MALAYSIA

IN THE HIGH COURT IN SABAH AND SARAWAK

AT KOTA KINABALU

JUDICIAL REVIEW APPLICATION NO. BKI-25-19/7-2022

In the matter of Articles 8 and 10 Federal Constitution;

And

In the matter of Section 2C Official Secrets Act 1972;

And

In the matter of Section 25(2) and/or the Schedule Courts of Judicature Act 1964;

And

In the matter of Order 53 Rules of Court 2012 and/or the inherent jurisdiction of this Honourable Court;

And

In the matter of Minister of Transport and the Government of Malaysia failing to make public an investigation report by Malaysian authorities into the crash of Nomad Aircraft 9M-ATZ on 6.6.1976 at Kota Kinabalu, Sabah

BETWEEN

HARRIS BIN MOHD SALLEH

(NRIC NO. 301104-12-5027) … APPLICANT

AND

1. CHIEF SECRETARY, GOVERNMENT OF MALAYSIA

2. MINISTER OF TRANSPORT

3. GOVEMENTOF MALAYSIA … RESPONDENTS

GROUNDS OF JUDGEMENT

Preliminary

[1] The Applicant, the former Chief Minister of the State of Sabah, Malaysia, is principally seeking is through Judicial Review under Order 53 Rules of Court 2012, the following reliefs: -

(a) An order of Mandamus directing the Respondents to take the necessary steps to declassify and/or make public the investigation report by Malaysian authorities into the crash of Nomad Aircraft 9M-ATZ Crash on 6.6.1976 at Kota Kinabalu, Sabah; and

(b) Any further and/or other order this Honourable Court deems fit and/or otherwise appropriate.

[2] The crash of the Nomad very near the approach of the runway at Kota Kinabalu on the 6.6.1976 ("Double 6") is one of those incidents where every Sabahan who were adults at that time can remember exactly where they were and what they were doing. The Double 6 incident left an indelible mark on the people and history of Sabah. Among the victims were senior cabinet members, including the then Chief Minister Tun Fuad Stephens, who was also the paramount chief or "Huguan Siou" of the Kadazan Dusun indigenous group in the State.

[3] Leave under Order 53 was granted by my predecessor, His Lordship Wong Siong Tung on the 08.08.2022 who also denied any stay sought by the Respondents pending their appeal to the Court of Appeal against the decision to grant leave.

[4] This decision is in respect of the substantive issues in the Judicial Review Application.

For ease of reference these grounds of judgement are divided as follows:

Paragraphs	
1 - 4	Preliminaries
5 – 15	The Double 6 Crash and its aftermath
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19 – 21	Official Secrets Act (OSA) De-classification
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The Double 6 Incident

[5] On 6.6.1976, the Nomad Aircraft 9M-ATZ ("**The Nomad Aircraft**") manufactured by the Government Aircraft Factory of Australia ("GAF"), crashed on its way from Labuan to Kota Kinabalu. The tragedy killed 11 persons, including the then Chief Minister of the

Sabah State Government, Tun Fuad Stephens and several other state ministers. As a result of the death of Tun Fuad Stephens, the Applicant who was then the deputy chief minister was appointed as the Chief Minister.

[6] Separate investigations were carried out by the 3rd Respondent and the Government of Australia. The Malaysian investigation team was led by Colonel Osman Saman, consisting of officers from the Department of Civil Aviation, the Royal Malaysian Air Force, the Royal Malaysian Police, and other associated departments. This Malaysian report is henceforth referred to as "**the Double 6 report**".

[7] The Australian investigation, prompted by the Australian connection described above and the requirements of **Annex 13 – Aircraft Accident and Incident Investigation, Convention on International Civil Aviation (the "Chicago Convention"),** involved a team comprised of representatives of GAF and officials from the Australian Department of Transport. Both Malaysia and Australia have ratified the Chicago Convention.

[8] To date, neither the Double 6 report nor the Australian reports have been released.

[9] The investigations were however completed. On 28.10.1976, in response to a question posed in Parliament on whether the 3rd Respondent intended to reveal the findings of the crash, the then Deputy Minister of Communications said, in summary, *the 3rd Respondent did not intend to place the full investigation report before Parliament. The investigations were however conducted by an investigation team which concluded that the tragedy did not reveal any technical errors or any act of sabotage as being the causes of the crash. What the investigation team instead discovered was that the fault was due to human error. It was said that the aircraft's cargo-hold at the back of the aircraft exceeded its maximum load and, as a consequence, this had resulted in the aircraft losing control when it attempted to land at Kota Kinabalu Airport. This resulted in the tragedy.*

'Penyata Rasmi Parlimen, Dewan Raykat' (28.10.1976).

