TAN SRI MUSA HAJI AMAN

v.

TUN DATUK SERI PANGLIMA HAJI JUHAR HAJI MAHIRUDDIN & ANOR AND ANOTHER APPEAL

Federal Court, Putrajaya
Mohd Zawawi Salleh, Abdul Rahman Sebli, Zabariah Mohd Yusof FCJJ
[Civil Application Nos: 08(f)-497-12-2019(S) & 08(f)-503-12-2019(S)]
1 September 2020

Civil Procedure: *Appeal — Appeal from Court of Appeal to Federal Court — Conditions of Appeal — Leave of Federal Court — Section 96 Courts of Judicature Act 1964 ("CJA"), paras (a) and (b) — Whether s 96(b) might be prayed together with or in alternative to s 96(a) CJA — "Constitution", definition of — Whether limited to Federal Constitution only*

Civil Procedure: *Appeal — Appeal from Court of Appeal to Federal Court — Conditions of Appeal — Leave of Federal Court under s 96(b) CJA — Whether any restriction on leave questions where matter related to effect of any provision of Constitution — Circumstances when leave ought to be granted*

Civil Procedure: *Appeal — Appeal from Court of Appeal to Federal Court — Court of Appeal dismissing appeal from High Court on basis of preliminary objection that appeal was academic and incompetent — No decision made on merits of issues raised on appeal to Court of Appeal — Whether such "decision" appealable to Federal Court with leave — Whether leave questions posed for Federal Court's determination warranted full and mature arguments in a full hearing before Federal Court*

Civil Procedure: *Appeal — Discretion exercised by appellate court — Discretion of appellate court to hear appeal that had become academic — How such discretion exercised — Whether any good reason in public interest for appellate court to hear such appeal — Whether likely that issue on appeal would have to be resolved in near future due to large number of similar cases in existence or in anticipation of*

Words & Phrases: *"Constitution" — Courts of Judicature Act 1964, s 96(b)*

The instant appeal arose out of a tussle between Tan Sri Musa Aman ("TSM") and Datuk Seri Shafie Apdal ("DSS") for the position of Sabah Chief Minister as a result of the defection of State Assemblymen after the Sabah constituent seat results of the 14th General Election ("GE 14") were announced by the Election Commission ("EC"). TSM was the assemblyman for the N42 Sabah State constituency. He was also the leader and State Liaison Chief of the Barisan Nasional Sabah ("BN-Sabah") coalition which comprised eight (8) political parties. DSS was the assemblyman for the N53 Sabah State constituency and president of the Parti Warisan

Sabah ("Warisan"). He was also the leader of another coalition comprising Wawasan and two other political parties. On 9 May 2018, BN-Sabah and an ally – Parti Solidariti Tanah Airku ("STAR") – obtained 31 seats in the 60-seat Sabah State Assembly. This simple 1-seat majority effectively gave TSM the command of the confidence of the majority of the Sabah State Legislative Assembly. On 10 May 2018 at 11pm, TSM was sworn in as Chief Minister by the Tuan Yang Terutama Yang di-Pertua Negeri of Sabah ("TYT"). The TYT, acting on the advice of TSM under arts 6(1), (2) and (3) of the Sabah State Constitution also swore in the State Cabinet. TSM thereafter handed to the TYT six (6) Instruments of Appointment appointing six additional nominated members of the State Legislative Assembly and advised the TYT to execute the same pursuant to art 14(1)(c) of the Constitution of the State of Sabah 1963 ("Sabah Constitution"). However, the TYT refused to do so. On 11 May 2018, the TYT received six statutory declarations from six BN-Sabah elected assemblymen each declaring and pledging full support for DSS to be appointed as the Chief Minister. On 12 May 2018, TSM was asked by the TYT to resign as Chief Minister. TSM refused to do so and instead asked the TYT to execute the six Instruments of Appointment for the six (6) additional nominated members of the State Assembly. At 9pm on 12 May 2018, the TYT swore in DSS as the new Chief Minister of Sabah pursuant to art 6(3) read together with art 10(2)(a) of the Sabah Constitution. The letter informing TSM that he ceased to command the confidence of the majority was prepared but only served upon TSM on 14 May 2018. On 16 May 2018, the new State cabinet was appointed and sworn in. They held office until 30 July 2020 when the State Legislative Assembly was dissolved by the TYT at the request of DSS. TSM filed an Originating Summons ("OS") in the High Court against TYT and DSS. TSM challenged the TYT's exercise of power to appoint DSS as the new Chief Minister of Sabah to replace him. He sought, *inter alia*, a declaration that he was still the lawful Chief Minister of Sabah. Prior to hearing of the OS, DSS filed an application to strike out the OS on the ground that it was academic. The Judge dismissed DSS's application and heard the merits of TSM's claim. The High Court held *inter alia*, that TSM was deemed to have vacated his post when he refused to resign following the loss of confidence and DSS's appointment as Chief Minister was lawful under art 6(3) of the Sabah Constitution. TSM appealed to the Court of Appeal. Counsel for DSS raised a preliminary objection to the appeal on the basis that the appeal was incompetent, had become academic and had to be dismissed forthwith. The Court of Appeal upheld the preliminary objection raised on behalf of DSS and dismissed TSM's appeal *in limine* without hearing its merits. TSM and another applied for leave to the Federal Court pursuant to s 96 of the Courts of Judicature Act 1964 ("CJA") to appeal against the decision of the Court of Appeal. The applicants agreed that the decision in TSM's application would apply to the other. At the hearing of the leave application, the TYT raised a preliminary objection that the matter was academic, hypothetical and abstract in view of the dissolution of the 15th State Legislative Assembly on 30 July 2020.

Held (by majority) (allowing TSM's application for leave):

Per Abdul Rahman FCJ delivering majority judgment:

(1) What was clear from *R v. Secretary of State for the Home Department ex parte Salem* [1999] AC 450 was that an appellate court was not precluded from hearing appeals that had become academic, subject to the caveat that the discretion to hear such appeals must be exercised with caution, and not merely because it was in the public interest to do so. The court would exercise the discretion if there was good reason in the public interest for doing so and "where it was likely that the issue would have to be resolved in the near future because a large number of similar cases existed or were anticipated". In the instant case, there was every reason in the public interest to hear the merits of TSM's appeal instead of casting it aside as being academic. It was public knowledge that this was not the first time that the people of Sabah had to face such kind of political turmoil and constitutional crisis, and it would not be the last if not finally resolved by the Federal Court. (paras 24-25)

(2) A determination of how the Sabah Constitution should work in the peculiar circumstances of the case, in particular the exercise by the TYT of his constitutional power to remove a sitting and validly appointed Chief Minister, was far more important than the question of whether TSM could be re-instated as the Chief Minister if he were to succeed in his claim. It was of lesser importance that the 15th State Legislative Assembly had been dissolved on 30 July 2020 and that the election for the 16th State Legislative Assembly was well under way. Of greater importance was for the apex court to determine if the position of law as interpreted by the High Court was the correct position of the law. This was to avoid a recurrence of the constitutional crisis, which had the potential to repeat itself after the results of the coming 16th State Legislative Assembly election were announced. (paras 29-30)

(3) The questions of law raised by TSM were of grave constitutional importance and had far reaching implications not only for the State of Sabah, but for the whole country. The questions ought to be resolved once and for all by the apex Court, to provide certainty. The people of Sabah had an inalienable right to know whether the removal of TSM as the validly appointed Chief Minister was done validly, lawfully and in accordance with the Sabah Constitution, the highest law in Sabah. There was no closure yet on the issue as to whether TSM had been lawfully removed from office. (paras 31-32)

(4) Appeals to the Federal Court from the Court of Appeal were governed by s 96 of the Courts of Judicature Act 1964 ("CJA"). Paragraph (b) might be prayed together with or in the alternative to para (a) of s 96. The word "Constitution" was defined by s 3 CJA to mean "the Constitution of Malaysia", but there was no indication in the CJA whether the "Constitution of Malaysia" encompassed the Federal Constitution and the State Constitutions or was limited only to the Federal Constitution. If Parliament had intended to limit

s 96(b) CJA to questions relating to the Federal Constitution only, then it would have used the term "Federal Constitution" instead of "Constitution", or it would have made its intention clear by expressly excluding the State Constitutions from its ambit. Such clear intention of the legislature might be found in the Interpretation Acts 1948 and 1967 which expressly excluded the Constitution of the States from the definition of "Federal Constitution". In any event, if at all there was any ambiguity in the word "Constitution" in s 96(b) CJA, the ambiguity must be resolved in favour of interpreting it to include within its embrace the Constitution of the States. This interpretation would not do violence to s 96(b) CJA. (paras 33-38)

(5) Under s 96(b) CJA, leave of the Federal Court was required but there was no restriction on leave questions when the matter related to the effect of any provision of the Constitution. Under s 96(b) CJA, leave would be granted where the issues raised were of public importance which ought to be finally settled by the Federal Court to provide certainty on the application of the Federal or State Constitutions and not limited only to matters relating to the Federal Constitution. In the instant case, the questions posed by TSM in his leave application fell squarely within the ambit of s 96(b) CJA as they related to the effect of the provisions of the Sabah Constitution. The constitutional questions that TSM posed for the determination of the Federal Court were of great public importance and could not be dismissed on the basis that they were allegedly academic. It was of paramount importance that the Federal Court decided on issues relating to the constitutionality of the TYT's exercise of power to remove a sitting Chief Minister once and for all. This was certainly not a case that, on first impression would inevitably fail if leave was granted. (paras 40-41)

(6) The Court of Appeal did not decide on any of the issues or questions raised in TSM's leave questions. The issues were never argued in the Court of Appeal and there was no decision on any of the constitutional issues raised by TSM. This did not mean that none of the leave questions came within the ambit of s 96(a) CJA. Such a consequence would deny TSM access to the Federal Court not because he did not raise the issues in the High Court and in the Court of Appeal, but because the Court of Appeal decided not to deal with them. (paras 44-47)

(7) There was no ambiguity in s 96 CJA. What was appealable to the Federal Court with leave was a decision from any judgment of the Court of Appeal "in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction." Clearly, TSM's appeal was "in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction" and all issues relating to the leave questions were canvassed before the High Court but were rejected by the High Court Judge. The "academic" point raised by DSS in the High Court could not count as a factor to be considered in granting leave under s 96 CJA as it had in fact been decided against him by the High Court, which was not appealed against, but

which became the sole basis for the Court of Appeal to dismiss TSM's claim. (paras 48-49)

(8) The constitutional questions posed by TSM for the Federal Court's determination warranted full and mature arguments in a full hearing before the Federal Court. It could not be denied that the points of argument advanced by TSM in support of the leave application merited a second and closer look by the Federal Court, having been rejected by the High Court and not considered by the Court of Appeal in view of its decision to dismiss the appeal on the sole ground that it had become academic. (paras 50-51)

(9) The courts were the guardians of the Sabah Constitution. It was only proper that TSM's application be granted in order for the Federal Court to finally determine whether the TYT had acted within the confines of his constitutional powers when he removed a sitting and validly appointed Chief Minister from office. (para 52)

Per Zawawi FCJ (dissenting):

(10) In matters concerning constitutional construction, the court must decide on concrete questions that had actually arisen in order to avoid injustice to future cases. The court did not determine abstract, academic or hypothetical questions of law. It was not the function of the court to decide such questions that did not have any impact on the rights and obligations of the parties. The court would not engage in a fruitless exercise. If the question was wholly ineffectual to the parties, it would be unnecessary and pointless but also inexpedient to decide and the court would properly decline to do so. (paras 78-79)

