**Federal Court Leave Application No. 08(f)-201-07/2024 (S)**

**Attorney-General of Malaysia v Sabah Law Society**

**Quorum:**

**Justice Nallini Pathmanathan, FCJ**

**Justice Zabariah binti Mohd Yusof, FCJ**

**Justice Rhodzariah binti Bujang, FCJ**

## Broad Grounds

(1) This is an application for leave to appeal under **section 96 Courts of Judicature Act 1964 ('CJA')** by the Attorney-General of Malaysia in respect of a decision handed down by the Court of Appeal on 18 June 2024.

(2) The Court of Appeal unanimously affirmed the High Court's decision granting leave for judicial review to the Sabah Law Society ("SLS") against the Government of Malaysia and the State Government of Sabah in respect of the Special Grant provided for Sabah under the provisions of the **Federal Constitution**.

(3) The State Government of Sabah is no longer a party to these proceedings having withdrawn from the same, prior to the hearing before the Court of Appeal.

(4) In this application, the questions for leave under **section 96 CJA** that fall for consideration may be divided into three categories:

A. Whether the respondent's present application for judicial review is within the Federal Court's exclusive jurisdiction under **Article 128(1)(b)**? (Leave Question 2 and 3)

B. Does the Sabah Law Society ('SLS') possess locus standi to bring the present judicial review? (Leave Question 4)

C. Is the present matter justiciable? (Leave Question 1)

(5) Before we deal with the leave questions, these are the salient background facts:

(a) The SLS is an entity established under the **Sabah Advocate Ordinance (Sabah Cap. 2)**. It is applying for judicial review in respect of the Special Grant provided for Sabah under **Article 112C and section 2 of Part IV of the Tenth Schedule of the Federal Constitution**.[1] This Special Grant is a matter that

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[1] **112C Special grants and assignment of revenue to States of Sabah and Sarawak**

(1) Subject to the provisions of Article 112D and to any limitation expressed in the relevant section of the Tenth Schedule—

(a) the **Federation shall make to the States of Sabah and Sarawak in respect of each financial year the grants specified in Part IV of that Schedule**;....

In **section 2 of Part IV of the Tenth Schedule referred to above**, the Special Grant is expressed as follows:

2. (1) **In the case of Sabah, a grant of amount equal in each year to two-fifths of the amount by which the net revenue** derived by the Federation from Sabah exceeds the net revenue which would have been so derived in the year 1963 if—

(a) the Malaysia Act had been in operation in that year as in the year 1964; and

was agreed to by Sabah, Sarawak and Singapore on the formation of Malaysia when the **Malaysia Agreement 1963** was entered into between the Federation of Malaya and the United Kingdom. This Special Grant is subject to review under **Article 112D**.[2] The respondent in the judicial review application is the Federal Government;

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(b) the net revenue for the year 1963 were calculated without regard to any alteration of any tax or fee made on or after Malaysia Day,

("net revenue" meaning for this purpose the revenue which accrues to the Federation, less the amounts received by the State in respect of assignments of that revenue).

[2] Article 112D provides as follows:

(1) The grants specified in section 1 and subsection (1) of section 2 of Part IV of the Tenth Schedule, and any substituted or additional grant made by virtue of this Clause, shall at the intervals mentioned in Clause (4) be reviewed by the Governments of the Federation and the States or State concerned, and if they agree on the alteration or abolition of any of those grants, or the making of another grant instead of or as well as those grants or any of them, the said Part IV and Clause (2) of Article 112C shall be modified by order of the Yang di-Pertuan Agong as may be necessary to give effect to the agreement:

Provided that on the first review the grant specified in subsection (2) of section 1 of the said Part IV shall not be brought into question except for the purpose of fixing the amounts for the ensuing five years.

(2) Any review under this Article shall take into account the financial position of the Federal Government, as well as the needs of the States or State concerned, but (subject to that) shall endeavour to ensure that the State revenue is adequate to meet the cost of State services as they exist at the time of the review, with such provision for their expansion as appears reasonable.

(3) The period for which provision is to be made on a review **shall be a period of five years or (except in the case of the first review) such longer period as may be agreed between the Federation and the States or State concerned;** but any order under Clause (1) giving effect to the results of a review shall continue in force after the end of that period, except in so far as it is superseded by a further order under that Clause.

