RAHSIA
DALAM MAHKAMAH RAYUAN DI MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO: W-01-1-2010

Dalam perkara keputusan responden-responden bertarikh 7.1.2009 yang mengatakan bahawa permit penerbitan pemohon untuk tempoh 1.1.2009 sehingga 31.12.2009 adalah tertakluk kepada syarat bahawa pemohon dilarang menggunakan istilah/ perkataan "Allah" dalam "Herald-The Catholic Weekly" sehingga Mahkamah memutuskan perkara tersebut.

Dan

Dalam perkara Permohonan untuk Perintah Certiori di bawah Aturan 53, Kaedah 2 (1) Kaedah-Kaedah Mahkamah Tinggi

Dan

Dalam perkara Permohonan Deklarasi-Deklarasi di bawah Aturan 53, Kaedah 2 (2) Kaedah-Kaedah Mahkamah Tinggi 1980

Dan

Dalam perkara Roman Catholic Bishops (Incorporation) Act 1957

ANTARA

1. MENTERI KESELAMATAN DALAM NEGERI
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DAN

TITULAR ROMAN CATHOLIC ARCBISHOP OF KUALA LUMPUR ... RESPONDEN

[DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN
PERMOHONAN UNTUK SEMAKAN KEHAKIMAN NO. RI-25-28-2009

Dalam perkara keputusan responden-responden bertarikh 7.1.2009 yang mengatakan bahawa permit penerbitan pemohon untuk tempoh 1.1.2009 sehingga 31.12.2009 adalah tertakluk kepada syarat bahawa pemohon dilarang menggunakan istilah/ perkataan "Allah" dalam "Herald-The Catholic Weekly" sehingga Mahkamah memutuskan perkara tersebut.

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TITULAR ROMAN CATHOLIC ARCBISHOP
OF KUALA LUMPUR ... PEMOHON

DAN

1. MENTERI KESELAMATAN DALAM NEGERI
2. KERAJAAN MALAYSIA ... RESPONDEN-RESPONDEN]

KORAM:

MOHAMED APANDI BIN ALI, JCA
ABDUL AZIZ BIN ABDUL RAHIM, JCA
MOHD ZAWAWI BIN SALLEH, JCA

GROUNDS OF JUDGMENT

[1] This is an appeal by the appellants against the decision of the learned Madam Justice Lau Bee Lan of Kuala Lumpur High Court given on 31.12.2009.

[2] In her decision the learned judge had allowed the respondent's application for judicial review and ordered an Order of Certiorari to quash the decision of the 1st appellant, who was at the material time the Minister of the 2nd appellant in charge of Home Affairs and Internal Security in the Ministry of Home Affairs, which imposed a condition on the publication permit for the period 1.1.2009 until 31.12.2009 ("the said permit") issued to the respondent for the

publication of the respondent's Weekly known as "Herald – the Catholic Weekly" ("the Herald").

[3] At the onset it is pertinent to note that the 1st appellant had issued a directive dated 5.12.1986 ("the 1986 directive") to all Christian's publications in the Malay version prohibiting the publisher of such publications from using the following words: "Allah", "Kaabah", "Baitullah" and "solat" in their publications.

[4] The brief material facts for the purpose of this appeal are as follows: the respondent applied for the said permit under the Printing Presses and Publication Act 1984 ('Act 301') to publish the Herald.

[5] On 7.1.2009, the 1st appellant approved the said permit but subject to two conditions. The conditions are stated in the 1st appellant's approval letter dated 7.1.2009 and they are as follows:

"(i) Permohonan penerbitan dalam bahasa Melayu adalah dibenarkan namun demikian, penggunaan kalimah "ALLAH" adalah dilarang sehingga mahkamah membuat keputusan mengenai perkara tersebut.

(ii) Di halaman hadapan penerbitan ini, tertera perkataan "TERHAD" yang membawa maksud penerbitan ini adalah terhad untuk edaran di gereja dan kepada penganut Kristian sahaja."

[6] In plain English, the first condition means that the respondent is prohibited from using the word "Allah" in the Malay version of the Herald until the Court has made a decision on the matter and the

second condition means the circulation of the said publication is restricted to churches and to those who profess the Christian faith only.

[7] The respondent has no objection to the second condition. However, the respondent was not satisfied with the first condition and had filed an application for a judicial review of the 1st appellant's decision to impose that condition vide an application for Judicial Review No. R1-25-28-2009 at Kuala Lumpur High Court. In the application the respondent seeks an order for certiorari to quash that decision and also for declaration that the decision was wrong in law, null and void. The respondent also seeks declarations (1) that Article 3 (1) of the Federal Constitution does not empower or authorize the 1st and 2nd appellants to prohibit the respondent from using the word "Allah" in the Herald; (2) that pursuant to Article 10 of the Federal Constitution the respondent has the constitutional right to use the word "Allah" in the Herald in the exercise of the respondent's right to freedom of free speech and expression; (3) that pursuant to Article 11 of the Federal Constitution the respondent has the constitutional right to use the word "Allah" in the Herald in the exercise of the respondent's freedom of religion which includes the right to manage its own religious affairs, and (4) that pursuant to Article 11 and 12 of the Federal Constitution the respondent has the constitutional right to use the word "Allah" in the Herald in the exercise of the respondent's right in respect of instruction and education of the catholic congregation in the Christian religion.

[8] The respondent grounded its application for judicial review on several grounds which can be stated briefly as follows: firstly, the 1st appellant had acted in breach of the rules of natural justice, procedural and substantive fairness and the duty to act fairly; secondly, the decision has violated the respondent's legal rights as provided in Articles 3, 10, 11 and 12 of the Federal Constitution, and thirdly, the decision was ultra vires Act 301.

[9] In this appeal the 1st and 2nd appellants raise three broad issues. Firstly, whether the 1st appellant had acted within his ministerial function and statutory power under Act 301. Secondly, whether the decision by the 1st appellant to prohibit the use of the word "Allah" in the Herald is in the interest of public safety and public order as it raises issues of religious sensitivities in this country and thirdly, whether the said decision is legal and reasonable as it was made pursuant to the 1986 directive and in compliance with the 'Enakmen-Enakmen Kawalan Dan Sekatan Pengembangan Agama Bukan Islam Kepada Orang Islam (Negeri-Negeri).

[10] The 3rd to the 9th appellants are the interveners in the application before the High Court. All of them have a common ground in this appeal and that is the decision of the 1st appellant is non justiciable.

[11] However, I think this appeal can be decided on two issues only. Firstly, whether the Minister's decision of 7.1.2009 is valid and lawful in that it has passed the test of Wednesbury principle of reasonableness in ***Associated Provincial Picture Houses Limited v Wednesbury Corporation [1984] 1 KB 223*** and that it has not contravened the

principles of illegality, procedural impropriety, proportionality and irrationality as enunciated in ***Council Of Civil Service Unions & Ors v Minister For The Civil Service [1985] 1 AC 374.*** Secondly, whether the decision of the 1st appellant has violated the respondent's constitutional rights under Articles 3, 10, 11 and 12 of the Federal Constitution.

[12] On the first issue, the applicable legal principles are well settled. It is trite that a judicial review is only concerned with the decision making process and not the decision itself. A judicial review is not an appeal. Therefore in any judicial review the Court cannot substitute the decision by the decision maker under review for its own decision. This principle has been laid down by the highest authorities: see ***Harpers Trading (M) Sdn Bhd v National Union Of Commercial Workers [1991] 1 MLJ 417*** FC and ***Minister of Labour v Lie Seng Fatt [1990] 2 MLJ 9*** SC.

