DATUK HAJI IDRIS HAJI BUJANG & ANOR

v.

KETUA PENTADBIRAN PARLIMEN MALAYSIA & ORS

Court of Appeal, Putrajaya
Lee Swee Seng, Che Mohd Ruzima Ghazali, Azizul Azmi Adnan JJCA
[Civil Appeal No: W-01(A)-75-02-2020]
30 January 2024

***Constitutional Law**: Parliament — Members of — Claim by former members of upper house of Parliament for adjustment in their pensions to account for increased salaries of members of Senate — Amendment to pensions of previous members of Parliament by Members of Parliament (Remuneration) (Amendment of First Schedule) Order 2015 ("2015 Order") — Whether subsidiary legislation like 2015 Order capable of taking effect retrospectively*

The appellants, the plaintiffs at the Court below, were former members of the upper house of Parliament. They retired from the Senate prior to the coming into force of the Members of Parliament (Remuneration) (Amendment) Act 2015 ("2015 Amendment Act"), by the terms of which salaries of the then-serving members of the Senate and House of Representatives were significantly increased. The appellants argued that their pensions ought to be adjusted to account for the increased salaries of the members of the Senate. The High Court, however, did not agree with their contention and dismissed their claims. Hence, the present appeal

Section 3 of the Members of Parliament (Remuneration) Act 1980 ("Act") provided for the salaries of members of the two Houses of Parliament while s 8 of the Act in turn provided for the entitlement to pension, gratuity and other benefits, which was prescribed in the First Schedule to the Act ("First Schedule"). On 4 March 2015, para 20 of the First Schedule was amended by the Members of Parliament (Remuneration) (Amendment of First Schedule) Order 2015 ("2015 Order"). Prior to this amendment, the pensions of previous members of Parliament would be adjusted to take into account revisions in the salaries of currently serving members. The 2015 Order amended para 20 such that there would no longer be any adjustment to pensions to account for increment in salaries of current members of Parliament. Instead, the pensioners and their entitled dependants would receive an annual increment of 2%. The 2015 Order was gazetted on 4 March 2015, but the amendment to para 20 was expressed to take effect from 1 January 2014. This meant that any increase in the salaries of current members of Parliament effected after 1 January 2014 would not, by the terms of the 2015 Order, result in an attendant increase in the pensions of retired members such as the appellants. The key and determinative question in this appeal was whether subsidiary legislation like the 2015 Order was capable of taking effect retrospectively.

Held (allowing the appeal):

(1) A piece of subsidiary legislation could always have retrospective effect if it only affected matters of procedure. However, where the subsidiary legislation affected vested or accrued rights or privileges, then the subsidiary legislation could only have retrospective effect if the principal Act expressly or by necessary implication provided that the subsidiary legislation might take effect retrospectively. If the subsidiary legislation affecting rights or privileges purported to have retrospective effect but was not empowered by the enabling legislation to have retrospective effect, then the subsidiary legislation was ineffective to defeat a pre-existing or accrued right or privilege, due to s 30(1)(b) of the Interpretation Acts 1948 and 1967 ("IA"). In such a case, the subsidiary legislation would only take effect from the date of its gazette. (para 43)

(2) The legal position relating to pension of members of the two houses of Parliament was as follows. The payment of pension under the Act remained a matter for the discretion of the State, exercisable through the powers granted under s 8 of the Act and para 2 of the First Schedule. However, once pension was granted, the eligible member of Parliament became possessed of a right to continue to receive the pension, on terms specified under the Act. This was the only reasonable construction in light of the express words used in the Act, and this right was one that might be enforced through a court of law. (para 56)

(3) The right to receive a pension that was adjusted in accordance with the increase in salaries effected through the 2015 Amendment Act had not yet accrued as at 1 January 2014. For this reason, the unaccrued inchoate right to receive an increased pension was not saved by the s 30(1)(b) of the IA. However, at the time the amendment to para 20 of the First Schedule was expressed to take effect, the appellants were possessed of the right to receive a pension that was in proportion to the then-current salaries of serving parliamentarians. This was clearly a pre-existing and accrued right (even if the right to receive the increase in salary had not yet accrued). Hence, the 2015 Order could not have the effect of modifying retrospectively such right of the appellants, due to the proper operation of s 30(1)(b) of the IA. (paras 59-60)

(4) The appellants were possessed of the right to receive a pension that was a proportion of the then-salaries of Senators. This right was purported to have been modified retrospectively by the promulgation of the 2015 Order. Having carefully examined the Act, this Court was unable to conclude that the Act expressly or by necessary implication provided for orders made under the Act to have retrospective effect. It must therefore follow that the 2015 Order could only take effect on the date of its gazette, which was on 4 March 2015. (para 61)

(5) By contrast, the 2015 Amendment Act did have retrospective effect (due to the powers of Parliament to legislate retrospectively), and thus when there was an increase in the salaries of current members of the Senate, there was

a concordant increase in the pension entitlement of the appellants as at 1 January 2015. From 4 March 2015 (being the date the 2015 Order actually came into force), further increases in the pension of the appellants would be at a rate of 2% per annum, in accordance with the amended para 20 of the First Schedule. (para 65)

Case(s) referred to:

Banbury v. Bank Of Montreal [1918] AC 626 (refd)

Haji Wan Othman v. Government Of The Federation Of Malaya [1965] 1 MLRH 413 (refd)

Haji Wan Othman v. Government Of The Federation Of Malaya [1966] 1 MLRA 625 (refd)

Kerajaan Malaysia v. Wong Pot Heng & Anor [1996] 2 MLRA 433 (folld)

Loh Kooi Choon v. Government Of Malaysia [1975] 1 MLRA 646 (refd)

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 1 MLRA 496 (refd)

Mentari Sekitar Sdn Bhd v. Heritage Property Sdn Bhd [2016] 5 MLRA 678 (refd)

Pengusaha, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v. Badrul Zaman PS Md Zakariah [2018] 6 MLRA 177 (refd)

Syed Ibrahim Syed Mohd & Ors v. Esso Production Malaysia Incorporated [2003] 2 MLRA 432 (refd)

Wong Pot Heng & Anor v. Kerajaan Malaysia [1992] 2 MELR 201; *[1992] 2 MLRH 612 (refd)*

Legislation referred to:

Employment Act 1955, part XII, ss 59, 60E

Federal Constitution, art 147(1)

