IN THE COURT OF APPEAL OF MALAYSIA

(APPELLATE JURISDICTION)

PALACE OF JUSTICE

CIVIL APPEAL NO. W-01-424-2010

Appellants

(1) MINISTER OF ENERGY, WATER AND COMMUNICATION

(2) GOVERNMENT OF MALAYSIA

v.

Respondents

MALAYSIAN TRADE UNION CONGRESS AND 13 OTHERS

[In the matter of the High Court of Malaya, Kuala Lumpur (Appellate and Special Powers Division), Application for Judicial Review No. R2-25-09-2007

Applicants

Malaysian Trade Union Congress and 13 Others

v.

Respondents

(1) Minister of Energy, Water and Communication

(2) State Government of Selangor

(3) Government of Malaysia]

Coram:

Zaleha Zahari, JCA

A. Samah Nordin, JCA

Mohd Hishamudin Yunus, JCA

DISSENTING JUDGMENT OF MOHD HISHAMUDIN YUNUS, JCA

This is an appeal by the appellants against the decision of the High Court of Kuala Lumpur (Appellate and Special Powers Division) of 28 June 2010. By way of judicial review, Hadhariah Syed Ismail JC had granted the respondents the following orders prayed for in their judicial review application before the learned Judicial Commissioner:

(1) that a writ of certiorari to issue to quash the decision of the first appellant (the Minister of Energy, Water and Communication) (hereinafter shall be referred to as 'the Minister') refusing to publish and/or disclose an Audit Report and a Concession Agreement; and

(2) that a writ of mandamus to issue to compel the Minister to publish and/or disclose the Audit Report and the Concession Agreement to the respondents and/or to the public within 7 days of the order.

The essence of the judicial review application is that despite repeated requests by the first respondent, the Malaysian Trade Union Congress ('the MTUC'), the first appellant, that is, the Minister, failed to disclose the following documents despite being obliged in law to do so:

(1) an agreement ('the Concession Agreement') of 15 December 2004 between –

(a) the Government of the State of Selangor (cited as the second respondent in the High Court proceedings, but is not a party in this appeal);

(b) the Federal Government (the second appellant in this appeal); and

(c) a company known as Syarikat Bekalan Air Selangor Sdn Bhd (also known by the acronym 'SYABAS' – but not a party either in the proceedings below or in this appeal); and

(2) an Audit Report justifying an increase of 15% in water tariffs ('the Audit Report').

Although the Concession Agreement is a very important document for the public, since the contents of which affect the lives and basic needs (access to treated water) of people living in the State of Selangor, yet, rather strangely, this Concession Agreement was not permitted by the parties to it to be made available for public disclosure. Instead, there is a peculiar clause – clause 45 – in the Concession Agreement that states that the Concession Agreement may be disclosed to a third party only with the agreement of all the three parties to the Agreement. The learned Senior Federal Counsel, Datin Azizah, appearing for the appellants, when asked by this Court, said that she did not know the rational for such a clause.

Prior to this Concession Agreement, the Selangor State Government determined the water tariffs within the State of Selangor.

Historically, until 15 March 2002, the Selangor Water Supply Department had been responsible for the distribution and treatment of water for the State of Selangor. On 15 March 2002, however, these services were privatized: the distribution and treatment components were separated with the non-profitable distribution aspect being taken over by Perbadanan Urus Air Selangor Bhd (PUAS). The profitable treatment aspect was taken over by a consortium comprising Puncak Niaga (M) Sdn Bhd ('Puncak Niaga'), Konsortium Abass Sdn Bhd and Syarikat Pengeluar Sdn Bhd ('SPLASH').

PUAS suffered a loss of about RM2 billion and was unable to meet its commitments. The Government of the State of Selangor asked for financial aid from the Federal Government, but that request was rejected.

However, in September 2004 it was announced that SYABAS would take over PUAS and the Federal Government would provide financial assistance of RM2.9 billion to SYABAS. At this juncture, Puncak Niaga held 70% interest in SYABAS, whilst Kumpulan Darul Ehsan

Berhad, a company owned by the Selangor Economic Development Corporation, held the remaining 30%.

With the execution of the 'confidential' Concession Agreement in December 2004, the water tariffs are now governed by the terms of the said Agreement. Under the Concession Agreement, SYABAS is entitled to increase the water tariffs only if it has fulfilled the performance indicators prescribed by a formula, in particular, if it has managed to achieve at least a 5% reduction in the Non Revenue Water (NRW), that is to say, to reduce the percentage of NRW to 37.78 %.

It is significant to note, however, that, earlier, on 19 April 2004, the Minister in a press statement had assured that any application by SYABAS to review tariffs would have to be considered from the context of results, capital expenditure and operational costs and from the context of successful reduction of NRW and distribution costs. The Minister had further assured that any suggestion to increase water tariffs would have to go through an evaluation exercise that

would be strict and transparent, and with due regard being had to the views of the various stakeholders, including the consumers.

