question relates to the effect of any provision of the Constitution; and

(c) the High Court judge should settle any questions of fact as may be necessary to assist the Federal Court in deciding the question and to the speedy and economical final determination of the proceedings.

[3] In DATUK SERI ANWAR IBRAHIM V GOVERNMENT OF MALAYSIA & ANOR

[2020] 3 CLJ 593 Azhar Mohamed FCJ held:

“In our Federal system of Government, only the FC is supreme; Parliament and the States Legislatures are subject to the FC.There are certain subjects that can only be legislated upon by Parliament, some subjects only by the State Legislatures, and others by both Parliament and State Legislatures. Parliament and the State Legislatures' legislative powers and authority to make laws are therefore derived explicitly from the FC and both the Legislatures must not exceed their constitutional authority to legislate.”

[4] Article 128. Jurisdiction of Federal Court

(1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction: -

- (a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and
- (b)

[5] In the case of **WEE CHOO KEONG v LEE CHONG MENG & ANOR [1996]**

3 CLJ 508 Siti Norma Yaakob JCA held that:

“Before exercising his discretion under s. 84 Courts of Judicature Act 1964, the Judge must be satisfied that the constitutional question sought to be referred must have a direct bearing to the matter of dispute before him and that the decision of the Federal Court must have the effect of bringing the determination of the dispute before him to a speedy and economical end.”

[6] Abdul Malek Ahmad JCA in **WEE CHOO KEONG (supra)** held that:

“The phrase "the effect of any provision" in s. 84 of the Courts of Judicature Act, 1964 means a constitutional provision that has left

room for doubt in the sense that it is vague or ambiguous which necessitates a proper construction of its interpretation from the Federal Court. This apart, there must also be a difficult issue or issues posed by the dispute that are irreconcilable with a constitutional provision and it is only in this situation that reference of a constitutional question becomes necessary.

[7] The Defendants submit that the case of **Nordin Salleh v Dewan Undangan Negeri Kelantan [1992] MLJ 697** should be argued further. In that case, the amendment to the Kelantan Constitution “a State law, by Article XXXIA, seeks to impose a restriction on the fundamental right of a member of the Legislature to form associations which, of course includes the right to dissociate, and it operates by way of disqualification, once the member exercises that right.”

[8] The Plaintiff submits that this case can be decided by High Court based on Nordin’s case and all the Defendants have failed to pass the threshold of Section 84 of CJA.1964. The Plaintiff argues that in Nordin’s case, the Supreme Court has decided that the law for exercising a fundamental right is within the power of the Parliament. The Supreme Court held that:

“In all the circumstances, the learned Judge has arrived at the unanimous conclusion that the direct and inevitable consequences of Article XXX1A of the Kelantan State Constitution which is designed to enforce party

discipline does impose a restriction on the exercise by members of the Legislature of their fundamental right of association guaranteed by Article 10(1)(c) of the Federal Constitution and that such restriction is not only protected by Article 10(1)(c) of the Federal Constitution but clearly does not fall within any of the grounds for disqualification specified under s. 6(1) of Part 1 to the Eighth Schedule to the Federal Constitution.....

It is, in our view, inconceivable that a member of the Legislature can be penalised by any ordinary legislation for exercising a fundamental right which the Constitution expressly confers upon him subject to such restrictions as only Parliament may impose and that too on specified grounds, and on no other grounds.”

[9] The Defendant’s argument is premised on the power of the state to enact law on the qualification of the Member of State Assembly (ADUN). If this argument is correct, then, the case of **ABDUL KARIM BIN ABDUL GHANI v LEGISLATIVE ASSEMBLY OF SABAH [1988] 1 MLJ 171** should also be argued. (Both parties did not refer to this case in their arguments). In **ABDUL KARIM’s** case, the Applicant applied for leave to commence proceedings for a declaration that the Constitution (Amendment) Enactment, 1986, of Sabah is invalid on the ground that the legislature of Sabah has no power to enact it. The declarations sought were as follows:

- (a) a declaration that the respondents are not empowered to make laws with respect to the matter of disqualification for membership of the Assembly as effected by The Constitution (Amendment) Enactment No. 3 of 1986.
- (b) a declaration that The Constitution (Amendment) Enactment No. 3 of 1986 of the State of Sabah thereby effecting an amendment to The Constitution of the State of Sabah by addition of Clause 2(d) to Article 18 thereto is null and void and of no effect by reason of the respondent's incompetence to enact the same.