Interpretation Acts 1948 And 1967, ss 20, 30(1)(b), (d)

Members of Parliament (Remuneration) (Amendment) Act 2015, First Schedule, paras 19A, 20

Members of Parliament (Remuneration) Act 1980, ss 3, 8, 12, First Schedule, paras 2, 19A, 20

Members of Parliament (Remuneration) (Amendment of First Schedule) Order 2015, paras 19A, 20

Pensions Ordinance 1951, s 5

Pensions Act 1980, ss 3(1), 9

Rules of the Court of Appeal 1994, r 18(2)

Counsel:

For the appellants: Krishna Dallumah (Indran V. Kumaraguru & Nasuha Badrul Din with him); M/s Krishna Dallumah & Indran

For the respondents: Rahazlan Affandi Abdul Rahim (Liew Horng Bin & Nurul Muhaimin Mohd Azman with him); AG's Chambers

JUDGMENT

Azizul Azmi Adnan JCA:

Introduction

[1] The appellants in this case, who were the plaintiffs at the court below, were former members of the upper house of Parliament. They retired from the Senate prior to the coming into force of the Members of Parliament (Remuneration) (Amendment) Act 2015, by the terms of which salaries of the then-serving members of the Senate and House of Representatives were significantly increased.

[2] The appellants argued that their pensions ought to be adjusted to account for the increased salaries of the members of the Senate.

Background

[3] Section 3 of the Members of Parliament (Remuneration) Act 1980 provides for the salaries of members of the two Houses of Parliament. Section 8 of the Act in turn provides for the entitlement to pension, gratuity and other benefits, which is prescribed in the First Schedule to the Act.

[4] In 1981, the First Schedule was amended by the introduction of para 19A to grant to the Yang di-Pertuan Agong the power to amend the First Schedule. This power is expressed by para 19B of the First Schedule to be exercisable by the Prime Minister or by any person authorised in writing by the Prime Minister.

[5] On 4 March 2015, in exercise of the powers under para 19A, para 20 of the First Schedule was amended by the Members of Parliament (Remuneration) (Amendment of First Schedule) Order 2015 (the "2015 Order"). Prior to this amendment, the pension of previous members of Parliament would be adjusted to take into account revisions in the salaries of currently serving members. The original para 20 read as follows:

> 20. Recomputation of pension and derivative pension.
>
> (1) Whenever the salaries of a Member are revised, the salary on which a pension granted under para 2 or a derivative pension granted under paras 5, 6 or 7 is based shall be adjusted to the revised salary as appropriate and the pension or derivative pension recomputed accordingly.
>
> (2) The recomputed pension under subpara (1) shall be payable with effect from the coming into force of the revised salaries.
>
> (3) In the case of a person who, before the coming into force of this Act, ceased to be a Member and he or his dependant is in receipt of a pension or derivative pension, as the case may be, the grant of the pension or derivative pension shall be governed by the provisions of

this Schedule and the salary on which a pension granted under para 2 or a derivative pension granted under paras 5, 6 or 7 is based shall be adjusted to the salary of a Member as appropriate and the pension or derivative pension shall be recomputed accordingly and be payable with effect from the date of the coming into force of this Act and thereafter such pension or derivative pension shall be recomputed and payable in accordance with subparas (1) and (2) whenever there is a revision of salaries.

(4) The provisions of subpara (3) shall apply *mutatis mutandis* to the pension payable under para (b) of s 2 of the Tunku Abdul Rahman Putra Al-Haj Pension Act 1971 [Act 22] as if it wore a pension under this Schedule and paras 5, 6 and 7, as the case may be, shall apply.

[6] The 2015 Order amended para 20 such that there would no longer be any adjustment to pensions to account for increment in salaries of the current members of Parliament. Instead, the pensioners and their entitled dependants would receive an annual increment of two percent. The amended para 20 reads as follows:

20. Recomputation of pension and derivative pension.

(1) Any pension granted under para 2 or derivative pension granted under para 5 or 6 shall be adjusted each year with an increment of two percent and shall be payable from January of each year.

(2) Subject to subpara (1) where a Member is granted a pension only upon attaining the age of fifty years by reason of him becoming a Member for the first time on or after 1 July 1990 and has ceased to be a Member upon completing thirty six months of reckonable service but has not attained the age of fifty years on the date he ceased to be a Member, his pension shall be adjusted by an increment of two percent beginning from the second year he is granted the pension.

(3) The pension that has been adjusted under subpara (1) shall be payable from 1 January 2014.

(4) A pension or derivative pension which is granted to:

(a) a person who ceased to be a Member; or

(b) the dependants of a deceased Member,

prior to 1 January 2014, shall first be adjusted in accordance with the First Schedule to the Act until 31 December 2013 as if the First Schedule has not been amended by this Order, before the readjustment of the pension or derivative pension is made in accordance with subpara (1).

(5) Any pension or derivative pension which has been adjusted pursuant to subpara (4) shall be recalculated in accordance with subpara (1) and shall be payable from 1 January 2014.

(6) The provisions of subpara (4) shall apply *mutatis mutandis* to the pension payable under subpara 2(b) of the Tunku Abdul Rahman Putra Al-Haj Pension Act 1971 [Act 22] as if it were a pension under this Schedule and paras 5 and 6, as the case may be, shall apply;

[7] The amendment to para 20 was effected via para 2(i) of the 2015 Order. By para 1(5) of the 2015 Order, para 2(i) was expressed to take effect retrospectively, from 1 January 2014:

Citation and commencement

1. (1) This order may be cited as the Members of Parliament (Remuneration) (Amendment of First Schedule) Order 2015.

(5) Subparagraph 2(i) is deemed to have come into operation on 1 January 2014.

[8] It will be observed that the 2015 Order was gazetted on 4 March 2015, but the amendment to para 20 was expressed to take effect from 1 January 2014. This meant that any increases in the salary of current members of Parliament effected after 1 January 2014 would not, by the terms of the 2015 Order, result in an attendant increase in the pensions of retired members such as the appellants. As we can see, this was precisely what had happened. The key and determinative question is whether subsidiary legislation like the 2015 Order was capable of taking effect retrospectively.

[9] On 9 July 2015-some three months after the 2015 Order was gazetted, the principal Act was amended to significantly increase the salaries of currently serving members of Parliament.