(4) A review under this Article shall not take place earlier than is reasonably necessary to secure that effect can be given to the results of the review from the end of the year 1968 or, in the case of a second or subsequent review, from the end of the period provided for by the preceding review; but, subject to that, reviews shall be held as regards both the States of Sabah and Sarawak for **periods beginning with the year 1969 and with the year 1974**, and

(b) In essence **Article 112C** provides that the State of Sabah is entitled to a grant equivalent to 40% of the amount by which the net revenue derived by the Federation from Sabah exceeds the net revenue which would have been derived in 1963 subject to **section 2(1)(a) and (b)**. We shall refer to that as the Special Grant;

(c) In the present judicial review application, the subject matter of relevance is **Article 112D** particularly **clauses (3) and (4)** (see footnote 2). These clauses provide that the Special Grant to Sabah (and Sarawak) are subject to review at specified times by the Government of the Federation and the Government of Sabah;

(d) SLS' grievance is that a second review of the Special Grant was not made by the end of 1974 as provided in clause (4). Instead on 20 April 2022 the Federal Government published an Order in the gazette under the authority of **Article 112D**. This Review Order 2022 reads as follows:

***'2. For a period of five years with effect from 1 January 2022, the Government of the Federation shall make to the State of Sabah, in respect of the financial year 2022, 2023, 2024, 2025 and 2026, grants in the amount of RM125.6***

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thereafter as regards either of them at such time (during or after the period provided for on the preceding review) as the Government of the Federation or of the State may require.

(5) .....

***million, RM129.7 million, RM133.8 million, RM138.1 million and RM142.6 million respectively.***

***3. The Sabah Special Grant (First Review) Order, 1970 [P.U. (A) 328/1970] is revoked.'***

(e) As submitted by SLS, after having failed to conduct a review by the end of 1974, the Federation allegedly "*failed to remedy Sabah's 40% entitlement for the annual payments for the period from 1974 to 2021 in its decision, action and omission under the Review Order 2022*". This is referred to by SLS as the "Lost Years";

(f) The position of SLS is that this failure to review amounts to a breach of the Federal Government's constitutional duty towards Sabah;

(g) They further contend that in the absence of any further reviews from 1974 until the present, the 40% or Special Grant is applicable until such time as a further review is conducted and implemented;

(h) In response, the Permanent Secretary of the Ministry of Finance of Sabah responded to the above averments as follows:

*'37. … I am advised and aver the grant contained in the 1970 Order was a substituted grant pursuant to Article 112D(1), and not the Sabah Special Grant. The 1970 Order did not*

*permanently alter or abolish the special grant contained in Part IV of the Tenth Schedule.'*

(i) **Article 112D(1)** reads as follows:

> *'The grants specified in section 1 and subsection (1) of section 2 of Part IV of the Tenth Schedule, and any substituted or additional grant made by virtue of this Clause, shall at the intervals mentioned in Clause (4) be reviewed by the Governments of the Federation and the States or State concerned, and if they agree on the alteration or abolition of any of those grants, or the making of another grant instead of or as well as those grants or any of them, the said Part IV and Clause (2) of Article 112c shall be modified by order of the Yang di-Pertuan Agong as may be necessary to give effect to the agreement: Provided that on the first review the grant specified in subsection (2) of section 1 of the said Part IV shall not be brought into question except for the purpose of fixing the amounts for the ensuing five years.'*

(j) Finally SLS submits that this judicial review application seeks only remedies aimed at compelling the Federal Government to comply with **Articles 112C, 112D and the Tenth Schedule of the Federal Constitution**. These prayers relate to the failure to conduct a review during the Lost Years and to pay the Special Grant as there is an omission to do so in the Review Order 2022. **At no stage is SLS asking the Court to**

**touch on the merits of the review envisaged under Article 112D.**

(6) We deal with the subject matter of Leave Questions 2 and 3 first to determine whether leave ought to be granted under **section 96 CJA**. It is important to bear in mind that this application for leave to appeal relates purely to the question of threshold leave to apply for judicial review. It does not relate to the substantial merits of the judicial review application.