But the truth was that there had been no meaningful discussion with the various stakeholders (including consumers) as had been assured by the Minister.

Despite the secrecy of the Concession Agreement, parts of it, however, through discussions in the mass media, came to the knowledge of the public. The parts that came to public knowledge relate to NRW, the formulation of water tariffs, and provisions on profits. In particular, a research paper by one Kim Eng published on 25 April 2005 states –

(a) that water tariffs would be reviewed on 1 January 2006, and would be reviewed every three years thereafter, and that in the event of non-review within 90 days of a milestone, SYABAS would be entitled to compensation. The quantum of review would be based on a formula which set out performance indicators;

(b) that these performance indicators included a reduction of NRW; and

(c) that the Federal Government would be paying compensation to SYABAS if tariffs were not reviewed on 1 January 2006.

In April 2005, reports surfaced which stated that SYABAS was entitled to the 1 January 2006 review. However, as at 1 January 2006, SYABAS did not get the review;

In October 2006, it was declared by the Minister that the water tariffs were reviewed and increased by 15%. This was supposedly on the basis of the performance indicators having been achieved including the NRW component.

The respondents contend that the basis of the review is questionable as:

(a) although an audit was reported to have been conducted in 2005, yet a review was not given on 1 January 2006;

(b) SYABAS does not appear to have prepared a report setting out what concrete efforts were taken to achieve the NRW reduction of 5% for the year 2005;

(c) media reports state that the NRW reduction programme was stopped by a Court order in or about August 2005; and

(d) reports are contradictory about the entitlement of SYABAS to an increase of tariffs.

Be that as it may, it was subsequently revealed that an Audit Report was in fact produced to Cabinet and that Audit Report confirmed that SYABAS had achieved the 5% reduction in NRW and thus entitled to an increase in water tariff with effect from 1 November 2006.

On 7 November 2006, Mr. Rajasekaran, the Secretary General of the Malaysian Trade Union Congress (the first respondent, MTUC), on behalf of MTUC, wrote to the Minister, the first appellant, seeking the latter to make public the Audit Report and the Concession Agreement before 16 November 2006. The letter reads –

KONGRES KESATUAN SEKERJA MALAYSIA
Malaysian Trade Union Congress

MTUC/2307

MTUC
PEJUANG KAUM PEKERJA
SEJAK 1949

7hb November 2006

YB Datuk Seri Dr. Lim Keng Yaik
Menteri Tenaga, Air dan Komunikasi
Putrajaya

Faks: 03 88893712

YB Datuk Seri Dr. Lim Keng Yaik

Merujuk kepada kenyataan akhbar YB Datuk mengumumkan kenaikan 15 peratus tariff air dan bayaran pampasan RM152 juta kepada Syabas.

Atas dasar keterbukaan, kami memohon agar YB mempublisitikan laporan Umum Auditor bersama dengan perjanjian sepakat di antara Kerajaan Persekutuan dan Kerajaan Negeri Selangor bersama Syabas. Kami amat

sukacita sekiranya laporan tersebut disebarkan kepada pengetahuan umum sebelum 16 November 2006.

Kami rela untuk mengambil laporan tersebut dari pejabat YB sekiranya diizinkan.

Kerjasama pihak YB dalam perkara ini amat kami hargai.

Sekian terima kasih.

Yang benar,

t.t.
(G.RAJASEKARAN)
Setiausaha Agung

Salinan: YAB Perdana Menteri
En. Teo Yen Hua, Ketua Setiausaha Dua

There was no reply by the Minister to this letter.

So, on 23 November 2006 Mr. Rajasekaran, on behalf of MTUC, again wrote to the Minister seeking disclosure of the two documents. This reminder letter reads –

KONGRES KESATUAN SEKERJA MALAYSIA

Malaysian Trade Union Congress

MTUC/2307

MTUC

PEJUANG KAUM PEKERJA

SEJAK 1949

23hb November 2006

YB Datuk Seri Dr. Lim Keng Yaik
Menteri Tenaga, Air dan Komunikasi
Putrajaya

Faks: 03 88893712

YB Datuk Seri Dr. Lim Keng Yaik

PER: MTUC Mengulangi Permintaan Sesalinan Laporan Audit Air dan Perjanjian Sepakat

Merujuk kepada surat kami bertarikh 7hb November 2006, MTUC tidak menerima sebarang maklumbalas dari Menteri sehingga ke hari ini.

Kami mengajukan sekali lagi permintaan tersebut, iaitu mendapatkan Laporan Audit Jabatan Air Kebangsaan dalam tempoh masa tujuh hari. Laporan tersebut akan mendalamkan pengetahuan kami mengenai kerasionalan kenaikan tariff air. Atas dasar keterbukaan dan

pemerintahan yang bersepadu kami sangat berharap agar Menteri akan bersetuju dengan permintaan ini.

