DATO' SRI MOHD NAJIB TUN ABD RAZAK

v.

MENTERI DALAM NEGERI & ORS

High Court Malaya, Kuala Lumpur
Amarjeet Singh Serjit Singh J
[Judicial Review No: WA-25-136-04-2024]
9 July 2024

Administrative Law: *Judicial review — Leave, application for — Mandamus — Whether hearsay evidence permitted in affidavit verifying facts relied on in application for leave to commence judicial review proceedings — Whether criteria of granting order of mandamus satisfied by applicant — Rules of Court 2012, O 53 — Specific Relief Act 1950, s 44(1)*

The applicant was a serving prisoner who had applied for a free pardon from His Majesty, the Yang Di-Pertuan Agong ("His Majesty") after exhausting his legal rights at the Federal Court. The Federal Court had affirmed the applicant's conviction and sentence of 12 years' imprisonment and a fine totalling RM210 million. The application for pardon was made pursuant to art 42 of the Federal Constitution ("FC"). It was then announced by way of a media statement that after considering the views and advice of the Pardons Board, His Majesty had granted the applicant a pardon by reducing the imprisonment term to six years and the fine to RM50 million. The order of His Majesty was produced as an exhibit by the applicant ("Main Order"). The applicant subsequently filed the instant application for leave to commence judicial review under O 53 of the Rules of Court 2012 ("ROC"), principally, for the following orders which were in the nature of *mandamus,* to compel all or any of the respondents to do the following acts: (i) to answer and/or confirm the existence of a supplementary order to the Main Order ("Addendum Order") which provided that the applicant was to serve the reduced term of imprisonment under house arrest; and (ii) to provide the applicant with a copy of the Main Order and the Addendum Order. The remaining order was a consequential order to the effect that the applicant serve the remainder of his prison sentence under house arrest at his residence in Kuala Lumpur. The Attorney General appeared and opposed the application on the grounds that the prerequisites of *mandamus* were not met and that the test for leave was not satisfied. There were two issues requiring consideration for the purpose of whether leave could be granted in the present application: (i) whether hearsay evidence was permitted in an affidavit verifying the facts relied on in an application for leave to commence judicial review proceedings; and (ii) as a separate and distinctive issue, whether the criteria of granting an order of *mandamus* had been satisfied by the applicant.

Held (dismissing the application):

(1) On the facts of the present case, the source (of the information contained in the affidavits relied upon by the applicant), Tengku Zafrul Tengku Abdul Aziz ("Tengku Zafrul"), the Minister of Investment, Trade and Industry, did not affirm any affidavit on behalf of the applicant. There was also no explanation forthcoming as to this fact from the applicant. The source was available but was not used. Instead, Tengku Zafrul had attempted to file an affidavit on his own standing (not on behalf of the applicant) but this Court denied him as the law did not allow him to do so at the leave stage. The application at the leave stage was an *ex parte* application and the test was to peruse the material produced by the applicant to see whether an arguable case had been made for the matter to proceed to a substantive stage. The Attorney General had a right of appearance to make representations at the leave stage while a putative respondent could only appear with the permission of the court and submit on the issues where the court needed assistance to determine whether there was an arguable case or not. The affidavit Tengku Zafrul had sought to file was apparently intended to point out inaccuracies in another affidavit by Ahmad Zahid Hamidi, the President of the United Malays National Organisation (UMNO) and the Deputy Prime Minister of Malaysia, and the applicant objected to the filing of the affidavit. There was no candour on the part of the applicant. The affidavits he relied on said nothing as to why Tengku Zafrul did not file an affidavit. The reliability of the hearsay evidence in the affidavits could not be judged and, therefore, no weight was placed on the said affidavits. Therefore, there could be no arguable case for further investigation at the substantive stage. (paras 46-47)

(2) It was trite that an order of *mandamus* as a relief was governed by s 44 of the Specific Relief Act 1950 ("SRA") or para 1 of the Schedule to the Courts of Judicature Act 1964. As the instant application was made under O 53 ROC by way of judicial review proceedings, the relief of *mandamus* was subject to the provisions of s 44 SRA, which was the substantive law. In the instant case, there was no provision in any written law or the FC that imposed a legal duty on the part of the Pardons Board to confirm the existence or produce any order wherein the power of pardon was exercised. It was agreed by all parties at the outset that there was no written law concerning the Pardons Board. The order of *mandamus* was a command issued by the High Court asking an authority to perform a public duty imposed upon it by law. *Mandamus* could be granted only when: (i) a legal duty was imposed on an authority, and it did not perform the same; and (ii) the applicant had a legal right to compel the performance of the public duty prescribed by law. Thus, the criteria for the granting of *mandamus* in the instant case were not satisfied. The applicant had failed to show any failure on the part of the respondents, in particular, the Pardons Board, to perform any statutory duties imposed upon them in law. For the foregoing reasons, the applicant had failed to establish the necessary requirement under s 44(1) SRA. (paras 48, 51, 52 & 53)