(11) In the instant case, a supervening event had occurred when the TYT dissolved the Sabah State Legislative Assembly on 30 July 2020 following the request of DSS. The supervening event made it impossible for the Federal Court to grant TSM any practical or effectual relief, should the Federal Court decide the case in favour of TSM. (paras 81 & 86)

(12) The exclusion of academic questions from determination was not based on a lack of jurisdiction but represented a form of judicial restraint. Therefore, the Federal Court retained discretion to hear an academic case where it was the interest of justice to do so. A prerequisite for the exercise of discretion was that any decision, pronouncement or order that the Federal Court might make must have some practical effects on the parties. The Federal Court should not consider and decide issues raised in the leave to appeal where it clearly appeared that there had been a change of circumstances after judgment was delivered by the trial court which would make any decision, pronouncement or order of no consequence to the contending parties. (paras 89 & 90)

(13) The court might entertain an academic issue which related to public law if it involved: (i) a discrete point of statutory construction; (ii) a situation where it did not involve detailed considerations of fact; and (iii) a situation where

there was a large number of similar cases which needed to be resolved. In exercising its jurisdiction on constitutional construction, the court was bound by two rules: (i) it must never anticipate a question of constitutional law in advance of the necessity of deciding it; and (ii) it must never formulate a rule of constitutional law broader than was required by the precise facts to which it was to be applied. (paras 91-92)

(14) The suggestion that the applicant's proposed leave questions were likely to recur and were thus amenable to adjudication even though they might otherwise be considered academic, was highly speculative. In the instant case, TSM's proposed leave questions did not involve discrete statutory construction nor gave rise to a situation where a large number of cases involving the same issues had to be resolved. It was not at all obvious that a decision in the instant case would serve to resolve future disputes. Each case was unique and had to be decided on its own facts. (paras 93-94)

(15) Even if a matter was not academic at the time when the action was filed, it might be considered academic at the time the decision on the matter was to be made at the Court of Appeal or Federal Court. The Court of Appeal could take additional evidence to determine if the matter had become academic on appeal and the Court of Appeal might also raise the question *sua sponte*. (paras 98-99)

(16) The Court of Appeal was correct in upholding the preliminary objection raised by the respondents. It was beyond argument that TSM had lost the confidence of the majority of the members of the State Legislative Assembly by the time his appeal reached the Court of Appeal. (para 100)

(17) The discretion whether to hear the leave application to appeal on merit should be exercised with caution and where the matter had become academic between the parties, the matter should not be heard by the Court unless there was some good reason for so doing. (para 101)

(18) The proposed leave questions or issues of law were not the issues or questions that formed part of the decision of the Court of Appeal which had dismissed TSM's appeal on the ground of it being incompetent and academic. As such, the merits or the substantive constitutional issues could not procedurally form part of the proposed leave questions. Pursuant to s 96(a) CJA an appeal to the Federal Court had to be against a decision of the Court of Appeal, but in the instant case, there had been no decision or judgment by the Court of Appeal on any of the issues or questions in the proposed leave questions 1 to 4 and 8 to 17. Although there had been a decision or judgment relating to proposed questions 5, 6 and 7, this was specifically in respect of the admission of fresh evidence – which decision was made on a different Notice of Motion which could not form part of the decision of the Court of Appeal which had dismissed TSM's appeal. (paras 102-104)

Case(s) referred to:

Adegbenro v. Akintola and Another [1963] 2 All ER 544 (refd)

Ainsbury v. Millington [1987] 1 All ER 929 (refd)

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 1 MLRA 611 (refd)

Attorney-General v. De Keyser's Royal Hotel, Limited [1920] AC 508 (refd)

Bar Council Malaysia v. Tun Dato' Seri Arifin Zakaria & Ors And Another Appeal; Persatuan Peguam-Peguam Muslim Malaysia (Intervener) [2018] 5 MLRA 345 (refd)

Dato' Seri Ir Hj Mohammad Nizar Jamaluddin v. Dato' Seri Dr Zambry Abdul Kadir [2012] 6 MLRA 259 (distd)

Datuk Syed Kechik Syed Mohamed & Anor v. The Board Of Trustees Of The Sabah Foundation & Ors [1998] 2 MLRA 277 (refd)

Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor [2020] 2 MLRA 1 (refd)

Gin Poh Holdings Sdn Bhd v. The Government Of The State Of Penang & Ors [2018] 2 MLRA 547 (refd)

Glawer v. Raettig [2007] EWCA CW 1560 (refd)

Ladd v. Marshall [1954] 3 All ER 745; [1954] 1 WLR 148 (refd)

Liverpool, New York and Philadelphia SS Co v. Commissioners of Emigration [1885] 113 US 33 (refd)

Loknath v. Birendra Kumar Sahu [1974] AIR SC 505 (refd)

Mills v. Green 159 US 651, 653 (1895) (refd)

Mwamba and Another v. Attorney General of Zambia [1993] 3 LRC 166 (refd)

R v. Secretary of State for the Home Department ex parte Salem [1999] 1 AC 450 (refd)

R v. SSHD, ex parte Salem [1999] 1 AC 450 (refd)

Shivraj Singh Chouhan and Others v. Speaker Madhya Pradesh Legislative Assembly and Others [2020] 4 MLJ 207 (refd)

Spind Malaysia Sdn Bhd v. Justrade Marketing Sdn Bhd & Ors [2018] 2 MLRA 281 (refd)

State of Rajasthan & Ors Etc Etc v. Union of India Etc Etc [1977] AIR 1361 (refd)

Stephen Kalong Ningkan v. Tun Abang Haji Openg And Tawi Sli [1966] 1 MLRA 456 (refd)

Sun Life Assurance Co of Canada v. Fervis [1944] 1 All ER 469 (refd)

Tan Eng Hong v. Attorney-General [2012] SGCA 45 (refd)

Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor & Other Applications [2012] 5 MLRA 618 (refd)

Titular Roman Catholic Archbishop Of Kuala Lumpur v. Menteri Dalam Negeri & Ors [2014] 4 MLRA 205 (refd)

Legislation referred to:

Constitution of the State of Perak, art 16(6)

Constitution of the State of Sabah, arts 6(1), (2), (3), (7), 7(1), 10(1), (1A), (2)(a), (b), (4), 14(1)(c), 21(2)

Courts of Judicature Act 1964, ss 3, 69, 80, 96(a), (b), 97

Rules of the Court of Appeal 1994, r 7

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JUDGMENT

Abdul Rahman Sebli FCJ (Majority):

The Applications

[1] The dispute concerns a tussle between Tan Sri Musa Aman ("Tan Sri Musa") and Datuk Seri Shafie Apdal ("Datuk Seri Shafie") for the position of Chief Minister of Sabah as a result of the defection of several State Assemblymen after the constituent seat results of the 14th General Election ("GE-14") were announced by the Election Commission ("EC").

[2] There were two applications before us, namely Application No: 08(f)-497-12-2019(S) filed by Tan Sri Musa and the other by Datuk Jahid @ Noordin Jahim ("Datuk Jahid") in Application No: 08(f)-503-12-2019(S). The 1st respondent in Application No: 08(f)-497-12-2019(S) is the Tuan Yang Terutama Yang di-Pertua Negeri of Sabah ("TYT") whilst the 2nd respondent was, at all material times, the Chief Minister of Sabah.

[3] The applications by Tan Sri Musa and Datuk Jahid were made pursuant to s 96 of the Courts of Judicature Act 1964 ("the CJA") for leave to appeal

against the decision of the Court of Appeal dismissing their claims following its decision to uphold the respondents' preliminary objection that their appeals were not competent because the appeals had become academic.

[4] At the commencement of the hearing before us, it was agreed by the parties that the outcome of Tan Sri Musa's application in Application No: 08(f)-497-12-2019(S) would apply to Datuk Jahid's application. Given the agreement between the parties, we proceeded to deal only with Tan Sri Musa's application. After hearing arguments by both parties, my learned sister Justice Zabariah Mohd Yusof FCJ and I allowed the application while our learned brother Justice Mohd Zawawi Salleh FCJ dissented. These are our grounds for allowing Tan Sri Musa's application for leave.

The Material Facts

[5] The material facts are not in dispute and they are as follows. Tan Sri Musa is the Assemblyman for the State constituency of N42 Sungai Sibuga. He was the leader of Barisan Nasional Sabah ("BN-Sabah") and at all material times its State Liaison Chief. Before the GE-14, BN-Sabah comprised eight political parties and they were:

(a) United Malays National Organisation ("UMNO");

(b) Parti Bersatu Sabah ("PBS");

(c) United Pasokmomogun Kadazandusun Murut Organisation ("UPKO");

(d) Liberal Democratic Party ("LDP");

(e) Parti Bersatu Rakyat Sabah ("PBRS");

(f) Malaysian Chinese Association ("MCA");

(g) Parti Gerakan Rakyat Malaysia ("Gerakan"); and

(h) Malaysian Indian Congress ("MIC").

[6] Datuk Seri Shafie is presently the caretaker Chief Minister of Sabah following the dissolution of the State Legislative Assembly on 30 July 2020. He is also the Assemblyman for the State constituency of N53 Senallang and President of Parti Warisan Sabah ("Warisan"). He led another coalition made up of Warisan and the following political grouping:

(a) The Democratic Action Party ("DAP"); and

(b) The Parti Keadilan Rakyat ("PKR").

[7] The other political party involved in this political turmoil is Parti Solidariti Tanah Airku ("STAR") which is led by Datuk Jefferey Kitingan. The party was, before the GE-14, not aligned to either BN-Sabah or Warisan.

[8] For context and to appreciate the constitutional importance of the matter in issue, we set out below the chronology of events leading up to the present application by Tan Sri Musa:

7 April 2018 The Parliament of Malaysia was dissolved to pave way for the GE-14. The Sabah State Legislative Assembly was also dissolved. The EC fixed nominations to take place on 28 April 2018 and for polling on 9 May 2018. For the State of Sabah, the GE-14 meant the election of sixty (60) members of the State Legislative Assembly.

28 April 2018 Nomination day.

9 May 2018 Polling day. At 9.00pm the results for the Sabah constituent seats were announced as follows:

(a) BN-Sabah won 29 seats including Tan Sri Musa's constituency of N42 Sungai Sibuga.

(b) Datuk Seri Shafie's coalition also won 29 seats with Warisan winning 21 seats, DAP 6 seats and PKR 2 seats.

(c) STAR won 2 seats.

Soon after the results for the constituent seats were announced by the EC, STAR which won two seats and which was not aligned to either BN-Sabah or the Warisan coalition, declared its support for the formation of a coalition government with BN-Sabah. This move by STAR resulted in a simple majority of 31 seats out of 60 seats for BN-Sabah, effectively giving Tan Sri Musa the command of the confidence of the majority of the State Legislative Assembly, *albeit* by a mere 1 seat majority.

10 May 2018 At about 11.00pm Tan Sri Musa was sworn in as Chief Minister by the TYT pursuant to art 6(3) and (7) of the Sabah Constitution. The swearing in was witnessed by the Chief Judge of Sabah and Sarawak ("CJSS") in the presence of the State Secretary ("SS"), the State Attorney-General ("SAG") and other dignitaries, Government officials and invited guests.