Memandangkan kenaikan tariff air berkait rapat dengan perjanjian sepakat di antara Kerajaan Persekutuan, Kerajaan Selangor dan Syabas kami berharap agar salinan perjanjian tersebut diberikan kepada kami.

Sekiranya kami tidak menerima sebarang maklum balas dalam tempoh masa tujuh hari dari Menteri Tenaga, Air dan Komunikasi, maka kami akan menganggap Menteri tidak berminat untuk memberi maklum balas terhadap permintaan kami.

Kerjasama pihak YB dalam perkara ini amat kami hargai.

Sekian terima kasih.

Yang benar,

t.t.
(G.RAJASEKARAN)
Setiausaha Agung

Salinan: YAB Perdana Menteri
En. Teo Yen Hua, Ketua Setiausaha Dua

On 4 December 2006 the Minister replied to the MTUC's letter. The Minister stated in his letter that the Audit Report and the Concession Agreement were 'not appropriate' ('*tidak sesuai*') to be disclosed to the public. The Minister gave a reason for the stand that he took: that

the two documents had been categorized as 'CONFIDENTIAL and SECRET'. The Minister's letter reads –

PUSAT PENTADBIRAN KERAJAAN PERSEKUTUAN
62668 PUTRAJAYA

Telefon: 603-8883 6000
Faks: 603-8889 1335

Ruj. Kami: KTAK: BF A (S) 22/12/1 Klt.2 (26)

Tarikh: 4 Disember 2006

SEGERA DENGAN FAKS: 03-8024 3224

En. G. Rajasekaran
Setiausaha Agung
Kongres Kesatuan Sekerja Malaysia (MTUC)
Wisma MTUC
10-5, Jalan USJ 9/5T
47620 SUBANG JAYA

Tuan,

PENYELARASAN KADAR TARIF AIR OLEH SYABAS

Dengan hormatnya saya diarah menarik perhatian tuan kepada perkara di atas dan surat tuan bertarikh 7 November 2006 adalah berkaitan.

2. *Untuk makluman pihak tuan, Kementerian ini berpendapat bahawa Perjanjian Konsesi di antara Kerajaan Persekutuan, Kerajaan Negeri Selangor dan pihak SYABAS serta Laporan Audit tidak sesuai untuk didedahkan kepada umum memandangkan dokumen berkenaan adalah dokumen berperingkat yang dikategorikan sebagai 'SULIT DAN RAHSIA' kerajaan.*

3. *Walau bagaimanapun, keputusan Laporan Audit tersebut telah dibentangkan kepada Jemaah Menteri dan telah dipersetujui. Laporan audit tersebut juga telah mengesahkan bahawa SYABAS telah berjaya mencapai sasaran pengurangan NRW sebanyak 5% yang telah ditetapkan dan mereka layak untuk menikmati kenaikan tariff yang berkuat kuasa mulai 1 November 2006.*

4. *Kerjasama pihak tuan amatlah dihargai dan didahului dengan ucapan terima kasih.*

Sekian.

"BERKHIDMAT UNTUK NEGARA"

Saya yang menurut perintah,

t.t.

(JAPAR ABU)
b.p. Ketua Setiausaha
Kementerian Tenaga, Air dan Komunikasi Malaysia

Edaran Dalaman
KSU
TKSU II
KP JBA

It is to be observed that it is not the Minister's position that he is under no obligation to disclose the two documents. His reason for his refusal to accede to the MTUC's request is merely because of the '*SULIT/RAHSIA* status' of the documents.

But it is also to be noted that the Minister's letter does not explain as to why the two documents had to be 'categorized' ('*dikategorikan*') as 'SULIT/RAHSIA'. The letter does not say that disclosure of the two documents would be detrimental to public interest or security. Significantly the letter makes no mention of either the Official Secrets Act 1972 (OSA) or clause 45 of the Concession Agreement.

It is further to be noted that the Minister's letter also discloses that an Audit Report had been tabled before the Cabinet and had been accepted by the Cabinet. The letter also states that the Audit Report had confirmed that SYABAS had successfully achieved the target of reducing NRW by 5% and hence was eligible to an increase in tariffs with effect from 1 November 2006.

MTUC as well as the other respondents felt aggrieved by the Minister's response.

The respondents' application for judicial review was filed on 15 January 2007.

In the proceedings before the High Court, the State Government of Selangor (the second respondent in the judicial review proceedings before the High Court) informed the Court (through the written submission of the State Legal Adviser) that it had no objection to the disclosure of the Concession Agreement to the applicants (the respondents in this appeal).

SYABAS too, in the course of the proceedings before the High Court, had, vide its letter of 14 April 2010 addressed to the applicants' solicitors (the applicants there are the respondents in this appeal), also categorically stated that it had no objection to the disclosure of the Concession Agreement to the applicants.