[10] In an internal memorandum issued to all members of GAF sometime in June 1976, the then Manager of the GAF, J H Dolphin, indicated that there was no need for members of GAF to be worried about the crash having been due to a failure of the aircraft. This carried the implication that the crash was not due to a failure of the aircraft. (Exhibit "HS-14" Enc 2).

[11] This was reiterated by the then Deputy Minister of Transport in Parliament on 15.12.2009, in response to a question as to whether the 2nd Respondent would reveal the findings of the Malaysian investigation. He said that "amongst the concrete factors" (translated from Bahasa Malaysia) determined as having caused the tragedy to occur were human error, or pilot error, and the excess loading of the aircraft concerned. He further said in Bahasa Malaysia:

> *"Walaupun pesawat berkenaan hanya berkapasiti untuk membawa enam orang penumpang sahaja, ia telah dinaiki oleh 11 orang penumpang disertai dengan excess baggage dan ini dipercayai menyebabkan pengendalian pesawat menjadi sukar dan off balance, khususnya semasa*

pendaratan ditambah pula dengan ketiadaan instrumen radar pada ketika itu."

[12] This is translated as:

"While the aircraft concerned only had the capacity to carry six passengers, it was boarded by 11 passengers coupled with excess baggage and it was believed to cause difficulty in the control and off balance of the aircraft, especially while landing in addition to the lack of any radar instrument at that time."

'Penyata Rasmi Parlimen, Dewan Raykat' (15.12.2009 - Exhibit "HS-15" Enc 2.

[13] Neither the Malaysian Investigation Report and the Australian Investigation Report have been made public despite several calls for their declassification and disclosure by politicians, family members of the crash victims and the public alike. The events surrounding the tragedy is still widely reported, having recently, in commemoration of its 46th anniversary, been made the subject of

an investigative documentary entitled '*Double Six: The Untold Stories'*

[14] The mystery as to the Double 6 crash remains a burning issue among Sabahans and the print media reflects this lack of closure. The Daily Express. 'Findings cannot stay secret forever: Yong' (Daily Express, 07.06.2016), 'NGO asks why Double Six findings a secret' (Daily Express, 01.06.2017), 'Family members still waiting for Double Six tragedy report' (Borneo Post, 06.06.2022) and 'Push for the release of Double Six findings' (Daily Express, 13.06.2022). See "HS-16", "HS-17," "HS-18" and "HS-19" (enclosure 2) respectively. The Double 6 crash is to Sabah, what the MH370 missing MAS Boeing 777 is to the world, and particularly to the aviation industry.

[15] The forgoing event have been judicially recognized as being matters of public interest. In **Datuk Harris Mohd Salleh v Datuk Yong Teck Lee & Anor [2018] 1 CLJ 145 (FC)**, Ahmad Maarop CJ (Malaya) (as he then was) said, at [49]:

"[49] Reverting to the present appeal, we can accept that the impugned statements concerned a matter of public interest - the Nomad plane crash on 6 June 1976 in Sabah (the double six tragedy) which took the lives of all on board the plane including Tun Fuad Stephens and some of the Berjaya Cabinet Ministers, as well as the speech on the topic of "Minyak Sabah Untuk Siapa" by Tengku Razaleigh on 2 April 2010 which was published on 4 April 2010 with caption "Invite saved my life: Razaleigh..." (Emphasis added)

Judicial Review

[16] The powers of the High Court in a Judicial Review application have been exhaustively litigated, discussed, adjudicated and conclusively pronounced by many decisions of the Appellate Courts in Malaysia and all in very recent legal history. The rationale and scope of Judicial Review needs to be re-stated here and which will become apparent later in this decision.

[17] The Federal Court in **Haris Fathillah Bin Mohamed Ibrahim & Ors v Tan Sri Dato' Sri Haji Azam Bin Baki& Ors [2023] 1LNS 270** through YAA Chief Justice Tun Maimun Binti Che Mat, had this to say (paraphrasing): -

> ***[62]*** *To build upon what was stated in SIS Forum (supra), judicial review in its broadest sense calls upon the Judiciary to examine the exercise of powers. A constitutional judicial review, whether to challenge the validity of legislation or such as in this case, to interpret the Federal Constitution itself, brings to light the question on how the constitutional provision should be applied. The statutory aspect of judicial review is when the exercise of those powers is questioned and judicial remedy is sought to bring those powers back into the confines of the law….*
>
> ***[68]*** *The appellants have cited cases on the importance of judicial independence. These cases are trite and need not be repeated. The fact is that while the respondents and other criminal investigative bodies are constitutionally entitled to investigate and the Public Prosecutor to commence criminal*

proceedings against Superior Court Judges, those powers must be exercised in good faith and only in genuine cases.

