Broad Grounds of Decision

WA-25-179-06/2023

Majlis Kawalan Tembakau Malaysia & 2 Others v Menteri Kesihatan Malaysia & Another

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15.5.2026, 3.30 p.m. (via Zoom)

Mah. : The Court thanks counsels for the oral submissions and extensive written submissions and Joint Scott Schedule which have greatly assisted the Court in arriving at a decision.

: The subject matter of challenge in this judicial review is the exemption which formed part of the Poisons (Amendment of Poisons List) Order 2023 [*P.U.(A) 93/2023*] made on 31.3.2023, which the Applicants submitted has legalised e-cigarettes and vapes with nicotine and can be sold freely without restrictions, including to those under 18 years of age. Initially, the Applicants sought an order of certiorari to quash that part of *P.U.(A) 93/2023* with the exemption and in the alternative, a declaration that the exemption is void.

: In view of the coming into force of the Control of Smoking Products for Public Health Act 2024 [*Act 852*] on 1.10.2024, the Applicants had, on the hearing date on 28.1.2026, submitted that the reliefs sought are now as follows (to which there was no objection by the Respondents):

> "*A. A declaration that the following part of the Poisons (Amendment of Poisons List) Order 2023 [P.U.(A)93/2023] ("**the Impugned***

***Order**") made on 31st March 2023 inserting the following exemption to the poisons list set out in the First Schedule ("**the Poisons List**") to the Poisons Act 1952 [Act 366] ("**Act 366**") is irrational:*

> *"(3) Preparation of a kind used for smoking through electronic cigarette and electric vaporizing device, in the form of liquid or gel"*
>
> *("**the Impugned Exemption**");*

B. *A declaration that the insertion of the Impugned Exemption to the Poisons List was done without proper or adequate consultation with the Poisons Board and was accordingly ultra vires section 6 of Act 366; and*

C. *A declaration that to the extent section 6 of Act 366 empowers the Minister to amend the Poisons List contained in the First Schedule of Act 366 without any oversight by Parliament, the said power is inconsistent with Article 66 of the Federal Constitution and therefore void.*"

(hereinafter referred to as the '**Revised Reliefs**').

: On 6.12.2023, the application by the Malaysian Medical Association to be appointed as amicus curiae in these proceedings was allowed.

: In arriving at my decision, I have considered the cause papers, affidavit evidence and oral and written submissions by the parties and the amicus curiae.

: Before proceeding to briefly discuss the grounds of application, it must first be made clear that the Court is persuaded by the Applicants' submission that –

(a) with the enactment of Act 852 and its subsidiary legislation, the Impugned Order no longer directly causes harm to public health. Nevertheless, the factual substratum of this application has not changed as, amongst others, –

(i) the Impugned Order has not been repealed;

(ii) the 1st Respondent ('**R1**') did not carry out conscious, meaningful, purposeful and effective consultation with the Poisons Board pursuant to s 6 of the Poisons Act 1952 (Revised 1989) [*Act 366*] before making the Impugned Order. Section 6 of Act 366 reads as follows:

"***Power of Minister to amend Poisons List***

> ***6.*** *The Minister may, from time to time, after consultation with the Poisons Board by order notified in the Gazette, add to, remove from or reinstate in the Poisons List any substance as he may deem fit or proper, or remove from transfer to or include in any column of the Poisons List any poison, or exempted preparation or amend any definition of any poison or exempted preparation contained in such list or in any column thereof.*";

(iii) R1 did not take into account relevant considerations when she made the Impugned Order that included the Impugned Exemption; and

(iv) R1 breached the duty to protect public health and failed to act in accordance with Malaysia's international commitments under the United Nations Convention on the Rights of the Child ('**CRC**') and the World Health Organization Framework Convention on Tobacco Control ('**WHO FCTC**') to prevent and reduce nicotine addiction when she made the Impugned Order and included the Impugned Exemption.

Therefore, despite the coming into force of Act 852 and its subsidiary legislation, the instant application is not academic as the factual context of this application has not changed and must be decided on its merits;

(b) the decision to make the Impugned Order is not simply one "*… which involves the Government policy within the purview of the executives (Cabinet)*" and is not susceptible to judicial inquiry by this Court as contended by the Respondents. The Impugned Order is as a result of R1's delegated legislative function under s 6 of Act 366 and is indeed amenable to judicial review; and

(c) the focus is on the material and evidence which was before R1 at the time the decision was made, namely as of 31.3.2023. There has to be "anxious scrutiny" of the Impugned Exemption in the Impugned Order as it revolves around the fundamental right to health.

: **1st Issue: Whether R1 acted irrationality in inserting the Impugned Exemption in the Impugned Order**

The Respondents asserted that R1 had taken into account all relevant considerations as evidenced by her affirmation in the Affidavit In Reply (encl. 25) that "*setelah meneliti cadangan pengenaan duti eksais ke atas cecair atau gel mengandungi nikotin yang digunakan untuk rokok elektronik dan vape yang telah diluluskan oleh Dewan Rakyat pada 9.3.2023, konsultasi dengan Lembaga Racun dan fakta bahawa KKM dalam proses untuk membentangkan "RUU Kawalan Merokok 2023" di Parlimen, saya telah membuat keputusan pada 30.3.2023 supaya pengecualian diberikan kepada cecair atau gel mengandungi nikotin yang digunakan untuk rokok elektronik dan vape daripada kawalan di bawah Akta 366;*". R1 also

averred that the Government's policy was in accordance with Article 6 of the WHO FCTC.