In this judgment I shall primarily confine myself to the five issues raised in the memorandum of appeal, namely, -

(1) that the learned Judicial Commissioner erred in concluding that the respondents have locus standi to commence the judicial review application;

(2) that the learned Judicial Commissioner erred in failing to hold that one of the documents, the Audit Report is an official secret document protected by section 2A of the Official Secrets Act, 1972;

(3) that the learned Judicial Commissioner erred in holding that the 1st appellant failed to take into consideration the legitimate expectation of the respondents as affected parties;

(4) that the learned Judicial Commissioner erred in failing to take into account the express provision of the Concession Agreement that it must remain confidential;

(5) that the learned Judicial Commissioner erred in her finding that that the documents contained no information that could be detrimental to public interest or safety.

The issue of locus standi

Under Order 53 rule 2(4) of the Rules of the High Court 1980, the respondents/applicants must establish that they have been adversely affected by the decision of the Minister not to make public the Concession Agreement and the Audit Report.

In my judgment, the respondents are adversely affected by the refusal of the Minister to disclose the contents of the Concession Agreement and the Audit Report.

First, water is a basic necessity of life and, therefore, access to treated water is a basic human right. If a citizen has to pay in order to have treated water, the cost to him ought to be minimal and affordable.

Second, the respondents are residents of Selangor and, therefore, are consumers of treated water in the State of Selangor. They do not have alternative access to treated water in Selangor. This is because SYABAS has a monopoly over distribution of treated water in Selangor. Any increase in tariffs would have an adverse impact on their lives as consumers of a basic commodity.

Third, the increase in water tariffs is triggered by the Concession Agreement and the Audit Report. Hence the respondents, as the consumers, should be entitled to know whether the Concession Agreement and the Audit Report justify the increase in tariffs. With the full knowledge as to what the Concession Agreement provides and what the Audit Report says, they would be in a position to form an opinion based on facts and to make an appropriate representation to SYABAS and to the Governments (the Selangor State Government and the Federal Government), if need be, pertaining to the increase in the tariffs.

Fourth, the *locus standi* threshold for judicial review actions is lower than in private law actions. In ***QSR Brands Bhd v Suruhanjaya***

Sekuriti & Anor [2006] 2 CLJ 532, Gopal Sri Ram JCA (as he then was) in delivering the judgment of the Court of Appeal said (at p. 541-542):

> **[15]** By contrast, *certiorari* and the other prerogative remedies were classified as public law remedies which permitted a far more liberal threshold *locus standi* test to be met. Hence, Lord *Wilberforce said in Gouriet v. Union of Post Office Workers* [1978] AC 435 that in applications for prerogative writs in the environment of public law enforcement the courts have allowed applicants "liberal access under a generous conception of *locus standi."*
>
> **[16]** It is to rid this dichotomous approach which often produced injustice that O. 53 in its present form was introduced. There is a single test of threshold *locus standi* for all the remedies' that are available under the order. It is that the applicant should be "adversely affected". The phrase calls for a flexible approach. It is for the applicant to show that he falls within the factual spectrum that is covered by the words "adversely affected". At one end of the spectrum are cases where the particular applicant has an obviously sufficient personal interest in the legality of the action impugned. See, ***Finlay v. Canada*** [1986] 33 DLR 421. This includes cases where the complaint is that a fundamental right such as the right to life or personal liberty or property in the widest sense (see, ***Tan***

Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan [1996] 2 CLJ 771) has been or is being or is about to be infringed. In all such cases, the court must, *ex debito justitiae,* grant the applicant threshold standing. See, for example ***Thorson v. Attorney General of Canada*** [1975] 1 SCR 138.

[17] At the other end of the spectrum are cases where the nexus between the applicant and the legality of the action under challenge is to tenuous that the court may be entitled to disregard it as *de minimis.* In the middle of the spectrum are cases which are in the nature of a public interest litigation. The test for determining whether an application is a public interest litigation is that laid down by the Supreme Court of India in ***Malik Brothers v. Narendra Dadhich*** AIR [1999] SC 3211, where, when granting leave, it was said:

> [P]ublic interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law, effective access to justice to the economically weaker class and meaningful realization of the fundamental rights. The directions and commands issued by the courts of law in public interest litigation are for the betterment of the society at large and not for benefiting any individual. But if the Court finds that in the garb of a public interest litigation actually an individual's interest is sought to be carried out or protected, it would be bounden duty of the

court not to entertain such petition as otherwise the very purpose of innovation of public interest litigation will be frustrated.