Immediately after Tan Sri Musa was sworn in as the Chief Minister, the TYT acting on the advice of Tan

Sri Musa as the Chief Minister swore in the State Cabinet. This was done pursuant to art 6(1), (2) and (3) of the Sabah Constitution. This ceremony was witnessed by the CJSS in the presence of the SS, the SAG and other dignitaries, Government officials and invited guests.

After the swearing in of the State Cabinet, Tan Sri Musa handed to the TYT six (6) Instruments of Appointment for the appointment of six (6) additional nominated members of the State Legislative Assembly and advised the TYT to execute the same pursuant to art 14(1)(c) of the Sabah Constitution. However the TYT refused to do so.

11 May 2018 In the afternoon of 11 May 2018, the TYT received six (6) statutory declarations from six (6) BN-Sabah elected assemblymen each declaring and pledging their support for Datuk Seri Shafie to be appointed as the Chief Minister;

12 May 2018 At about 10.05am Tan Sri Musa was summoned to the Istana by the TYT. He was asked to resign as Chief Minister. Tan Sri Musa refused and urged the TYT to execute the Instruments of Appointment for the appointment of the six (6) additional nominated members of the State Legislative Assembly. It was alleged by Tan Sri Musa that the TYT told him: "Whether you resign or not, I am going to swear in Shafie as Chief Minister at 9.00pm tonight".

Tan Sri Musa said he did not offer, tender or otherwise indicate his resignation as Chief Minister, nor did he request for a dissolution of the State Legislative Assembly.

On the same night at about 9.00pm the TYT swore in Datuk Seri Shafie as the new Chief Minister of Sabah. This was done pursuant to art 6(3) read together with art 10(2)(a) of the Sabah Constitution.

The letter by the TYT informing Tan Sri Musa that he had ceased to command the confidence of the majority was prepared. The gist of the letter presupposed that Tan Sri Musa must tender his resignation including the resignation of his Cabinet members pursuant to art 7(1) of the Sabah Constitution.

14 May 2018 The letter that was prepared on 12 May 2018 was served on Tan Sri Musa's representative-cum secretary, Effendi Mohd Sunon. The delay in serving the letter was due to the fact that 12 May 2018 was a Saturday and Tan Sri Musa was not reacheable at the material time.

15 May 2018 The TYT interviewed six (6) members of the State Legislative Assembly who stated by way of statutory declaration that they had switched allegiance from Tan Sri Musa to Datuk Seri Shafie. The TYT did not interview or seek the views of any other member of the State Legislative Assembly to ascertain the views of a majority of the members of the House. This was also undisputed.

16 May 2018 On the advice of Datuk Seri Shafie, the TYT appointed the other members of the State Cabinet. The swearing in ceremony was witnessed by the CJSS, the State officials and invited guests. This was the status *quo* before 30 July 2020, the date on which the State Legislative Assembly was dissolved by the TYT at the request of Datuk Seri Shafie.

[9] There is no dispute and is common ground that the appointment of Tan Sri Musa as Chief Minister on 10 May 2018 was valid and in accordance with the Constitution of Sabah.

[10] Dissatisfied with the decision of the TYT to remove him from office, Tan Sri Musa filed an Originating Summons ("OS") in the High Court at Kota Kinabalu naming both the TYT and Datuk Seri Shafie as defendants. His challenge was mainly directed at the TYT's exercise of power to appoint Datuk Seri Shafie as the new Chief Minister of Sabah to replace him. He sought, amongst others, a declaration that he was still the lawful Chief Minister of Sabah.

[11] Prior to the hearing of the OS, Datuk Seri Shafie filed an application to strike out the OS on the ground that it was academic. The application was premised on Datuk Seri Shafie's assertion that he had by then commanded the confidence of the majority of the members of the State Legislative Assembly. He asserted that even if Tan Sri Musa were to succeed in his claim, it would not change anything as he would still remain as Chief Minister.

[12] The application to strike out Tan Sri Musa's OS was dismissed by the learned High Court judge on 9 July 2018. No appeal was filed against this decision, which means Datuk Seri Shafie accepted, as a matter of law, that Tan Sri Musa's claim was not academic. It was, in the circumstances, contended by learned counsel for Tan Sri Musa that the issue of Tan Sri Musa's claim being

academic has now become *res judicata* and should not be reopened for further argument: *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 1 MLRA 611.

[13] Having decided that Tan Sri Musa's claim was not academic, the learned judge proceeded to hear the merits of the claim, addressing two principal issues and four subsidiary issues, in the following order:

Principal issues

(a) Whether the TYT was acting within his constitutional power when he purportedly dismissed Tan Sri Musa as the Chief Minister;

(b) Whether the TYT's appointment of Datuk Seri Shafie as the Chief Minister was *ultra vires*, null and void.

Subsidiary issues

(c) Whether Tan Sri Musa had lost the confidence of the majority of the State Legislative Assembly;

(d) Whether a vote of no confidence was the only way to determine that Tan Sri Musa had lost the confidence of the majority of the members of the State Legislative Assembly;

(e) Whether there was extraneous resource in support of Tan Sri Musa's loss of confidence of the majority of the members of the State Legislative Assembly; and

(f) Whether, by Tan Sri Musa's refusal to resign, he was deemed to have vacated the Chief Minister's post.

[14] The learned judge answered the subsidiary issues first, as follows:

(i) No single political party won the majority in the GE-14 such that its leader could command a majority of the State Legislative Assembly. When six assemblymen defected from BN-Sabah to Datuk Seri Shafie's side, Tan Sri Musa lost the confidence of the majority of the State Legislative Assembly;

(ii) It is clear from the case of *Dato' Seri Ir Hj Mohammad Nizar Jamaluddin v. Dato' Seri Dr Zambry Abdul Kadir* [2012] 6 MLRA 259 that there is no mandatory requirement for a vote of no confidence to be taken in the State Legislative Assembly before a Chief Minister can be said to have lost the confidence of the State Legislative Assembly and art 7(1) of the Sabah Constitution contains no express requirement for such a vote;

(iii) The TYT was entitled to rely on the statutory declarations of the six assemblymen as extraneous evidence of Tan Sri Musa's

loss of support, despite the fact that Tan Sri Musa did not admit losing the confidence of the State Legislative Assembly and did not request for its dissolution;

(iv) Article 7(1) of the State Constitution required Tan Sri Musa under those circumstances to tender the resignation of his Cabinet, which included his own resignation as Chief Minister. In the absence of resignation, Tan Sri Musa was deemed to have resigned with his Cabinet.

[15] In view of her answers to the subsidiary issues, the learned judge expectedly answered the two principal issues in the following manner:

(i) The question whether the TYT was acting within his constitutional power when he dismissed Tan Sri Musa as the Chief Minister did not arise because Tan Sri Musa was deemed to have vacated his post when he refused to resign following the loss of confidence; and

(ii) The appointment of Datuk Seri Shafie as Chief Minister was therefore lawful under art 6(3) of the Sabah Constitution.

Basis Of The High Court's Decision

[16] Two things are clear from the decision of the High Court. First, in pith and substance it was premised on the fact that since Tan Sri Musa refused to resign when asked to do so by the TYT, he was deemed to have resigned. Secondly, it was premised on the legal position as decided by this court in *Dato' Seri Ir Hj Mohammad Nizar Jamaluddin v. Dato' Seri Dr Zambry Abdul Kadir* [2012] 6 MLRA 259 ("the Perak case") that there is no mandatory requirement for a vote of no confidence to be taken in the State Legislative Assembly before a Chief Minister can be said to have lost the confidence of the majority of the House.

[17] Aggrieved by the decision of the High Court, Tan Sri Musa appealed to the Court of Appeal. Before the appeal was set down for hearing, learned counsel for Datuk Seri Shafie on 20 November 2019 filed a notice of motion pursuant to r 7 of the Rules of the Court of Appeal 1994 ("RCA") to move the court for an order to admit a letter issued by the Secretary of the State Assembly and five (5) attached pages containing the names of all the assemblymen to be used as fresh evidence at the hearing of the appeal.

[18] The application was supported by the affidavit in support sworn and affirmed by learned counsel for Datuk Seri Shafie and not by the defecting six assemblymen themselves. There was no affidavit in opposition filed by Tan Sri Musa. The court was notified that at the hearing of the application, counsel for Tan Sri Musa would oppose the application based solely on points of law and procedure.

[19] The objection raised by learned counsel for Tan Sri Musa was that the deponent of the affidavit in support of Datuk Seri Shafie's application had no personal knowledge of the contents of the affidavit. It was therefore submitted that the affidavit in support was defective.

[20] The objection was overruled by the Court of Appeal, citing *Ladd v. Marshall* [1954] 3 All ER 745; [1954] 1 WLR 148 and pursuant to s 69 of the CJA and r 7 of the RCA. The affidavit in support was in the event admitted in evidence to support Datuk Seri Shafie's contention that in any case Tan Sri Musa had lost the confidence of the majority of the members of the State Legislative Assembly by the time he filed his appeal to the Court of Appeal.

[21] Three days before the hearing of the appeal, learned counsel for Datuk Seri Shafie filed a preliminary objection to Tan Sri Musa's appeal on the basis that the appeal was incompetent and had become academic and must be dismissed forthwith. It was the same ground that had been ventilated before and dismissed by the High Court in respect of which no appeal was filed by Datuk Seri Shafie.

[22] On the hearing date, the Court of Appeal proceeded to hear both the preliminary objection and Tan Sri Musa's appeal. The Court of Appeal, citing the decision of this court in *Bar Council Malaysia v. Tun Dato' Seri Arifin Zakaria & Ors And Another Appeal; Persatuan Peguam-Peguam Muslim Malaysia (Intervener)* [2018] 5 MLRA 345, upheld the preliminary objection by Datuk Seri Shafie and accordingly dismissed Tan Sri Musa's appeal *in limine* without hearing the merits. Thus the merits of Tan Sri Musa's appeal did not see the light of day, nipped in the bud so to speak.

[23] In upholding the preliminary objection raised by Datuk Seri Shafie, the Court of Appeal acknowledged that it is not unusual for the court to hear cases which may have become academic or hypothetical, but declined to do so, citing *R v. Secretary of State for the Home Department ex parte Salem* [1999] AC 450. In that case the House of Lords through Lord Slynn of Hadley had said at p 456:

> "The House of Lords had a discretion to hear an appeal in a cause where there is an issue involving a public authority even though by the time the appeal was due to be heard there was no longer a lis to be decided directly affecting the rights and obligations of the parties as between themselves. However, the House would exercise that discretion with caution and would not hear appeals if the result would be academic between the parties unless there was good reason in the public interest for doing so, eg where there was a discrete point of statutory construction not involving detailed consideration of the facts and where it was likely that the issue would have to be resolved in the near future because a large number of similar cases existed or were anticipated."

[24] What is clear from *ex parte Salem* is that an appellate court is not precluded from hearing appeals that have become academic, subject of course to the caveat that the discretion must be exercised with caution, and not merely

because it is in the public interest to do so. The House of Lords made it clear that the court will exercise the discretion if there is a good reason in the public interest for doing so and "where it was likely that the issue would have to be resolved in the near future because a large number of similar cases existed or were anticipated".

[25] In the present case there is, in our view, every reason in the public interest to hear the merits of Tan Sri Musa's appeal instead of casting it aside as being academic. It is public knowledge that this is not the first time that the people of Sabah had to face this kind of political turmoil and constitutional crisis, and it will not be the last if not finally resolved by this court.