[13] In this appeal it is not disputed that the 1st appellant's decision of 7.1.2009 imposing the conditions for publication of the Herald in Malay version is an exercise of administrative discretion under the relevant provisions of Act 301. The law as to the exercise of discretion as I understand it from the cases referred to above particularly the case of ***Wednesbury Corporation*** (supra) which was referred to in the case of ***Minister of Labour v Lie Seng Fatt*** (supra) is that so long as the discretion is exercised within the four corners of the principles I stated earlier, that discretion is absolute and cannot be questioned in any Court of law. It has also been said that in exercising a discretion, a fortiori an absolute discretion as in this case, the decision maker must consider matters required to be

considered and disregard irrelevant collateral matters and the decision must be within the perimeters of the statutory powers given to the decision maker on the matter. It goes without saying therefore if the decision is made in compliance with these principles and requirements such decision cannot be said to be unreasonable and is unassailable. But if the exercise of the discretion is made in contravention of any law or that the decision maker has taken into consideration irrelevant matters or that the decision maker has acted in excess of powers conferred upon him in respect of the matter which he decided or that the decision militates against the object of the statute, then the Court can intervene and strike down the decision as unreasonable and unlawful. [See ***Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serba Guna Sungei Gelugor Dengan Tanggungan [1999] 3 CLJ 65*** FC, ***Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ CA, Padfield and Ors v Minister Of Agriculture, Fisheries and Food & Ors [1968] 1 AER 64*** HC - referred to and quoted by the learned High Court judge in her judgment which discussed and lend support to this proposition].

[14] In this instant case the power to grant a publication permit is the absolute discretion of the 1st appellant under section 6 (1) of Act 301. Under section 12 of the same Act, the permit granted shall be subject to such conditions as may be endorsed therein. In this regard it is common ground in this appeal that the said permit granted to the respondent contained general conditions as shown in Form B in the First Schedule of the Printing Presses And Publications (Licenses And Permits) Rules 1984 ('the 1984 Rules'). There are 12 conditions attached to the permit issued to the respondent. For our purpose,

the most relevant conditions are condition 6 and condition 11 which reads:

Condition 6:

> *"The news paper shall not publish any material, photograph, article or other matter which is prejudicial to public order, morality, security, the relationship with any foreign country or government or which is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to the public interest or national interest."*

Condition 11

> *"The permit holder is required to comply with and not to contravene any directive from time to time issued by the Minister of Home Affairs."*

[15] Under these two conditions, the permit holder is prohibited from publishing not only materials which are otherwise prejudicial to public interest or national interest but also is prohibited from publishing materials **which are likely** to be prejudicial to the public interest or national interest. The permit holder is also required to comply with any directive from time to time issued by the 1st appellant which directive in my view would and should relate to matters of public interest, public order and national interest under the scheme of things envisage under Act 301 and the 1984 Rules.

[16] A publisher of any publication should not be allowed to use the approval given to publish a publication, as a licence to publish any

material under the sun without due regard to public order, morality, safety and sensitivity. It is true that Article 10 (1)(a) of the Federal Constitution guaranteed freedom of expression. But that freedom is not absolute. A freedom of expression used by one to scandalize another for example will be subject to the dictates of the law. This non-absolute nature of the freedom of expression and speech is apparent from the reading of Article 10(2) of the Federal Constitution which empowers Parliament to impose such restriction as necessary or expedient in the interest of, *inter alia*, the security of the Federation, public order or morality. In my opinion, public interest and national interest encompass public order, peace and harmony of the general public at large.

[17] With regard to the power of the 1st appellant to impose conditions on the said permit, the learned judge rejected the argument by the Senior Federal Counsel for the 1st and 2nd appellants that the exercise of that power is not subject to review because of the ouster clause in s.13A (1) of Act 301 as being misconceived. Section 13A (1) of Act 301 reads: *'[A]ny decision of the Minister to refuse to grant or to revoke or to suspend a licence or permit shall be final and shall not be called in question by any court on any ground whatsoever'*. The learned judge reasoned that section 13A (1) [which was inserted in 1987 by Act A684/87] applies only to refusal to grant, suspension or revocation of licence/permit. It does not apply to the power of the Minister to impose conditions. I think that is too narrow a view to take. The granting or approval of a permit comes with the conditions prescribed in the 1984 Rules in the permit itself and any such condition that the Minister may impose. [In any event the ouster clause in s.13A was deleted in 2012

by Act A1436/2012 with effect from 15.7.2012, though at the material times the ouster clause was still applicable].

[18] Instead the learned judge accepted the respondent's contention that the 1st appellant had not taken into consideration relevant factors (listed in paragraph 52 (i) to (xxii) of the respondent's affidavit in support of the judicial review application). These factors were reproduced by the learned judge in her judgement at paragraph 12 pg 36 of the appeal record vol. 1. The relevant factors that the learned judge said the 1st appellant did not or failed to take into consideration consist mainly of factors which the learned judge described as 'uncontroverted historical evidence' of the fact that for years or centuries the word 'God' has been translated and used in Bahasa Melayu translation of the Bible as "Allah" as well as in Bahasa Indonesia Bible and, also that the word "Allah" to identify the Christian God has been used by Bahasa Melayu speaking Christian natives of Peninsular Malaysia, Sarawak and Sabah.

[19] The learned judge also said that the 1st appellant had taken into account irrelevant considerations which she had listed in paragraph 13 of her judgment. Among the irrelevant factors or consideration taken into account by the 1st and 2nd appellants, according to the learned judge, is the position of Islam as the official religion of the Federation under Article 3 (1) of the Constitution, the allowance under Article 11(4) of the Constitution for laws to be passed to control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam and that several States in the Federation have passed laws to control or restrict propagation

of other religions or beliefs among Muslims, and the confusion that have ensued from the used of the prohibited words in Christian publications. Thus, relying on and applying the law as laid down in the cases cited in her judgement namely ***Minister of Labour & The Government of Malaysia v Lie Seng Fatt [1990] 1 CLJ (Rep) 195, Padfield and Ors v Minister of Agriculture, Fisheries And Food & Ors [1968] 1 AER 694*** (HL), ***Sagnata Investments Ltd v Norwich Corp [1971] 2 OB 614*** and ***Minister of Home Affairs, Malaysia v Persatuan Aliran Kesedaran Negara [1990] 1 CLJ (Rep) 186,*** the learned judge ruled that the decision taken by the 1st appellant in imposing the condition is invalid, null and void. All the cases cited by the learned judge in her judgment as stated above has one common trait that is in each of the cases the Court found that the respective relevant authorities in arriving at its decision in those cases had either no factual basis to do so or had taken into account irrelevant considerations and therefore the decision was declared null and void.

[20] Before the High Court and before us, Senior Federal Counsel for the 1st and 2nd appellants submitted that by virtue of rule 3 of the 1984 Rules read together with ss. 6 and 26 of Act 301, the decision by the 1st appellant to impose and attach conditions to the permit granted to the respondent is legal and in accordance with the law. First of all, I agree with the learned judge that the correct section on the powers to impose condition is section 12 and not section 26 of Act 301. However I think the learned judge got it wrong when she said, at paragraph 10.4 of her judgment at pg 34, vol 1 of the appeal record, that rule 3 of the 1984 Rules merely provides the mechanism by which conditions are imposed and that section 12 of Act 301 is the

enabling provision under Act 301 by which the Minister derives his power to impose conditions. She said all these, after she accepted the fact that the standard form of permit is in Form B of the First Schedule to the 1984 Rules and it contains the specified standard conditions on the reverse side of the permit. She accepted that Condition 1 to Condition 12 under heading "CONDITIONS OF PERMIT" on the reverse of Form B to the First Schedule to the 1984 Rules which is the standard form of permit for publication, are standard conditions imposed by law i.e. the 1984 Rules (which is a subsidiary legislation) made by the Minister i.e. the 1st appellant pursuant to the legislative power conferred on him by s. 26 of Act 301.