Fifth, the second to the twelfth respondents are citizens of Malaysia and water users in the Concession Area. They stand in a fiduciary relationship with the Government of Malaysia (***Kerajaan Negeri Selangor & Ors v Sagong Tasi & Ors*** [2005] 4 CLJ 169). By reason of this fiduciary relationship it is the duty of the Federal Government to ensure that the provision of treated water is adequately regulated to ensure meaningful access, and ensuring that profiteering does not occur from water provision services. This duty, particularly, the duty to protect consumers, imposed on the Federal Government, is further entrenched by the Water Services Industry Act 2006. I shall say more of this fiduciary relationship principle later.

Sixth, the 13th and 14th respondents sue as children (by their next friends). They reside with their parents within the concession area. They too are consumers of treated water and, as children, are further protected by law, in particular, the Child Act 2001 which decrees that paramount consideration be given to their interest and welfare.

Finally, the first respondent, MTUC, is a society and a federation of trade unions. It represents workers' interests. It is the oldest national center representing Malaysian workers and has approximately 500,000. Its headquarters is located in Subang Jaya, Selangor. It had written two letters to the Minister seeking disclosure of the Concession Agreement and the Audit Report, and whose request had been refused by the latter. Although the Minister had refused the request, the Minister had never treated the first respondent as a mere busybody. The Minister in his reply had never taken the position that *per se* the first respondent had no right to have sight of the two documents sought; or that he is under no duty to make public disclosure of those documents. The Minister had merely taken the position it was in no position to disclose the documents by reason of their 'confidential' status. The relevant Ministry's officer, Encik Japar, in his affidavit, also takes a similar position.

Whether the Audit Report is protected by the Official Secrets Act, 1972 ('the OSA')

In my judgment, the Audit Report is not protected by the OSA. There is no evidence that *prior* to its being produced before the Cabinet the Audit Report had been classified as official secret under the OSA. Indeed the affidavit of Encik Japar bin Abu, the Division Secretary of the Water Services Division of the Ministry in question merely states:

> *7. Saya menegaskan di sini bahawa Laporan Audit adalah Dokumen berperingkat yang dikategorikan sebagai 'RAHSIA' Kerajaan dan tidak boleh didedahkan kepada umum. Ini adalah Berdasarkan fakta bahawa Laporan Audit telah dibentangkan dan diputuskan dalam mesyuarat Jemaah Menteri yang bersidang pada 11.10.2006. Justeru itu, Dokumen tersebut merupakan Dokumen peringkat 'Rahsia' di bawah Jadual seksyen 2A Akta Rahsia Rasmi 1972.*

'Official secret' is defined by section 2 of the OSA as –

> **'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 s State or such public officer appointed under section 2B.**

Section 2A of the OSA states –

> **Addition, deletion or amendment of the Schedule**
>
> **2A. The Minister may, from time to time, by order published in the Gazette, add to, delete from, or amend any of the provisions of the Schedule hereto.**

Strictly, this section 2A is irrelevant and should not have been referred to by Encik Japar. However, the Schedule provides –

> **SCHEDULE**
>
> **[Section 2A]**
>
> **Cabinet documents, records of decisions and deliberations including those of Cabinet committees;**

It is to be observed that the term 'Cabinet documents' appears in the above Schedule. Is the Audit Report a 'Cabinet document'? The OSA, however, does not define the term 'Cabinet documents'.

With respect, I do not think that the Audit Report could legally be said to be a Cabinet document. With respect, the above officer (Encik Japar) has misunderstood the Schedule to the OSA or rather had adopted a literal interpretation of the term 'Cabinet document'. His interpretation of the Schedule to the OSA is that a non official secret document would automatically become an official secret document the moment it is produced before the Cabinet. This is a misconception. In this regard, it must be appreciated that, first, the Audit Report, before the Cabinet meeting (Encik Japar, in his affidavit, discloses that the Cabinet meeting in question was held on 11 October 2006), was already in existence independently of any Cabinet paper, and had never been classified as an official secret *prior* to it being produced before the Cabinet. There is much force in Encik Malik Imtiaz's argument that it would be nonsensical for any document of any nature that was put before the Cabinet to immediately/automatically become an official secret. Such an interpretation would be perverse as any document that the Cabinet happened to consider would *ipso facto* become a 'state secret' instantly, despite the same never being labelled as such prior to the Cabinet meeting.

Second, Encik Japar, in his affidavit, never states that the Cabinet had made a decision declaring the Audit Report to be an official secret under the OSA.

Third, Encik Japar, in his affidavit, never says that the Audit Report was prepared *solely* for the purpose of making it part of a Cabinet paper; and, fourth, Encik Japar did not explain why the Audit Report must be classified as 'official secret' (apart from merely stating the fact that the Audit Report had been tabled before the Cabinet and invoking the Schedule to the OSA). Indeed, he never states in his affidavit that the disclosure of the Audit Report would be detrimental to the national security or public interest.

Now, section 17A of the Interpretation Acts 1948 and 1967 requires that legislation be construed purposively –

> **Regard to be had to the purpose of Act**
>
> **17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be**

preferred to a construction that would not promote that purpose or object.