Case(s) referred to:

Advance Synergy Capital Sdn Bhd v. The Minister of Finance, Malaysia & Anor [2011] 1 MLRA 477 (refd)

Gobi Avedian And Another v. Attorney General And Another Appeal [2020] SGCA 77 (distd)

Jurong Shipyard Pte Ltd v. BNP Paribas [2008] 4 SLR(R) 33 (refd)

Koon Hoi Chow v. Pretam Singh [1972] 1 MLRH 497 (folld)

Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd [2008] 1 MLRA 705 (folld)

Mohamad Hassan Zakaria v. Universiti Teknologi Malaysia [2017] 6 MLRA 470 (refd)

MyTeksi Sdn Bhd & Ors v. Competition Commission [2023] 3 MLRA 697 (refd)

Peguam Negara Malaysia v. Dr Micheal Jeyakumar Devaraj [2012] 1 MLRA 157 (refd)

Savings & Investment Bank Ltd v. Gasco Investments (Netherlands) BV [1984] 1 WLR 271 (refd)

Tuan Sarip Hamid & Anor v. Patco Malaysia Berhad [1995] 1 MLRA 536 (folld)

WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 MLRA 257 (refd)

Legislation referred to:

Courts of Judicature Act 1964, Schedule, para 1

Evidence Act 1950, ss 2, 63(b), 64, 65, 114(h)

Federal Constitution, arts 37, 39, 42, Fourth Schedule

Prison Act 1995, s 43

Rules of Court (Cap 322, R 5, 2014 Rev Ed) [Sing], O 41 r 5(1), (2)

Rules of Court 2012, O 41 r 5(2), O 53 rr 3(2), 5(1), (2), 6, O 92 r 4

Specific Relief Act 1950, s 44(1)

Other(s) referred to:

Michael Supperstone & James Goudie, *Judicial Review*, p 357, para 2

MP Jain, *Administrative Law of Malaysia and Singapore,* 3rd Edn, pp 652-653

Counsel:

For the applicant: Muhammad Shafee Abdullah (Muhammad Farhan Muhammad Shafee & Wan Mohammad Arfan Wan Othman with him); M/s Shafee & Co

For the respondents: Shamsul Bolhassan (Ahmad Hanir Hambaly @ Arwi & Ainna Sherina Saipolamin with him); AG's Chambers

JUDGMENT

Amarjeet Singh Serjit Singh J:

Introduction

[1] The applicant is a serving prisoner who had applied for a free pardon from His Majesty the Yang Di-Pertuan Agong ("His Majesty") after exhausting his legal rights at the Federal Court. The Federal Court had affirmed the conviction and sentence meted out to the applicant. The sentence was for a term of 12 years' imprisonment and a fine totalling RM210 million.

[2] The application for pardon was made pursuant to art 42 of the Federal Constitution. A meeting of the Pardons Board was convened and was presided by His Majesty. On 2 February 2024, it was announced by way of a media statement that after considering the views and advice of the Pardons Board, His Majesty had on 29 January 2024 granted the applicant a pardon by reducing the imprisonment term to 6 years and the fine to RM50 million. The order of His Majesty was produced as an exhibit by the applicant. The applicant refers to this order as the 'Main Order'.

[3] On 1 April 2024, the applicant filed the instant application for leave to commence judicial review under O 53 of the Rules of Court 2012, principally, for the following orders which are in the nature of *mandamus* to compel all or any of the respondents to do the following acts:

(1) to answer and/or confirm the existence of a supplementary order to the Main Order dated the same date (ie 29 January 2024) (which the applicant refers to as the 'Addendum Order') and which order provided that the applicant was to serve the reduced term of imprisonment under house arrest (prayer 1);

(2) to provide the applicant with a copy of the Main Order and the Addendum Order dated 29 January 2024.

[4] The remaining order is a consequential order to the effect that the applicant serve the remainder of his prison sentence under house arrest at his residence in Kuala Lumpur.

[5] The Attorney General appeared and opposed the application which was heard on 17 April 2024 on the ground that the prerequisites of *mandamus* were not met and that the test for leave was not satisfied. The application was heard in chambers as required by O 53 r 3(2) of the Rules of Court 2012.

Events Following The Hearing On 17 April 2024

[6] On the date of hearing of the leave application, as required by O 53 r 3(2) of the Rules of Court 2012, the following affidavits said to have verified the facts relied on in the O 53 statement were before me: Affidavit No 1 (encl 3) and Affidavit No 2 (encl 9) affirmed by the applicant; and Affidavit No 3 (encl

13) affirmed by Ahmad Zahid bin Hamidi ("Ahmad Zahid"), the President of UMNO and the Deputy Prime Minister of Malaysia.

[7] After hearing the submissions of both parties, this Court adjourned the application to 5 June 2024 for a decision. In the meantime, parties were allowed to file further written submissions on the following issue: whether an affidavit verifying the facts relied on in the O 53 statement could contain hearsay material to verify the facts relied on in the O 53 statement. The written submissions were to be filed in this Court by the middle of May 2024.