[21] It is clear that the standard conditions Condition 1 to 12 are imposed by law because rule 3 of the 1984 Rules provides that licence and permit granted under the Act shall be in the Form appearing in the First Schedule containing such conditions as are specified therein and such further conditions as may be endorsed therein by the Minister. Thus, the conditions are already incorporated into the permit by the Rules! In my opinion the learned judge's view as to the power of the Minister to impose condition is only true in relation to the imposition of *"such further conditions as may be endorsed therein by the Minister"* found in rule 3 of the 1984 Rules. However on the facts and evidence in this case, I do not think that the prohibitive conditions imposed by the 1st appellant in its letter of 7.1.2009 to the respondent comes within the category or class of 'such other conditions'. This is because the said conditions were already contained in the 1986 directive. In my view the contents of the 1st appellant's letter of

7.1.2009 does not go beyond re-stating the prohibitions which have been imposed by the 1986 directive, and by virtue of Condition II to the said permit, the respondent is required to comply with the 1986 directive.

[22] I have mentioned at the beginning of this judgement that in 1986 the 1st appellant had issued the 1986 directive to all Christian's publications as per the mailing list attached to the directive. The 2nd paragraph of the directive spelt out the words that are permissible to be used in all Christian publications whereas paragraph 3 of the same directive listed the words which are prohibited from usage in such publications. There are four words that are prohibited; and these are : "Allah", "Kaabah", "Baitullah" and "Solat". The reason for this prohibition is explained in paragraph 4 of the 1986 directive as follows:

> *"Tujuan kerajaan mengambil ketetapan berhubung dengan istilah/perkataan serta syarat-syarat di atas kepada penerbitan agama Kristian adalah semata-mata untuk menjaga ketenteraman awam dan mengelakkan berlakunya salah faham di antara umat Islam dengan penganut-penganut ugama Kristian. Oleh itu tuan/puan adalah dengan ini diingatkan supaya mematuhi arahan kerajaan dalam semua bentuk penerbitan agama Kristian yang diterbitkan."*

[23] Therefore it can be argued that as early as 1986, the 1st and 2nd appellants were already concerned with the possibility of public disorder and confusion or misunderstanding between the Muslims and the Christians if Christian's publications are allowed to use the prohibited words including the word "Allah" in any of their publication.

[24] The 1986 directive has never been withdrawn and still in force. Mr Porres Royan, learned counsel for the respondent was asked whether the respondent took any action to protest against or to challenge the 1986 directive. His response was that to the best of his knowledge there was none. Then he said (and this is from the Bar but without any objection from any of the appellants) at that time the Herald was not yet in publication and that the Herald until today has been in publication for 14 years. A simple arithmetic would therefore suggest that the Herald started publication only around 1999. Since the directive on the prohibition of the usage of the word "Allah" in any Christian publication has been around since 1986 and has not been withdrawn, the Court can take judicial notice that the respondent is aware of the 1986 directive when it started publishing the Herald because the 1986 directive was sent to all Christian's publications. In fact earlier than 5.12.1986, the 1st and 2nd appellants had also issued a directive prohibiting the use of the words "Allah", "Kaabah", "solat" and "Baitullah" in the publication of al-kitab by the Christian publication. These two directives were averred to and deposed in paragraph 9 of the 1st appellant's affidavit in reply affirmed on 6.7.2009 and the directives were exhibited as Exhibit DSHA-1 and DSHA-2.

[25] Puan Suzana Atan, Senior Federal Counsel for the 1st and 2nd appellants, submitted that the issuance of the permit with the attached conditions and subsequent directive issued to the respondent in the letter dated 7.1.2009 are within the 1st appellant's ministerial function and statutory power under the Act is valid and

in accordance with law. I agree with this submission for the following reasons. In the light of section 12 of Act 301 and rule 3 of the 1984 Rules and Condition II of the permit issued to the respondent, the 1st appellant had not acted in excess of his power or function in imposing the conditions stated in the letter of 7.1.2009. In fact it is incumbent upon the respondent to comply with the two directives under Condition II of the said permit.

[26] Whether a consideration is relevant or otherwise and whether there is a factual basis for the exercise of a discretion by the decision maker, has to be decided according to the facts of each particular case. In this appeal, the 1st appellant has affirmed an affidavit in reply dated 6.7.2009 deposing as to the facts and circumstances to justify his decision in imposing the conditions as in the letter dated 7.1.2009 (Exhibit MP-25 in respondent's affidavit in support of the application for judicial review affirmed by Tan Sri Datuk Murphy Nicholas Xavier A/L Pakiam). In his affidavit in reply, the 1st appellant has said in paragraph 6 as follows:

> *"(a) Pemohon telah dimaklumkan mengenai keputusan saya melalui surat Ketua Setiausaha Kementerian Dalam Negeri bertarikh 7.1.2009 yang telah ditandatangani bagi pihak oleh pegawai di kementerian saya iaitu Che Din bin Yusoh;*
>
> *(b) Dalam mencapai keputusan tersebut, saya berpuas hati bahawa penggunaan kalimah "ALLAH" dalam penerbitan majalah Herald – The Catholic Weekly akan mengancam keselamatan dan ketenteraman awam serta menimbulkan sensitiviti keagamaan di kalangan rakyat Malaysia."*

[27] In a letter dated 24.4.2007 to the respondent prohibiting the use of the word "Allah" in the Herald, the 1st appellant had said in paragraph 6 of that letter that the issue (i.e. the usage of the word "Allah" in the said publication) has become very sensitive and therefore it has been categorised as a security issue.

[28] Now to return to the affidavit in reply by the 1st appellant in response to the respondent's judicial review application, the 1st appellant had deposed in paragraphs 8 and 9 that the respondent had been issued with eight (8) admonition and prohibition letters on the usage of the word "Allah" in the Herald and that such admonition and prohibition is consistent with the 1986 directive.

[29] In paragraphs 9.4 and 11 of the same affidavit in reply, the 1st appellant had deposed that one of the reasons why the prohibition on the usage of the four words in the 1986 directive was imposed is to avoid any confusion in religious practice which may threaten public order and security and also which may contribute to a religious sensitivity among Malaysians. In the words of the 1st appellant's in paragraphs 9.4 and 11 of the affidavit in reply:

> *"9.4 Antara sebab larangan empat perkataan tersebut adalah untuk mengelakkan berlakunya sebarang kekeliruan beragama yang boleh mengancam keselamatan dan ketenteraman awam serta menimbulkan sensitiviti keagamaan di kalangan rakyat Malaysia;*

And

> *11. Selanjutnya, pemohon juga telah dimaklumkan bahawa antara sebab larangan tersebut adalah untuk mengelakkan berlakunya sebarang kekeliruan beragaman yang boleh mengancam keselamatan dan ketenteraman awan serta menimbulkan sensitiviti keagamaan."*

[30] However, the learned judge in this case had rejected this affidavit evidence by the 1st appellant by stating in paragraph 13.4 of her judgment that she agreed with the respondent that there is no factual basis for the 1st appellant to impose the impugned condition in view of the uncontroverted historical evidence averred in paragraph 52 of the respondent's affidavit in support of the judicial review application. The learned judge referred to the case of ***Sagnata Investments Ltd v. Norwich Corp [1971] 2 QB 614,*** cited by the respondent before her to justify this conclusion. Nevertheless, I think neither the historical evidence nor the fact that the word "Allah" appears in Al-Kitab (which is the Malay version of the Bible) is a sufficient justification for the 1st appellant not to consider imposing the prohibitive condition of the usage of the word "Allah" in the Herald. The Al-Kitab and the Herald are two publications of entirely different character. The Al-Kitab is the Malay version of the Bible – so, it is obvious that it meant only for Christians. Moreover the Ministry of Home Affairs had already specified the condition that the Al-Kitab is to be used in churches and among Christians only; and that the words "BUKAN UNTUK ORANG ISLAM" are to be printed clearly and conspicuously on the front page of the Al-Kitab. This condition is obvious from the Ministry's letter dated 24.4.2007 to the respondent – in paragraphs 10, 11 and 12. Whereas the Herald is a newsletter or in the same category as a newspaper (albeit with

restricted circulation) which is used or likely to be used as the mouthpiece for the Catholic church to disseminate informations on the activities of the Catholic church or Catholic congregations. It is acknowledged by learned counsel for the respondent that as of today the Herald is accessible online. This online accessibility means that the Herald can be read by anybody – be it Muslim or non-Muslim. For this reason, I am of the view that the permission given by the Ministry for the printing and publication of Al-Kitab in which the word "Allah" appears cannot be treated in the same manner as the printing and publication of the Herald with the usage of the word "Allah".