[26] The political and constitutional crisis arising from the removal of the Menteri Besar of Perak as reported in *Dato' Seri Ir Hj Mohammad Nizar Jamaluddin v. Dato' Seri Dr Zambry Abdul Kadir* [2012] 6 MLRA 259 serves as another reminder that the issues raised by Tan Sri Musa in the leave questions need to be resolved by this court.

[27] The decision of the House of Lords in *ex parte Salem* was referred to by this court in *Spind Malaysia Sdn Bhd v. Justrade Marketing Sdn Bhd & Ors* [2018] 2 MLRA 281, where it was observed as follows:

> "[44] The general rule is not without exceptions. In *R v. Secretary of State for the Home Department, ex parte Salem* [1999] AC 450 (at 456), the House of Lords exercised discretion to hear an appeal on a question of public law, even though by the time of the appeal there is no longer an issue which will directly affect the rights and obligations of the parties. More recently, in the case of *Kerajaan Malaysia v. Mudek Sdn Bhd* [2017] 6 MLRA 25 (at [2]), the fact that the parties have reached an amicable settlement before the appeal was heard did not preclude this court from answering the questions posed, in order to correct and clarify the position of the law stated in the judgment of the Court of Appeal."

[28] In the present case, the view that the Court of Appeal took was that the case "does not appear" to fall within the *ex parte Salem* exception for public law matters. Thus, according to the Court of Appeal, although the issue relating to the question who is the rightful Chief Minister of Sabah as raised in the projected appeal was significant, it was not of outstanding public importance because even if the projected appeal were to succeed, "which is at best from the plaintiff's point of view", that would not make Tan Sri Musa the Chief Minister again as he does not meet the threshold under art 6(3) of the Sabah Constitution.

[29] With the greatest of respect to the learned judges of the Court of Appeal, a determination of how the Sabah Constitution should work in the peculiar circumstances of the case, in particular the exercise by the TYT of his constitutional power to remove a sitting and validly appointed Chief Minister, is far more important than the question whether Tan Sri Musa can be re-instated as the Chief Minister if he were to succeed in his claim.

[30] For the same reason, it is of lesser importance that the 15th State Legislative Assembly has been dissolved on 30 July 2020 as confirmed by the Honourable State Attorney-General and that the election for the 16th State Legislative Assembly is well under way. Of greater importance is for the apex court to determine if the position of the law as interpreted by the High Court is the correct position of the law. This is to avoid a recurrence of the constitutional crisis, which has the potential to repeat itself after the results of the coming 16th State Legislative Assembly election are announced by the EC.

[31] The questions of law raised by Tan Sri Musa are of grave constitutional importance and have far reaching implications not only for the State of Sabah but for the whole country and ought to be resolved once and for all by this court, being the apex court, to provide certainty and cannot be left hanging.

[32] The people of Sabah have an inalienable right to know whether the removal of Tan Sri Musa as the validly appointed Chief Minister was done validly, lawfully and in accordance with the Constitution of Sabah, the highest law in the land below the wind. As it is, there is no closure yet on the issue as to whether Tan Sri Musa had been lawfully removed from office.

Principles Governing Leave To Appeal

[33] Appeals to this court from the Court of Appeal are governed by s 96 of the CJA, which reads as follows:

> "Conditions of appeal
>
> 96. Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court-
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or
>
> (b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision."

[34] This court in *Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor & Other Applications* [2012] 5 MLRA 618 had further expounded s 96(a) of the CJA and the principles governing the granting of leave in the following terms:

> "1) Basic prerequisites:
>
> i) that leave to appeal must be against the decision of the Court of Appeal;
>
> ii) that the cause or matter must have been decided by the High Court exercising its original jurisdiction;

iii) that the question must involve a question of law which is of general principle not previously decided by the Federal Court (first limb of s 96(a); and

iv) that the issue to be appealed against has been decided by the Court of Appeal.

2) As a rule leave will normally not be granted in interlocutory appeals.

3) Whether there has been a consistent judicial opinion which may be uniformly wrong eg, *Adorna Properties Sdn Bhd v. Boonsom Boonyanit*.

4) Whether there is a dissenting judgment in the Court of Appeal.

5) Leave to appeal against interpretation of statutes will not be given unless it is shown that such interpretation is of public importance.

6) That leave will not normally be given:

i. where it merely involves interpretation of an agreement unless this Court is satisfied it is for the benefit of the trade or industry concerned;

ii. the answer to the question is not abstract, academic or hypothetical;

iii. either or both parties are not interested in the result of the appeal;

iv. that on first impression the appeal may or may not be successful; if it will inevitably fail leave will not be granted."

[35] It will be noted that Terengganu Forest Products was not a decision on para (b) of s 96, which for ease of reference we reproduce again below:

"(b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision."

[36] This paragraph may be prayed together with or in the alternative to para (a) of s 96. The word "Constitution" is defined by s 3 of the CJA to mean "the Constitution of Malaysia". However, there is no indication in the CJA as to whether the "Constitution of Malaysia" encompasses the Federal Constitution and the State Constitutions or is only limited to the Federal Constitution.

[37] It was submitted, and we agree with learned counsel for Tan Sri Musa, that if Parliament had intended to limit s 96(b) of the CJA to questions relating to the Federal Constitution only, then it would have used the term "Federal Constitution" instead of "Constitution", or it would have made its intention clear by expressly excluding the State Constitutions from its ambit.

[38] Such clear intention of the legislature can be found in the Interpretation Acts 1948 and 1967 which expressly excludes the Constitution of the States from the definition of "Federal Constitution". In any event, we take the view that if at all there is any ambiguity in the word "Constitution" in s 96(b) of the CJA, the ambiguity must be resolved in favour of interpreting it to include

within its embrace the Constitution of the States. This interpretation will not in our view do violence to s 96(b) of the CJA.

[39] There is virtually no case law on the principles to be applied in an application for leave pursuant to s 96(b) of the CJA. Richard Malanjum CJSS (later CJ) in *Titular Roman Catholic Archbishop Of Kuala Lumpur v. Menteri Dalam Negeri & Ors* [2014] 4 MLRA 205 observed in his dissenting judgment:

> "As regards s 96(b) there is hardly any judgment of this court that dealt with it. But it should be given the same approach as s 96(a), *inter alia*, to consider **"the degree of public importance and on the necessity of the legal issue being finally resolved by the Federal Court."** Its application is not impeded by any other rules other than as discussed in *Kredin Sdn Bhd (supra)*."
>
> [Emphasis Added]

[40] From the wording of s 96(b) of the CJA, it is clear that leave of this court is required but the provision contains no restriction on leave questions when the matter relates to the effect of any provision of the constitution. For this reason, we are of the view that leave under s 96(b) of the CJA will be granted where the issues raised are of public importance which ought to be finally settled by this court to provide certainty on the application of the Federal or State Constitutions and not limited only to matters relating to the Federal Constitution. In our view the 10 questions posed by Tan Sri Musa in his leave application fall squarely within the ambit of s 96(b) of the CJA as they relate to the effect of the provisions of the Sabah Constitution.

[41] We need to stress the point that the constitutional questions that Tan Sri Musa posed for the determination of this court are of great public importance and cannot be dismissed on the basis that they are, allegedly, academic. It is of paramount importance that issues relating to the constitutionality of the TYT's exercise of power to remove a sitting Chief Minister must be decided once and for all by this court. This is certainly not a case which, on first impression will inevitably fail if leave is granted.

[42] This court in *Dato' Seri Ir Hj Mohammad Nizar Jamaluddin v. Dato' Seri Dr Zambry Abdul Kadir* [2012] 6 MLRA 259 recognised the importance of the matter before the court when it heard and determined an appeal relating to the constitutionality of the dismissal of Dato' Seri Nizar as Menteri Besar of Perak although it was clear that Dato' Seri Nizar's claim had become academic due to his loss of majority in the Perak State Legislative Assembly.

[43] In that case, neither the Court of Appeal nor this court took the position that Dato' Seri Nizar's appeal had become academic given his loss of majority in the State Legislative Assembly. We are mindful of the fact that in that case the issue of Dato' Seri Nizar's claim being academic was not raised but we do not think that this court in deciding to hear the appeal by Dato' Seri Nizar was blissfully unaware of the principle laid down in *ex parte Salem*. The principle is too trite and too familiar to have been missed by this Court.

Whether Leave Questions Fall Under Section 96(a)?

[44] In the written submissions filed on behalf of Datuk Seri Shafie before the leave questions were reduced from 17 to the present 10 questions, it was argued that Tan Sri Musa had failed to fulfill the requisite conditions for the grant of leave under s 96(a) of the CJA as the proposed leave questions are not questions that form part of the decision of the Court of Appeal. It was pointed out that the Court of Appeal did not decide on any of the issues or questions raised in the proposed questions and the issues were never argued before the Court of Appeal.

[45] Item (1)(iv) of the guideline that this court laid down in *Terengganu Forest Products* stipulates that the issue to be appealed against must have been decided by the Court of Appeal. In the present case however, there was no decision on any of the constitutional issues raised by Tan Sri Musa and hence according to learned counsel, do not fulfill the prerequisites of s 96(a) of the CJA.

[46] Does this mean that none of the 10 leave questions posed by Tan Sri Musa for this court's determination come within the ambit of s 96(a) of the CJA, given that they have no relation to the decision of the Court of Appeal, which was to dismiss Tan Sri Musa's appeal on the sole ground that his appeal had become academic?

[47] We do not think so. That could not have been the consequence that this court in *Terengganu Forest Products* intended by including Item (1)(iv) in the guideline because that would be to deny Tan Sri Musa access to this court, not because he did not raise the issues in the High Court and in the Court of Appeal but because the Court of Appeal decided not to deal with them.

[48] There is no ambiguity in s 96 of the CJA. What is appealable to this court with leave is a decision from any judgment of the Court of Appeal "in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction". Clearly, Tan Sri Musa's appeal was "in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction" and all issues relating to the leave questions were canvassed before the High Court but were rejected by the learned judge.

[49] The "academic" point raised by Datuk Seri Shafie in the High Court cannot count as a factor to be considered in granting leave under s 96 of the CJA as it had in fact been decided against him by the High Court, which as we mentioned, was not appealed against, but which became the sole basis for the Court of Appeal to dismiss Tan Sri Musa's claim.

[50] As for the merits of Tan Sri Musa's proposed appeal to this court, we are of the view that the 10 constitutional questions that he posed for this court's determination warrant a full and mature argument in a full hearing before this Court. We reproduce below the proposed questions of law:

(1) Whether art 7(1) read with art 10(4) and art 10(2) of the Sabah Constitution confers a discretion on the TYT to:

(a) determine whether a validly appointed Chief Minister ceases to command the confidence of the majority of the members of the Legislative Assembly; and/or

(b) dismiss the validly appointed Chief Minister.

(2) If the answer to Question (1) is in the affirmative, whether such discretion is only exercisable by the TYT upon a concession by the Chief Minister that he had ceased to command the confidence of the majority of the members of the State Legislative Assembly.

(3) If the answer to Question (1) is in the affirmative, whether such discretion is only exercisable by the TYT if the Chief Minister has first been given the opportunity to request for a dissolution of the State Legislative Assembly under art 7(1) of the Sabah Constitution.

(4) Whether in the absence of a concession or a request for dissolution, a vote of no confidence in the Legislative Assembly is nonetheless required as it was in *Stephen Kalong Ningkan v. Tun Abang Haji Openg And Tawi Sli* [1966] 1 MLRA 456 before the TYT can treat the Chief Minister as having resigned under art 7(1) of the Sabah Constitution.