[8] Instead of filing the written submissions, the applicant filed two further affidavits to verify the facts relied on: Affidavit No 4 (encl 26) affirmed by Wan Rosdy bin Wan Ismail, a Vice President of UMNO and also the Menteri Besar of Pahang ("Wan Rosdy") and Affidavit No 5 (encl 28) affirmed by the applicant. Both these affidavits were dated 21 May 2024 and 25 May 2024 respectively. The affidavits were followed by an application dated 25 May 2024 (encl 29) for this Court to accept and consider both the said affidavits for the purposes of the leave application. The application was opposed by the Attorney General. Suffice it to say that on 5 June 2024, I allowed the application and heard submissions by the parties. These developments resulted in the decision for leave being adjourned to 3 July 2024 for decision.

[9] One other event took place. It was this. On 25 April 2024, this Court received a letter from the solicitors of Tengku Zafrul bin Tengku Abdul Aziz ("Tengku Zafrul"), the Minister of Investment, Trade and Industry who sought leave of this Court to put in an affidavit to answer certain inaccuracies in Affidavit No 3 that was affirmed by Ahmad Zahid. On 2 May 2024, I did not allow the filing of the affidavit after hearing all parties. Tengku Zafrul had sought to file the affidavit in his personal capacity and not on behalf of the applicant. The applicant opposed the attempt by Tengku Zafrul. My reason for not allowing the filing of the affidavit was that what was attempted by Tengku Zafrul at this stage was not provided by O 53 or any other provision of the Rules of Court 2012. I found no authority and counsel who appeared for Tengku Zafrul was candid in answering that there was no authority for what his client was attempting to do and cited O 92 r 4 of the Rules of Court 2012, ie the inherent jurisdiction of the court for admitting the affidavit. I had informed counsel that Tengku Zafrul could try again if leave is granted to be heard.

[10] The importance of Tengku Zafrul's role, as seen below, is that he was the source of the information in Affidavit No 3 and Affidavit No 4 regarding the existence of the Addendum Order. Without Tengku Zafrul the applicant had nothing. Of interest, is the fact that Tengku Zafrul, being the only source of the existence of the Addendum Order, was not called upon to file any affidavit on behalf of the applicant.

[11] On 3 July 2024, after reading the O 53 statement and the affidavits filed on behalf of the applicant hearing orally and reading the written submissions filed by the parties, I dismissed the application for leave. I had given broad grounds

for my decision and informed parties that in the event of an appeal, I would provide fuller and detailed grounds. Counsel for the applicant immediately responded by stating that he had his client's instructions to appeal. Hence, this judgment.

The Facts And Grounds Pleaded

[12] In his O 53 statement, the following material facts were pleaded in respect of the Addendum Order:

(i) His Majesty had "immediately or simultaneously issued' an Addendum Order after making the Main Order;

(ii) "The Addendum Order was curiously not announced" when the Main Order was announced;

(iii) "The Addendum Order was already in existence since 29 January 2024";

(iii) "On 12 February 2024 the applicant received clear information" that His Majesty had issued the Addendum Order; and

(v) The applicant through his solicitors had sought confirmation of the Addendum Order from the respondents but received no response.

[13] The applicant then pleaded the following complaints:

(i) the failure of the 1st to the 6th respondents to answer and confirm the existence of the said Addendum Order dated 29 January 2024;

(ii) the failure to fulfil the applicant's request to be served with the said Addendum Order, and

(iii) the inaction by the 1st and 2nd respondents to execute the said Addendum Order which would place the applicant under "house arrest" instead of imprisonment.

[14] The grounds pegged on these complaints are irrationality, unreasonableness, illegality, and non-compliance with the Federal Constitution and were framed as follows:

(a) The grant of pardon be it a reprieve, respite, remission, suspension or commutation is the unfettered discretion and prerogative of His Majesty under art 42 of the Federal Constitution and not justiciable by the courts.

(b) This prerogative known as the prerogative of mercy can be exercised by His Majesty for any reasons ranging from a mere show of mercy to one of correcting an injustice that may occur in the court of law.

(c) His Majesty is "the fountain of justice" as positioned under arts 37, 39, and 42 of the Federal Constitution, and the oath of office under Part I of the Fourth Schedule of the Federal Constitution, and as the fountain of justice has absolute and unlimited powers of pardon.

(d) The command of His Majesty is not merely administrative decrees but reflections of the legal and moral authority vested in the Monarchy.

(e) The respondents' disregard to the requests of the applicant to confirm the Addendum Order constitutes a direct intrusion of the applicant's basic right as provided in the Federal Constitution and also constitutes a direct contempt of the command of His Majesty.