HASHIM YEOP A SANI SCJ held that:

“There is no doubt in my mind that the subject of disqualification of a member of the Federal Parliament is a Federal subject. The subject of disqualification of a member of the Legislative Assembly of the State is a State subject. This is clearly put in paragraph 6 of the Eighth Schedule to the Federal Constitution being one of the essential provisions required by the Federal Constitution to be incorporated in the State Constitution. Disqualification in relation to membership of the legislature of the State is within the competency of the State legislature to enact is indeed recognised by Federal law in the Election (Conduct of Elections) Regulations 1981 where Regulation 7 thereof allows objection to nomination to be made on the ground, inter alia, that the candidate is disqualified from being a member under the

provision of the Constitution of the State concerned in the case of an election to a State Legislative Assembly.

It is also obvious in the provision of paragraph 5 of the Eighth Schedule to the Constitution that disqualification is a subject within the competency of a State. Paragraph 5 reads as follows:

"Every citizen of or over the age of twenty-one years who is resident in the State is qualified to be a member of the Legislative Assembly, unless he is disqualified for being a member by the Federal Constitution or this Constitution or by any such law as is mentioned in section 6 of the Eighth Schedule to the Federal Constitution."

Paragraph 5 has been carried as Article 16 of the Sabah Constitution word for word. The words "this Constitution" of course refer to the State Constitution of Sabah.

Finally, if the new provision is regarded as a provision for the tenure of seats of members of the State legislature then it is certainly a State matter clearly falling under Item 7 (machinery of State Government) of the State List in the Ninth Schedule to the Federal Constitution. Article 74(4) of the Federal Constitution reads:

"Where general as well as specific expressions are used in describing any of the matters enumerated in the Lists set out in

the Ninth Schedule the generality of the former shall not be taken to be limited by the latter."

Reading Item 7 of the State List with Article 74(4) it is obviously within the power of a State legislature to enact a law in the nature of the new Article 18(2)(d) of the Sabah Constitution."

[10] The case of ABDUL KARIM BIN ABDUL GHANI (*supra*) was never referred or argued in NORDIN SALLEH (*supra*). This is one of the reasons why this case should be determined directly at the Federal Court level.

In **DATUK SERI ANWAR IBRAHIM (*supra*)** the Federal Court held that:

"...the general rule is that the Federal Court does not entertain abstract, academic, or hypothetical questions. This was stated by Edgar Joseph Jr FCJ in *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors* and another application [1999] 1 MLJ 257, who at p 264, observed as follows:

Having said that, this court does not sit to decide abstract or academic or hypothetical questions of law regarding which the parties are not in dispute. Thus, in *Ainsbury v Millington* [1987] 1 All ER 929 (refd), Lord Bridge said this (at pp 930–931):

It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.

[11] In the nutshell, I am of the opinion that:

(i) The case of ABDUL KARIM BIN ABDUL GHANI (*supra*) was never referred or argued in NORDIN SALLEH (*supra*).

(ii) In the case of NORDIN SALLEH the issue was on the fundamental right of association guaranteed by Article 10(1)(c) of the Federal Constitution, whereas in the case of ABDUL KARIM, the issue was on disqualification of a member of the Legislative Assembly of the State under Article 74(4) of the Federal Constitution.

Therefore, the basic requirements of Section 84 of the CJA 1964 and Article 128 of the Federal constitution have been fulfilled by the Defendants.

[12] Based on the above reasons, Enclosure 13,14 and 19 are allowed. No order as to cost.