However, based on the Respondents' affidavits in encls. 25, 26 (affirmed by the Secretary General of the Treasury on 5.10.2023) and 42, it is apparent that the main factor in making the Impugned Exemption in the Impugned Order was due to the fact that, during the tabling of the country's 2023 Budget on 24.2.2023, the Honourable Minister of Finance had proposed to impose excise duties on electronic cigarettes and vape liquids containing nicotine. The House of Representatives had approved the 2023 Budget on 9.3.2023. The Ministry of Finance then informed the Ministry of Health "*supaya mengambil tindakan selari dengan cadangan tersebut daripada kawalan di bawah Akta Racun 1952*". By legalising liquid or gel nicotine in electronic cigarettes and vapes, R2 may tax the products and the revenue collected will be channelled towards health initiatives by the Ministry of Health.

Hence, despite recognising that electronic cigarettes and vape liquids are dangerous to health and that Malaysia is obliged to regulate and restrict their supply, sale and use, R1 proceeded to make the Impugned Order which included the Impugned Exemption to give effect to the decision regarding taxation.

Additionally, the enactment of Act 852 strengthens the Applicants' argument that the Impugned Exemption is irrational as it shows that there was a legal lacuna in regulating electronic cigarettes and vape products with nicotine during

the material period and that Parliament had never intended to allow vape products to be unregulated. YB Datuk Seri Dr. Dzulkefly bin Ahmad who affirmed *Afidavit Tambahan Responden Pertama (4)* on 23.10.2024 averred, among others, that "*… setelah Akta 852 ini berkuat kuasa, telah terdapat undang-undang komprehensif yang mengawal selia penggunaan dan penjualan sediaan nikotin yang digunakan dalam rokok elektronik dan peranti pengewapan elektronik dalam bentuk cecair atau gel.*".

I am satisfied that the Applicants have established that R1's decision in making the Impugned Exemption motivated primarily by economic reasons, prior to the implementation of Act 852, is irrational and thus, the 1st Issue is answered in the affirmative.

: **2nd Issue: Whether the insertion of the Impugned Exemption in the Impugned Order was done without proper or adequate consultation with the Poisons Board and is ultra vires s 6 of Act 366**

The crux of the Respondents' submission is that –

(a) Act 366 did not specify the method of consultation that is required and hence the word "*consultation*" is to be read in the context of the functions of the Poisons Board in s 3 of Act 366. The Respondents relied on the case authority of *Dato' Seri Anwar Ibrahim v PP* [2000] 2 CLJ 570 for the proposition that to consult means to refer a

matter for advice, opinion or views; it does not mean to consent; and

(b) there was adequate consultation as required under s 6 of Act 366 as the Poisons Board meeting on 29.3.2023 had discussed the issue of the exemption of nicotine liquids and gels from the Poisons List and the Chairman of the Poisons Board had conveyed the decision of the meeting to reject R1's proposal for exemption to R1.

However, in my view, the word "*may*" in s 6 of Act 366 refers to the power to "*add to, remove from or reinstate*" in the Poisons List. Consultation with the Poisons Board under s 6 of Act 366 is not only mandatory, it must, as submitted by the Applicants, be conscious, meaningful, purposeful and effective.

In this case, there was no physical meeting between R1 and the Poisons Board and after the unanimous decision of the Poisons Board was communicated to R1, there were no further discussions or exchange of views; R1 proceeded to include the Impugned Exemption in the Impugned Order; and there was no explanation forthcoming from R1 in acting against the advice of the Poisons Board. The alleged "consultation" by R1 was merely formal compliance with Act 366 whereas effective consultation necessitates the exchange of views and the consideration of counterproposals.

Furthermore, as alluded under the 1st Issue, based on the Respondents' affidavits in encls. 25, 26 and 42, a decision had

already been made for the imposition of excise duties and inevitably, the Impugned Exemption in the Impugned Order had to be made. If I may put it crudely, it was a “done deal”. This lends credence to the Applicants’ submission that the Respondents treated the consultation as a mere formality resulting in the overwhelming evidence of the dangers posed by electronic cigarettes and vape liquids and the increased likelihood of vapes leading to nicotine addiction on the part of children being ignored.

The 2nd Issue is therefore answered in the affirmative.

: **3rd Issue: The constitutionality of s 6 of Act 366**

The Applicants submitted that s 6 of Act 366 is unconstitutional because it seeks to amend the primary Act without any parliamentary scrutiny. This provision is a piece of delegated legislation known as the “*Henry VIII clause*” i.e. a clause which enables a primary legislation to be amended or repealed by subordinate legislation, with or without further parliamentary scrutiny. The Appellants posited that s 6 of Act 366, which does not set out the criteria on which the Minister is to exercise her powers to amend the Poisons List other than a duty to consult the Poisons Board, must be considered to be inconsistent with Article 66 of the Federal Constitution, being excessive delegation of legislative power.

According to the Applicants, the Henry VIII clause-type provisions have yet to be discussed by the Malaysian courts

and the examples of such provisions are s 11 of the Customs Act 1967, s 6 of the Excise Act 1976 and s 4 of the Local Government Elections Act 1960.

I pause here to thank the Applicants' counsel for being frank and candid in the oral submission and the Supplementary Submissions (encl. 110) as regards Prayer C of the Revised Reliefs. The counsel's conduct is exemplary.

In my view, it is not necessary for the Court to consider the 3rd Issue and prayer C of the Revised Reliefs as the 1st and 2nd Issues and prayers A and B of the Revised Reliefs are sufficient to dispose of the present application.

: In the premises, the Applicants' application in encl. 19 for a declaration as prayed in Prayers A and B of the Revised Reliefs is allowed with no order as to costs.

Dato' Aliza Binti Sulaiman JCA
Sitting as Judge, High Court in Malaya
at Kuala Lumpur (BKK1)