(7) Leave Questions 2 and 3 relate to whether SLS' application for judicial review falls solely within the exclusive jurisdiction of the Federal Court under **Article 128(1)(b)**.

(8) **Article 128(1)(b)** which the Attorney-General of Malaysia relies on reads as follows:

*'128. (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*
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> ***(b) disputes on any other question between States or between the Federation and any State.'***

(9) The paradigm example of an **Article 128(1)(b)** case was set out by Tengku Maimun CJ in **Nik Elin Zurina bt Nik Abdul Rashid & Anor v Kerajaan Negeri Kelantan [2024] 2 MLJ 150 [FC] ("Nik Elin")**:

*'[4] The first type of cases involves disputes on any question between States or between the Federation and any State. Purely by way of example, if the Federation were to sue or be sued by the State of Pahang, or if the State of Perak were to sue or be sued by the State of Perlis, these suits can be filed directly in the Federal Court — without leave.'*

(10) The Attorney-General of Malaysia argues that the question of whether the present dispute is caught by **Article 128(1)(b)** is a threshold question that needs to be answered before a hearing on the merits. It is further argued that this clearly a matter of public interest and novelty warranting the grant of leave.

(11) This argument presupposes that the threshold question of whether the **Article 128** exclusive jurisdiction of the Federal Court is engaged may be disposed of entirely or wholly at the leave stage for judicial review, and never again.

(12) However, we are of the view that this issue is more properly determined during the substantive hearing of the judicial review application where a re-examination of **Article 128** may be necessitated. In other words, during the substantial merits hearing of the judicial review application. We say so for several reasons:

Definition of 'State' in the Federal Constitution

(a) **Article 160 of the Federal Constitution** defines 'State' as meaning 'State of the Federation'. Therefore **Article 128** is to be read as applying to the State of Sabah and not any other body or entity such as the SLS. **In other words, as the State Government of Sabah is not a party to these proceedings, it cannot be said that it falls within the definition of Article 128(1)(b) which envisages a dispute between a State and the Federation**;

Lack of a 'dispute'

(b) While there is no case law on how the word 'dispute' in the context of **Article 128(1)(b)** is interpreted, it appears obvious that it must involve some form of disagreement between the relevant parties. For instance, in the context of arbitration, the Singapore Court of Appeal in **Tjong Very Sumito and others v Antig Investments Pte Ltd [2010] 2 All ER (Comm) 366** at [34] cites Born, International Commercial Arbitration (2009) p 1093 to say '***The general definition of dispute requires the making of a claim by one party and its rejection by the other***.'

(c) **In the present case, the State of Sabah has made no claim on its own behalf and therefore there cannot be said to be a dispute between them and the Federation**;

Use of the word 'between' in Article 128(1)(b)

(d) It is of note that **Article 128(1)(b)** says that disputes '*between*' the Federation and any State fall within the Federal Court's exclusive jurisdiction; it does not say that disputes affecting or relating to the Federation and any State fall within the Federal Court's exclusive jurisdiction;

(e) The point therefore is: if **Article 128(1)(b)** was intended to impose a substantive restriction on the types of matters that must be brought only to the Federal Court, it would have used different words. The fact that the word '*between*' was chosen suggests that what matters is that the parties to the suit are the Federation and any State not that the suit affects the Federation and/or any State;

(f) The general position is that the exclusive jurisdiction of the Federal Court must be construed strictly; that is to say, unless exclusive jurisdiction is expressly conferred by the **Constitution**, the court should be wary of asserting such jurisdiction. There are several reasons for this, chief among them being that aggrieved litigants should not be deprived of their right of appeal, and that **the general scheme of the Federal Constitution empowers the High Court to determine issues of constitutionality** (see **Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors [2018] 3 MLJ 417**):

*'[31]: The rationale for construing strictly the limits of the exclusive original jurisdiction of this court was explained in Rethana v Government of Malaysia [1984] 2 MLJ 52. In that case, the Employees' Social Security Act 1969 was challenged not on the basis that Parliament had no power to enact it, but on the basis of inconsistencies with provisions in the Federal Constitution. This court held that since the subject matter of the Act is covered by the Federal List, the suit is within the original jurisdiction of the High Court and ought not be litigated at the first instance before this court. Per Mohamed Azmi FJ (as His Lordship then was) at p 54:*