In ***Takong Tabari v Government of Sarawak & 3 Ors*** [1995] 1 CLJ 403 Richard Malanjum J (as he then was) explained the purpose of the OSA –

> In my view the [Official Secrets] Act deals mainly with the prevention of unauthorised disclosure of official secrets and thus created offences for any such infringement. I do not think it is intended to be used to avoid any liability or to defeat any claim regardless of the culpability of the party relying on it. It is obvious that the primary goal of the Act is to protect classified documents or information which by such disclosure would be detrimental to the national security or public interest.

In my judgment, in order to qualify as a 'Cabinet document' for the purpose of the Schedule, the Audit Report must have been prepared solely for the purpose of making it part and parcel of a Cabinet paper, and it is not the case here. The Audit Report was already in existence before the Cabinet paper was prepared.

In any case, even assuming for a moment that the Audit Report is a Cabinet document, in my judgment, on the authority of ***Takong Tabari***, in order to qualify as an official secret under the OSA, it must be proven that disclosure of the Audit Report is detrimental to national security or public interest. Again it is not the case here. The Audit Report had been examined by the learned Judicial Commissioner during the proceedings before her and she has made this pertinent observation:

> Having read the Audit Report myself, I had this to say. The report contains information relevant to the Concession Agreement, in particular to the increase in water tariff. But, I was of the view that the report did not contain information detrimental to the national security or public interest. As with the Concession Agreement, here also I could foresee there will be public discussion and criticism against the government.

The legitimate expectation issue

The appellants appear to contest the following statement made by the learned Judicial Commissioner –

To sum up, the 1st respondent's refusal to disclose the Concession Agreement and the Audit Report was made without taking into consideration the legitimate expectation of a member of the public who is affected in the decision making process to be treated fairly.

There is a legitimate expectation here on the part of the respondents on the following grounds. First, treated water is a basic necessity of life and right to treated water is a basic human right.

Second, as I have said earlier when dealing with the issue of *locus standi*, the respondents are residents of Selangor and, therefore, are consumers of treated water in the State of Selangor. By reason of the monopolistic position of SYABAS, they do not have alternative access to treated water in Selangor. Any increase in tariff would have an adverse impact on their lives as consumers of a basic commodity.

Third, earlier, on 19 April 2004, the Minister in a press statement had assured that any application by SYABAS to review tariffs would have to be considered from the context of results, capital expenditure and operational costs and from the context of successful reduction of NRW and distribution costs. The Minister had further assured that

any suggestion to increase water tariffs would have to go through an evaluation exercise that would be strict and transparent, and with due regard being had to the views of the various stakeholders, including the consumers. But what had really happened after the assurance was that, in breach of the assurance, there had been no meaningful discussion between the Minister/Federal Government and the stakeholders (including consumers).

Fourth, as has been pointed out in the early part of this judgment, despite the secrecy of the Concession Agreement, parts of it, somehow, had surfaced and had come to public knowledge. It is now known to the public that water tariffs would be reviewed on 1 January 2006, and would be reviewed every three years thereafter, and that in the event of non-review within 90 days of a milestone, SYABAS would be entitled to compensation. The quantum of review would be based on a formula which set out the performance indicators. These performance indicators include a reduction of NRW; and that the Federal Government would be paying compensation to SYABAS if tariffs were not reviewed on 1 January 2006.

Now, as a matter of law, a legitimate expectation arises when there is a clear and unambiguous representation made by a public authority, and in the present case, by a Minister. The principle of substantive legitimate expectation is rooted in the concept of fairness, and by this principle the Minister is required to give effect to the representation that he had made earlier to the public earlier.

In ***Food Corpn. Of India v. Kamdhenu Cattle Feed Industries*** [1993] AIR Supreme Court 1601 the Supreme Court of India said:

> There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides

of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power as it is unrealistic, but provides for control of its exercise by judicial review.

This principle of legitimate expectation was discussed and applied by our Federal Court in ***Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan*** [1999] 3 MLJ 1.

In ***Shri Dinesh Trivedi, MP & Ors v Union of India & Ors*** [1997] 4 SCC 306 the Supreme Court of India held –

16. In modern constitutional democracies, it is axiomatic that citizens have a right to know about affairs of the Government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare.

At a later part of its judgment, at paragraph 18, the Court went on to hold –

18. The case of ***S. P. Gupta v. Union of India*** decided by a seven-Judge Constitution Bench of this Court, is generally considered as having broken new ground and having added a fresh, liberal dimension to the need for increased disclosure in matters relating to public affairs. In that case, the consensus that emerged amongst the judges was that in regard to the functioning of Government, disclosure of information must be the ordinary rule while secrecy must be an exception, justifiable only when it is demanded by the requirement of public interest.

Clause 45 of the Concession Agreement.

