

## JUDGMENT Express

[2023] 1 MLRA

Siti Zabedah Kasim & Anor  
v. ACP Noor Dellhan Yahaya & Ors

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### SITI ZABEDAH KASIM & ANOR v. ACP NOOR DELLHAN YAHAYA & ORS

High Court Malaya, Kuala Lumpur  
Wan Ahmad Farid Wan Salleh J  
[Judicial Review Application No: WA-25-248-04-2022]  
28 September 2022

**Civil Procedure:** *Judgment and orders — Application for judicial review and certiorari to quash prohibition order made pursuant to s 98 Criminal Procedure Code (“CPC”) — Whether prohibition order open to challenge in collateral proceeding — Whether s 98(4) CPC must be exhausted first before prohibition order might be challenged in collateral proceeding*

On 20 January 2022 an order (“prohibition order”) was issued by the Magistrate’s Court in Criminal Application No: WA-89-84-01-2022 upon the application of the 1st respondent to prevent any person from having an assembly in three particular locations in Kuala Lumpur. Consequent thereto, a peaceful assembly (“rally”) that was to be held by a civil movement, “Tangkap Azam Baki” to protest against the purported inaction of the Malaysian Anti-Corruption Commission Advisory Board (“MACC Board”) to act on complaints against the MACC Chief Commissioner Tan Sri Azam bin Baki, had to be relocated to a new location. The 1st applicant, who had intended to attend the rally, which she eventually did, claimed that the respondents had unlawfully restrained her from exercising her fundamental rights. The applicants thus applied for leave for judicial review and an order of *certiorari* to quash the prohibition order. The applicants also sought *inter alia* a declaration that the said order was unlawful, null and void and in the alternative, that the 1st respondent’s action in applying for the same was unlawful. The application was objected to by the Attorney General on the grounds *inter alia* that the prohibition order was not amenable to judicial review, and that the applicants ought to have first applied to the Magistrate’s Court for it to exercise its power under s 98(4) of the Criminal Procedure Code (“CPC”) to rescind or alter the said order. The applicants conceded that the Magistrate’s Court could rescind or alter the prohibition order but argued that the said order could be challenged in collateral proceedings such as by way of judicial review and that the court in this instance had the power to review the said order. The issue that arose for determination in essence was whether the prohibition order made under s 98 of the CPC was open to challenge in a collateral proceeding.

**Held** (refusing the application for leave without costs):

(1) As a general rule, a prohibition order under s 98 of the CPC could not be subjected to a collateral attack at the first opportunity. A party aggrieved by such an order should first apply to the same Magistrate's Court under s 98(4) of the CPC to rescind or otherwise alter the said order on the grounds *inter alia* that the order was applied for in bad faith and was an affront to his/her constitutional right to peaceful assembly under art 10 of the Federal Constitution; and the court could either rescind or alter the said order or even refuse the application. It was at that stage, ie after s 98(4) of the CPC was exhausted that the Magistrate's Court's decision could be subjected to a collateral attack in a separate proceeding. It would be an abuse of process if an aggrieved party was allowed to override or otherwise circumvent the said provision by filing an application for leave for judicial review immediately after the prohibition order. (paras 27 & 30)

(2) A prohibition order could be challenged in a collateral proceeding provided s 98(4) of the CPC had been exhausted by the aggrieved party. Where the aggrieved party was unable to resort to s 98(4) of the CPC, an explanation must be given. The reviewing court would exercise its discretion to circumvent the said provision if the explanation given was reasonable, and in this regard, what was reasonable would depend on the facts of the particular case. (paras 32-33)

**Case(s) referred to:**

*Hassan Marsom & Ors v. Mohd Hady Ya'akop* [2018] 5 MLRA 263 (distd)

*QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 1 MLRA 516 (refd)

*R v. Hereford Magistrate's Court, Ex parte Rowlands* [1998] QB 110 (refd)

*Re Muhammad Ali Hamid* [1999] 1 MLRH 581 (distd)

*SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener)* [2022] 3 MLRA 219 (refd)

**Legislation referred to:**

Criminal Procedure Code, ss 98(4), 307, 323(2)

Drug Dependents (Treatment And Rehabilitation) Act 1983, s 6(1)

Prevention and Control of Infectious Diseases (Measures Within Infected Local Areas) (National Recovery Plan) Regulations 2021, regs 9, 10

**Counsel:**

*For the applicants: K Shanmuga (Alyyna Ng with him)*

*For the respondents: Ahmad Hanir Hambaly (Noor Atiqah Zainal Abidin & Dzul Iswari with him); AG's Chambers*



## JUDGMENT

**Wan Ahmad Farid Wan Salleh J:**

### The Background Facts

[1] Sometimes in December 2021, it was widely reported by the media that a member of the Malaysian Anti-Corruption Commission Consultation and Corruption Prevention Panel (“the MACC Panel”), Edmund Terrence Gomez (“Gomez”), had resigned. According to the report, the reason for Encik Gomez’s resignation was because of the purported inaction of the MACC Advisory Board to act on his complaints against the MACC Chief Commissioner, Tan Sri Azam bin Baki.