> *Under our Constitution,* ***the Federal Court is an appellate court and its exclusive original jurisdiction is limited****. In my opinion,* ***this particular original jurisdiction of the Federal Court conferred by art 128(1)(a) read with s 45 of the Courts of Judicature Act 1964 should be strictly construed*** *and confined to cases where the validity of any law passed by Parliament or any State Legislature is being challenged on the ground that Parliament has legislated on a matter outside the Federal List or Concurrent List; or a State Legislature has enacted a law concerning a matter outside the State List or the Concurrent List as contained in the ninth Schedule to the Federal Constitution.* ***To extend the exclusive original jurisdiction of the Federal Court to matters which are not expressly provided by the Constitution would apart from anything else, deprive aggrieved***

***litigants of their right of appeal to the highest court in the land.'***

*[35]:'….* ***The High Court is competent to hear such challenges, for the general scheme of the Federal Constitution is to empower the High Court to pronounce on the constitutionality of federal and state laws*** *(Gerald Fernandez v Attorney-General, Malaysia [1970] 1 MLJ 262 at p 264).'*

(emphasis added)

(g) By raising the issue of **Article 128(1)(b)** at this juncture relating to the exclusive jurisdiction of the Federal Court, the Attorney-General of Malaysia is effectively arguing that SLS does not possess the locus standi to bring the present suit by way of judicial review and that the only way to have this matter determined is by way of engaging the **Article 128(1)(b)** jurisdiction;

(h) On a prima facie consideration of the matter for purposes of leave to appeal it is not plain and obvious that this matter is one which falls solely within the jurisdiction of **Article 128(1)(b)** and precludes any determination of the matter by way of judicial review;

(i) Secondly, this is a matter that relates to threshold standing or locus standi rather than substantive standing in a judicial review application. See **Datuk Bandar Kuala Lumpur v.**

**Perbadanan Pengurusan Trellises & Ors And Other Appeals [2023] 5 CLJ 167 ("Trellises")** at paragraph 493:

> *'[493]: For the reasons we have set out above, particularly in relation to the law relating to locus standi in this jurisdiction, from Lim Kit Siang and Othman bin Saat to QSR and MTUC, O 53 r 2(4) relates to threshold locus standi.* ***The reference to substantive locus standi is, effectively a reference to the substantive merits of the case, which allows the court to review its finding on threshold locus standi in view of the factual and legal matrix of the entirety of the matter. A person or entity may well fall within the broad approach to 'adversely affected' as envisaged under O 53 r 2(4) in the context of the particular area of law or statute dealing with the subject matter of a case, but yet may not succeed on a substantive examination of the matter because when the entirety of the legal and factual matrix is analysed, he may not have met the requirements to warrant the grant of the various remedies available under judicial review.'***
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> (emphasis added)

(j) We reiterate that there may be considerations arising at the substantive hearing that warrant a re-examination of the **Article 128** question. It is unclear at this juncture what the State Government of Sabah's stance is on the specific issues here. In the absence of the State Government of Sabah's

stance, it is not tenable to treat the matter as one pertaining to a dispute between the State Government of Sabah and the Federation as required under **Article 128(1)(b)**;

(k) The Court of Appeal in the present case rightly relied on **Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor [2014] 2 CLJ 525; [2014] 3 MLJ 145; [2014] 2 AMR 101 ("MTUC")** and **Trellises** to point out that the courts should take a broad and liberal approach to locus standi in respect of public interest litigation (Court of Appeal, [43]):

**MTUC**:

*'[64] Looking at the whole legal and factual context of the application especially the fact that this is a public interest litigation, we are of the view that MTUC had shown that it had a real and genuine interest in the two documents.'*

**Trellises**:

*'[440] It is also equally clear that in most jurisdictions this threshold issue has, and continues to evolve in manner that is consonant with a broad, liberal and flexible approach rather than the converse. This, in turn, is in keeping with the rule of law which requires that in order to maintain an equitable ordering between the citizenry and the government at various levels, the law must be relevant and effective in maintaining a check and balance for the ultimate benefit of the populace.*