[31] At this juncture, I would like to recall that under s.6 of Act 301, the power to grant a publication permit was at the material time is an absolute discretion of the 1st appellant and in granting such permit the 1st appellant may impose conditions. In **Administrative Law of Malaysia and Singapore (Third Edition),** Professor MP Jain had opined at pg 413 that –

> *"... A discretionary power is a power which is exercisable in its discretion by the concerned authority. An official in whom discretionary power is vested has, to a greater or lesser extent, 'a range of option' at his disposal and he exercises a measure of personal judgment in making the choice. The officer has power to make choices between various courses of action; or even if he has to achieve a specific end, he has a choice as to how that end may be reached..."*

[32] What need to be considered is that whether the exercise of the discretion by decision maker is done in good faith and without

improper motive. In ***Minister of Labour, Malaysia v Lie Seng Fatt*** (supra) the then Supreme Court said at page 12 that:

> *"...So long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by court unless he had misdirected himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the object of the statute."*

[33] It is obvious from the affidavit in reply by the 1st appellant in this case that his decision to impose the impugned condition in the exercise of his discretion is neither actuated by any improper motive nor has he misdirected himself in law. The 1st appellant also has not in my view taken into account irrelevant matters. It is also evident in the 1st appellant affidavit in reply that the 1st appellant had considered the potential harm to public order and national security that may result in multi racial and multi religious society like ours arising from religious misunderstanding and religious sensitivity if the forbidden words are to be allowed to be used in a Christian publication like the Herald. Being the Minister in charge of Home Affairs and Internal Security, public order and public safety is very much the 1st appellant's concern.

[34] In ***Re Application of Tan Boon Liat @A Allen; Tan Boon Liat v Menteri Dalam Hal Ehwal Dalam Negeri, Malaysia & Ors [1976] 2 MLJ 83,*** Justice Abdoolcader said that 'the expression 'public order' is not defined anywhere but danger to human life and safety and the disturbance of public tranquillity must necessarily fall within the purview of the expression'. The learned judge in that case also attempted to define

'public order' to mean the tranquillity and security which every person feels under the protection of the law, a breach of which is an invasion of the protection which the law affords. Later in the same case, the learned judge by reference to the Indian Supreme Court case of ***Romesh Thappar v State of Madras AIR 1950 SC 124–127*** said that *"the maintenance of public order is equated with the maintenance of public tranquillity, that 'public safety' is part of the wider concept of public order..".*

[35] In ***Darma Suria Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors [2010] 1 CLJ 300*** the Federal Court, speaking through the judgment of Justice Gopal Sri Ram FCJ, held that an act is prejudicial to public order if it disrupts or has the potential to disrupt public safety and tranquillity.

[36] Before us the learned Senior Federal Counsel submitted that religious issues are sensitive issues which may cause disaffection or discontents in a cosmopolitan society, which in turn may lead to the disturbance of the current life of the community resulting in disturbance of public order. She cited ***PP v Pung Cheng Choon [1994] 1 MLJ 566*** for this proposition. She further submitted that the Muslim's community in this country is very sensitive on religious issues, especially on the use of the word "Allah". This is because, she said, if one refers to "Allah" it refers to God for Muslims. *Kalimah* "Allah", she further submitted, is sacred to the Muslims and is placed on the highest position and its sanctity must be protected. *Kalimah* "Allah" also refers to 'oneness' and cannot be part of the concept of Trinity of Father, Son and the Holy Ghost of the Christian faith. Thus she submitted the word "Allah" is not just a mere word or translation of the word God as described in the Herald but it is a special name for

the Muslim's God. The usage of the word "Allah" as interpretation of word God or the concept of God by the Herald may cause confusion, religious sensitivity and disharmony between the Muslims and the Christians. I accept this submission. In this regard it is pertinent to observe in the context of Muslims society in Malaysia the Arabic term "Allah" is used to refer to God in the religion of Islam without any translation or modification to its meaning. Therefore I agree that the use of word "Allah" in the Herald to describe or refer to God among the Christian would create confusion among the Muslims as the concept of God in Islam and in Christianity is world apart – in the former it refers to the concept of oneness of God whereas in the latter it refers to the concept of Trinity of God.

[37] Essentially the complaint by the respondent as to unreasonableness of the 1st appellant decision is that there is no basis for the 1st appellant to make the impugned decision. The respondent argued, and this is accepted by the learned trial judge, that the 1st appellant did not disclose or depose to any factual evidence to support his claim that the usage of the word "Allah" in the Herald would pose a threat to national security or public order. The respondent did not question the discretionary power of the 1st appellant to impose conditions on the said permit, but the impugned condition itself. There is also no allegation that the 1st appellant had misdirected himself on the law in the exercise of the discretion or that the discretion was exercise with improper motive. The fact that there is no allegation of improper motive or mala fide in the exercise of the discretion is in itself, in my view, shows that the respondent accepts

that the 1st appellant's concern with national security and public order arising from a potential religious sensitivity and misunderstanding if the word "Allah" is allowed to be used in Christian's publication for 'God' is genuine and real and not just an illusion.

[38] Prof. MP Jain in the passage cited earlier had said that an exercise of a discretionary power involves an exercise of some measures of personal judgment. The reluctance on the part of court of law to interfere with this exercise of personal judgment, as matter of principle, is well documented in the case law particularly so where it concerns national security or public order or simply on a question of policy. For example, in ***Council of Civil Service Unions & Ors v Minister of Civil Service [1985] AC 374,*** Lord Fraser said at page 402 para C that:

> *"...The decision whether the requirements of national security out-weight the duty to of fairness in any particular case is for the Government and not for the courts; the Government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security."*

[39] The subjective satisfaction test as to matters of national security or public order or policy, hence the reluctance to interfere with the exercise of discretion on those matters has also been accepted by our courts – see ***Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs) Malaysia [1969] 2 MLJ 129, Kerajaan Malaysia & Ors v Nasharuddin Nasir [2004] 1 CLJ 81.*** The primary reason for this approach is that the Government alone has access to the necessary information to form an opinion whether such matters are matters of

national security or public order. It the responsibility of the Government to formulate policy for the safety of the public. It was said in ***Liversidge v Sir John Anderson & Anor [1942] AC 206*** at page 253 that *"a decision on this question can manisfestly be taken by one who has both knowledge and responsibility which no court can share."* Suffian FJ in ***Karam Singh*** (supra) accepted the argument and reasoning that when the power to issue a detention order has been made to depend on the existence of a state of mind in the detaining authority, which is purely a subjective condition, so as to exclude a judicial inquiry into the sufficiency of the grounds to justify the detention, it would be wholly inconsistent to hold that it is open to the court to examine the sufficiency of the same grounds to enable the person detained to a representation. He went further to say that 'in making their decision, they have complete discretion and it is not for a court of law to question the sufficiency or relevance of these allegations of fact.". In ***Arumugam a/l Kalimuthu v. Menteri Keselamatan Dalam Negeri & Ors [2013] 5 MLJ 174,*** my learned brother Justice Mohamed Apandi Ali JCA (now FCJ) had the occasion of discussing the exercise of the 1st appellant's power under section 7 of the Act 301 to prohibit the printing, importation, production etc of any publication which contains materials prejudicial or likely to be prejudicial to public order and concluded that the test to the exercise of such power is a subjective satisfaction of the 1st appellant. The power, he said, is without doubt a subjective discretionary power of the Minister. Case law also has shown that in exercising this discretionary power and subjective satisfaction, the 1st appellant may also take into consideration whether the act or the publication that is to be regulated has the potential to disrupt the even tempo of the life of

the community that it would prejudice public order, public safety and tranquillity. The 1st appellant consideration is not limited or confined to actual disruption of public order or tranquillity – see ***Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors [2010] 1 CLJ 300; PP v. Khong Teng Khen & Anor [1976] 2 MLJ 166, 177.*** In other words the 1st appellant, as the Minister in charge of home security and public order need not wait for violence to break out before exercising his discretion to prevent such violence that likely to lead to lawlessness and public disorder.