[18] Then again in **SIS Forum (Malaysia) v Kerajaan Negeri Selangor; Majls Agama Islam Selangor (Intervener) [2022] 3 CLJ 339**, a decision of the Federal Court:

[45] *Judicial review is thus a core tenet of the rule of law which is inextricably linked to the notion of constitutional supremacy in a democratic form of Government. This is because a core feature of the rule of law is the doctrine of separation of powers, a corollary to which is the concept of check and balance.*

[46] *Judicial review - whether constitutional review or statutory review - is a fundamental aspect of check and balance and is the vehicle through which the judicial branch of Government can perform its constitutional function vis-à-vis the other branches of Government.*

[47] *At the risk of repetition, in line with decided cases, the judicial power of the Federation which includes judicial review*

(constitutional and statutory) is vested by constitutional design solely in the two High Courts.

De-classification

[19] The Double 6 report, classified on the 28.10.1976, is sought by the Applicant through this Judicial Review to be declassified under Section 2C of the Official Secrets Act 1972 ("**OSA**"):

2C Declassification of official secret by a Minister or a public officer

A Minister or public officer charged with any responsibility in respect of any Ministry, department or any public service or the Menteri Besar or the Chief Minister of a State or the principal officer in charge of the administrative affairs of a State may, at any time, declassify any document specified in the Schedule or any official document, information or material as may have been classified and upon such declassification, the said document, information or material shall cease to be official secret.

[20] The cause papers disclose that an application was made to the Minister to declassify the report but there was no forthcoming decision by the Minister.

[21] It is clear then that this Judicial Review does not seek to challenge the constitutionality of any legislation within the framework of the sacrosanct Federal Constitution, but rather a challenge to the statutory exercise (or non-exercise) of a discretion allowed in the OSA. In essence, it is the decision or discretion of the Minister, and not the law that the judicial review is sought.

Applicant - suppression cause speculation

[22] The Applicant appears to have directly benefited from the death of Tun Fuad Stephens as he was appointed the Chief Minister in Tun's place the day following the accident. In the words of Anantham Kasinather JCA at the Court of Appeal stage of **Datuk Yong Teck Lee & Anor v Datuk Harris Mohd Salleh [2014] 6 CLJ 649 (COA)** acknowledged:

"[3] The cause of the crash naturally formed the subject matter of investigations conducted by the Federal Government of Malaysia and the State Government of Sabah. Although the results of these investigations were never made public, books bearing the title "Harris Salleh of Sabah" and "The Sabahan - The Life and Death of Tun Fuad Stephen" speculated on the causes of the crash. The contents of these books and other contemporaneous literature on this subject in the media only served to fuel speculation on the real causes of the crash, in the absence of an official report. There is no doubt that sabotage was one of the many causes speculated by the public.

[4] It is safe to say that the speculation over the causes for this crash was on the wane by the year 2010 although on 6 June every year, there is an official state memorial conducted by senior state officials and members of the victim's family at the crash site to commemorate the crash. However, this whole issue was reignited by the speech of one of the two West Malaysians who had disembarked from the aircraft on that fateful day. The incident that reignited interest on this subject

was the visit to Sabah of Tengku Razaleigh and a speech that he delivered on 2 April 2010. On this date, Tengku Razaleigh addressing an audience at a forum at Penampang, Sabah revealed for the first time in public that he was already seated and strapped to his seat in the aircraft together with the late Tun Fuad and the Tengku Bendahara Pahang when the respondent came on board and invited him to leave the aircraft and board another aircraft to visit the respondent's cattle farm in Banggai. Tengku Razaleigh then, in turn, according to Tengku's speech at this forum, invited Tun Rahman Yaakub and Tengku Bendahara Pahang to join him to visit the cattle farm." (Emphasis added)

[23] That the public interest in this matter fermented speculation of wrong doing is clear which the then United Borneo Front chairman, Datuk Jeffrey Kitingan, was reported to have testified in the defamation case a referred to above that:

"This is a big tragedy involving half of the cabinet ministers and they were supposed to be in Labuan to sign an oil agreement and from what we know, the agreement was not

signed and there was a crash including the Chief Minister (CM) who was supposed to sign the agreement.