[2] The complaint against Tan Sri Azam was in respect of his alleged ownership of shares in a company.

[3] In a press conference made on 5 January 2022, Tan Sri Azam explained that his share account had been used by his brother to purchase stocks in the open market. On the same day, the Chairman of the MACC Advisory Board announced that the Board was satisfied with Tan Sri Azam’s explanation that he had no beneficial interest in the shares.

[4] However, the announcement of the Chairman of the MACC Advisory Board was challenged by 6 other members of the Board. In a joint statement on 8 January 2022, the 6 members of the Advisory Board distanced themselves from the Chairman’s statement.

[5] Despite the numerous statements made by various parties, including the Secretary of Dewan Rakyat, the Securities Commission and the Parliamentary Select Committee on Finance and Economy, there was no evidence that any investigation was commenced against Tan Sri Azam.

[6] Aggrieved, on 18 January 2022, a civil movement called “Tangkap Azam Baki” (Arrest Azam Baki) announced that it would be organising a peaceful assembly (“the Rally”) to protest against the alleged inaction against Tan Sri Azam.

[7] On 20 January 2022, the putative 1st respondent, ACP Noor Dellhan Yahya, obtained an order prohibiting any person from having an assembly in three locations which were Dataran Merdeka, Sogo and Masjid Jamek. The order (“Prohibition Order”) was issued by the Kuala Lumpur Magistrate’s Court vide Criminal Application No: WA-89-84-01-2022. The Prohibition Order *inter alia* states as follows:

OLEH YANG DEMIKIAN perarakan dan perhimpunan dari Kompleks Sogo, Jalan Tuanku Abdul Rahman, Kuala Lumpur dan LRT Masjid Jamek, Kuala Lumpur dalam radius satu (1) kilometer serta perhimpunan di Dataran Merdeka, Kuala Lumpur pada 22 Januari 2022 #TangkapAzamBaki Rombak SPRM adalah dengan ini dilarang, dan semua orang awam diberi amaran



tidak menyertai perarakan dan perhimpunan tersebut, tidak mengunjungi atau melawat tempat-tempat tersebut atau mengambil apa-apa bahagian dalam perhimpunan itu.

[8] However, subsequent to the issuance of the Prohibition Order, the organisers of the Rally announced that the Rally would be relocated outside the Bangsar LRT Station (“New Location”).

[9] The 1st applicant sought to attend the rally. However, the 1st applicant contended that the respondents had unlawfully restrained her from exercising her fundamental rights. In para 16 of her affidavit in support of the application for leave in encl 3 (“AIS-3”), the 1st applicant affirmed as follows:

We sought to attend the Rally. However, the respondents by their actions - including unlawfully procuring a Magistrate’s Prohibition Order (as defined below) - purporting to prevent any person from assembling at the original Rally locations, blocking roads, public transport access and pedestrian walking access in various parts of Kuala Lumpur -unlawfully restrained us from exercising our fundamental liberties to express ourselves and to gather in peaceful assembly with other Malaysians. Further, I contend that the Respondents abused or misinterpreted the Order to shut down effectively the whole of the centre of Kuala Lumpur which has had negative impact on the businesses in the area.

[10] Be that as it may, the 1st applicant eventually arrived at the Rally and participated in the same, although she had to make a detour resulting in her taking a longer route.

### The Judicial Review

[11] Aggrieved, the applicants commenced this application for leave for judicial review seeking numerous reliefs, which *inter alia* include:

- (a) A declaration that the Prohibition Order granted by the Kuala Lumpur Magistrate’s Court is unlawful and therefore null and void.
- (b) A direction in the nature of *certiorari* to quash the Prohibition Order.
- (c) Alternatively, a declaration that the actions of the putative 1st respondent in applying for the Prohibition Order were unlawful.

[12] The applicants also sought an order for a declaration that reg 9 or reg 10 or each of them of the Prevention and Control of Infectious Diseases (Measures Within Infected Local Areas) (National Recovery Plan) Regulations 2021 (“COVID-19 Regulations”) do not prohibit gatherings or processions to express political views.



### The Attorney General's Objection

[13] The Attorney General ("AG") objects to this application for leave.