[10] Immediately prior to the introduction of the Members of Parliament (Remuneration) (Amendment) Act 2015 (the "2015 Amendment Act"), the monthly salaries of members of the Senate and House of Representatives were RM4,112.79 and RM6,508.59 respectively. The 2015 Amendment Act increased these amounts to RM11,000.00 and RM16,000.00 respectively. This amendment was expressed to take effect retrospectively, from 1 January 2015.

[11] For members of the Senate, the increment represented a 167.46% increase in salaries, whereas for members of the lower house, the percentage increase was 145.83%.

[12] As explained, the appellants did not, *ex facie*, enjoy any increment to their pensions, because the 2015 Order was expressed to take effect from 1 January 2014. This was when their pensions would be pegged to an annual two percent increase. The increase in the salaries brought about by the 2015 Amendment Act only took effect after, on 1 January 2015.

The Appellants' Case

[13] The following were the principal arguments raised in the appellants' originating summons and in submissions before the High Court:

(a) it was claimed that the amendments to para 20 of the First Schedule:

(i) contravened arts 132, 147 and 160(2) of the Federal Constitution and were thus unconstitutional. These provisions of the Constitution, according to the appellants, protected their rights to pension, and any amendment resulting in less favourable terms would therefore be unconstitutional;

(ii) contravened the provisions of ss 8 and 12 of the Members of Parliament (Remuneration) Act 1980, the legislative intent of such provisions as well as the original paras 2 and 20 of the First Schedule to the Act; and

(iii) was intended solely to address the effects of inflation and as such did not equate to the right of the appellants to receive recomputed and revised pension payments;

(b) the appellants further claimed that they had acquired vested rights for their pension to be reckoned as a proportion of the current salaries of members of the Senate; and

(c) it was further claimed that the appellants were possessed of a legitimate expectation for their pensions to be revised whenever there was an attendant revision to the salaries of currently serving members of the Senate.

[14] It will be observed that the issue regarding the retrospectivity of the 2015 Order was not raised before the High Court.

At The High Court

[15] The High Court dismissed the appellants' claims. The decision of the High Court may be summarised as follows:

(a) the amendments effected by the 2015 Order to para 20 of the First Schedule to the Members of Parliament (Remuneration) Act 1980 was clear and unambiguous, and the court was bound to give effect to its terms, which was that, with effect from 1 January 2014, the pension of the appellants would be subject to a 2% annual increase;

(b) the provisions of the 2015 Amendment Act was also clear and unambiguous, which was that the increase in salaries would apply only to serving members of Parliament with effect from 1 January 2015;

(c) reliance may not be placed on the superseded provisions of para 20 of the First Schedule, as these had been amended and ceased to be the law;

(d) the contention that the amendments to para 20 introduced by the 2015 Order was unconstitutional was not made out because:

(i) the appellants' pension payments were in no way reduced by amended para 20, and hence there could not be said to be contravention of art 147(1) of the Federal Constitution, which provides for the protection of pension rights; and

(ii) in any event, the appellants, as members of the Senate, were not part of the public services within the meaning of the Federal Constitution and hence were not accorded the protection under art 147(1); and

(e) the doctrine of legitimate expectation had no application in this case, because there was no entitlement or recognition at law that could be said to give rise to any such legitimate expectation.

[16] At the High Court, the appellants were directed to bear costs of RM5,000.00.

The Arguments Before Us

[17] In the course of submissions before this court, it became apparent that the 2015 Order purported to take effect retrospectively. As explained above, the issue of retrospectivity of subordinate legislation had not been argued before the court below. We directed counsel to address this, as well as other points, in further submissions. The initial hearing date was 27 October 2023, and we heard further arguments on 15 December 2023.

[18] We were of the view that the issue of whether the 2015 Order could have retrospective effect was entirely a question of law. As a general rule, points of law entitling the party raising them to judgment must be made at first instance, and if they are not then made, they cannot be raised at the appeal stage: *Banbury v. Bank of Montreal* [1918] AC 626 (HL). The courts nonetheless have an untrammelled discretion to allow a question of law to be raised for the first time on appeal, as an exception to this general rule. The court may allow a new point of law to be raised by the parties for the first time before it where the interests of justice so require: *Pengusaha, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v. Badrul Zaman PS Md Zakariah* [2018] 6 MLRA 177. The question of whether the interests of justice are met depends on the peculiar facts of each case: *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 1 MLRA 496. Two clear exceptions to the general rule are where the new point of law relates to illegality or jurisdiction: *Mentari Sekitar Sdn Bhd v. Heritage Property Sdn Bhd* [2016] 5 MLRA 678, but the categories of cases are not closed: *Luggage Distributors, ibid*. A party seeking to raise a new point of law in appeal must first seek leave of the Court of Appeal if that new point has not been set out in the memorandum of appeal: r 18(2) of the Rules of the Court of Appeal 1994.

[19] We considered that, given that the ramifications of the claim extended beyond just the appellants in the present case, it was in the interests of justice that all legal points be completely canvassed before the court. We were also cognisant that, under r 18(2), the court in determining the outcome of the appeal is not limited to the grounds of objection set out in the memorandum of appeal.

Summary Of Findings

[20] The findings of this court are summarised below:

(a) we discern no error on the part of the High Court in addressing the arguments canvassed before it;

(b) we nonetheless allow the appeal, on grounds that the 2015 Order did not have retrospective effect, for the reasons explained in the following paras;

(c) the Members of Parliament (Remuneration) Act 1980, on its proper construction, did not permit for subsidiary legislation made under it to have retrospective effect. It must therefore follow that the 2015 Order could only take effect on the date of its gazette, which was on 4 March 2015;

(d) the payment of pensions to parliamentarians are provided under the Members of Parliament (Remuneration) Act 1980, which on its proper construction establishes that the pension of eligible parliamentarians is an entitlement and therefore (in our view) enforceable in a court of law. This differs from the position of a pensionable officer under the Pensions Act 1980;

(e) accordingly, the appellants were possessed of the right to receive a pension that was in proportion to the then-current salaries of serving parliamentarians. This was a clearly a pre-existing and accrued right. In our considered view, the 2015 Order could not have the effect of modifying retrospectively such right of the appellants, due to the proper operation of s 30(1)(b) of the Interpretation Acts 1948 and 1967;

(f) by contrast, the 2015 Amendment Act did have retrospective effect (due to the powers of Parliament to legislate retrospectively), and thus when there was an increase in the salaries of current members of the Senate from RM4,112.79 to RM11,000.00, there was a concordant increase in the pension entitlement of the appellants as at 1 January 2015. From 4 March 2015 (being the date the 2015 Order actually came into force), further increases in the pension of the appellants would be at a rate of 2% per annum, in accordance with the amended para 20 of the First Schedule.