At the outset it is important to note that, unlike in the case of the Audit Report, the appellants, in refusing to disclose the Concession Agreement, are not relying on the OSA. The appellants are merely relying on a contractual obligation to the other parties to the Agreement, namely, the Selangor State Government and SYABAS, by reason of clause of 45 of the Concession Agreement. In this regard, I refer to paragraph 5 of Encik Japar's affidavit. It states –

> 5. *Saya menegaskan di sini bahawa Perjanjian Konsesi di antara Kerajaan Persekutuan, Kerajaan Negeri Selangor dan pihak SYABAS adalah dokumen berperingkat yang dikategorikan sebagai "SULIT" berasaskan Klausa 45 Perjanjian Konsesi di*

mana Perjanjian tersebut hanya boleh didedahkan kepada pihak ketiga dengan persetujuan semua pihak kepada Perjanjian tersebut.

The appellant's position is that the contractual obligation of confidentiality is paramount and takes precedence.

With respect, I think that the Minister's (Government of Malaysia's) contractual obligation (by reason of clause 45) to the Selangor State Government and SYABAS can no longer be a used as a basis of the Minister's refusal for the disclosure of the Concession Agreement. For at the beginning of this judgment it has already been pointed out that both the Selangor State Government and SYABAS (the only parties to the Concession Agreement, besides the Government of Malaysia) are already prepared to disclose the Concession Agreement to the applicants. The learned Judicial Commissioner in her judgment said –

The Concession Agreement is a tripartite agreement. It was revealed in the written submission of the 1st and 3rd respondents that clause 45 of the

said agreement restraint disclosure to any third party without prior mutual agreement of the parties unless disclosure is required by law or the rules of any stock exchange. It is also evident from the 2nd respondent's written submission that they have no objection to disclose the concession agreement to the applicants. Vide their letter of 14.4.2010 addressed to the applicants' solicitors, SYABAS has categorically stated that they also have no objection to the disclosure of the concession agreement.

The appellants, either in the memorandum of appeal or in their submissions, have never challenged the correctness of the above statement of facts by the learned Judicial Commissioner.

Whilst it is true that the change in position taken by the Selangor State Government and SYABAS was only after the date of the Minister's letter, still, that was a change in position that took place while proceedings before the High Court were still on-going. Therefore, the appellants ought to have conceded before the High Court that clause 45 of the Concession Agreement, by reason of the change in position of the Selangor State Government and SYABAS, was no longer an issue before the Court.

In any case such contractual obligation of non-disclosure (if it still exists) does not stand in the way of judicial consideration of public interest. The appellant's claim to confidentiality must be examined by reference to public interest. Confidentiality would only be upheld if disclosure will be detrimental to public interest. In ***The Commonwealth of Australia v John Fairfax & Sons Ltd*** [1980] 147 CLR 39 the High Court of Australia said (at p. 52) –

> But it can scarcely be a relevant detriment to the government that publication of material concerning its action will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.
>
> Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.
>
> The court will not prevent the publication of information which merely throws light on the part workings of government, even if it be not public property, so long as it does not prejudice the community in other respects.

> Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs.

In the present case, the appellants have not suggested that disclosure of the Concession Agreement would be detrimental to public interest. On the contrary, we have the following pertinent observation of the learned Judicial Commissioner who had examined the Concession Agreement, and this is what she has said –

> Having read through both the documents, in particular, the Concessions Agreement, **I had no doubt that it contains no information detrimental to the national security or public interest**. But I could foresee its disclosure may lead to public discussion and criticism against the government.

Findings of the Judicial Commissioner

The appellants take the position that the learned Judicial Commissioner erred in holding that the documents contained no information that could be detrimental to public interest or safety.

With respect there is no merit at all in this argument.

In the course of the proceedings the documents were made available by the appellants to the learned Judicial Commissioner without any objection by the appellants when the learned Judicial Commissioner requested to examine them. As I have pointed out earlier, the learned Judicial Commissioner, having examined both documents, had made a finding that there is nothing in the documents, if disclosed to the appellants or to the public, would be detrimental to public interest or safety.

The appellants on their part have not explained in their affidavits in what way that disclosure of the documents to the respondents or to the public would be detrimental to public interest or safety. It is elementary that he who alleges must prove.

Whether the Minister under a duty to disclose the two documents

It is the contention of the learned Senior Federal Counsel for the appellants, Datin Azizah, that regardless of the OSA or clause 45, the Minister is under no legal duty to disclose the documents as there is

no statutory provision which obliges the Minister to make such disclosure. Citing section 44 of the Specific Relief Act, 1950, the learned Senior Federal Counsel argues that, in the absence of such a statutory provision, no order of mandamus can be issued against the Minister.

Now with respect, I do not think that that the learned Senior Federal Counsel can raise such an argument as this is not one of the issues raised in the appellants' memorandum of appeal. The learned Senior Federal Counsel should only confine her submission to the 5 issues raised in the memorandum of appeal.