[14] The grounds of the AG's objection can be summarised as follows:

- (a) The Prohibition Order is not amenable to judicial review. According to the learned SFC, the Prohibition Order was issued by the learned Magistrate pursuant to s 98 of the Criminal Procedure Code ("CPC"). The learned Senior Federal Counsel ("SFC") submitted that there is an avenue for appeal for the decision made by the learned Magistrate, which includes the Prohibition Order, under s 307 of the CPC.
- (b) There is a more appropriate alternative procedure or remedy to review the Prohibition Order. According to the learned SFC, the applicants should have made an application before the Kuala Lumpur Magistrate's Court for the Magistrate to exercise her power under s 98(4) of the ("CPC") to rescind or alter any order made under the section.
- (c) The application is frivolous and vexatious. The learned SFC contended that the Prohibition order did not cover the area where the Rally was actually being held since the Rally organiser had changed the venue to the New Location. In any event, the announcement of the New Location was made known to the applicant beforehand.

### The Applicants' Response

[15] Learned counsel for the applicants, in response, conceded that the learned Magistrate could rescind or alter the Prohibition Order. However, learned counsel submitted that the Magistrate in rescinding the Prohibition Order has no power to award damages for any losses suffered. In any event, according to learned counsel, the Prohibition Order is not subject to a revision by the High Court under s 323(2) of the CPC. It provides that:

- (2) Orders made under ss 97 and 98 are not proceedings within the meaning of this section.

[16] In short, learned counsel submitted that judicial review is permitted when an alternative remedy, in the form of a revision, is not provided for by the law. Learned counsel then referred me to *R v. Hereford Magistrate's Court, Ex parte Rowlands* [1998] QB 110 and contended that the existence of a right of appeal in the High Court does not preclude the right to apply for judicial review if a party is aggrieved on the grounds of procedural impropriety, unfairness or bias.

[17] Learned counsel further contended that this Court has the power to review the Prohibition Order. The power of the Court, according to learned counsel,



encompasses all forms of executive decisions and all decisions of inferior tribunals. My attention was drawn to the judgment of the Federal Court in *SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener)* [2022] 3 MLRA 219 FC.

[18] One instance where the decision of the Magistrate's Court is reviewable by the High Court can be seen in the application of s 6(1) of the Drug Dependents (Treatment and Rehabilitation) Act 1983 ("DDTRA"). Under the said provision, a Magistrate, upon the recommendation of a Rehabilitation Officer, can make an order for a person to undergo treatment and rehabilitation at a Rehabilitation Centre for a period of two years.

[19] Learned counsel then referred me to the judgment of Zaleha J (later FCJ) in *Re Muhammad Ali Hamid* [1999] 1 MLRH 581. It was held in that case that a Magistrate's decision under s 6 of the DDTRA is not an order pronounced by a Magistrate's Court in a criminal case or matter, nor does it fall in the category of proceedings before 'an inferior criminal court' as prescribed under s 323 of the CPC. In short, the decision of the Magistrate ordering bail of RM10,000.00, in that case, is liable to be set aside by an order of *certiorari*. However, on the facts, the Court refused to make such an order because of the wrong mode of commencement.

[20] The crux of the applicants' contention is that the Prohibition Order can be challenged in collateral proceedings such as this judicial review.

[21] Further, learned counsel submitted that the fact that there is an alternative procedure under the CPC is irrelevant. My attention was then drawn to *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 1 MLRA 516 CA. The case carries the proposition that the existence of an alternative remedy does not automatically and without more oust the court's judicial review jurisdiction. The proper approach, according to the Court of Appeal, is for the judicial review court to take into account the availability of the alternative remedy in deciding whether to exercise its discretion to grant relief on the substantive application.

### The Analysis

[22] Let me begin by analysing learned counsel for the applicants' argument that the Prohibition Order issued by the learned Magistrate can be subjected to a collateral attack. Learned counsel cited *Re Muhammad Ali*. I do not have any problem in accepting the proposition that the decision made by a Magistrate under s 6 of the DDTRA is subject to judicial review. The Magistrate's decision under s 6 of the Act is not an order pronounced by a Magistrate's Court in a criminal case. In the circumstances, it does not fall into the category of proceedings before 'an inferior criminal court' as prescribed under s 323 of the CPC for it to be amenable to a revision proceeding.





[23] I also take note of the line of authorities relied on by learned counsel for the applicant that remand orders are subject to judicial review. In short, a remand order is not subject to revision under s 323 of the CPC. It can be challenged in a collateral proceeding. This can be seen in the judgment of the Federal Court in *Hassan Marsom & Ors v. Mohd Hady Ya'akop* [2018] 5 MLRA 263 FC. It carries the proposition that remand orders can be collaterally challenged in civil proceedings even though not set aside in proceedings under the CPC.

[24] However, in this application for leave, we are not dealing with either an order under s 6 of the DDTRA or the legality of a remand order.