And then one week later it was signed by the next CM who took over who was not in that plane and who invited the Petronas chief, the other party to the agreement, out of the plane to another plane

So, won't you want to know? Would that not raise so many questions? Would that not lead to so many speculations? Some may even speculate that this incident might have been planned, otherwise why did this tragedy happen? Why was the agreement not signed? Why some people went out of the plane? Why was the agreement rushed when the State and the families were still in mourning?" (Emphasis added)

[24] It cannot be said then that the Applicant is an officious bystander with no legitimate interest in having the Double 6 report de-classified. He has been directly implicated in the accident and suspicions are harboured until today. Neither could the Applicant

have access to the Australian report. The Applicant alleges that the Australian Government had not released the Australian Investigation Report because it covered legal implications from countries that had bought or received Nomad aircrafts. Further, the Australian Government had claimed that it would declassify its report on the condition that the Malaysian Government was agreeable to release its own findings.

Applicant - Freedom of Information

[25] The Applicant submitted that the power and duty to de-classify is derived from three main tenets:

(a) Our democratic from of government underlines the existence of a right to free speech;

(b) The right to receive information; and

(c) Permissible encroachment in that the encroachment by Parliament into both free speech and the right to information

is allowable where it is expedient within the meaning of Article 10(2) (a) of the Federal Constitution.

[26] HRH Sultan Azlan Shah, in a public lecture after retiring from the bench considered the provisions of the OSA in particular the provisions making it an offence for unauthorised disclosure, in a public lecture entitled, "The **Right to Know**", at Universiti Sains Malaysia on the 19.12.1986: -

"Though the Federal Constitution does not expressly provide that all persons have the "right to know" (it does not mention the right to information), the fundamental right of expression as embodied in Article 10(1)(a) will be meaningless if the public do not have the necessary information on which they can express their views

[27] In further support of this contention, the Applicant cited the case of **Lee Kwan Woh v PP [2009] 5 CLJ 631 (FC)** where Gopal Sri Ram FCJ said, at [13]:

"[13] The fourth principle of constitutional interpretation is this. Whilst fundamental rights guaranteed by Part II must be read generously and in a prismatic fashion, provisos that limit or derogate those rights must be read restrictively. As Lord Nicholls of Birkenhead and Lord Hope of Craig Head in the Privy Council case of Prince Pinder v. The Queen [2002] UKPC 46 said in their joint dissent: -

> *It should never be forgotten that courts are the guardians of constitutional rights. A vitally important function of court is to interpret constitutional provisions conferring rights with the fullness needed to ensure that citizens have the benefit these constitutional guarantees are intended to afford. Provisos derogating from the scope of guaranteed rights are to be read restrictively. In the ordinary course they are to be given 'strict and narrow', rather than broad, constructions':*

[28] Which leads to the doctrine of proportionality where *all forms of state action - whether legislative or executive - that infringe a fundamental right must (a) have an objective that is sufficiently*

important to justify limiting the right in question; (b) the measures designed by the relevant state action to meet its objective must have a rational nexus with that objective; and (c) the means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve, See **Alma Nudo Atenza v PP & Another Appeal [2019] 5 CLJ 780 (FC)**

[29] The Courts have been constantly asked to adjudicate on the conflict or tension between a protagonist on the one hand, and the executive's absolute discretionary powers allowed by statute, on the other. One such case was **Merdeka University Bhd v. Government of Malaysia [1982] 1 LNS 1 FC**. There the words used by the statute were "*If, the Yang di-Pertuan Agong is satisfied*". In interpreting that statutory formula, Suffian LP said:

> *"It will be noted that section 6 used the formula 'If the Yang di Pertuan Agong is satisfied etc.' In the past such a subjective formula would have barred the courts from going behind His Majesty's reasons for his decision to reject the plaintiff's application; but, as stated by the learned Judge, administrative law has since so far advanced such that today*

such a subjective formula no longer excludes judicial review if objective facts have to be ascertained before arriving at such satisfaction and the test of unreasonableness is not whether a particular person considers a particular course unreasonable, but whether it could be said that no reasonable person could consider that course reasonable". [emphasis added]

[30] The Applicant concludes this argument by arguing that every legal power must have legal limits otherwise there is dictatorship. Discretion should be exercised for a proper purpose or should not be exercised unreasonably; this notion was succinctly put by HRH Raja Azlan Shah in his dicta in. **Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise [1979] 1 MLJ 135 (FC)**