[21] The summary in the preceding paras should be read as being subject to what follows. These grounds constitute the judgment of the court.

Analysis

[22] We saw no error in the reasoning adopted by the High Court in addressing the arguments raised before it. We do not propose to address in detail the initial grounds of appeal raised before us, except to state that the arguments advanced

for the appellants were not made out. In particular, the appellants were not members of the public service, and hence the protection accorded under art 147(1) of the Federal Constitution did not apply.

[23] The crisp issue before us was whether it was permissible for subsidiary legislation to have retrospective effect. It is well established that the legislature can always promulgate laws that have retrospective effect, subject to the provisions of the Federal Constitution. Do the same principles apply to delegated legislation?

The Applicable Principles

[24] The search for the answer to the question must begin with s 20 of the Interpretation Acts 1948 and 1967, which provides as follows:

> Section 20. Subsidiary legislation may be retrospective.
>
> Notwithstanding the absence of any express provision in any Act or other written law, where such Act or other written law empowers any person to make subsidiary legislation, such subsidiary legislation may be made to operate retrospectively to any date which is not earlier than the commencement of the Act or other written law under which it is made or, where different provisions of that law come into operation on different dates, the commencement of that law under which it is made:
>
> > Provided that no person shall be made or shall become liable to any penalty in respect of any act done before the date on which the subsidiary legislation was published.

[25] The expression "subsidiary legislation" is defined in s 2 to include orders such as the 2015 Order. It can thus be seen that s 20 appears to provide that subsidiary legislation may be promulgated in such a manner as to give it retrospective effect, provided of course that the effective date of the subsidiary legislation cannot pre-date the commencement of its principal Act.

[26] The effect of amendments to laws must be construed in accordance with s 30(1) of the Interpretation Acts 1948 and 1967, which among others preserves rights and privileges accrued under the repealed provisions. Section 30(1) provides as follows:

> Section 30. Matters not affected by repeal.
>
> (1) The repeal of a written law in whole or in part shall not-
>
> (a) affect the previous operation of the repealed law or anything duly done or suffered thereunder; or
>
> (b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law; or
>
> (c) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under the repealed law; or

(d) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been made.

[27] Sections 20 and 30 of the Interpretation Acts 1948 and 1967 were considered by the Court of Appeal in *Syed Ibrahim Syed Mohd & Ors v. Esso Production Malaysia Incorporated* [2003] 2 MLRA 432. In that case, the plaintiff appellants were employees of Esso Production Malaysia Incorporated, the respondent defendant. The appellants were engaged in offshore petroleum-related activities under a contract between Esso and Petronas, but were denied certain entitlements due to them under Part XII of the Employment Act 1955, such as rest day pay, annual leave and overtime. The appellants made a claim with the Department of Labour. After their claim was lodged but before it was determined, the Minister of Human Resources issued the Employment (Exemption) (No 2 Order 1997, which exempted Petronas and its contractors from compliance with the provisions of Part XII of the Employment Act 1955. The Employment (Exemption) (No 2 Order 1997 was expressed to take effect retrospectively, from 1 October 1974.

[28] The Court of Appeal found that the Employment (Exemption) (No 2 Order 1997 did not have the effect of defeating the accrued rights of the appellants in that case.

[29] The precise *ratio decidendi* of the case of *Syed Ibrahim Syed Mohd & Ors v. Esso Production Malaysia Incorporated* [2003] 2 MLRA 432 is somewhat elusive, as the passages of the judgment of the court appears to suggest two differently nuanced conclusions.

[30] The first can be derived from the following para of the judgment:

> [I]t is clear to us that a subsidiary legislation with retrospective effect would be applicable to procedural matter and not to a right. As such to consider whether a subsidiary legislation with retrospective effect is void or otherwise, a distinction should be made whether that subsidiary legislation affects a procedural matter or a right. If it affects a procedural matter then it would be effective on the date appointed but then a procedural matter could become a right as illustrated in the authorities above and once it becomes a right it could not be taken away retrospectively. There is an exception to this rule in that where the parent Act by express provision or by implication provides for the making of the subsidiary legislation with retrospective effect as stated in *Wong Pet Heng & Anor v. Kerajaan Malaysia.* The High Court decision was reported in [1992] 2 MLRH 612; [1992] 2 MELR 201, while the Federal Court decision was reported in [1996] 2 MLRA 433.

[31] The passage quoted above may be summed as follows: a piece of subsidiary legislation can always have retrospective effect if it only affects matters of procedure. Where however the subsidiary legislation affects rights (or where

a matter of procedure becomes a right), then the subsidiary legislation can only have retrospective effect if the principal Act expressly or by necessary implication so provides. Put another way, there must be an empowering provision in the parent Act before subsidiary legislation made under that Act can have retrospective effect. The passage quoted also suggests that, if the subsidiary legislation affecting rights purports to have retrospective effect but is not empowered by the enabling legislation to have retrospective effect, then the subsidiary legislation is void to the extent that it purports to take effect prior to the date of its gazette.

[32] Further in the judgment of the court, it was stated:

> In our view, the effect of s 30(1) of the Interpretation Acts is not to have the Exemption Order be declared null and void but gives right which was filed before the Exemption Order was promulgated (in this case the date of the gazette) would be proceeded upon as if the Exemption Order was never made.

[33] This passage suggests a slightly different conclusion, which is that subsidiary legislation in question does not become null or void, but would simply be ineffective to defeat a prior accrued right.

[34] The Court of Appeal in *Syed Ibrahim Syed Mohd & Ors v. Esso Production Malaysia Incorporated* [2003] 2 MLRA 432 referred to the case of *Wong Pot Heng & Anor v. Kerajaan Malaysia* [1992] 2 MELR 201; [1992] 2 MLRH 612.

[35] The first plaintiff in the latter case had been wrongfully dismissed from employment. He obtained a substantial award for backwages and termination benefits from the Industrial Court. The second plaintiff obtained a judgment for a similarly substantial sum for wrongful termination of his contract of service. Their employer at the time was the Co-operative Central Bank Ltd ("CCB"), which subsequently suffered a financial collapse. As a result, Bank Negara Malaysia appointed receivers in respect of the assets of CCB.