[25] In this application for leave for judicial review, we are dealing with a Prohibition Order made under s 98 of the CPC. First thing first, to begin with, the Prohibition Order made by the learned Magistrate is not amenable to a revision. Section 323 of the CPC specifically excludes s 98. So that is settled.

[26] But the question is, since the order made under s 98 is specifically excluded from the revisionary powers of the High Court, does it mean that it is automatically open to challenge in a collateral proceeding?

[27] My considered view on the proper steps to be taken is this.

- (a) If a party is aggrieved by the Prohibition Order, the first step that he or she must take is to apply to the same Magistrate's Court to rescind or otherwise alter the Prohibition Order under s 98(4) of the CPC, which provides:

Any Magistrate may rescind or alter any order made under this section by himself or his predecessor in office.

- (b) In short, upon being cognisant of the Prohibition Order, the aggrieved party can apply for the Magistrate to rescind the same. As alluded to by the 1st applicant in para 22.3 of her AIS-3, the aggrieved party can also contend that the putative 1st respondent applied for the Prohibition Order in bad faith. He or she can further argue that the Prohibition Order is an affront to his or her constitutional right to a peaceful assembly under art 10 of the Federal Constitution. The aggrieved party can also argue that the COVID-19 Regulations do not prohibit gatherings or processions to express political views. The list is not exhaustive.
- (c) Upon being moved by the said application, the Magistrate can either rescind or alter the Prohibition Order. She can even refuse the application.
- (d) It is at this stage, which is after s 98(4) of the CPC is exhausted, that the decision of the Magistrate can be subject to a collateral attack in a separate proceeding.



(e) In short, as a general rule, the Prohibition Order cannot be subject to a collateral attack at the first opportunity.

[28] Learned counsel for the applicants invited me to conclude that this application for leave for judicial review is not premature. After all, it is at the leave stage. Relying on *QSR Brands*, learned counsel submitted that the availability of the alternative remedy in deciding whether to exercise its discretion to grant relief should be ventilated at the substantive stage.

[29] Since the threshold for leave is low, learned counsel submitted that it should be allowed.

[30] With respect, my view is this Court has to give meaning to s 98(4) of the CPC. To allow an aggrieved party to override or otherwise circumvent s 98(4) by filing the application for leave for judicial review immediately after the Prohibition Order would be an abuse of process. Even in *QSR Brands*, the Court of Appeal held that the proper approach is for the judicial review court to take into account the availability of the alternative remedy in deciding whether to exercise its discretion to grant relief on the substantive application.

[31] Unfortunately, the 1st applicant did not state in her AIS-3 as to why she did not exhaust her right to make an application under s 98(4) of the CPC. The Court is deprived of her explanation.

[32] In conclusion, coming back to the question of whether the Prohibition Order can be challenged in a collateral proceeding, the answer is in the affirmative, provided that s 98(4) of the CPC has been exhausted first by the aggrieved party. If the aggrieved party, for some reason or the other, cannot resort to s 98(4) of the CPC, then he or she must explain it in his or her affidavit in support. If the reviewing Court finds the explanation reasonable, then it can exercise its discretion in circumventing s 98(4) of the CPC.

[33] What is reasonable will depend on the facts of each individual case.

### Findings

[34] As I indicated earlier, the exercise of the power by the Magistrate under s 98(4) of the CPC is amenable to a collateral attack in an application for judicial review. An aggrieved party must have exhausted this s 98(4) first before coming to this Court. In the absence of any credible explanation for the applicants to circumvent s 98(4), this application is frivolous, vexatious and an abuse of the process of the Court.

[35] The application for leave is refused.

[36] However, in view of the public interest generated on the issues raised herein, I am not giving any order as to costs.

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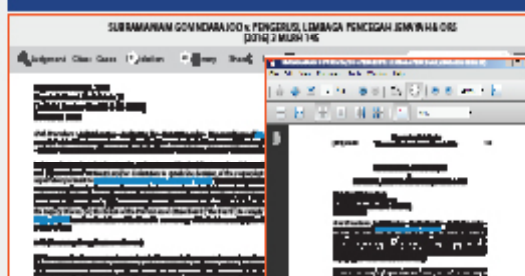


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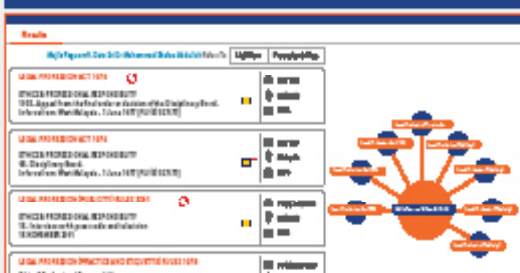
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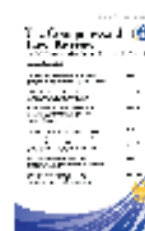
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