*[443] As a result, public interest litigation has not been consonant with the rest of the jurisdictions in the common law or civil law world. This becomes a matter of considerable concern as it precludes or prohibits an essential feature of the Federal Constitution, namely the right of the citizenry to challenge and/or seek remedies where there are serious omissions or acts which appear to be unlawful or ultra vires, using the reason of a lack of standing to sue.'*

Locus in constitutional cases is to be broadly construed

(l) It is worth at this juncture, at risk of repetition, to reproduce the core reasoning of Tengku Maimun CJ on locus standi in **Nik Elin**:

> *"[22] Locus standi refers to the standing or right of the person to sue. The most recent decision by this court on this issue is that in Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals [2023] 3 MLJ 829; [2023] 5 CLJ 167 ('Taman Rimba'). In that case, the court endorsed the minority judgment of Eusoffe Abdoolcader SCJ in Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12 ('Lim Kit Siang'). Summarising the analysis therein, locus standi ought to be relaxed as much as possible to allow any public-spirited person to file a public law suit provided that he has some interest in the matter.*

*[24]* ***In a case such as the present one involving constitutional judicial review, we opine that locus standi must be adjudged on principles even broader than the ones already applicable in Taman Rimba.*** *The starting point for this is the words in art 4(1), as follows:*

> *4 Supreme law of the Federation*
>
> *(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.*

*[26] Giving the respondent's proposition its deepest possible consideration, what they suggest is that if a law has been passed either by Parliament or the State Legislatures, and it is constitutionally invalid, then going by the rules of locus standi the courts must pause on deciding the validity of that law until in effect the 'correct person' shows up before the courts to challenge that law. This proposition is not supported by the language of art 4(1) because nowhere is it suggested in art 4(1) that the courts should now filter the litigants that come before them seeking to challenge the constitutional validity of legal provisions for the reason that the question of validity comes second to the personality before the court.*

> *[29] We therefore take the view that the fact that legislation has been passed creates a factual circumstance in which it can be challenged. Art 4(1), which forms the substantive constitutional basis for all constitutional judicial review cases, does not discriminate between the circumstances and situations in which such challenges can be brought or the categories of persons that can bring them, apart from differentiating between the nature and procedure for those proceedings ie between 'incompetency' and 'inconsistency' challenges.'*
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> (emphasis added)

(m) Her Ladyship astutely points out that **Article 4(1)** which forms the basis of all constitutional judicial review does not suggest there needs to be any restriction as to the type of people that can initiate constitutional judicial review (**Nik Elin**, [24], [26] and [29]). While **Nik Elin** was concerned specifically with an incompetency challenge, it is clear that it is authority for the more general proposition that locus must be construed very broadly, even more broadly than in **Trellises**, where the **Constitution** is involved;

(n) Therefore, SLS, who even on the principles laid out in **Trellises**, have standing to bring the present claim, definitely have standing where locus is to be adjudged even more broadly. This is even more so as we are dealing with threshold locus standi in judicial review.

**(13) Therefore as there is no prima facie case at this juncture to justify the conclusion that this matter falls within the exclusive jurisdiction of the Federal Court under Article 128(1)(b) and, as SLS has threshold locus standi to bring this judicial review application, there is no necessity for the grant of leave. This is particularly so as the issue of substantive locus standi may, if necessary, be considered in the course of the substantive judicial review on the merits.**

(14) On the issue of justiciability, the judgment of the Court of Appeal is comprehensive and sets out the position clearly in paragraph 50. We see no reason to warrant the grant of leave under **section 96 CJA**. We reiterate that at the leave stage, the court is concerned primarily with threshold locus standi and non-justiciability in the present case is not apparent on a prima facie construction of the cause papers. This matter, as we have stated earlier, deals with whether the failure to review and provide Sabah's Special Grant amounts to a breach of the relevant Articles of the **Federal Constitution**, and for prayers to remedy the same. That is not a matter of policy. Therefore, the grant of leave is not warranted and the matter should proceed to be heard on its substantive merits.

Date: 17 October 2024