[36] On 25 July 1991, the Essential (Protection of Depositors) (Amendment) Regulations 1991 were introduced, which amended subsidiary legislation previously issued under the Emergency (Essential Powers) Act 1979. These amendments were expressed to take effect retrospectively, from 23 July 1986.

[37] As a result of these amendments, the receivers were empowered to repay the depositors of CCB in priority to the debts of the plaintiffs in that case. The plaintiffs challenged the validity of the Essential (Protection of Depositors) (Amendment) Regulations 1991 on grounds that they were *ultra vires* and void because they purported to take effect retrospectively. The plaintiffs contended that their debts ought to rank *pari passu* with those of the depositors.

[38] At first instance, the High Court was of the view that the Emergency (Essential Powers) Act 1979 did not confer upon the Yang di-Pertuan Agong the power to make emergency regulations taking retrospective effect, and

that the provisions of the Essential (Protection of Depositors) (Amendment) Regulations 1991 which purported to take retrospective effect were "invalid to the extent that they were made to operate retrospectively".

[39] The decision of the High Court was affirmed by the Federal Court (see *Kerajaan Malaysia v. Wong Pot Heng & Anor* [1996] 2 MLRA 433).

[40] Following the decision in *Kerajaan Malaysia v. Wong Pot Heng & Anor* [1996] 2 MLRA 433, s 20 of the Interpretation Acts 1948 and 1967 was amended in 1997. The additional wording that was inserted by the 1997 amendment is underlined in the following table:

Prior to amendment	Post the Interpretation (Amendment) Act 1997
20. Subsidiary legislation may be retrospective Subsidiary legislation may be made to operate retrospectively to any date which is not earlier than the commencement of the Act or other written law under which it is made or, where different provisions of that law come into operation on different dates, the commencement of that law under which it is made: Provided that no person shall be made or shall become liable to any penalty in respect of any act done before the date on which the subsidiary legislation was published.	20 Subsidiary legislation may be retrospective <u>Notwithstanding the absence of any express provision in any Act or other written law, where such Act or other written law empowers any person to make subsidiary legislation, such</u> subsidiary legislation may be made to operate retrospectively to any date which is not earlier than the commencement of the Act or other written law under which it is made or, where different provisions of that law come into operation on different dates, the commencement of that law under which it is made: Provided that no person shall be made or shall become liable to any penalty in respect of any act done before the date on which the subsidiary legislation was published.

[41] According to the Court of Appeal in *Syed Ibrahim Syed Mohd & Ors v. Esso Production Malaysia Incorporated* [2003] 2 MLRA 432, this amendment would not have changed the result in *Kerajaan Malaysia v. Wong Pot Heng & Anor* [1996] 2 MLRA 433 or the principle that a principal Act must still empower the making of retrospective subsidiary legislation, in order for such subsidiary legislation to have effect retrospectively. The Court of Appeal stated:

> The amendment was adding the words "Notwithstanding the absence of any express provision in any Act or other written law empowers any person to make subsidiary legislation, such..." to the original s 20. The decision of *Wong Pot Heng & Anor* made it clear that a person is empowered to make subsidiary legislation only when the parent Act provides the person with such power. For that subsidiary legislation to have retrospective effect the parent Act must also provide that person to make the subsidiary legislation with retrospective

effect. This power could not be provided by s 20 of the Interpretation Acts. It was contended in *Wong Pot Heng & Anor* even though the Yang di-Pertuan Agong was not provided with the power to make subsidiary legislation with retrospective effect by the parent Act, he could do so by s 20 of the Interpretation Acts which empowered him to do. This contention was rejected by the High Court and the Federal Court. The Federal Court went on to state that the Interpretation Acts are nothing more than interpreting words and phrases of the statutes. They have no legislative power to provide a person to make a subsidiary legislation with retrospective effect. The power for a person to make a subsidiary legislation must be provided by the parent Act itself and not by the provisions of the Interpretation Acts. The full explanation is stated in the judgments we have cited earlier. Though s 20 of the Interpretation Acts had been amended by the addition of several words it would not change their character as Interpretation Acts. For that reason, the decision of *Wong Pot Heng & Anor* is still binding and the amendment to s 20 had not changed the situation. In order to give the Exemption Order its retrospective effect, the Act must make provisions for it. There is no such provisions in the Act.

[42] The applicable principles may thus be summed up in the following manner. Parliament possesses plenary powers of legislation, and is competent to legislate with retrospective effect, subject to any restriction in the Federal Constitution (see *Loh Kooi Choon v. Government of Malaysia* [1975] 1 MLRA 646).

[43] A piece of subsidiary legislation can always have retrospective effect if it only affects matters of procedure. Where however the subsidiary legislation affects vested or accrued rights or privileges, then the subsidiary legislation can only have retrospective effect if the principal Act expressly or by necessary implication provides that the subsidiary legislation may take effect retrospectively. If the subsidiary legislation affecting rights or privileges purports to have retrospective effect but is not empowered by the enabling legislation to have retrospective effect, then the subsidiary legislation is ineffective to defeat a pre-existing or accrued right or privilege, due to s 30(1)(b) of the Interpretation Acts 1948 and 1967. In such a case, the subsidiary legislation would only take effect from the date of its gazette.

Is There A Right To Receive Pension?

[44] The respondents argue that there is no absolute right to any pension, and that it is paid gratuitously at the election of the state. If this is so, it follows that there will not exist any right in respect of pensions that may be enforceable in the courts. Furthermore, if the appellants are not possessed of any right to pension, s 30(1)(b) of the Interpretation Acts 1948 and 1967 would not operate to prevent the 2015 Order from taking retrospective effect.

[45] Even though there exists authority for the proposition that members of the public service do not have an absolute right to pension, the appellants in this case are not members of the public service receiving pensions under the Pensions Act 1980. Rather, the payment of pensions to parliamentarians are

provided under the Members of Parliament (Remuneration) Act 1980, which on its proper construction establishes that pension is an entitlement and therefore (in our view) enforceable in a court of law.

[46] The respondents cited the case of *Haji Wan Othman v. Government of the Federation of Malaya* [1965] 1 MLRH 413 in support of their arguments. The plaintiffs in that case were retired civil servants who had accepted the option of receiving a lump sum gratuity in return for a reduced pension at the rate of ¾ of their full pension. They argued that, after a lapse of years following retirement, their pension should revert to the full amount.