[40] In this appeal it has been shown that since 1986 the 1st appellant when issuing the 1986 directive prohibiting the usage of four (4) words including *kalimah* "Allah" in any Christian publication had already assessed the potential harm to public order and safety it would cause if the usage had not been restricted. The learned High Court judge in this case does not appear to appreciate this concern. However, events that unfolded soon after the learned High Court judge pronounced her decision on the respondent's judicial review application showed that the concern of the 1st appellant on the potential harm to public order and safety had become a reality and not merely imaginary. These events, as submitted by the learned Federal Counsel for the 1st and 2nd appellants, were attacks on churches and mosques (which are places of worship for Christians and Muslims respectively), the street protests and inflammatory discussions and accusations on the subject, in the media and in the blogs. The attacks on churches and mosques were recorded and deposed to in three affidavits (filed after the pronouncement of the High Court's decision and for the purpose of this appeal) by the

journalists and reporters who covered the events. These affidavits were filed as Afidavit Wartawan 1, Afidavit Wartawan 2 and Affidavit Wartawan 3 by the 1st and 2nd appellants and the filing of these affidavits was not objected to by respondent. These affidavits were affirmed by Mohd Aizat bin Shariff Fisalluddin on 21.8.2013, by Mohd Turmadzi bin Madun on 27.8.2013 and by Marhalim bin Abas also on 27.8.2013 respectively. Therefore I am of the view that the 1st appellant indeed have a reasonable basis for exercising his subjective satisfaction of his discretionary power to impose the impugned condition.

[41] I am also of the view that it is not unreasonable for the appellant to take into consideration (in making his decision to impose the impugned condition) the special position of Islam as the religion of the Federation as provided under Article 3(1) of the Federal Constitution. I will say more on this when I discuss the second issue in this appeal.

[42] Therefore having given my utmost consideration to the law applicable to the exercise of the discretion in this case and the cases on this point as well as the explanations and reasons given by the 1st appellant in his affidavit in reply in respect of the decision that he had made, I would answer the first issue in the affirmative that is the Minister's decision of 7.1.2009 is valid and lawful in that it has passed the test of Wednesbury principle of reasonableness in ***Associated Provincial Picture Houses Limited v Wednesbury Corporation [1984] 1 KB 223*** and that it has not contravened the principles of illegality, procedural impropriety, proportionality and irrationality as

enunciated in ***Council Of Civil Service Unions & Ors v Minister For The Civil Service [1985] 1 AC 374.***

[43] The second issue to be considered in this appeal is whether the decision of the 1st appellant has violated the respondent's constitutional rights under Articles 3, 10, 11 and 12 of the Federal Constitution. These Articles are about the position of Islam as the religion of the Federation, freedom to practice one own's religion, freedom of speech and expression and the right to propagate one own's religion except that propagation of other religions (save for Islam) among the Muslims is prohibited, rights to education and also about non-discrimination on the grounds of religion, race, descent or place of birth.

[44] The Court is to interpret the Constitution and to uphold its provisions without fear or favour. In interpreting the Constitution, the Court must carefully consider the language used in the relevant provisions particularly and in the whole, of the Constitution generally. Any particular provision of the Constitution should not be interpreted in isolation or compartmentalised; but must be looked at in relation to the other provisions of the Constitution so as to arrive at an harmonious interpretation and to give effect to the basic structures of the Constitution as drafted by its framers. To achieve this, the provisions of the Constitution must be construed broadly and not in a pedantic way. Thus the normal rules of interpretation do not always necessarily apply to the interpretation of the Constitution – see the judgment of Raja Azlan Shah Ag. L.P.: in ***Dato***

Menteri Othman bin Baginda & Anor v. Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29, at pg 32.

[45] Having said briefly on the basic rule of interpretation of the Constitution, let us examine whether the decision of the 1st appellant in the letter of 7.1.2009 has violated the respondent's constitutional right under those relevant provisions.

[46] The learned High Court judge, in concluding that it was so, agreed with the submission of the respondent that the 1st appellant had taken into account irrelevant consideration in that Islam being the religion of the Federation in Article 3(1). It was argued for the respondent, reading Article 3(1) together with Article 11(1) of the Federal Constitution it allows other religions including that of the respondent to be practiced alongside Islam in peace and harmony. However when comes to propagation of religion one must be mindful of the restriction imposed by Article 11 (4) which in plain English means that propagation of other religions among Muslims is prohibited and the relevant State Authorities responsible for the administration of Islam in the respective States may resort to legislative measures in the States (and the Parliament in the case of States where the Agong is the Head of Islam) to curb such propagation.

[47] On this issue I have had the opportunity to read the judgment of my learned brother Justice Mohamed Apandi Ali in draft. I wholeheartedly agree with his analysis of the historical background and interplay of Articles 3(1) and 11(1) and 11(4) in that Article 3(1)

was a by-product of the social contract entered into by our founding fathers of the Federal Constitution and the introduction of Article 11 (4) was to protect the sanctity of Islam as the religion of the Federation and to protect it against any threat of propagation of other religions to the followers of Islam.

[48] I would add however that the position of Islam as the religion of the Federation, to my mind imposes certain obligation on the power that be to promote and defend Islam as well to protect its sanctity. In one article written by Muhammad Imam, entitled Freedom of Religion under Federal Constitution of Malaysia – A Reappraisal [1994] 2 CLJ lvii (June) referred to by learned counsel for the 8th appellant it was said that : *"Article 3 is not a mere declaration. But it imposes positive obligation on the Federation to protect, defend, promote Islam and to give effect by appropriate state action, to the injunction of Islam and able to facilitate and encourage people to hold their life according to the Islamic injunction spiritual and daily life."*

[49] It is also relevant to note that scholars such as Professor Andrew Harding and Prof. Dr. Shad Saleem Faruqi who have studied and analysed Article 3 and Article 11 of the Federal Constitution, and whose views have been referred to and quoted extensively by my learned brother Justice Mohamed Apandi Ali in his judgment, have said that freedom of religion is specifically safeguarded in the Federal Constitution and the restriction of proselytism under Article 11(4) has more to do with the preservation of public order than with religious priority. In fact Prof. Harding is of the view that Article 11(4) was inserted because of public order considerations – see Prof. Andrew

Harding - ***Law, Government and the Constitution in Malaysia*** (1996 at pg 201) and Prof. Dr. Shad Saleem Faruqi - ***Document of Destiny the Constitution of the Federation of Malaysia*** (2008 – at pp. 138-139).

[50] Given the circumstances of the case and the views expressed by scholars on the issue, I hold that it is nothing unreasonable or irrelevant for the 1st appellant to take into consideration of Islam as the religion of the Federation under Article 3(1) and the restriction on proselytism under Article 11(4) to impose the impugned condition that he did in respect of the publication of the Herald. There is nothing unconstitutional about it.

[51] The next constitutional issue to be considered is whether the 1st appellant decision has infringed the respondent's constitutional rights to profess, practice and propagate its religion. My view is that it does not. In its letter of 7.1.2009, the 1st appellant did not state anywhere in the letter that the respondent is prohibited from practising or propagating its religion. The letter also did not prevent the respondent from publishing the Herald; but restricting its circulation to churches and those who profess Christianity only. There is also no restriction for the Herald to be circulated to other non-Muslims besides the Christians.

[52] The 1st appellant's letter of 7.1.2009 only prohibits the respondent from using the word "Allah" for God in the Herald. I do not think this prohibition is unconstitutional and inhibits the respondent, which represents the Christians community, to practice their religion. It has been shown above that such prohibition is consistent with

obligation of the 1st appellant to have regard to Islam as the religion of the Federation in Article 3(1) and its protection pursuant to Article 11(4). Indian cases have shown that the constitutional protection afforded to the practice of one's own religion is confined to religious practice which forms an essential and integral part of the religion – see ***Javed v. State of Haryana AIR 2003 SC 3057; Commissioner of Police v. Acharya Jagadishwaranada Avadhuta [2004] 2 LRI 39 AR.*** I have read the illuminating judgment by my learned brother Justice Mohd Zawawi Salleh JCA in draft which discussed this issue in detail and in scholarly manner. I equally agree that the word "Allah" is not an essential and integral part of the Christian religion.