(5) Whether a vote of confidence as opposed to a vote of no confidence in the Legislative Assembly for the purported new Chief Minister is constitutional pursuant to art 6(3) of the Sabah Constitution.

(6) Whether an invalid/unlawful appointment of a Chief Minister under art 6(3) of the Sabah Constitution can be legitimised through a subsequent show of confidence by the majority of members of the Legislative Assembly.

(7) Whether the TYT had properly exercised his constitutional discretion pursuant to art 14(1)(c) read with art 10 of the Sabah Constitution in failing and/or refusing to appoint the six (6) nominated members selected by the then validly appointed Chief Minister.

(8) Whether in determining the Chief Minister who had ceased to command the confidence of the majority of the members of the State Legislative Assembly as provided under art 7(1) of the Sabah Constitution and for fulfilling the test laid down in *Dato' Seri Ir Hj Mohammad Nizar Jamaluddin v. Dato' Seri Dr Zambry Abdul Kadir* [2012] 6 MLRA 259, is it necessary that the loss of confidence is properly established when either:

(a) the TYT has been informed by the Chief Minister that he ceases to command the confidence of the majority of the members of the State Legislative Assembly; or

(b) the TYT has incontrovertible evidence of the votes of a majority of members of the Legislative Assembly that the Chief minister no longer enjoys the support of the aforesaid; or

(c) both of the foregoing.

(9) Is a change in support of a small number of members who were part of the previous majority of members of the State Legislative Assembly sufficient evidence that a Chief Minister has ceased to command the confidence of the majority where the majority as a whole has not been consulted.

(10) Whether the decision in *Dato' Seri Ir Hj Mohammad Nizar Jamaluddin v. Dato' Seri Dr Zambry Abdul Kadir* [2012] 6 MLRA 259 is no longer good law because the Federal Court did not decline to determine the said appeal on the basis that the appellant in that case no longer had a majority in the State Legislative Assembly.

[51] Given the importance of the issues raised in the proposed leave questions, we do not think it can be denied that the following points of argument advanced by learned counsel for Tan Sri Musa in support of the leave application merit a second and closer look by this court, having been rejected by the High Court and not considered by the Court of Appeal in view of its decision to dismiss the appeal on the sole ground that it had become academic:

(a) Article 7(1) read with art 10(4) and (2) of the Sabah Constitution only confers a discretion on the TYT to determine whether a validly appointed Chief Minister ceases to command the confidence of the majority of the members of the State Legislative Assembly and/or dismiss a validly appointed Chief Minister to dissolve the State Legislative Assembly or he concedes the same;

(b) The TYT's discretion is only exercisable upon a request by an incumbent Chief Minister to dissolve the State Legislative Assembly by virtue of art 7(1) of the Sabah Constitution. Without the said request, there is no mandatory requirement for an incumbent Chief Minister to tender his resignation or that of the members of his Cabinet;

(c) Article 10(4) of the Sabah Constitution expressly curtails the discretion of the TYT to matters enumerated in art 10(2). The words "and no other" employed in the said art 10(4) serves to enforce the point that save for matters contained in art 10(2), the TYT may not exercise any personal discretion;

(d) By acting the way he did, the TYT had circumvented the constitutional process in dismissing Tan Sri Musa as Chief Minister without first affording an opportunity to Tan Sri Musa to request for a dissolution of the State Legislative Assembly;

(e) The TYT had acted beyond the scope of his constitutional authority in immediately dismissing Tan Sri Musa when it is provided by art 10(2)(b) of the Sabah Constitution that his discretion is confined to "withholding of consent to a request for the dissolution of the Legislative Assembly";

(f) There is an express limitation imposed on the exercise of discretion by the TYT and it would be meaningless for the Sabah Constitution to prescribe such limitation if the TYT is free, at his pleasure, to disregard it: *Attorney-General v. De Keyser's Royal Hotel, Limited* [1920] AC 508 where the House of Lords held:

> "It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions upon, and to attach conditions to, the exercise by the Crown of the powers conferred by statute, if the Crown were free at its pleasure to disregard these provisions."

(g) The proper constitutional process would be for Tan Sri Musa to request for a dissolution of the State Legislative Assembly and should the TYT withhold his consent for such dissolution, only then shall Tan Sri Musa tender his resignation;

(h) In the present case, the TYT ignored this pertinent constitutional process and rushed to determine that Tan Sri Musa had ceased to command the confidence of the majority of the State Legislative Assembly. The TYT had dismissed Tan Sri Musa with extraordinary speed, effectively dismissing him within approximately 48 hours;

(i) The present case stands in contrast to the Perak case where the Menteri Besar of Perak made a request to dissolve the Assembly pursuant to art 16(6) of the Perak Constitution which was subsequently denied by the Sultan of Perak. Only after this request was made and denied could the Menteri Besar of Perak be dismissed by the Sultan from his position;

(j) Unlike the Sultan of Perak, who is a Malay hereditary Ruler, the office of the TYT of Sabah is a creation of the Sabah Constitution. On this basis, the TYT may only exercise such discretion or powers which are specifically enumerated under the Sabah Constitution. Unlike a Sultan, the TYT does not possess any reserve power germane to that of a hereditary Ruler;

(k) Tan Sri Musa was denied the opportunity to request for a dissolution of the State Legislative Assembly, which he

was constitutionally entitled to under art 7(1) of the Sabah Constitution. His dismissal was therefore premature and/or *ultra vires* the Sabah Constitution;

(l) In *Stephen Kalong Ningkan v. Tun Abang Haji Openg And Tawi Sli* [1966] 1 MLRA 456, the former Federal Court declined to follow *Adegbenro v. Akintola and Another* [1963] 2 All ER 544, observing that "by the provisions of the Sarawak Constitution, lack of confidence may be demonstrated only by a vote in Council Negri". Article 7(1) of the Sabah Constitution is *in pari materia* with art 7(1) of the Sarawak Constitution;

(m) The *Ningkan* case has not been overruled by the Perak case and still represents the law in Malaysia;

(n) A determination by this court is essential to ascertain whether the position in the Sabah Constitution, which is fundamentally different from the Perak Constitution, remains as per the position in the *Ningkan* case;

(o) The act of the 44 State assemblymen (inclusive of the 6 nominated members) in passing a vote of confidence in support of Datuk Seri Shafie during the first sitting of the State Legislative Assembly on 11 June 2018 was unconstitutional. The High Court had ruled that the 6 nominated members would not be taken into account in determining whether the Chief Minister had commanded the majority of the State Legislative Assembly but the Court of Appeal had wrongly taken into account the 6 additional nominated members in making such determination;

(p) The majority of the members of the State Legislative Assembly could not legitimise an invalid/unlawful appointment of Datuk Seri Shafie by way of a show of confidence in the State Legislative Assembly;

(q) The Court of Appeal erred in attributing too much weight to the invalid vote of confidence and in doing so erred in declining to decide whether the TYT had properly exercised his powers under art 7(1) of the Sabah Constitution and whether his purported appointment of Datuk Seri Shafie as Chief Minister was lawful pursuant to art 6(3);

(r) By holding that the appeal was academic, the Court of Appeal adopted a convenient solution without addressing the fundamental constitutional questions before it. The effect of the Court of Appeal's decision is to legitimise the unconstitutional appointment of Datuk Seri Shafie as the Chief Minister and ascribe to the TYT powers that he does not have under the Sabah Constitution;

(s) Where the appointment of Datuk Seri Shafie as Chief Minister was unconstitutional, it is liable to be struck down: *Mwamba and Another v. Attorney General of Zambia* [1993] 3 LRC 166 where the Supreme Court of Zambia held:

> "For the purposes of the arguments related to disqualification under the Constitution, we have visited some authorities and they show that in many Commonwealth countries with a written constitution like ours, the courts have not shrunk from reviewing the validity of an appointment made by a Head of State in the exercise of an executive discretion and where a person not qualified or disqualified has been appointed, the appointment is liable to be struck down: see, for example, *Re Nori's Application* [1989] LRC (Const) 10, a decision from the Solomon Islands. In that case, the court declared as invalid the appointment of the Governor-General by Her Majesty the Queen as the Head of State because he still held a public office and was, therefore, disqualified at the time of his election and appointment to this political office, contrary to the relevant provision of the Constitution."

(t) It is clear from art 10 of the Sabah Constitution that the TYT shall act in accordance with the advice of Tan Sri Musa as the lawfully appointed Chief Minister;

(u) The TYT, by refusing to carry out his constitutional duties and obligations had caused both political and constitutional instability in Sabah by refusing and failing to execute the Instruments of Appointment of the six nominated members. To prevent such future crisis from recurring, a determination by this Court is essential;

(v) The extraneous sources relied on by the TYT could not be said to be properly established for it was premised on statements of a minority of the members of the State Legislative Assembly. Further, these same minority members had contradicted their similar and recent declarations of support for Tan Sri Musa;

(w) The imposition of a requirement for extraneous evidence to be "properly established" is to guard against the risks as elucidated by the Privy Council in *Adegbenro v. Akintola & Another*;

(x) For there to have been incontrovertible evidence of votes indicating a change in the minority, the TYT should have consulted once again all members of the State Legislative Assembly or a majority thereof before swearing in Datuk Seri Shafie as Chief Minister;

(y) The TYT ought to have refrained from undertaking the role of a political umpire between different political factions which would, ultimately, have led to a politicisation of the office, contrary to the purpose and constitutionality of the same: *Shivraj Singh Chouhan*

and Others v. Speaker Madhya Pradesh Legislative Assembly and Others [2020] 4 MLJ 207 where the Supreme Court of India held:

> "The authority of the Governor is not one to be exercised in aid of a political dispensation which considers an elected government of the day to be a political opponent. The precise reason underlying the entrustment of the authority to the Governor is the ability to stand above political conflicts and with the experience of statesmanship, to wheel the authority in a manner which sub-serves and does not detract from the strength and resilience of democratically elected legislatures and the governments in the states who are accountable to them. To act contrary to this mandate would result in the realisation of the worst fears of the constitutional framers who were cognisant that the office of the Governor could potentially derail democratically elected governments but nonetheless placed trust in future generations to ensure that government of the people, by the people and for the people would not be denuded by those who were designed to act as its sentinels."

(z) The *ratio decidendi* in the Perak case requires further refinement and elaboration in view of the distinguishing factors present in the instant case. As it stands, the Perak case does not address the questions of law posed in the present case. Any attempt to directly read across and apply the Perak case to the instant case would only serve to ignore the constitutional differences between the two and in doing so, ignore the uniqueness and distinctiveness of the Sabah Constitution.

[52] Before we depart from the case, we just want to say that in considering Tan Sri Musa's application for leave, we have reminded ourselves that the courts are the guardians of the Sabah Constitution. As such it is only proper in our view that Tan Sri Musa's application be granted in order for this final court to finally determine whether the TYT had acted within the confines of his constitutional powers when he removed a sitting and validly appointed Chief Minister from office. In this regard, what the Supreme Court of India said in *State of Rajasthan & Ors v. Union of India* [1977] AIR 1361 is pertinent to the point:

> "The court cannot and should not shirk this responsibility, because it has sworn the oath of allegiance to the Constitution and is also accountable to the people of this Country. There are indeed numerous decisions of this court where constitutional issues have been adjudicated upon though enmeshed in questions of religious tenets, social practices, economic doctrines or educational policies. The court has in these cases adjudicated not upon the social, religious, economic or other issues, but solely on the constitutional questions brought before it and in doing so, the court has not been deterred by the fact that these constitutional questions may have such overtones or facets. We cannot, therefore, decline to examine whether there is any constitutional violation involved in the President doing that he threatens to do, merely on the facile ground that the question is political in tone, colour or complexion."