"Applying the principles stated above, what is the effect of the condition under consideration? I read the affidavit of the Chairman, Land Executive Committee as claiming an unfettered discretion to grant or reject any application under section 124 or impose such conditions or other requirements

as the Committee think fit. I cannot subscribe to this proposition for a moment. Unfettered discretion is a contradiction in terms. My understanding of the authorities in these cases, and in particular the case of Pyx Granite (ante) and its progeny compel me to reject it and to uphold the decision of the learned judge. It does not seem to be realised that this argument is fallacious. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that "public bodies must be compelled to observe the law and it is

essential that bureaucracy should be kept in its place", (per Danckwerts L.J. in Bradbury v London Borough of Enfield [1967] 3 All ER 434 442.)" (Emphasis added)

Respondents – The Applicant had no Locus Standi

[31] In support of the Respondents' contention that the Applicant lacked locus standi, they recorded that the Applicant had filed the defamation suit over the allegation against him related to the Accident and the same had ended in his favour. (**See Datuk Harris Mohd Salleh v Datuk Yong Teck Lee & Anor [2018] 1 CLJ 145**) ('**the Defamation Suit**"). With that, the Applicant in actuality had been vindicated from the said allegations and has no pending interest over the Report.

[32] The Respondents further argued that the Applicants have failed to comply with the test of threshold locus standi based on the case of **Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor [2014] 2 CLJ 525** and **Marcel Jude Joseph v The Minister of Education Malaysia [2012] 7 CLJ 196**, he has no locus to initiate this action.

[33] The fact that the Federal Court had ruled in favour of the Applicant in the Defamation Suit is in fact a recognition of the Applicant's personal interest and reputation resulting from the fateful plane crash. He directly benefited from the crash as he immediately became the Chief Minister of Sabah as he was then assistant chief minister to then Chief Minister Tun Fuad Stephens, who tragically perished in the crash together with his son, Johari, and thus allegations that he had engineered the crash has been whispered amongst the populace. He has been directly prejudiced as his immediate superior, the Chief Minister, and his key fellow cabinet colleagues have likewise perished. Even applying the threshold test, cited in *MTUC* and *Marcel Jude* (above) it is clear the Applicant has the locus, not least as a Sabahan and an elected State Assemblyman and a member of the State Cabinet.

Respondents – the Applicant is late

[34] The Respondents argue that the Applicant is way out of time relying principally on the 60 day time frame allowed in Order 53 Rule 3(6) Rules of Court 2012.

[35] The Double 6 report was classified under OSA since 28.10.1976 (paragraph 7 Applicant's Affidavit in Reply – Encl.50). 45 years later, the Applicant sent a letter dated 23.3.2021 seeking for disclosure of the Report (para 22.1 Statement – Encl.3). The Respondents argue that the Applicant had allowed a blatant delay in filing the present judicial review application.

[36] The Applicant denied that he was aware of the classification since 1976. He admitted that he discovered the classification of Report under OSA in mid-2019 [See: Encl.50 – paragraph 7.2]. Thus, there still a delay of some three years.

[37] Given the sheer public interest in this case resulting in the death of so many State elected leaders, it touches every Sabahan dearly, particularly those who lived through the transition from the Mustapha led USNO Government to the Harris led Berjaya Government it is with ease that, in the interest of justice in this matter I extend and abridge time needed to file an application for Judicial Review to the date the Applicant did file his application pursuant to the power allowed in **Order 3 of the Rules of Court 2012.**

Respondents - The impugned decision by the Minister is not tainted with illegality, irrationality or procedural impropriety

[38] The Respondents argue that whether a document needs to remain classified is purely the discretion of the 3rd Respondent, pursuant to section 2C OSA. In this case, the 3rd Respondent had stated that the Report still needs to be classified under OSA.

[39] This argument by the Respondent is hard to fault or question. Parliament has, in its wisdom, legislated the OSA which vests the Minister concerned the discretion to classify a document under the Schedule to the OSA. Quoting from the OSA:

> *"official secret" means any document specified in the Schedule and any information and material relating thereto and includes any other official document, information and material as may be classified as "Top Secret", "Secret", "Confidential" or "Restricted", as the case may be, by a Minister, the Menteri Besar or Chief Minister of a State or such public officer appointed under section 2B;*

And

SCHEDULE [Section 2A]

Cabinet documents, records of decisions and deliberations including those of Cabinet committees;

State Executive Council documents, records of decisions and deliberations including those of State Executive Council committees;

Documents concerning national security, defence and international relations.