[53] One final point which I would like to touch on is that in this appeal the 3rd to the 9th appellants have also raised the argument that the decision of the 1st appellant is non justiciable because the State Enactments which were passed by the respective State Legislature pursuant to the provision of a federal law make under Article 11 (4) of the Federal Constitution to curb the propagation of other religions among the Muslims is an exercise of discretion by the respective Rulers of the respective States who are the Head of Religion of Islam for the relevant States.

[54] I do not find this argument relevant. In my view what is being questioned here is not the exercise of the discretion or prerogatives of the Rulers as Head of Religion of Islam but the discretion by the Minister i.e. the 1st appellant pursuant to a statutory power given to him.

[55] For the above reasons, I too would allow the appeal; and as agreed between parties there shall be no order as to cost.

Dated: 14th October 2013

sgd.
(DATO' ABDUL AZIZ BIN ABDUL RAHIM)
Judge
Court of Appeal, Malaysia

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IN THE COURT OF APPEAL OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO. W-01-1-2010

BETWEEN

1. **MENTERI DALAM NEGERI**
2. **KERAJAAN MALAYSIA**
3. **MAJLIS AGAMA ISLAM & ADAT MELAYU TERENGGANU**
4. **MAJLIS AGAMA ISLAM WILAYAH PERSEKUTUAN**
5. **MAJLIS AGAMA ISLAM NEGERI MELAKA**
6. **MAJLIS AGAMA ISLAM NEGERI JOHOR**
7. **MAJLIS AGAMA ISLAM NEGERI KEDAH**
8. **MALAYSIAN CHINESE MUSLIM ASSOCIATION**
9. **MAJLIS AGAMA ISLAM NEGERI SELANGOR … APPELLANTS**

AND

TITULAR ROMAN CHATHOLIC ARCHBISHOP OF KUALA LUMPUR … RESPONDENT

(DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN RAYUAN & KUASA-KUASA KHAS)
PERMOHONAN SEMAKAN KEHAKIMAN NO: R1-25-28-2009

Dalam perkara Keputusan Responden-responden bertarikh 7.1.2009 yang menyatakan bahawa Permit Penerbitan Pemohon untuk tempoh 1.1.2009 hingga 31.12.2009 adalah tertakluk kepada syarat bahawa Pemohon dilarang menggunakan istilah/perkataan "Allah" dalam "Herald – The Catholic Weekly" sehingga Mahkamah memutuskan perkara tersebut

Dan

Dalam perkara Permohonan untuk Perintah Certiorari di bawah Aturan 53, Kaedah 2(1) Kaedah-kaedah Mahkamah Tinggi 1980

Dan

Dalam perkara Permohonan untuk Deklarasi di bawah Aturan 53, Kaedah 2(2) Kaedah-kaedah Mahkamah Tinggi 1980

Dan

Dalam Perkara Roman Catholic Bishops (Incorporation) Act 1957

DI ANTARA

TITULAR ROMAN CATHOLIC ARCHBISHOP OF KUALA LUMPUR … PEMOHON

DAN

1. MENTERI DALAM NEGERI … RESPONDEN PERTAMA

2. KERAJAAN MALAYSIA … RESPONDEN KEDUA]

CORAM:

MOHAMED APANDI BIN ALI, JCA (now FCJ)
ABDUL AZIZ BIN ABD RAHIM, JCA
MOHD ZAWAWI BIN SALLEH, JCA

JUDGMENT OF MOHD ZAWAWI SALLEH, JCA

[1] I have had the advantage of reading in draft the judgments prepared by my learned brothers, Mohamed Apandi Ali, JCA (now FCJ) and Abdul Aziz Abd Rahim, JCA. I agree with them both, and for the reasons which they give, I too would allow this appeal. In view, however, of the importance of the case, I would like to add a few observations of my own on the issue whether the usage of the word "Allah" in the "Herald – the Catholic Weekly" ("the Herald") is an essential and integral part of the religion of Christianity.

[2] At page 48 of the Appeal Record, Her Ladyship had this to say:

> "… The next question is whether the used of the word "Allah" is a practice of the religion of Christianity. In my view there is uncontroverted historical evidence alluded to in paragraph 52(i) to (xxii) alluded to above which is indicative that the use of the word "Allah" is a practice of the religion of Christianity. From the evidence it is apparent that the use of the word "Allah" is an essential part of the worship and instruction in the faith of the Malay (Bahasa Malaysia) speaking community of the Catholic Church in Malaysia and integral to the practice and propagation of their faith"."

[3] The Federal Constitution is silent on what constitutes practising a religion for the purposes of Article 11 (1). Case-law has to a certain extent defined the word 'practice' by indicating what types of acts are not considered religious practices. In **Hjh Halimatussaadiah bte Hj Kamaruddin v Public Services Commission, Malaysia & Another** [1994] 3 MLJ 61, the appellant claimed that she had been wrongfully dismissed from her employment due to her refusal to comply with employment condition that prohibited an attire that covered a female public servant's face while on duty. According to the appellant, this contravened her right to religious practice on grounds that the wearing of the purdah ("a headdress covering a woman's entire face except the eyes") was part of her religious practice as a Muslim. However, the court disagreed and held that the government is entitled to forbid non-essential and optional religious traditions in the interest of the public service. Purdah was not considered as a religious practice as it was not a requirement under Islam since there was no express mention of such a requirement in the Quran.

[4] In **Meor Atiqulrahman bin Ishak & Others v Fatimah Sihi & Others** [2005] 2 MLJ 25, the Respondents who were students, took out an action against the 1st Appellant who was the school principal, contending that their fundamental right of the freedom of religion guaranteed by Article II (I) of the Federal Constitution had been infringed by the 1st Appellant's action because she had prevented them from entering the school wearing a serban ("a headgear worn by some Muslim males") which they contended is part of their religious rights. The question before the court was whether wearing a serban is an integral part of the religion of Islam. The court held that there is no evidence that it was mandatory and an integral part of Islam. His Lordship Gopal Sri Ram JCA (as he then was), explained what constitutes the integral part of religion and stated at page 20 as follows:

> "I would merely pause to observe that Das Gupta J's second principle is based on a substrum of fact. It requires the court to determine as a fact based purely on relevant and admissible evidence placed before it as to whether the religion practice in question is an integral part of the particular religion.".

[5] His Lordship then referred to the case of **Javed v State of Haryana**, AIR 2003 SC 3057, where RC Lahoti J (as he then was) said:

> "The meaning of religion - the term as employed in Article 25 - and the nature of protection conferred by Article 25 stands settled by the pronouncement of the Constitution Bench decision in **Dr. M. Ismail Faruqui and Ors. v. Union of India and Ors** (1994) 360.The protection under Articles 25 and 26 of the Constitution is with respect to religious practice which forms an essential and integral part of the religion. A practice may be a religious practice but not an essential and integral part of practice of that religion. The latter is not protected by Article 25.".

[6] In India, the test adopted by the courts to determine whether a person's religious practice is protected under Articles 25 and 26 of the Constitution is simply this: whether the nature of the religion would be changed without that impugned part or practice. The implication of this test was that only the permanent essential part was protected by the constitution, and this part was perceived to be mandatory. In **Commissioner of Police and Ors v Acharya Jagadishwarananda Avadhuta and Anor** (2004), 12 SCC 770, a religious sect (Ananda Margis) wanted to perform the tandava dance with skulls and knives on the street of Calcutta but was denied permission by the Police Commissioner. The court reiterated its test:

> "Test to determine whether a part of practice is essential to the religion is to find out whether the nature

> of religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part. There cannot be additions or subtractions to such part. Because it is the very essence of that religion and alterations will change its fundamental character. It is such permanent essential part is what is protected by the Constitution. Nobody can say that essential part or practice of one's religion has changed from a particular date or by an event. Such alterable parts or practices are definitely not the 'core' of religion where the belief is based and religion is founded upon.". (p.5)

[7] The majority opinion in that case held that the Ananda Margis order was founded in 1955, and the dance was introduced as a practice in 1966. Hence, the tandava dance was not the core upon which the order was founded.