[47] Suffian J refused the plaintiffs' claim in that case, holding that pensions are not payable by reason of any contract between the government and its employees. Rather, the power to grant pensions is couched purely in permissive terms in the Pensions Ordinance 1951, which also expressly precludes any absolute right to pension. The relevant passages are instructive and bears reproduction *in extenso*:

> There is no doubt that it is in Government's interest to pay pensions because they ensure devoted service and the retention of the service of experienced and skilled officers, but pensions are not payable by Government because of a contract with its employees; they are payable by virtue of the Pensions Ordinance, 1951, and its predecessor from which it departs little if at all. The Ordinance does not say that when a public servant has worked so many years at such and such a salary he shall be entitled to receive so much pension a month from Government.
>
> Section 3(1) merely says that it shall be lawful for the relevant authority "to make regulations for the granting of pensions, gratuities and other allowances to persons who have been in the public service..." s 4 says that these pensions, gratuities and allowances are charged on the general revenues of the Government.
>
> Pension Regulation says that every pensionable officer who has served not less than ten years may on his retirement be granted a pension and then it proceeds to give the formula for calculating the rate of the pension payable.
>
> Not a word is said about the officer being entitled to anything, the whole tenor of the legislation being permissive, the relevant authority being merely authorised, not compelled, by the legislature to do this and that for the retired officer.
>
> It is undoubted that legally a member of the public service holds office during the pleasure of the Head of State, even before the enactment of cl (2A) of art 132 of the Constitution, and he may therefore be retired or dismissed without compensation.
>
> Should there be any doubt about this, s 5 of the Ordinance in the most emphatic terms provides:
>
> "(1) No officer shall have an absolute right to compensation for past services or to any pension, gratuity or other allowance under

this Ordinance, nor shall anything in this Ordinance contained limit the right of the Federal Government or, as the case may be, of the Government of any State to dismiss any officer without compensation.

(2) Where it is established to the satisfaction of the Yang di-Pertuan Agong that an officer has been guilty of negligence, irregularity, or misconduct, it shall be lawful for the Yang di-Pertuan Agong to reduce or altogether to withhold the pension, gratuity or other allowance for which such officer would have become eligible but for the provisions of this section."

In view of these very explicit provisions I do not see how I can declare that these pensioners who were paid a lump sum gratuity and have lived more than ten years after their retirement are entitled to draw their full pension on the expiration of that ten year period until their death.

...

If I am right in my interpretation, pensioners would do well to consider pursuing their cause in Parliament rather than in the courts. Pensions are paid out of public money and under the Constitution no public money may be expended without legislative authority and the only legislative authority in existence today does not permit the executive to pay a pensioner his full pension if he has ever taken a gratuity. Only Parliament may enlarge this authority.

[48] The case went on appeal to the Federal Court (reported as *Haji Wan Othman v. Government of the Federation of Malaya* [1966] 1 MLRA 625), where Thomson LP in delivering the leading judgment declined to address the question of whether there existed a right to pension. He stated as follows:

Now, I do not propose to examine the precise nature of the "rights", if any, which the pensions law confers upon those for whose benefit it was enacted and the question of how far, if at all, these rights are a proper subject for determination by the courts.

On the one hand there is much to be said for what would appear to have been the view of the trial judge that there are no such rights capable of being determined by the courts. Section 5 of the 1951 Ordinance contains this provision:

"No officer shall have an absolute right to compensation for past services or to any pension, gratuity or other allowance under this Ordinance".

That is substantially the same as s 30 of the Superannuation Act, 1834, and regarding that section Lord Hanworth said in the Court of Appeal in the case of *Nixon v. Attorney-General, (supra)* (at p 592), that it "destroys the possibility of a claim of legal right". The same point was thus put by Viscount Dunedin in the House of Lords (at p 191):

"Section 30 of the Act of 1834 says there is to be no absolute right. My Lords, to get out of a provision that you are not to have an absolute right

a positive provision that you are to have a right, is an argument which has only to be stated to be rejected."

On the other hand the analogy with the United Kingdom legislation can be carried too far. Our law does not contain anything which, on the face of it at any rate, corresponds with such provisions as the proviso to s 2 of the Superannuation Act, 1859, s 3 of the Superannuation Act, 1866, or s 9 of the Superannuation Act, 1887, all of which make it clear in terms that the determination of questions of the amount of pensions and gratuities is for the Treasury.

I am, however, as I have said, reluctant to express any views on the point in the light of the discussion to which we have listened in the present case. It would be impossible to do so without expressing views that might have a bearing on the general question of how far the "rights" of public servants are justiciable under the present Constitution, a question which could not be determined without going into the question of the distribution among the present constitutional organs of the powers which in Great Britain make up the prerogatives of the Crown. Moreover, that question may require consideration of the Irish Free State cases (*Wigg Attorney-General* [1927] AC 674 and *In re Transferred Civil Servants (Ireland) Compensation* [1927] AC 674) and in the present proceedings neither side has attempted to derive any assistance from these cases.

[49] We observe that the current Pensions Act 1980 adopts much the same formulae as its predecessor legislation. For instance, s 9, which is the principal operative provision creating a power to grant pensions, remains permissive in nature, and does not create any obligation on the part of the state to pay pension:

Section 9. Grant of pension, etc.

(1) The Yang di-Pertuan Agong may grant a pension, gratuity or other benefit to a pensionable officer on:

(a) compulsory retirement under s 10; or

(b) optional retirement under s 12 after completing a period of not less than ten years' reckonable service; or

(c) retirement under s 11.

[50] Section 3(1) follows the same language previously contained in s 5 of the Pensions Ordinance 1951:

Section 3. Pension, etc. not an absolute right.

(1) No officer shall have an absolute right to compensation for past service or to any pension, gratuity or other benefit under this Act.

[51] However, the appellants in the present case do not receive their pensions under and by virtue of the Pensions Act 1980. The respondents, by the own

submissions, acknowledge that the appellants were not, during their tenure as senators, members of the public service. Instead, the appellants receive pension pursuant to the provisions of the Members of Parliament (Remuneration) Act 1980. Upon a proper construction of this Act, pension is an entitlement of eligible parliamentarians.