(f) The respondents instead of obeying the command of His Majesty have unreasonably and irrationally failed to do so without lawful cause or any cogent reason. The failure of the respondents in not responding to the queries of the applicant necessarily draw the adverse inference against them, in that the said Addendum Order does exist with the substantive content as contended by the applicant.

(g) Section 43 of the Prison Act 1995 read together with art 42 of the Federal Constitution provides that the 1st and 2nd respondents can allow the release of any prisoner on licence and on such conditions, such as "house arrest". The denial is unreasonable and/or irrational in light of the Addendum Order.

[15] Based on the above, the applicant concluded, that the leave to commence judicial review proceedings ought to be granted.

Analysis And Decision

[16] To obtain leave under O 53 r 3(2) of the Rules of Court 2012, the applicant must file an affidavit verifying the facts stated in the O 53 statement. In the instant case, not one of the affidavits with regard to the existence of the Addendum Order was within the direct knowledge of the deponents. The evidence was pure hearsay.

Affidavit No 1 And Affidavit No 2 Affirmed By The Applicant

[17] The relevant paragraphs on the existence of the Addendum Order in Affidavit No 1 were framed as follows:

(i) Paragraph 21:

> "... His Majesty... had also immediately or simultaneously issued an Addendum Order on the same day which was within the powers and jurisdiction of His Majesty... The Addendum Order curiously was not announced by the 4th, 5th, and 6th Respondents or by any of the other

> Respondents when the announcement of the Main Order only was made. It must be impressed that the Addendum Order was already in existence since 29 January 2024."

(ii) Paragraph 22:

> "On 12 February 2024 the Applicant received clear information that in addition to the Main Order dated 29 January 2024, His Majesty... had issued an Addendum Order stipulating that the Applicant be allowed to serve the reduced sentence of his imprisonment under the condition of "home arrest," instead of confinement in Kajang Prison."

While the relevant paragraph of Affidavit No 2 stated as follows:

(iii) Paragraph 4:

> "On 7 March 2024, I read articles in newspapers that YB Dato' Sri Ismail Sabri Bin Yaakob raised a query in parliament with regards to my house arrest and whether it was a component of the pardon order of His Majesty... dated 29 January 2024."

[18] Based on the above, the applicant had averred that his solicitors had written to the respondents to confirm the existence but received no reply. The Media Statement by the Pardons Board issued on 2 February 2024 and exhibited by the applicant in Affidavit No 1 said that the applicant was pardoned on 29 January 2024 by the reduction of the jail term and fine. I found Affidavit No 1 and Affidavit No 2 affirmed by the applicant contained bare statements. Further, the applicant did not even state the source or the grounds of his information and/or belief. The averments therein on the existence of the Addendum Order were pure hearsay and therefore inadmissible.

Affidavit No 3 Affirmed By Ahmad Zahid

[19] The relevant paragraphs in Affidavit No. 3 on the existence of the Addendum Order were as follows:

(iv) Paragraph 6:

> "On 30 January 2024, during a meeting in my house...I was informed by him (Tengku Zafrul) of the existence of the Addendum Order. Upon querying further, he subsequently showed me a copy of the said Addendum Order on his phone which he personally photographed/ scanned from an original copy as shown to him by His Majesty...I further sighted that the Addendum Order is dated 29 January 2024 and has the seal and signature of His Majesty... I further confirm that the Addendum Order is genuine and in fact is the Royal Prerogative Order as the Main Order."

(v) Paragraph 7:

> "I verily believe that for the sufficient period of time, I sighted and read the Addendum Order and I clearly saw the entire contents and that it forms part of the pardon process of the Applicant which is supplementary to

the Main Order both dated 29 January 2024. Thus, I hereby confirm the existence of the Addendum Order dated 29 January 2024 issued by His Majesty..."

(vi) Paragraph 9:

"I do not have a copy of the Addendum Order dated 29 January 2024 because for reasons of confidentiality and propriety, especially in the light of the fact that the Addendum Order had by then not been executed or enforced as yet. I however confirm that the same is within the collective possession of the Respondents. I am further verily informed that the Honourable Attorney General has an original or copy of the Addendum Order for his legal input on the same."

[20] Ahmad Zahid's affidavit shows that he has no personal knowledge of the Addendum Order. His source was Tengku Zafrul who told him that His Majesty had shown Tengku Zafrul the Addendum Order and that Tengku Zafrul had taken a photograph of the same. Ahmad Zahid said that he saw a photograph of the Addendum Order on Tengku Zafrul's mobile phone. No photograph of the Addendum Order was produced on the grounds of secrecy. I found the averments made by Ahmad Zahid pure hearsay and inadmissible on this point.

[21] The other averments, ie the respondents, and in particular, the Attorney General, having possession of the Addendum Order were averments made without even the source of such information being revealed. Those averments by Ahmad Zahid were also pure hearsay and inadmissible.