[8] In other cases too, the Indian Courts had distinguished between essential and non-essential practices. In **The Durgah Committee, Ajmer and Anr. v Syed Hussain Ali and Ors** AIR 1961 SC 1402, the question was whether the legislative action of constituting a Durgah Committee under the Durgah Khwaja Saheb Act, 1955, for the administration and management of the Ajmer Durgah endowment was violative of the denominational right of the "Chisti Sufis". It was decided that religious denomination could claim the protection of Article 26 only to the extent of practices

which were essential and integral part of religion and to no others. It was noted that the “Chisti Sufis” did not show that they had any customary rights for the management of the Durgah endowment and hence the right to manage the same could not be defended as an “essential” religious practice protected under the constitution.

[9] In State of **West Bengal v Ashutosh Lahiri** AIR 1995 SC 464, the court ruled that the scarifies of a cow by Muslim on Id Kurban (“Idul Adha”) was not an “essential” part of Islam since a camel or a goat could be substituted for the cow.

[10] The principle to be distilled from the authorities above cited is that freedom of religion extends only to practices and rituals that are essential and integral part of the religion. In this respect, the courts rejected what could be called the “assertion’s test”, whereby a petitioner could simply assert that a particular practice was religious practice. It was the court’s task to assess the sufficiency of the evidence required to establish the existence of such a practice. Therefore, a “practice” or set of beliefs must not only exist, but be “essential” to that religion.

[11] Learned counsel for the 8th Appellant submitted that that Her Ladyship had erred in law and fact in holding that the usage of the word “Allah” is a practice of the religion of Christianity and that the usage of the word “Allah” is an essential part of the worship and instruction of the faith of the Malay speaking community in the Catholic Church in Malaysia and integral to the practice and propagation of their faith. In the affidavits filed by the 1st and 2nd Appellants, they had denied this assertion by the Respondent.

[12] Learned counsel for the 8th Appellant further submitted that the affidavit evidence filed by the Respondent in the High Court failed to show that the word “Allah” is an integral part of the teaching of Christianity. As regards to the many versions of the earlier Malay translations of the Bible, which have been taken to be among the historical proof to justify the term “Allah” being as such in its present day translation, learned counsels for the 3rd – 9th Appellants in their submissions argued that it is particularly noteworthy that they were mainly translated by the non-Malay – to be more specific, by the missionaries – to spread Christianity among the local population in Malay Archipelago. Therefore, the translation was incorrect.

[13] It was contended by learned counsel for the 8th Appellant that the word “Allah” does not appear in the original Bible. The original Bible of the Christian was the Hebrew Bible, also known as the Tanakh. The very first translation of the Hebrew Bible was into Greek, also known as Septuagint (LXX) which later became the received text of the Old Testament in the churches and the basis of the canon. There was no word “Allah” in the Greek New Testament either. That being the historical fact, it was submitted that the word “Allah” is not an integral part of the faith and practice of Christianity.

[14] In reply, learned counsel for Respondent submitted that the Christian in Malaysia and Indonesia had for years used the word “Allah” to refer to “God” in Bahasa Melayu and Bahasa Indonesia. Mainstream Bible translations in both languages used “Allah” as the translation of Hebrew Elohim (translation in English Bible as “God”). Learned counsel further submitted that the Catholic Church in Malaysia and Indonesia and the great majority of other Christian denomination hold that “Allah” is the legitimate word for “God” in Bahasa Melayu.

[15] It is trite that the court may take judicial notice of public history, literature, science and art and may resort for its aid to

appropriate books or documents of reference. (See: section 57(2) of the Evidence Act 1950 and **Lim Kong v Public Prosecutor** [1962] MLJ 195; **Pembangunan Maha Murni Sdn Bhd v Juruurus Ladang Sdn Bhd** [1986] 2 MLJ 30 and **Adong bin Kuwau & Ors v Kerajaan Negeri Johor** [1997] 1 MLJ 418). In **Commonwealth Shipping Representative v P & O Branch Service** [1923] AC 191, Lord Sumner had this to say at page 212:

> "Judicial notice refers to facts which a judge can be called upon to receive and to act upon either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer.".

[16] With this principal in mind, I now turn to consider the question whether the Herald should use the word "Allah" in the Malay version. I shall begin by considering controversial issue whether Christians should use the word "Allah" in the Bible translations. The issue is the subject of a long debate, especially for non-Arabic speaking Christians. This debate does not exist for Arabic-speaking Christians who had continually translated "Elohim" and "Theos" (the primary terms for "God" in Biblical Hebrew and Greek), as "Allah" from the earliest known Arab Bible translations in the eight century till today.

[17] When those whose mother tongue is Arabic and who live among Muslims have no problem with the name “Allah” being used for God in the Bible, this raises a question about what possible problem there might be with the use of “Allah” elsewhere in the translation of the Bible. There are some non-Arabic speaking Christians who say that the word “Allah” and “God” refer to different deities and therefore that “Allah” should never be used in any translation of the Bible. One person who has written a book arguing against the use of the word “Allah” by Christian is a Nigerian, G.J.O Monshay. In his book, “Who is this Allah?”, Ibadan, Nigeria: Firelines Inst., 1990, he writes at page 8: “*for long we had assumed that Christians and Muslims serve the same God, and that it is only in the language of expression and mode of worship that they differ*.”. But he concludes that they are not.

[18] Many sincere missionaries who strive to be Biblical tend to reject all Muslim terminology, culture and religions forms which they construe as “Islamic” – even elements rooted in Biblical Jewish and Christian origin. In arguing that “Allah” is not the God of the Bible, Brutus Balan, an Australian, advances the following reasons:

“The word '*Allah*' no matter the origin pre Muhammad is understood in the Islamic context today as the Quranic deity. It is not a word that depicts the Trinitarian *Yahweh-Elohim* (Lord God) of the Bible. It is wrong for any translation of the Bible in any language to use this word 'Allah' to refer to the God of the Bible. Doing so brings confusion and ambiguity between what the Bible teaches as the Trinitarian monotheistic God with that of the 'Allah' of the Quran. It cannot be considered as a mere argument over semantics for Christians of the protestant/evangelical variety. To use 'Allah' synonymously in reference to the Biblical deity is both confusing for the Muslims and Christians as to which God one is referring to as it is poles apart theologically. There is the danger for both sides untaught of its respective theologies to think it is the same God who is worshipped. **Christians must distinguish themselves in their doctrine and not use an Arabic word for the Biblical God.**

1. In today's religious context, the word 'Allah' is a word loaded with Islamic theology. The God of the Christian Bible *Yahweh-Elohim* beginning from Genesis to Revelation is a Trinitarian monotheistic God. It is not a creation of the Church but it is an inspired Biblical revelation. Its mathematics is hard to understand but it is the heart of John 3: 16, the Gospel in a nutshell. That is, the Trinitarian monotheistic God the "Father", sending forth God the "Son", Christ Jesus, who incarnated in the human flesh, to offer Himself as the blood-sacrifice, a substitute to take upon Himself the sin of doomed humanity, dying on the cross and rising up again on the third day from the dead thereby saving humanity from God's wrath upon sin. After Christ resurrection and ascension, as promised by Him, God the Holy Spirit descended upon the earth to indwell every true believer of Christ (the Church), according to the Scriptures (Bible) to enable the believer to live a holy life and to be the seal of redemption testifying in the heart of the forgiveness of sin in Christ Jesus. The Christian Gospel is based on this redemptive revelation

of the triune Godhead. The Quranic concept of '*Allah*' is in total opposition to this. **There is NO similarity between them whatsoever.**