[40] Nothing in the cause papers disclose any hint of a reason offered by the Minister/Respondents for maintaining the classification. The Minister only states as follows in his Affidavit in Reply [E.49, p.9, para 14]:

"...the [Malaysian Investigation Report] is still classified and as

to-date, there is no approval from the Cabinet on the declassification of the same." (Emphasis added)

[41] The assumption here is that the Minister, in this case in charge of transport, can classify and de-classify a document touching on *national security, defence and international relations*. A further assumption here is that he alone is clothe with the socratic wisdom to know what is in the interest of the Nation, And he decides alone because ultimately, the electorate put him in that seat of power.

[42] HRH Sultan Azlan Shah, in a public lecture referred to in para 26 above at Universiti Sains Malaysia on the 19.12.1986 said: -

"In Malaysia, the Official Secrets Act of 1972 is based on the English Act of 1911. When the Act was introduced in Parliament in 1972 it was said that the object of the then proposed Bill was to equip the Government with adequate powers to deal with spies of foreign countries. The Malaysian Act does not define what may amount to "secret information". It is therefore left to the executive to decide what information may be classified as "official secret". It grants a wide discretion

to the Minister concerned to determine what should be classified as official secrets. Whether, in any particular case, any document or information the Government requires is to be kept from public knowledge or from the knowledge of specified persons depend on the manner the Government treats that document or information. As pointed out by a leading constitutional writer:

Thus, the government is the sole judge of what information is to be kept secret. It is within the sole discretion of the executive to classify information ...

The scope of the Malaysian Act and the absolute discretion given thereunder to the executive to determine what may amount to an official secret is indeed very wide and far-reaching. It is in fact, so widely drafted that little leeway is even given to the courts to check any excessive exercise of these powers by the Government. "(emphasis added)

[43] The Applicant argues that the freedom of speech in Article 10 of the Federal Constitution include the right to receive information. Quoting

the decision of the late Gopal Sri Ram, FCJ in **Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 (FC)** [emphasis added]

> *[13] Article 10 contains certain express and, by interpretive implication, other specific freedoms. For example, the freedom of speech and expression are expressly guaranteed by art. 10(1)(a). The right to be derived from the express protection is the right to receive information, which is equally guaranteed. See, Secretary, Ministry of Information and Broadcasting, Government of India v. Cricket Association of Bengal AIR [1995] SC 1236." (Emphasis added)*

[44] Such classification of a document does not infringe Article 8 of the Federal Constitution as there is no unequal treatment in the 3rd Respondent's decision to classify the document and maintain the classification under OSA. The decision to maintain the classification of investigation report applied to everyone and not just the Applicant. In other words, everyone has no access to the said

report. Thus, there is no inequality and discriminatory or different treatment given towards the Applicant.

[45] In countering the argument by the Applicant that **Article 8** (*All persons are equal before the law*) and **Article 10** (*every citizen has the right to freedom of speech*) of the **Federal Constitution** the Respondents counters by saying that in determining whether a legal provision is inconsistent with the equality provision, the first question to be asked is whether the legal provision is discriminatory. If it is not discriminatory, it does not transgress the equality provision and it is a good law. This is based on the Federal Court's decision in the case of **Datuk Haji Harun bin Haji Idris v Public Prosecutor [1977] 2 MLJ 155**. The OSA applies to everybody and is not discriminatory to any one segment or class of society.

[46] The rights in Article 10 have no bearing on the obligation on the Minister to de-classify the Double 6 report. In any event it is now established that the right to freedom of speech in Malaysia is not absolute.

Respondents - Condition for Mandamus not fulfilled.

[47] The Respondents argue that the Applicant has failed to bring his case within the purview of section 44 of the Specific Relief Act, 1950 when he failed to satisfy one of the requirements of section 44(1) namely;

> *"[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, or on the corporation in its corporate character;"*

[48] This condition of section 44(1) imposes on the Applicant an obligation to show that the Respondent has a corresponding legal duty under any specific law that governs his claim of demand

[49] The Respondents' key contention is that the de-classification of a document protected under OSA is an exercise of discretion by the

Minister. The provision does not impart a duty on the Minister to declassify any document. Thus, the relief sought in the present application does not fulfil the requirement for mandamus.

[50] The Applicant counters by arguing that section 44 has no application this case. This is because section 44, Specific Relief Act does not apply to a Minister. That section applies only to a person holding "public office". As defined by the section 3, Interpretation Acts 1948 and 1967 [E.64, p.8]: ""public office" means an office in any of the public services; "public officer" means a person lawfully holding, acting in or exercising the functions of a public office;"

Analysis of the Arguments of the Parties.