Affidavit No 4 Affirmed By Wan Rosdy

[22] The relevant paragraphs in Affidavit No 4 on the existence of the Addendum Order were as follows:

(vii) Paragraph 6:

"Pada petang 30 Januari 2024,... (a)... Tengku Zafrul telah memberitahu bahawa Ke Bawah Duli Yang Maha Mulia Seri Paduka Baginda Yang Di-Pertuan Agong XVI telahpun keluarkan keputusan permohonan pengampunan ("Keputusan Pertama") iaitu mengurangkan perintah penjara sebanyak 50% dan hukuman denda pula ke RM50 juta sahaja; (b) Kedua, dengan Keputusan Pertama, Ke Bawah Duli Yang Di-Pertuan Agong XVI telah mengeluarkan satu lagi perintah ("Perintah Adendum") yang memerintahkan supaya Pemohon menjalani dengan serta merta hukuman penjaranya di dalam keadaan pemenjaraan di rumah kediaman Pemohon dan bukan di mana-mana penjara."

(viii) Paragraph 9:

"Saya tidak mempunyai Salinan Titah Adendum bertarikh 29 Januari 2024 kerana atas alasan-alasan kerahsiaan dan kewajaran, terutamanya memandangkan bahawa Titah Adendum pada masa itu belum dilaksanakan atau dikuatkuasakan lagi seperti sepatutnya sudah berlaku."

[23] The affidavit affirmed by Wan Rosdy states that his source of information on the Addendum Order is also Tengku Zafrul. Wan Rosdy himself has no personal knowledge of the Addendum Order except what Tengku Zafrul told him and showed him on the latter's mobile phone. I found the averments made by Wan Rosdy pure hearsay and inadmissible.

Affidavit No 5 Affirmed By The Applicant

[24] In this affidavit, the applicant refers to two events that occurred after his application was filed. The first event was that he was served with the Main Order through his solicitors in a letter dated 23 May 2024. The issuance of the Main Order, he contends, outlines the duty to serve the pardon order. A perusal of the Main Order reveals that it was made and signed under the hand of His Majesty. The order was addressed to the Commissioner General of Prisons and to "Anyone Who Receives This Order". The order was also signed and issued by the Minister in the Prime Minister's Department for the Federal Territories on the command of His Majesty.

[25] The second event was that a speech was given by the Prime Minister at a political event. A transcript of part of the speech was admitted as an exhibit. The applicant said that in the speech, the Prime Minister proffers his opinion, as apparently advised by the Learned Attorney General and of a discussion with His Majesty, which obviously concerns the Addendum Order. It was averred that these discussions fortify the contention of his solicitors of the existence of the Addendum Order. The applicant further claimed that the Prime Minister was skirting around the issue of the legality of the Addendum Order in the said speech. I found the transcript not stating what the applicant perceives it to say.

Issues Before This Court

[26] There are two issues before me for the purpose of whether leave can be granted in the application for leave to commence judicial review to obtain the reliefs of *mandamus* sought.

(a) whether hearsay evidence is permitted in an affidavit verifying the facts relied on in an application for leave to commence judicial review proceedings; and

(b) as a separate and distinctive issue, whether the criteria of granting an order of *mandamus* has been satisfied by the applicant.

First Issue: Hearsay Affidavit Evidence In A Leave Application

[27] I will begin with the issue of hearsay evidence in the affidavits verifying facts filed on behalf of the applicant.

[28] It is trite that to obtain leave, which is by way of an *ex parte* application, the applicant must file a statement containing the facts and grounds relied on to obtain the reliefs sought and an affidavit verifying the facts in support of the application ("the leave stage").

[29] If the applicant is successful in obtaining leave he is required to give notice to the respondents of the hearing of the substantive application ("the substantive stage") and required at the same time to serve the statement and affidavit verifying facts on the respondents.

[30] The affidavit served for the substantive stage is the same affidavit on the strength of which leave was granted. It suffices to state that leave is granted after a perusal of the statement and affidavit verifying facts, gives rise to an arguable case in favour of granting the relief sought at the substantive hearing, may be the resultant outcome (*WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 MLRA 257).

[31] In other words, the same evidence as per the affidavit verifying facts is used for the purpose of the substantive application. It is pertinent to observe that an application for judicial review is decided on affidavit evidence. In very rare circumstances, a deponent can be cross-examined on his affidavit verifying facts (see O 53 r 6 of the Rules of Court 2012). The affidavit verifying facts is therefore an important component for obtaining leave and subsequently for the purposes of the substantive stage.

[32] The crucial question is whether hearsay may be referred to in an affidavit verifying the facts. I found that Affidavits No 1, No 2, No 3, and No 4 concerning the Addendum Order are hearsay. I also hold that what Ahmad Zahid saw in the handphone of Tengku Zafrul was not secondary evidence under s 63(b) read with ss 64 and 65 of the Evidence Act 1950. Further, the Evidence Act 1950 does not apply to affidavits as provided under s 2 of the same.

[33] The cases and authors of books in respect of judicial review are on common ground that the application for leave is an interlocutory application.