[53] It was for all the reasons aforesaid that my learned sister Justice Zabariah Mohd Yusof FCJ and I decided to allow the leave applications by Tan Sri Musa and Datuk Jahid.

Mohd Zawawi Salleh FCJ (Minority):

Preliminary Objection

[54] I regret that I am unable to agree with the reasoning and decision of the majority on preliminary objection raised by the respondents.

[55] I decided to uphold the preliminary objection. These are my reasons.

Application

[56] There are two applications before the Court, namely the applicant's application for leave to appeal to the Federal Court ("the leave to appeal") pursuant to s 96(a) and (b) of the Courts Judicature Act 1964 ("CJA") and an application by way of Notice Motion ("the related application") pursuant to s 80 of the CJA which essentially seeking to the stop the respondents from acting to effect a dissolution of the Sabah State Assembly and therefore maintaining the status *quo*.

[57] The leave to appeal was fixed for hearing on 26 August 2020. On 24 August 2020, learned counsel for the 1st respondent in Civil Application No: 08(f)-497-12-2019(S) and the 2nd and 3rd respondents in Civil Appeal Application No: 08(f)-503-12-2019(S) wrote to the Deputy Registrar of the Federal Court informing that at commencement of the hearing of the leave to appeal, the respondents would raise a preliminary objection that the matter is academic, hypothetical and abstract in view of the dissolution of the 15th State Legislative Assembly on 30 July 2020.

[58] This court resolved to entertain the Notice of Preliminary Objection because the court must satisfy itself that the leave to appeal is not academic, hypothetical and abstract and it would have a practical effect on the parties. There is no doubt that the decision of preliminary objection would most likely decide the fate of the leave to appeal.

[59] The applicant opposed the Notice of Preliminary Objection. The nub of the applicant's submission is that the leave appeal is not academic and that even if it is, this court should exercise its discretion to hear the application nonetheless. According to learned counsel, the points at issue are of immense public interest and have the ability to transcend the immediate fact of the present case. A public interest would be served by having this court to pronounce on the proper construction of arts 6(3), 10(2), 10(4) and 14(1)(c) of the Sabah Constitution which involved the exercise of powers by Tuan Yang Terutama Yang di-Pertua Negeri ("TYT") in appointing the Chief Minister ("CM").

Background To The Dispute

[60] The background facts giving rise to the leave to appeal have been fully set out in the judgments of the High Court, the Court of Appeal and submissions of the parties.

[61] Suffice to say the dispute concerns the tussle between Tan Sri Musa Aman ("the applicant") and Datuk Seri Shafie Bin Haji Apdal ("the 2nd respondent"), for the position of CM in the State of Sabah as a result of the defection of certain State assemblymen. TYT, Tun Datuk Seri Haji Panglima Haji Juhar Haji Mahiruddin, is the 1st respondent.

[62] The applicant is the assemblyman for the N42 Sungai Sibuga constituency. He is the leader of Barisan Nasional Sabah ("BN-Sabah") and at all material times, its State's Liaison Chief. BN-Sabah comprises of eight (8) political parties which are:

(a) United Malay National Organization ("UMNO");

(b) Parti Bersatu Sabah ("PBS");

(c) United Pasokmomogun Kadazandusun Murut Organization ("UPKO");

(d) Liberal Democratic Party ("LDP");

(e) Parti Bersatu Rakyat Sabah ("PBRS");

(f) Malaysian Chinese Association ("MCA");

(g) Parti Gerakan Rakyat Malaysia ("Gerakan"); and

(h) Malaysian Indian Congress ("MIC").

[63] The 2nd respondent is the State Assemblyman for N53 Senallang Constituency. He is the President of Parti Warisan Sabah ("PWS"). The 2nd respondent leads another coalition ("Shafie's Coalition") comprising PWS and the following political groups:

(a) Democratic Action Party ("DAP"); and

(b) Parti Keadilan Rakyat ("PKR").

[64] Another party involved in this political turmoil is Parti Solidariti Tanah Airku ("STAR/Solidariti") led by Datuk Jefferey Kitingan.

[65] The following table summarises the key events leading up to the present dispute.

The Dissolution Of Parliament, The 14th General Election ("GE-14") And Its Results

Dates	Events
7.4.2018	Parliament of Malaysia was dissolved. The Sabah State Legislative Assembly was also dissolved to pave way for the holding of the GE-14. The Election Commission ("EC") fixed nominations to take place on the 28 April 2018 and for polling on 9 May 2018. For Sabah, GE-14 meant the election of sixty (60) members of its assembly.
28.4.2018	Nomination day.
9.5.2018	Polling day. On 9.00pm the results for the Sabah constituent seats were announced as follows: a. BN-Sabah won twenty-nine (29) seats including the applicant's constituency of N42 Sungai Sibuga; b. Shafie's Coalition won twenty-nine (29) seats with PWS winning twenty-one (21) seats, DAP six (6) seats and PKR two (2) seats; and c. STAR/Solidariti won two (2) seats. Soon after the result was announced by the EC, STAR/ Solidariti declared its support for the formation of a coalition Government with BN-Sabah. This coalition cumulatively resulted in a simple majority of thirty-one (31) seats out of sixty (60) seats. Effectively, the applicant was said to command the confidence of the majority of the Sabah State Legislative Assembly.
10.5.2018	At about 11.00pm, the applicant was sworn in as the CM by the TYT pursuant to art 6(3) and (7) of the Sabah Constitution. The swearing in was witnessed by the Chief Judge of Sabah and Sarawak ("CJSS") in the presence of the State Secretary, the State Attorney-General ("the State AG") and other dignitaries, Government officials and invited guests. Immediately after the applicant was sworn in as the CM, the TYT acting on the advice of the applicant as the CM swore in the State Cabinet. This was made pursuant to art 6(1), (2) and (3) of the Sabah Constitution. This ceremony was witnessed by the CJSS, in the presence of the State Secretary, the State AG and other dignitaries, Government officials and invited guests.

	After the swearing in of the State Cabinet, the applicant handed to the TYT, six (6) Instruments of Appointment ("the instruments") for the appointment of six (6) additional nominated members of the Sabah State Legislative Assembly and advised the TYT to execute the same pursuant to Articles 14(1)(c) of the Sabah Constitution. However, this was refused by the TYT. The applicant contended that the refusal was contrary to art 10(1), (1A) and (4) of the Sabah Constitution.

The Defection Leading To The *Status Quo*

Dates	Events
12.5.2018	At about 10.05 am, the applicant was summoned to the Istana by the TYT. He was asked to resign as CM. However, the applicant refused and urged the TYT to execute the instruments. It was alleged by the applicant that the TYT told him these words: "Whether you resign or not, I am going to swear in Shafie, ie the 2nd respondent as CM at 9.00 pm tonight". The applicant alleged that he did not offer, tender or otherwise indicated his resignation as CM nor did he request for the dissolution of the Sabah State Legislative Assembly. On the same night, at about 9.00 pm the 2nd respondent was sworn in as the CM by the TYT. This was made pursuant to Article 6(3) read together with Article 10(2)(a) of the Sabah Constitution. The TYT prepared a letter informing the applicant that he had ceased to command the confidence of the majority ("the letter"). The gist of the letter presupposed that the applicant must tender his resignation including the resignation of his Cabinet members pursuant to Article 7(1) of the Sabah Constitution.
14.5.2018	The letter was served on the applicant's representative cum Secretary, Effendi Mohd Sunon. The delay in serving the letter was due to 12 May 2018 being a Saturday and the applicant was unreachable at the material time.

16.5.2018	Upon the advice of the 2nd respondent, the TYT appointed the other members of the State Cabinet. The swearing in ceremonies were witnessed by the CJSS, the State officials and invited guests. This is the *status quo* before 30 July 2020, the date of which the State Legislative Assembly was dissolved by TYT at the request of the 2nd respondent.

History Of Proceedings

At The High Court

[66] The present suit began at the High Court where the applicant filed an originating summons against the respondents challenging mainly the 1st respondent's exercise of powers to appoint the 2nd respondent as the new CM of Sabah. The applicant sought a declaration that he is still the lawful CM of Sabah. There was another suit filed by Datuk Jahid @ Noordin bin Jahim ("Datuk Jahid") challenging the constitutionality of the appointment of the 2nd respondent as the CM and his dismissal as Ministry of Local Government & Housing. Both suits were heard together.

[67] The learned High Court Judge ("the learned judge") addressed six (6) principal and subsidiary issues namely:

Principal issues

(a) Whether the TYT was acting within his constitutional power when he purportedly dismissed the applicant as CM; and

(b) Whether the TYT's appointment of the 2nd respondent as the CM is *ultra vires*, null and void.

Subsidiary issues

(a) Whether the applicant had lost the confidence of the majority of the Sabah State Legislative Assembly;

(b) Whether a vote of no-confidence is the only way to determine that the applicant has lost the confidence of the majority of the members of the Sabah State Legislative Assembly;

(c) Whether there is extraneous resource in support of the applicant's loss of confidence of the majority of the members of the Sabah State Legislative Assembly; and

(d) Whether, by the applicant's refusal to resign, he is deemed to have vacated the CM post.

[68] The learned judge, Yew Jen Kie J (as she then was), answered the subsidiary issues as follows:

(a) No single political party won the majority in the GE-14 such that its leader could command a majority of the State Legislative Assembly. When six (6) assemblymen defected from BN-Sabah, the applicant lost the confidence of the majority of the Sabah State Legislative Assembly (see paras 29-30 of the High Court Judgment).

(b) It was clear from the case of *Dato' Seri Ir Hj Mohammad Nizar Jamaluddin v. Dato' Seri Dr Zambry Abdul Kadir* [2012] 6 MLRA 259 ("the Perak case") that there was no mandatory requirement of a vote of no confidence in the State Legislative Assembly before a Chief Minister can said to have lost the confidence of the State Assembly and art 7(1) of the State Constitution contains no express requirement of such a vote (see paras 57 and 59 of the High Court's Judgment).

(c) The 1st respondent was entitled to rely on the Statutory Declarations ("SD") from the six (6) assemblymen as extraneous evidence of the applicant's loss of support, despite the fact that the applicant did not admit losing the confidence of the State Assembly and did not request a dissolution (see paras 66 and 67 of the High Court's Judgment).

(d) Article 7(1) of the State Constitution required the applicant under those circumstances to tender resignation of his Cabinet, which included his own resignation as CM. In the absence of a resignation, the applicant was deemed to have resigned with his Cabinet (see paras 69 and 88 of the High Court's Judgment).

[69] Premised on the answers to the subsidiary issues, the learned judge answered the principal issues as follows:

(a) This issue did not arise because the applicant was deemed to have vacated his post when he refused to resign following the loss of confidence (see paras 70 and 71 of the High Court's Judgment); and

(b) The appointment of the 2nd respondent as CM was therefore lawful under art 6(3) of the State Constitution.

[70] Cumulatively, the answers given by the learned judge led to the dismissal of the suit.