Moreover, the appellants in their affidavit, and the Minister in his letter to MTUC, had never taken the position that the Minister is under no obligation to disclose the two documents either to the public or to the respondents, in particular, MTUC. The position that the appellants had taken all along was merely that legally they are prevented from disclosing the documents by reason of clause 45 of the Concession Agreement and the OSA.

In any case, in my judgment the legal duty or obligation is not confined only to legal duties or obligations prescribed by statutes. A Court of law has the power to issue an order of mandamus pursuant to section 44 of the SRA to compel any person holding public office (such as a Minister) to carry out a duty if that person by reason of law, written law or otherwise, is under a duty or obligation to do a particular act and has failed to do so. In the present case the Minister is under a legal duty to make disclosure. That legal duty arises by reason of the fact that a fiduciary relationship exists between the Government and the citizens, particular, when it is to be considered that treated water is a basic necessity off life and that access to treated water is a basic human right, that SYABAS enjoys a monopolistic position in relation to consumers of treated water in Selangor; and that under section 3(1) of the Water Services Industry Act 2006 the 'Federal Government shall have executive authority with respect to all matters relating to water supply systems and water supply services'. In the context of this fiduciary relationship it is to be recalled that the Minister had given his assurances that the Government would be strict and transparent in considering any application by SYABAS for any increase in tariff, and would take into

account the views of the various stakeholders, including consumers. A similar assurance had been given by the Federal Government in Parliament in the Explanatory Statement when tabling the *Water Services Industry Bill* (later passed by Parliament as the Water Services Industry Act 2006) –

> Objektif polisi nasional bagi industri Perkhidmatan bekalan air dan pembentungan ialah: (a) untuk mewujudkan satu struktur telus dan berintegrasi bagi perkhidmatan bekalan air dan pembentungan yang memberikan Perkhidmatan yang efektif dan efisien kepada pengguna-pengguna; b) untuk mengawal kepentingan-kepentingan jangka panjang pengguna-pengguna; c) untuk mengawal tariff dan memastikan perkhidmatan bekalan yang mampu diperolehi atas dasar saksama; dan d) untuk mewujudkan satu system kebertanggungjawapan dan tadbiran yang efektif di antara pengendali-pengendali dalam industri perkhidmatan bekalan air dan pembentungan.

In ***Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors*** [2005] 4 CLJ 169, Gopal Sri Ram in delivering the judgment of the Court of Appeal said (at p.p. 193-194):

There is nothing startling in the trial judge holding the first and fourth defendants [State Government of Selangor and the Government of Malaysia] to be fiduciaries in public law. In a system of Parliamentary democracy modeled along Westminster lines, it is Parliament which is made up of the representatives of the people that entrusts power to a public body. It does this through the process of legislation. The donee of the power – the public body – may be a Minister of the Crown or any other public authority. The power is accordingly held in trust for the people who are, through Parliament, the ultimate donors of the power. It follows that every public authority is in fact a fiduciary of the power it wields. Sometimes the power conferred is meant to be exercised for the benefit of a section or class of the general public, as is the case here. At other times it is to be exercised for the general good of the nation as a whole, that it to say, in the public interest. But it is never meant to be misused or abused. And when that happens, the courts will intervene in the discharge of their constitutional duty.

So, in ***Premachandra v. Major Montague Jayawickrema*** [1994] 2 Sri LR 90, at p. 105, G.P.S. De Silva CJ when delivering the judgment of the Supreme Court of Sri Lanka said:

> There are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by

reference to the purposes for which they were so entrusted. (Emphasis added.)

In the course of his judgment the learned Chief Justice referred to the following passage extracted from ***Administrative Law*** by HWR Wade (5th edn):

> Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms.

Further, a duty to make disclosure on the part of the appellants to the respondents also arises by reason of the principle of legitimate expectation explained earlier, a principle that has come into play by reason of the public assurances that the Minister had made.

[Appeal dismissed with costs]

(DATO' MOHD HISHAMUDIN YUNUS)

Judge, Court of Appeal

Palace of Justice

Putrajaya

Date of decision: 25 February 2011

Date of written of grounds of dissenting judgment: 9 May 2011

Datin Hajjah Azizah Hj. Nawawi, Senior Federal Counsel (Attorney-General's Chambers) for the appellants

Encik Malik Imtiaz Sarwar, Cik Jenine Gill and Encik Alliff Benjamin bin Suhaimi and Encik Ang Hean Leng (Messrs Thomas Philip) for the respondents

SALINAN DIAKUI SAH

SETIAUSAHA KEPADA
Y.A. DATO' MOHD HISHAMUDIN BIN MOHD YUNUS
HAKIM MAHKAMAH RAYUAN MALAYSIA
PUTRAJAYA