The Dilemma

[51] The OSA is clear. The Minister alone has the right and discretion to classify and subsequently to de-classify a document. Understandably, he need not give his reasons for exercising such decision to classify because in so doing he may compromise the very national security status he seeks to protect. Added to this is the

recognition that Parliament had every right to enact the OSA and within the OSA to clothe the Minister with an almost absolute discretion to classify and de-classify. It is not for the Courts to even attempt to curtail or question that right. In any event the constitutionality of the OSA is not the issue here.

[52] The Applicant has relied on a plethora of authorities, principally from the apex court, laying and reinforcing the foundation on the powers of the Superior Courts in a Judicial Review on the precept of the basic structure with separation of powers between the executive, legislature and the judiciary within our democratic framework. More cogently was the argument on the right to information as a corollary to free speech, the proportionality doctrine in that a power conferred that infringe a fundamental right must have an objective that is sufficiently important to justify limiting the right in question, all these precepts ultimately derived its existence and force from the Federal Constitution.

[53] It appears difficult to choose between the two sides as this Court must do, because the respective weight, legality and cogency

between these arguments mean that the scale of justice is finely balanced.

The Test of Legitimacy

[54] I believe that there is a common underlying and unmistakable thread running through all these precepts and doctrines raised particularly by the Applicant. The common thread is that they all seek a singular goal, that is, to legitimise both the legal provision and the perception of the exercise of the discretion, as in this case.

[55] For example, we have judicial review by the Courts, the basic structure represented by separation of powers and the doctrine or proportionality, are all to ultimately afford legitimacy to the actions of the legislature or of a statutory act or decision by the executive.

[56] The foundation of our democracy is the Federal Constitution. So long as laws, the citizens, the legislature, executive and the judiciary are or act within the confines of the Federal Constitution, there is

law and order. With such mutual compliance comes an innate sense of legitimacy by the citizens of their Government. This sense of legitimacy is critical for society to survive and thrive. You are all in Court today because you believe in the legitimacy of this Court as an arbiter of the prevailing dispute. If the Courts have no legitimacy, disputes will be resolved by armed conflict and society will dissolve into chaos.

[57] Legitimacy can be multi-tiered– firstly, legitimacy of a legislation with reference to its conformity with the Federal Constitution and, secondly, legitimacy of the exercise of a statutory discretion to the wider perception of the populace in its democratic government.

[58] This is not in any way to disparage or question the reasoning behind the series of landmark decisions by the Federal Court, cited by the parties in this case, on the standing of the basic structure, proportionality and judicial review, among others. Far from it, the concept of legitimacy pervades the ultimate objective of these decisions. Legitimacy was alluded to only in passing in some of the landmark cases cited but it is hard to ignore that the ultimate aim of these decisions is to preserve the legitimacy of the legislature or the

executive. It is for this very reason we have the power of Judicial Review resided in the Courts as a "check and balance". The whole purpose of "check and balance" in any case is to promulgate the legitimacy of a legislation or of an executive action.

[59] Legitimacy of the government in the eyes of the populace is critical as the public must recognise the law and the Government as legitimate, failing which, the public will not believe in, and follow, the rule of law. The proverbial "unruly horse" doctrine of "public policy" or public interest are in their true essence, doctrines of public legitimacy of the rule of law.

[60] Coming to the case in hand does the decision of the Minister in not to de-classifying the Double 6 report lower the populace's estimation of his reputation, and in consequence, his legitimacy of his ministerial portfolio and the Government he represents?

[61] The most compelling argument on the part of the Applicant is of the right to information being the corollary to the freedom of speech. In addition, the doctrine that the right given to the Minister must be in proportion to the evil such right seeks to protect. I would agree that

where the Minister is given the power to de-classify under section 2C of the OSA under given circumstances, a duty to de-classify arises and the non-exercise of such duty must be with reason.

[62] Equally compelling is the argument by the Respondents of clear letter of the law in the form of the unchallenged OSA where there is no provision to require the Minister to give any rationale for his decisions to classify and de-classify any document.

[63] When faced with this dilemma, the test of legitimacy is relevant.