[52] Section 8 of the Members of Parliament (Remuneration) Act 1980 provides as follows:

> Section 8. Pensions and gratuities.
>
> A Member shall be **entitled** to such pension, gratuity and other benefits as are prescribed in the First Schedule.
>
> [Emphasis Added]

[53] Now, if the First Schedule is examined, it appears to adopt the permissive "may" rather than the imperative "shall" in its operative provisions. For instance, para 2 of the First Schedule provides as follows:

> 2. Pension for Members.
>
> (1) A person who ceases to be a Member **may** be granted a pension if he has completed 36 months of reckonable service.
>
> [Emphasis Added]

[54] Despite this, we are of the view that, on a proper construction of the Act as a whole, pension remains a right of eligible parliamentarians. We have referred to s 8, which provides that pension is an entitlement of the eligible members of Parliament. It is also not insignificant, in our view, that the Members of Parliament (Remuneration) Act 1980 does not contain any equivalent provision to s 3(1) of the Pensions Act 1980, which expressly precludes the existence of a right of a retired member of the public service to pension. Furthermore, para 19 of the First Schedule references pension and derivative pension as a "right or privilege":

> 19. Regulations.
>
> (1) The Yang di-Pertuan Agong may make regulations for the better carrying out of this Schedule.
>
> (2) Without prejudice to the generality of subpara (1):
>
> (a) where a person or Member who before the coming into force of this Act had acquired any **right or privilege** in relation to pension or gratuity under the law repealed under s 13 and no provision exists in this Schedule to deal with this right or privilege, the regulations may provide for such right or privilege to continue with such modification as the Yang di-Pertuan Agong deems fit;

(b) where as a result of the implementation of the provisions of this Schedule a situation arises involving a determination whether a **right or privilege** in relation to a pension or derivative pension should, having regard to the principles underlying the provisions of this Schedule, accrue to a person who had ceased to be a Member between the period 31 August 1957 and the date of the coming into force of this Act or to the dependants of such person, and justice and equity require it to be dealt with, the regulations may provide for the conferment of a right or privilege to such person upon such terms and conditions as the Yang di-Pertuan Agong deems fit.

[Emphasis Added]

[55] Thus, while the operative provisions granting pension (such as in para 2 of the First Schedule) is expressed as being merely permissive, once pension has already been granted, that pension is referred to in the First Schedule as a right or privilege.

[56] We are of the view therefore that the legal position relating to pension of members of the two houses of Parliament is as follows. The payment of pension under the Members of Parliament (Remuneration) Act 1980 remains a matter for the discretion of the state, exercisable through the powers granted under s 8 of the Act and para 2 of the First Schedule. However, once pension is granted, the eligible member of Parliament becomes possessed of a right to continue to receive the pension, on terms specified under the Act. This, in our considered view, is the only reasonable construction in light of the express words used in the Act. This right is one that may be enforced through a court of law.

Is The Appellants' Right To Pension Saved By Section 30(1)(b) Of The Interpretation Acts 1948 And 1967?

[57] It will be recalled that the Court of Appeal in *Syed Ibrahim Syed Mohd & Ors v. Esso Production Malaysia Incorporated* [2003] 2 MLRA 432 was of the view that the exemption order issued by the Minister of Human Resource could not have retrospective effect because (among others) the rights of the plaintiffs in that case to benefits under Part XII of the Employment Act 1955 had already accrued, and were thus protected under s 30(1)(b) and (d) of the Interpretation Acts 1948 and 1967.

[58] Before us, it was advanced for the respondents that, because the right to the increased pension had not yet accrued or vested as at 1 January 2014 (being the date on which amendment to para of the First Schedule was expressed to take effect under the 2015 Order), s 30(1)(b) of the Interpretation Acts 1948 and 1967 did not operate to save such right from being extinguished by the retrospective amendment. The increase in the salaries of serving parliamentarians only took effect as at 1 January 2015, through the 2015 Amendment Act.

[59] We are in total agreement with Mr Liew for the respondents, that the right to receive a pension that was adjusted in accordance with the increase in salaries effected through the 2015 Amendment Act had not yet accrued as at 1 January 2014. For this reason, the unaccrued inchoate right to receive an increased pension was not saved by the s 30(1)(b) of the Interpretation Acts 1948 and 1967, the material portion of which reads as follows:

> (1) The repeal of a written law in whole or in part shall not:
>
> ...
>
> (b) affect **any right, privilege**, obligation or liability **acquired, accrued** or incurred under the repealed law; or
>
> [Emphasis Added]

[60] However, at the time the amendment to paragraph was expressed to take effect, the appellants were possessed of the right to receive a pension that was in proportion to the then-current salaries of serving parliamentarians. This was a clearly a pre-existing and accrued right (even if the right to receive the 167.46% increase had not yet accrued). In our considered view, the 2015 Order could not have the effect of modifying retrospectively such right of the appellants, due to the proper operation of s 30(1)(b) of the Interpretation Acts 1948 and 1967.

Does The Members Of Parliament (Remuneration) Act 1980 Permit Subsidiary Legislation To Take Effect Retrospectively?

[61] We have concluded that the appellants were possessed of the right to receive a pension that was a proportion of the then-salaries of senators. This right was purported to have been modified retrospectively by the promulgation of the 2015 Order. Having carefully examined the Members of Parliament (Remuneration) Act 1980, we were unable to conclude that the Act expressly or by necessary implication provides for orders made under the Act to have retrospective effect. It must therefore follow that the 2015 Order could only take effect on the date of its gazette, which was on 4 March 2015.

[62] Mr Liew for the respondents argued that the wording of para 19A of the First Schedule itself empowers the making of retrospective amendments to the First Schedule. Paragraph 19A provides as follows:

> 19A. Amendment of Schedule by order.
>
> The Yang di-Pertuan Agong may by order amend this Schedule where it appears to him necessary or expedient so to do, and any amendment so made shall have effect as if enacted in this Schedule.

[63] We were unable to agree with this submission. Paragraph 19A simply delegates the power to amend the First Schedule to the Yang di-Pertuan

Agong, which may be effected by way of an order. Thus, the First Schedule can be amended by way of subsidiary legislation, without the need to amend the principal Act by way of an amendment Act. Once the order has been made to amend the First Schedule, the amendments take effect as though they had been enacted in the Schedule. This does not, whether expressly or by necessary implication, mean that such order can be made to have retrospective effect.

Conclusion

[64] Due to:

(a) the existence of the accrued right of the appellants to receive pension as a proportion of then-current salaries of existing parliamentarian; and

(b) the absence of provisions in the Members of Parliament (Remuneration) Act 1980 providing (whether expressly or by necessary implication) for orders made pursuant to para 19A of the First Schedule to have retrospective effect,

we are of the view that the 2015 Order did not have retrospective effect and could only come into force on 4 March 2015, being the day on which the 2015 Order was gazetted.