[34] The applicant contends that for the purposes of an interlocutory application, O 41 r 5(2) of the Rules of Court 2012 provides that it is sufficient to state the source and belief of the deponent. In other words, the applicant has no personal knowledge other than what he was told by a third party. Thus, his knowledge that is derived from a third party is hearsay evidence. Such evidence is allowed for the purposes of an application for leave under O 53 r 3 of the Rules of Court 2012. In support of his contention, the applicant relied on the Singapore Court of Appeal case of *Gobi Avedian And Another v. Attorney General And Another Appeal* [2020] SGCA 77.

Tuan Sarip Hamid

[35] I am not persuaded by the submissions of the applicant. I am, instead, bound by the decision of the Supreme Court in *Tuan Sarip Hamid & Anor v. Patco Malaysia Berhad* [1995] 1 MLRA 536 which had adopted the views of the learned authors of the book "*Judicial Review*", namely, Michael Supperstone QC and James Goudie QC. On the question of whether hearsay material may be referred to in the affidavit in support of the application for leave to

commence a judicial review application, the following passage in the said book was approved. This is what was said:

> On the last question whether hearsay material may be referred to in the affidavit in support of the application for leave, the learned authors have this to say at p 357, para 2, and we agree:
>
> It is not entirely clear whether the affidavit in support of the application for leave should be regarded as interlocutory in character or otherwise. This has a possible significance in terms of whether hearsay material may strictly be admitted. The application for leave itself is undoubtedly interlocutory; however, if leave is granted, the affidavit in support of the leave application is served together with the Notice of Motion and forms the first basis of the applicant's case in the substantive application. As a matter of practice, a degree of common sense should be exercised in selecting the identity of the deponent. In cases where the attack is on the reasoning of a written decision as disclosing an error of statutory construction, it may be that fairly formal affidavit in support from a solicitor instructed in this case, exhibiting the decision and other essential material would suffice. At the other extreme, in an Immigration case where the issue was whether as a matter of fact the immigrant was or was not an illegal entrant, it would be highly desirable, if not essential, to have direct evidence at the leave stage on the disputed facts from the immigrant himself.

[36] In judicial review applications, as opposed to other interlocutory applications, the distinguishing factor is that the affidavit verifying facts is the same affidavit used for the substantive application. Thus, according to *Tuan Sarip Hamid*, while the leave application for review is interlocutory in character, the affidavit may require direct knowledge depending on the nature of the subject matter. In this case, in view of the nature of the subject matter, the Addendum Order, or its existence thereof, I hold that no weight is attached to the same in determining whether leave ought to be granted or otherwise.

Gobi Avedian And Another v. Attorney General And Another Appeal

[37] The case relied on by the applicant was the Singapore case of *Gobi Avedian And Another v. Attorney General And Another Appeal* [2020] SGCA 77. The case did not assist the applicant. First, the facts. Two Malaysians ("the appellants") were sentenced to death and after having exhausted their legal rights were awaiting to be judicially executed by hanging. A Malaysian non-Governmental organisation, Lawyers for Liberty ("LFL") released a press statement claiming that it had discovered a "brutal and unlawful method" was used by officers of the Singapore Prison Service ("SPS") when hanging a prisoner in the event the rope used for hanging broke during the hanging process. The LFL claimed that the information was provided by a former SPS officer ("the Witness"). On 28 January 2020 applications for leave to commence judicial review proceedings (similar to our O 53 of the Rules of Court 2012) were made by the appellants directing their executions to be stayed as there was an imminent risk that their right to life and equality under the Constitution of Singapore would be violated.

[38] In their affidavit verifying facts, the prisoners exhibited the LFL press statement and an affidavit deposed by one Zaid Abd Malek ("Zaid") who was the appellants' Malaysian solicitor. Zaid averred that he had met the Witness in his office in Kuala Lumpur wherein the Witness had provided details of the unlawful manner of hanging. The Witness was only prepared to file an affidavit verifying the facts if he was granted immunity by the Singapore authorities.

[39] The High Court dismissed the applications for leave holding that the LFL press statement being a media report was not reliable evidence while Zaid's affidavit was hearsay evidence. The High Court held the application for leave was not an interlocutory proceeding and therefore O 41 r 5(1) (in *pari materia* with our O 53 r 5(1) of the Rules of Court 2012) applied. Rule 5(1) provided that an affidavit could only contain such facts as the deponent was able of his own knowledge to prove whereas r 5(2) provided that in interlocutory proceedings, statements of information and belief may be made accompanied with the sources and grounds thereof. Ultimately, the High Court held that since the affidavit verifying facts only contained bare statements and hearsay evidence, there was no basis for leave to be granted.

[40] The appellants appealed to the Court of Appeal. The main issue concerned Zaid's affidavit which contained information received from the Witness. The Court of Appeal held that an application for leave in judicial review proceedings was an interlocutory application. The question before the Court of Appeal was whether Zaid's affidavit was admissible pursuant to O 41 r 5(2).