Before The Court Of Appeal

[71] Dissatisfied with the decision of the learned judge, the applicant and Datuk Jahid then appealed to the Court of Appeal. The appeals were set for hearing on 28 November 2019. However, on 20 November 2019, learned counsel for the 2nd respondent filed a Notice of Motion pursuant to r 7 of the

Rules of Court of Appeal 1994 ("RCA 1994") to move the court for an order to admit a letter issued by the Secretary of the Sabah State Legislative Assembly and five (5) attached pages containing the names of all the assemblymen ("the Senarai") as evidence in the appeals (see para 40 of the Court of Appeal Judgment).

[72] The application was supported by an affidavit in support sworn and affirmed by counsel for the 2nd respondent. There was no affidavit in opposition filed neither by the applicant nor Datuk Jahid. During the hearing of the application, the court was told that learned counsel for both the appellants would only oppose the application premised on points of law and procedures. Learned counsel for the 1st respondent raised an objection from the Bar that the deponent of the affidavit in support did not show that he had personal knowledge of the Senarai. Therefore, he submitted the affidavit in support was defective (see paras 41-42 of the Court of Appeal Judgment).

[73] On the issue of admitting fresh evidence, the Court of Appeal admitted the Senarai citing the case of *Ladd v. Marshall* [1954] 3 All ER 745; [1954] 1 WLR 148 and pursuant to s 69 of the CJA 1964 and r 7 of RCA 1994 (see paras 44-51 of the Court of Appeal Judgment).

[74] However, three days before the hearing of the appeal, ie on 25 November 2019, counsel for the 2nd respondent filed a Notice of Preliminary Objection on the basis that the appeals were incompetent and had become academic and the appeals were to be dismissed forthwith. The notice was also issued to the applicant. On the date of the hearing, the Court of Appeal heard both appeals and the notice altogether (see paras 54-56 of the Court of Appeal Judgment).

[75] The Court of Appeal, citing the most recent case of the apex court in *Bar Council Malaysia v. Tun Dato' Seri Arifin Zakaria & Ors And Another Appeal; Persatuan Peguam-Peguam Muslim Malaysia (Intervener)* [2018] 5 MLRA 345, upheld the preliminary objection and dismissed both appeals with cost without considering the merits.

Decision

[76] I have carefully considered the submissions from all parties and perused the record of the leave to appeal. I am of the view that this court should upheld the preliminary objection raised by the respondents.

[77] It is trite law that a case before court may at some point in the litigation process lose an element of justiciability and become academic. It may occur when controversy initially existing at the time of the action was filed is no longer "live" due to subsequent acts or events, so that an adjudication of the case or declaration on the issue would not serve any useful purpose or have any practical effect.

[78] The general rule is equally applicable to questions of constitutional law. In matters concerning constitutional construction, the Court must decide on concrete questions that have actually arisen in order to avoid injustice to future cases (see *Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor* [2020] 2 MLRA 1; and *Gin Poh Holdings Sdn Bhd v. The Government Of The State Of Penang & Ors* [2018] 2 MLRA 547).

[79] The court does not determine abstract, academic or hypothetical questions of law. It is not the function of the court to decide such questions that do not have any impact on the rights and obligations of the parties. The Court would not engage in a fruitless exercise. If the question is wholly ineffectual to the parties, it would be unnecessary and pointless but also inexpedient to decide and the court would properly decline to do so (see *Tan Eng Hong v. Attorney-General* [2012] SGCA 45; *Sun Life Assurance Co of Canada v. Fervis* [1944] 1 All ER 469; HOL at 470 per Viscount Simon LC; *Ainsbury v. Millington* [1987] 1 All ER 929 at 930-931 per Lord Bridge; *Loknath v. Birendra Kumar Sahu* [1974] AIR SC 505; SC per Bhagwati J; *Datuk Syed Kechik Syed Mohamed & Anor v. The Board Of Trustees Of The Sabah Foundation & Ors* [1998] 2 MLRA 277 per Edgar Joseph Jr FCJ; and *Bar Council Malaysia v. Tun Dato' Seri Arifin Zakaria & Ors And Another Appeal; Persatuan Peguam-Peguam Muslim Malaysia (Intervener)* [2018] 5 MLRA 345).

[80] In *Mills v. Green*, 159 US 651, 653 (1895), the Supreme Court of United States stated:

> "The duty of this Court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue."

[81] In the present case, it is common ground that on 30 July 2020, supervening event had occurred when the Sabah State Legislative Assembly was dissolved by the 1st respondent following the request/advice of the 2nd respondent. The 1st respondent signed the Proclamation of Dissolution of the Sabah State Legislative Assembly pursuant to art 21(2) of the State Constitution. The proclamation was subsequently gazetted on the same day and EC was duly notified of the same. On 17 August 2020, the EC held a special meeting in relation to the 16th General Election for Sabah State Legislative Assembly and had announced the following important dates:

(a) Nomination of candidate on 12 September 2020;

(b) Early voters votes on 27 August 2020; and

(c) General Election on 26 September 2020.

[82] The EC has fixed a campaign period of fourteen (14) days which commences after the nomination of candidates and ends on 25 September 2020 at 11.59pm.

[83] On 4 August 2020, the applicant had filed an application for leave for judicial review, *inter alia*, seeking to review the following constitutional matters:

(a) The written request dated 29 July 2020 purportedly to dissolve the Sabah State Legislative Assembly; and

(b) The Proclamation dated 30 July 2020 purportedly dissolving the State Legislative Assembly.

[84] On 21 August 2020, the High Court dismissed the said application for Leave for judicial review. Dissatisfied with the decision of High Court, the applicant filed an appeal to the Court of Appeal.

[85] It is trite law that the decision of the High Court remains valid, enforceable and binding on the parties until it is set aside by the Court of Appeal.

[86] The above supervening events had make it impossible for this court, if it should decide the case in favour of the applicant, to grant him any practical or effectual legal relief.

[87] Learned counsel for the applicant submitted that even if this court is to conclude that the matter has become academic by virtue of the dissolution of the Sabah State Legislative Assembly, the public interest exception to the academic doctrine applies here and this court should not allow the erroneous decision of the courts below to stand.

[88] Learned counsel for the applicant urged this court to exercise its discretion to deal with the leave to appeal on merit because the matter raises discrete issues of huge public importance that would have an effect on the future matters. Learned counsel for the applicant advanced a number of arguments in support of his submission:

(i) As the guardian of the Constitution, the court should answer questions which not only concern the circumvention of the constitutional process by the TYT in the dismissal of the applicant but also pertaining to the legality of the appointment of the 2nd respondent and correspondingly the legitimacy of his Government (Questions i, ii, iii);

(ii) Based on *Stephen Kalong Ningkan v. Tun Abang Haji Openg And Tawi Sli* [1966] 1 MLRA 456 and the clearly distinguishable features in *Adegbenro v. Akintola & Anor* [1963] 3 All ER 544, in the absence of a concession or a request for dissolution by the CM, a vote of no confidence in the State Legislative Assembly is nonetheless required before the CM ceases to hold his position. A determination by the Federal Court is essential to ascertain whether the position in the Sabah Constitution which is fundamentally different from the Perak Constitution, remains as per the position stated in *Stephen Kalong Ningkan (supra)* (Question iv);

(iii) It is a question of general principle decided for the first time, a question of importance and of public advantage concerning the effect and meaning of a constitutional provision as to whether the members of the State Legislative Assembly are permitted to usurp the role of the TYT expressly stated under art 6(3) of the Sabah Constitution. This is the constitutional law pertaining to the separation of powers and the duties of the TYT, the CM and the State Legislative Assembly provided under the Sabah Constitution (Question v);

(iv) Whether an act which is contrary to the Sabah Constitution can be legitimised by a vote, resolution of by the acclamation of the members of the State Legislative Assembly. The necessity for the court's determination of the constitutionality of the 2nd respondent position as CM is pertinent to ensure that public confidence in democratic processes is preserved and political and democratic rights are respected. Therefore, it is of public advantage (Question vi);

(v) The refusal of the TYT to carry out his constitutional duties and obligations based on the advice of the CM had caused both political and constitutional instability in Sabah. To prevent such future crisis from recurring, a determination and decision of this Court is essential. Therefore, it is of public advantage (Question vii);

(vi) The questions amongst others also concern the proper exercise of constitutional powers by the TYT in determining whether the CM ceases to command the confidence of the majority of the members of the State Legislative Assembly. The appointment of CM must be based on incontrovertible evidence of votes garnered from extraneous sources properly established. The sudden change in support of a minority of the members does not amount to incontrovertible evidence as required by the Perak case (Question viii and ix); and

(vii) Whether the decision in the Perak case is no longer good law because the Federal Court did not decline to determine the said appeal on the basis that the appeal was 'academic' notwithstanding the act that the appellant in that case no longer had a majority in the State Legislative Assembly. Affirming the Court of Appeal decision would be depriving the people of Sabah and the applicant of a proper constitutional determination of the validity of the incumbent government which is a matter of paramount importance to the public and the rule of law (Question x).

[89] I accept the proposition that the exclusion of academic questions from determination is not based on a lack of jurisdiction but rather represents a

form of judicial restraint. Therefore, this court retains a discretion to hear an academic case where it is the interest of justice to do so.

Should This Court Exercise Its Discretion To Hear An Academic Leave To Appeal?

[90] I am not persuaded that this court should exercise its discretion to hear the leave to appeal on merit. A prerequisite for the exercise of discretion is that any decision, pronouncement or order which this court may make would have some practical effect on the parties. This court should not consider and decide issues raised in the leave to appeal where it clearly appears that there has been a change of circumstances after judgment was delivered by the trial court which would make any decision, pronouncement or order that has no consequence to the contending parties.

[91] The court may entertain an academic issue which relates to public law if involves:

(i) A discrete point of statutory construction;

(ii) A situation where it does not involve detailed considerations of fact; and

(iii) A situation where there is a large number of similar cases which need to be resolved.

[92] In exercising its jurisdiction on constitutional construction, the court is bound by two rules. First, it must "never anticipate a question of constitutional law in advance of the necessity of deciding it" and second, it must "never formulate a rule of constitutional law broader that is required by the precise facts to which it is to be applied". (See *Datuk Seri Anwar Ibrahim (supra)*; and *Liverpool, New York and Philadelphia SS Co v. Commissioners of Emigration* [1885] 113 US 33 at p 39).

[93] It might be suggested that the applicant's proposed leave questions are likely to recur and are thus amenable to adjudication even though they might otherwise be considered academic.

[94] In my view, any conclusion with regard to recurring of the questions in the future is highly speculative. The applicant's proposed leave questions do not involve discrete statutory construction nor give rise to a situation where a large number of cases involving the same issues have to be resolved. It is not at all obvious that a decision in this case would serve to resolve future disputes. Each case is unique and must be decided on its own facts.

[95] It is an established principle of law that not every constitutional points raised by a litigant can be heard by the courts, especially if constitutional points are related to a political controversy which has become academic by subsequent development. A court hearing a matter will not readily accept an

invitation to adjudicate on issues which such a nature that the decision sought will have no practical effect or result. It matters not that the points at issue involve construction of the provision of Constitution.