[64] Coincidentally, it is exactly nine years to today (8.3.2014) that MH370 disappeared from the face of the earth with 239 hapless souls on board. The Minister of Transport who is the 2nd Respondent made a statement through *BERNAMA* which was published yesterday (07.03.2023 but reported a few days earlier in the national press) and which I now quote excerpts from such report extracted from the Borneo Post, 07.03.2023 (paraphrasing, with emphasis):

> *"Kuala Lumpur: Transport Minister Anthony Loke Sunday stressed that he will not summarily close the book on the Malaysia Airlines (MAS) flight MH370 tragedy……. I am painfully aware of the desire for closure. Since 2014, Malaysia and its international partners have searched millions of square kilometres … Loke said to the families of the 239 passengers and crew members on board the lost aircraft, no amount of sympathy can erase the grief and heartache of losing their loved ones. "Malaysians will always stand by you and share the weight of this tribulation together. We honour the lives lost and will not forget them,", he added"*

[65] For the Minister to deny de-classification of the Double 6 report, without offering any reason, but then speak of openness and closure in respect of MH370 cannot by any stretch of the imagination reflect well on him as Minister of the people. He has the acknowledged right under the OSA NOT to de-classify but in so doing his legitimacy as the people's representative in our democratic Government and in the context of the circumstances of this case, is diminished and consequently prejudices the legitimacy of the very Government he serves. It is this very state of affairs that Judicial Review can arrest.

[66] Clearly, in this case, given the lapse of 47 years and the events that have transpired in Parliament following the crash, the power to classify the document is not in proportion to the purpose or objective to maintain such classification in 2023 but only, I hasten to add, within the context of this case.

[67] At this stage, it bears repeating the dicta of HRH Azlan Shah in **Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise [1979] 1 MLJ 135 (FC)** (emphasis added)

> *Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard*

for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law.

[68] Although not explicit, it is difficult to deny that this clear dictum of HRH seeks, ultimately, to assure the populace a sense of legitimacy in their government.

[69] Applying this somewhat subjective test of legitimacy to the arguments by the parties, the scale is no more finely balanced but has tipped, and tipped in favour of the Applicant.

Conclusion

[70] With the above discussion in mind, I make the following findings within the specific circumstances of this case, in that the clear provisions of the OSA and the power of the Minister therein is ultimately subject to the Federal Constitution and that:

(a) The right to information exists as a corollary to the right to free speech. The Federal Constitution seeks to establish an

egalitarian society where the citizens exercise their right to free speech on facts and reason and not on assumptions and conjecture. Coupled with this is the right of Sabahans to know the conclusions from the plane crash investigation;

(b) The doctrine of proportionality in that the objective sought from the infringement of a right must be in proportion to the need to infringe, especially after a lapse of 47 years, and the absence of cogent reasons to prolong the infringement;

(c) If in fact the Double 6 report discloses some wrong-doing then even more so the public have a right to demand justice as it is trite that no person is above the law. The Minister will again lose his credibility and legitimacy if he is perceived as using his executive discretion to shield the wrongdoer from the force of law. One must not forget that the credibility of any Minister is directly reflected on the legitimacy of the Government he serves;

(d) The Executive owes a duty to the aviation industry internationally and in Malaysia to disclose the outcome of the investigation so that lessons can be learnt and air travel

can be made safer, as has been done in all other cases of commercial plane crashes;

(e) Given that section 2C of the OSA confers on the Minister the power to de-classify, it is axiomatic that a consequential duty to de-classify arises when the circumstances justifying the classification, which have never been alluded to by the Minister in this case, has waned;

(f) The Applicant, a Sabahan, the then deputy chief minister, an elected assemblyman and a cabinet member has been personally and directly affected by the non-de-classification of the Double 6 report;

(g) The victims in the crash are leaders in their respective communities and are mostly elected assemblymen. The families of these victims, deserve closure as much as the families of MH370;

(h) The Minister's decision not to de-classify is not exhibited to have been reasonably exercised;

(i) The continued suppression of the Double 6 report does not enhance but rather lowers the sense of legitimacy of the executive in the eyes of the populace particularly in Sabah; and

(j) In the premises, it is therefore clearly in the public interest for the Double 6 report to be de-classified.

[71] In paragraphs [31] to [50] I have already discussed and dealt with the various technical arguments of the Respondents against this judicial review.

Order

[72] I accordingly order:

(a) An order of Mandamus directing the Respondents to take the necessary steps to declassify and/or make public the investigation report by Malaysian authorities into the crash of Nomad Aircraft 9M-ATZ Crash on 06.06.1976 at Kota Kinabalu, Sabah on or before the 8.6.2023.

(b) And to the extent that if such disclosure requires, by treaty or otherwise, concomitant action by the Australian Government, that the Respondents do take immediate steps to procure such action, to facilitate the prompt de-classification ordered.

(c) Given the unique nature of this case in that, this is essentially not a contentious matter I make no order as to costs.

Dated the 8th March, 2023

-SIGNED-

YA Datuk Christopher Chin Soo Yin
Judge
High Court of Kota Kinabalu, Sabah

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Kota Kinabalu, Sabah

For the Respondent: Jabatan Peguam Negara
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