[41] The Court of Appeal reiterated the rationale for O 41 r 5(2) which was provided in *Savings & Investment Bank Ltd v. Gasco Investments (Netherlands) BV* [1984] 1 WLR 271 at p 282. There it was held that the rule was an exception to the general rule in the following words:

> The purpose of [the exception] is to enable a deponent to put before the court in interlocutory proceedings, **frequently in circumstances of great urgency**, facts which he is not able of his own knowledge to prove but **which, the deponent is informed and believes, can be proved by means which the deponent identifies by specifying the sources and grounds of his information and belief**.
>
> [Emphasis Added]

And in *Jurong Shipyard Pte Ltd v. BNP Paribas* [2008] 4 SLR(R) 33:

> [87] Each of these justifications is present on the facts of the present originating summons.... Thus, the present originating summons is a prime example of an application **where the circumstances are of great urgency and evidence is not obtainable at short notice, and the object is either to keep matters as they are or to prevent the happening of serious or irremediable harm**.
>
> [Emphasis Added]

[42] The Court of Appeal said in respect of Zaid's affidavit:

> [65] In the present case, the application in OS 111 referred to the "imminent risk" of the appellants (the prisoners") being subjected to illegal executions.... In the context of those pending executions, the importance of preventing irremediable harm to the appellants took on greater significance, and there was therefore sufficient reason to admit Mr Zaid's affidavit.
>
> [66] However, that is not the end of the matter. First, an affidavit filed pursuant to O 41 r 5(2) of the Rules must still meet the requirements in the provision itself. As a safeguard, O 41 r 5(2) requires the deponent to state "the sources and grounds" of the statements of information or belief contained in the affidavit. The failure to identify the sources of information contained in certain paragraphs may render those paragraphs inadmissible as pure hearsay evidence (see the decision of the High Court in *Dynacast (S) Pte Ltd v. Lim Meng Siang And Others* [1989] 2 SLR(R) 226 at [19]). Secondly, the admissibility of the affidavit is a distinct question from the weight a court should accord to the evidence within. The appropriate weight to be placed on statements in an affidavit will depend on the circumstances of the case. Although an affidavit filed in interlocutory proceedings such as the present application may be admitted notwithstanding the fact that it contains hearsay evidence, the evidence contained therein must still meet a minimum threshold of reliability before a court will accord it any weight. What this minimum threshold is, will depend on the facts of each case but it should not be permissible for a deponent to obtain leave to commence judicial review simply by stating − without more − that he has been told something that he believes to be true. He must identify the source (here, the Witness), as required by O 41 r 5(2), and the source must be prepared to take responsibility for the truth of what he has said. For that reason, though admissible, Mr Zaid's affidavit failed to meet the minimum threshold of reliability....he failed to provide the name or address of the Witness and it was insufficient for the Witness to say, through Mr Zaid, that he would sign an affidavit in the event he was granted immunity.... This court simply does not have enough evidence to judge the reliability of the Witness's evidence and no weight can be placed on Mr Zaid's affidavit.

[43] In view of the *Gobi* case, which held that the application for leave to commence judicial review is an interlocutory application, the affidavit that contained hearsay was allowed based on the exception of urgency to preserve the status *quo*. Paragraph [65] in the *Gobi* case stated that the importance of preventing irremediable harm took on greater significance, and there was therefore sufficient reason to admit Zaid's hearsay affidavit. However, para [66] in the *Gobi* case provides that the failure to state the "sources and grounds" of the statements of information or belief contained in the affidavit may render those paragraphs inadmissible as pure hearsay.

[44] Further, the admissibility of the affidavit is a distinct question from the weight a court should accord to the evidence. The evidence contained therein must still meet a minimum threshold of reliability before a court will accord it any weight. What this minimum threshold is, will depend on the facts of

each case but it should not be permissible for a deponent to obtain leave to commence judicial review simply by stating – without more - that he has been told something that he believes to be true. He must identify the source.

[45] The matter does not end here. The source in such cases, according to *Gobi* must be prepared to take responsibility for the truth of what he has said. Here, the source is Tengku Zafrul. In this case, there was no urgency as in *Gobi*'s case where the executions of the applicants were imminent. In the instant case, there was no such urgency or a situation of preventing irremediable harm.

[46] The source, Tengku Zafrul, did not affirm any affidavit on behalf of the applicant. There is also no explanation forthcoming as to this fact from the applicant. The source was available but was not used. Instead, Tengku Zafrul had attempted to file an affidavit on his own standing (not on behalf of the applicant) but this Court denied him as the law does not allow him to do so at the leave stage. The application at the leave stage is an *ex parte* application and the test is to peruse the material produced by the applicant to see whether an arguable case has been made for the matter to proceed to a substantive stage. The Attorney General has a right of appearance to make representations at the leave stage while a putative respondent can only appear with the permission of the court and submit on the issue or issues where the court needs assistance as to whether there is an arguable case or not (*Advance Synergy Capital Sdn Bhd v. The Minister of Finance, Malaysia & Anor* [2011] 1 MLRA 477; and *MyTeksi Sdn Bhd & Ors v. Competition Commission* [2023] 3 MLRA 697).