[96] In *Glawer v. Raettig* [2007] EWCA CW 1560, the Court of Appeal in England dealt with the issue of academic appeals. Sir Anthony Clarke giving the judgment of the court said:

> "24. I turn to the principles. We were referred to a number of cases. The theme which runs through them all is that neither the Court of Appeal not the House of Lords will ordinarily entertain academic appeals. So for example in *Sun Life Assurance v. Jervis* [1994] AC 111, the House of Lords declined to hear an appeal which was concerned with the respondent's rights under an endowment policy. The issue was one of construction. The terms on which leave to appeal were given had an effect that the respondent had no financial interest in the appeal and the only (arguable) public interest would have been to clarify an issue of interpretation for other, hypothetical cases. Viscount Simon LC said the House was not interested in 'expressing its view on a (mere) legal conundrum' (see p 113). But he also made it clear (see p 115) that he was not 'lay(ing) down a rule for all cases'."

[97] Learned counsel for the applicant submitted that the "academic point" has been decided against the respondents by the High Court and there was no appeal lodged against the decision. Therefore, the issue ought not to be taken as a factor whether the application for leave to appeal under s 96 of the CJA should be granted or otherwise.

[98] With respect, in the circumstances of the present case, I disagreed. It is pertinent to note that even if the matter is not academic at the time when the action was filed, it may be considered academic at the time the decision on the matter is to be made at the Court of Appeal or Federal Court.

[99] The Court of Appeal can take additional evidence to determine if the matter has become academic on appeal and the Court of Appeal may also raise the question *sua sponte*.

[100] In my view, the Court of Appeal was correct in upholding the preliminary objection raised by the respondents. The preliminary objection was anchored on a letter issued by the Secretary of the State Legislative Assembly and five (5) attached pages containing the name of all the assemblymen. It is beyond argument that the applicant had lost the confident of majority of the members of the State Legislative Assembly by the time his appeal reached the Court of Appeal.

[101] In exercising the discretion whether to hear the leave application to appeal on merit, I am mindful that it should be exercised with caution and that where the matter has become academic between the parties, the matter should not be heard by the court unless there is some good reason for so doing. As stated by Lord Slynn in *R v. SSHD, ex parte Salem* [1999] 1 AC 450 at pp 456G - 457B:

> "The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[102] Further, the proposed seventeen (17) leave questions or issues of law are not the issues or questions that form part of the decision of the Court of Appeal which had dismissed the applicant's appeal on the ground of being incompetent and academic. As such, the merits or the substantive constitutional issues cannot procedurally form part of the proposed leave questions.

[103] Section 96(a) of the CJA set out the requirements in respect of appeals from the Court of Appeal to the Federal Court. One of the requirements is that the appeal must be against the decision of the Court of Appeal (see *Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor & Other Applications* [2012] 5 MLRA 618).

[104] There has been no decision or judgment by the Court of Appeal on any of the issues or questions contained in the proposed questions 1 to 4 and 8 to 17. The questions were never argued before the Court of Appeal and hence do not fulfil the prerequisites of s 96(a) of the CJA. Although there was a decision or judgment of the Court of Appeal relating to proposed Questions 5, 6 and 7 but this was specifically in respect of the admission of fresh evidence. This decision was made purely on different Notice of Motion which subsequently could not form part of the decision of the Court of Appeal which had dismissed the applicant's appeal. Even if the applicant wished to appeal against the said decision on the admission of fresh evidence, the period of appeal of one month pursuant to s 97 of the CJA had lapsed.

Conclusion

[105] While this court retains a residual discretion to hear and decide a case that is academic, I take the general rule to be that a court should refrain from doing so without good reason. In the present case, it would not be in the interest of justice for this court to determine an academic case where the decision has no practical effect on the parties. The applicant cannot be re-instated as the CM of Sabah even if he succeeds in his claim.

[106] The tussle between the applicant and the 2nd respondent for the position of CM Sabah is not of current public interest because the Sabah State Legislative Assembly had been dissolved on 30 July 2020. Any interest previously generated regarding the appointment of the applicant as the CM has become academic by virtue of the dissolution of the Sabah State Legislative Assembly. The supervening events had overtaken the matter after the judgment delivered by the High Court. Therefore, any further consideration of the case would not produce any judgment having any legal effect. The current interest

is on the coming 16th Sabah State Legislative Assembly. The matter is wholly academic, exciting no interest to the public but a historical one. The parties ought to put the matter to bed.

[107] For all the above reasons, I find that the leave to appeal is academic, hypothetical and abstract and there is no compelling justification to exercise the discretion to hear its merit. Consequently, I upheld the preliminary objection with costs. The leave to appeal is hereby struck out. So ordered.

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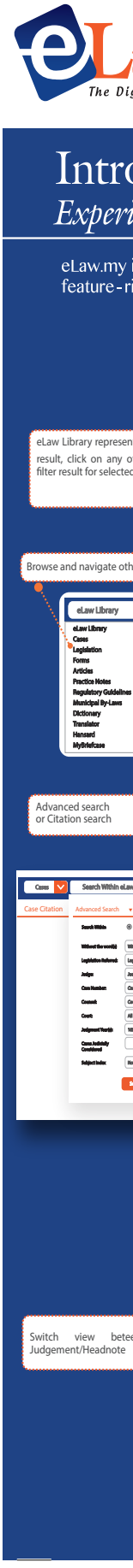

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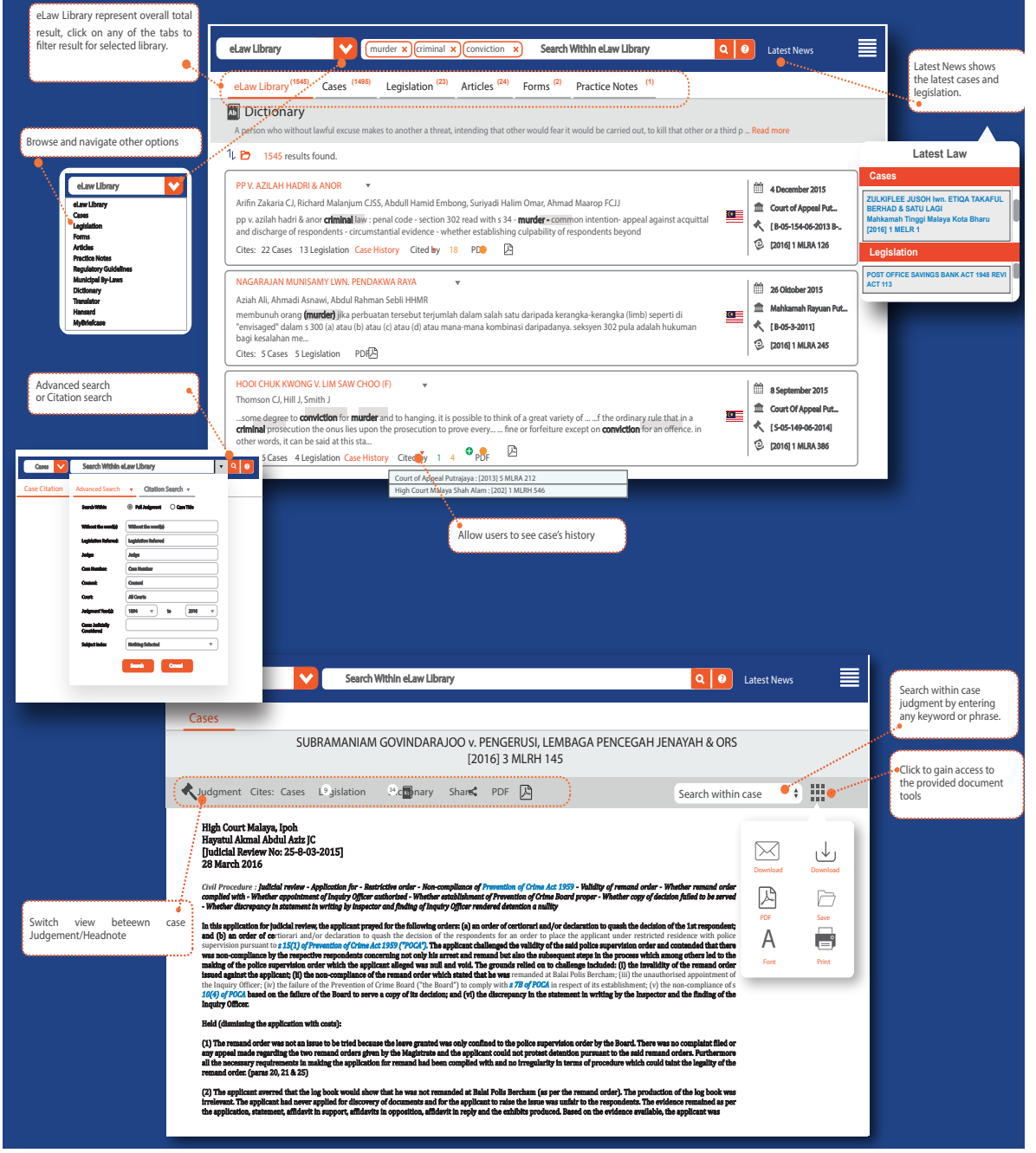

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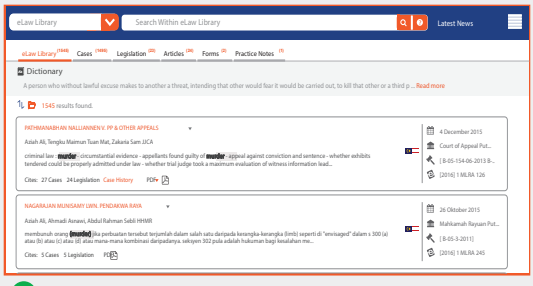

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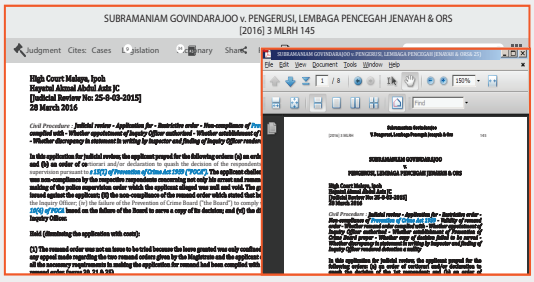

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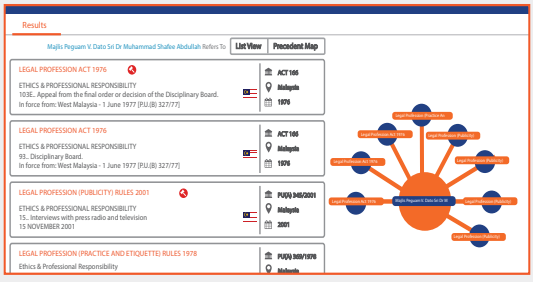

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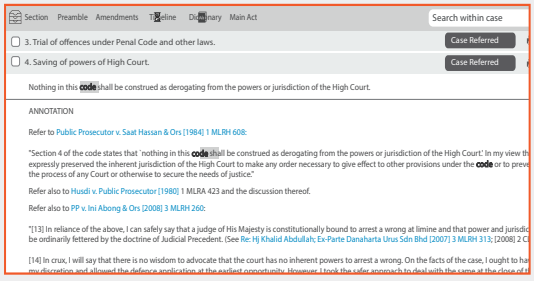

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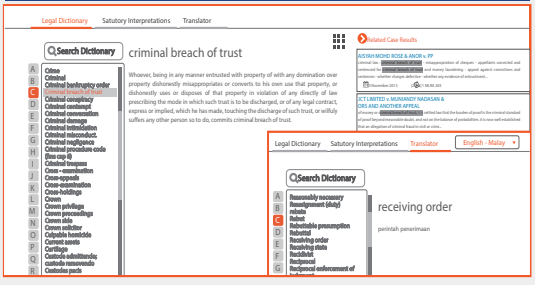

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