[65] By contrast, the 2015 Amendment Act did have retrospective effect (due to the powers of Parliament to legislate retrospectively), and thus when there was an increase in the salaries of current members of the Senate from RM4,112.79 to RM11,000.00, there was a concordant increase in the pension entitlement of the appellants as at 1 January 2015. From 4 March 2015 (being the date the 2015 Order actually came into force), further increases in the pension of the appellants would be at a rate of 2% per annum, in accordance with the amended para 20 of the First Schedule.

[66] The appeal is thus allowed accordingly. We set aside the order of the court below and direct that each party bear their own costs in this appeal.

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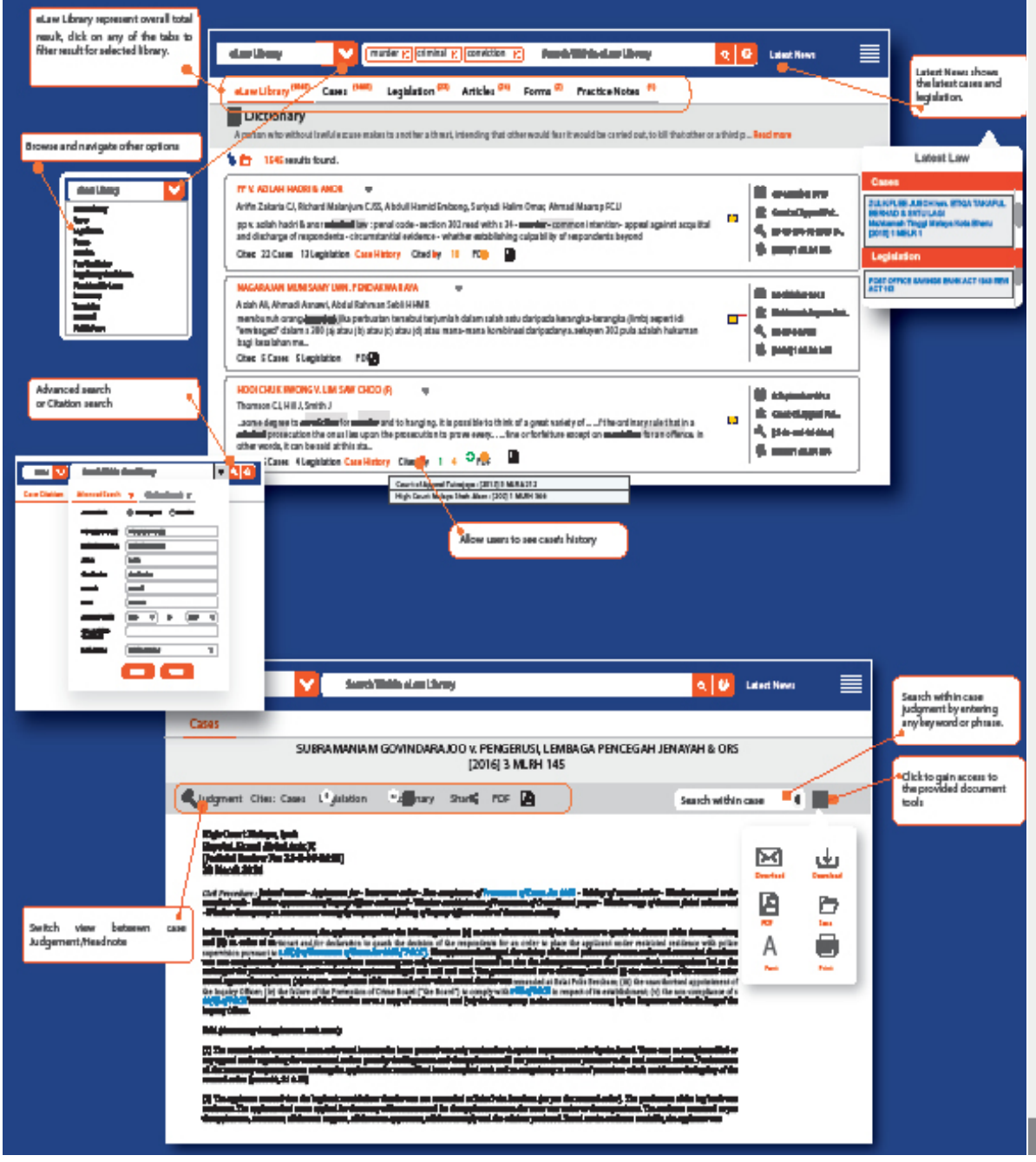

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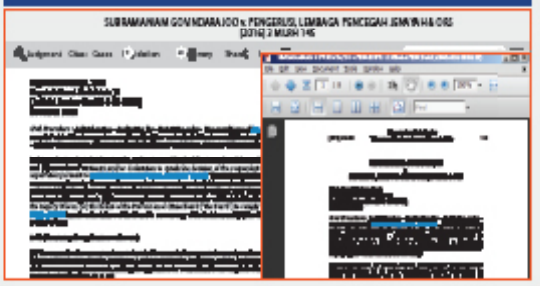

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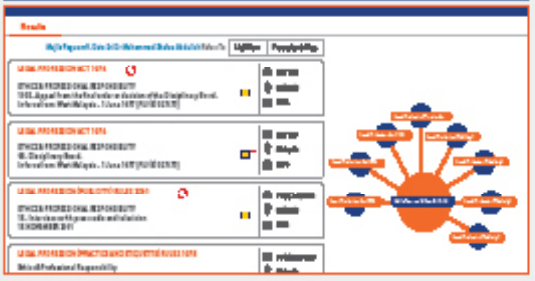

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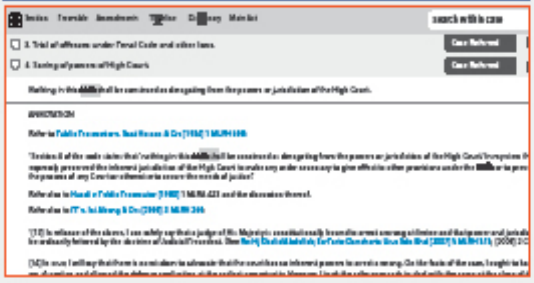

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