[47] The affidavit Tengku Zafrul had sought to file was apparently to point out inaccuracies in Ahmad Zahid's affidavit and the applicant objected to the filing of the affidavit. There was no candour on the part of the applicant. The affidavits he relied on said nothing as to why Tengku Zafrul did not file an affidavit. The reliability of the hearsay evidence in the affidavits could not therefore be judged and therefore no weight is placed on the said affidavits. Therefore, there can be no arguable case for further investigation at the substantive stage.

Second Issue: Whether Criteria For *Mandamus* Satisfied

[48] I revert to the issue of whether the reliefs of *mandamus* claimed can be granted. It is trite as held by the Federal Court in *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* [2008] 1 MLRA 705 that an order of *mandamus* as a relief is governed by s 44 of the Specific Relief Act 1950 ("SRA") or para 1 of the Schedule to the Courts of Judicature Act 1964 ("CJA"). The instant application is made under O 53 by way of a judicial review proceedings. If made under O 53, the relief of *mandamus* is subject to the provisions of s 44 of the SRA, which is the substantive law.

[49] Section 44 is housed in Chapter VIII of Part 2 of the SRA and concerns the enforcement of public duties. The relevant portion in s 44(1) reads:

(1) A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office... Provided that:

(a) an application for such an order be made by some person whose property,..., or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

(b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or Court in his or its public character,...;

(c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;

(d) the applicant has no other specific and adequate legal remedy; and

(e) the remedy given by the order applied for will be complete.

[50] The legal principles governing the grant of an order of *mandamus* can be found in *Peguam Negara Malaysia v. Dr Micheal Jeyakumar Devaraj* [2012] 1 MLRA 157 and *Mohamad Hassan Zakaria v. Universiti Teknologi Malaysia* [2017] 6 MLRA 470 where it established that in an application for an order of *mandamus*, the conditions that are cumulative have to be fulfilled, reiterating and adopting what Sharma J said in *Koon Hoi Chow v. Pretam Singh* [1972] 1 MLRH 497, that is to say:

(a) An order under s 44 is in its nature an order of *mandamus*. It is a peremptory order of the Court commanding somebody to do that which it was his clear legal duty to do. The applicant seeking such an order must have a legal right to the performance of such duty by the person against whom the order is sought;

(b) The prerequisites essential to the issue of an order under s 44 or of a *mandamus* are:

(i) whether the applicant in the High Court has a clear and specific legal right to the relief sought;

(ii) whether there is a duty imposed by law on the public officer(s);

(iii) whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the public officer(s); and

(iv) whether the applicant has any remedy, other than by way of *mandamus*, for the enforcement of the right which has been denied to him.

(c) These are the questions, but only some of the questions, which are necessary to be answered in every application for *mandamus*. The applicant must show not only that he has a legal right to have

> the act performed but that the right is so clear and well defined as to be free from any reasonable controversy. The order cannot issue when the right is doubtful, or is a qualified one or where it depends upon an issue of fact to be determined by the public officer(s).

[51] In the instant case, there is no provision in any written law or the Federal Constitution that imposes a legal duty on the part of the Pardons Board to confirm the existence or produce any order wherein the power of pardon is exercised. It was agreed by all parties at the outset that there is no written law concerning the Pardons Board. *Mandamus* can be granted only when a legal duty is imposed on an authority.

[52] In MP Jain's '*Administrative Law of Malaysia and Singapore*', 3rd edn at pp 652-653, it is stated: "The order of *mandamus* is a command issued by the High Court asking an authority to perform a public duty imposed upon it by law... *Mandamus* can be granted only when (i) a legal duty is imposed on an authority, and it does not perform the same, and (ii) the applicant has a legal right to compel the performance of the public duty prescribed by law. Thus, the criteria for the granting of *mandamus* in the instant case are not satisfied."

[53] As can be seen above and from the facts of the case, the applicant failed to show any failure on the part of the respondents, in particular, the Pardons Board, to perform any statutory duties compelled to them in law. For the foregoing reasons, I find that the applicant had failed to establish the necessary requirement under s 44(1) of the SRA.

No Response To The Letters Seeking Confirmation

[54] The applicant submitted that the respondents did not reply to his solicitors' letters to confirm or otherwise deny the existence of the Addendum Order. The failure to respond, according to the applicant, drew adverse inference under s 114, illustration (h) of the Evidence Act 1950. That provision provides that if a person refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him. It suffices to state that this section does not apply to affidavits by virtue of s 2 of the Evidence Act 1950.

[55] More importantly, while it is good governance and transparency for public officers to respond to queries but the law does not impose a duty on the respondents to do so. The criteria for an order of *mandamus* is therefore not met.

[56] For the above reasons, the leave was dismissed.