2. The early 'Christian missionaries', erred when they started to Christianize pagan words so that the 'converts' from the Christianized colonies and communities are not brought into a religio-social vacuum. Therefore, the word *Allah* that pre-dates Islam, a word that was and is a non Hebrew word for a pagan deity, the "Moon-god" of the pre Muhammad Arabs was Christianized and retained among the Middle Eastern Arab Christian converts finding its way in the Arabic Bible translation. Post Muhammad this same "Moon-god" is now appropriated and identified with the Islamic Quran by Muhammad. This contextualization of the Arabic word, *Allah,* in Bible translation, was followed in Asia and many parts of the world where there was a Muslim-Arabic religious influence. **It was wrong then and it is wrong now.**

3. The word '*Allah*' is a transliteration of the Arabic word and it does not represent the Hebrew God of the Bible pre or post Muhammad. To be true, the translators at that time ought to have transliterated the Hebrew words, '*Jehovah*' (Lord) and '*Elohim*' (God) incorporating it in the ethnic language of a people group , thus introducing the God of the Bible without any confusion to any locally known pagan deities. Why use the Arabic word '*Allah*' for the Biblical God revealed to the Jewish Hebrew speaking prophets of the Old Testament and the Jewish apostles/associates of the New Testament? After all *'the people of the Book'*, the Jews, were worshipping '*Jehovah-Elohim'* 500 years before Mohammed appropriated this "Moon-god", Allah, as the deity of Islam. No matter how it is insisted, it is a betrayal of the God of the Bible to call Him '*Allah*' of Muhammad's Islam. **Words do not exist in a vacuum and they are loaded with implications. When we import from the Quran a word that is alien to the Jewish Bible, we also import its Islamic teachings.**

4. Since the Old Testament of the Bible was written in Hebrew, the language of the Jews, modern translations must use the TRANSLITERATED Hebrew words for the God of the Bible when a generic word is unavailable in any local language to distinguish the God of the Bible (since '*Allah*' is a loaded Islamic word today). The same consistency must apply even for the New Testament (written in Greek) for God and Lord ('*Theos'* and '*Kurios'*) for it is a reference to the same Biblical God of the Old Testament. If there was no indigenous word or equivalence for a word in another language, people have always transliterated the foreign word, contextualizing it with slight changes and adding it to the local vocabulary. The Indonesian and Malaysian languages are testament to this. Words like '*confrontasi*' for confrontation, '*reformasi* ' for reformation, etc., have now become part of the Malay/Indonesian vocabulary. **Therefore, Bible translation must be in keeping with its revelatory language in translation and when untranslatable, transliterated.**

……

10. The Indonesian/Malay and the Middle Eastern Bible translations erroneously use the word 'Allah' to refer to the God of the Bible. Even though the argument that it is not an exclusive word for the Muslims because it pre-dates Islam and that it is currently used by Arabic speaking Christian minority, this Islamic deity called 'Allah' is never found in the Hebrew text of the Bible. Hebrew, Aramaic and Arabic languages may have similar linguistic root from where it branched out but since the birth of Islam, 'Allah', is a word that refers to the deity of the Quran ('There is no god but Allah'). This Muslim deity is antithetical to the Biblical God, Jehovah-Elohim. They are poles apart even though many untaught people say there is only a minor difference. They mean well but have not investigated the content and theology of the Bible and the Quran.".

(See: http:/www.danielpipes.org/comments/185481)

[19] Not long ago (August 2007), a Roman Catholic in Netherland, Tiny Muskens, called for all Christians to use the word “Allah”. However, the call was objected by the Protestant Christian as well as the Catholic Christians. The President of the Catholic League for Religious and Civil Rights disputed the idea and said:

> “Bishop Martinus Tiny Muskens can pray to “Allah” all he wants, but only addlepated Catholics will follow his lead. It is not good sign when members of the Catholic hierarchy indulge in a fawning exchange with Muslims or those of any other religion.”.
>
> (See http:/www.foxnews.com/story/0.2933, 293394,00.html).

[20] The Chairman of the General Synod of the Dutch Protestant Church, Gerrit de Pijter, also opposed to Musken’s idea that Christians use the word “Allah”. He had this to say:

> “I applaud every attempt to encourage dialogue with Muslims, but I doubt the sense of this manoeuvre.”.
>
> (See: http:/www.news.com.au/story/0.23599, 222540 – 13762,00.html).

[21] Christians who advocate for using the word “Allah” among Muslims in non-Arabic speaking countries argue that introducing foreign terms for “God” will create immense hurdles in

communication, perhaps even guaranteeing that a truly indigenous church planting movement will never occur. The task, they say, is not to discard such easily redeemable terms, but to fill them with Biblical meaning. The more a Muslim's understanding of "Allah" is informed by Scriptures, the more Biblical their theology of God will become. Therefore, if the translator's objective is to render the Scriptures in a way that will be well received as "Good News" by Muslim readers, the solution to this linguistic quagmire is not necessarily to avoid the term "Allah", no matter how vehemently some non-Arabic knowing Christian may oppose it. John Gilchrist, a South African Christian leader and writer makes the following comments in his book: "Communicating the Gospel to Muslims", section 4 – "Becoming a Muslim to the Muslims":

> "What, then, is the Biblical approach to Muslims in the light of this method into which the great apostle allows us to enter? It is simply this - in the same way that he became as a Jew to the Jews, so each of us must become as a Muslim to the Muslims. We must discover the beliefs of the Muslims, their view of prophetic history, their assessment of Jesus Christ, and their overall religious perception of life, and present the Gospel against that background. Samuel Zwemer, one of the most famous missionaries to Muslims, sums this up perfectly in saying: We must become Moslems to the Moslem if we would gain them for Christ. We must do this in the Pauline sense, without compromise, but with self-sacrificing sympathy and unselfish love. The

> Christian missionary should first of all thoroughly know the religion of the people among whom he labours; ignorance of the Koran, the traditions, the life of Mohammed, the Moslem conception of Christ, social beliefs and prejudices of Mohammedans, which are the result of their religion, - ignorance of these is the chief difficulty in work for Moslems. (Zwemer, The Moslem Christ, p. 183).".
>
> (See: answering – islam/org/Gilchrist/Vol 2/3B html).

[22] It would seem that the biblical translations of the Bible into Arabic and other languages used by the majority Muslim communities in the Middle East, Africa and Asia have generally not used "Allah" to translate the Hebrew tetragrammaton **YHWH**. This is considered to be the particular name of the supreme being of the people of Israel as revealed to Moses. In Arabic translations it is transliterated as **yahwah** or translated as **rabb** (Lord), corresponding to the Jewish custom of using ***adonai*** in place of saying the divine name. Translations of **YHWH** in other languages used in the Islamic world have followed the precedent of the Arabic in either transliterating **YHWH** and/or using a word for Lord (**rabb** in Bambara and Somali, ***khodavand*** in Persian, Pashto, Sindhi, and Urdu, **Tuhan** in Indonesian). The exceptions to this practice are the Malay translations of 1912 and 1988 that use "Allah" for **YHWH**; the Biatah translation used in Sarawak, Malaysia, and the

Tausug translation used in Jolo, Philippines, followed the precedent of the Malay translations. However, the completely revised Malay Bible of 1996, restored the practice of translating Elohim as “Allah”. (See: Daud Soesilo; “Translating the Names of God Revisited: Field Experience from Indonesia and Malaysia,” (a paper presented at the Annual Meeting of the SBL/AAR in November 2000), pp. 4 and 8).

[23] It is pertinent to note that there have been biblical translations in a few languages that have changed the word used for the supreme being from previous translations. The original Pashto translation of the Bible in 1895 had “Allah”, but this was changed to *Khoda* in the revision of the New Testament beginning with the Gospel of Matthew published in 1931, conforming to the usage in Urdu and the Iranian languages. The Bengali translation of the Bible made in 1809 by William Carey used *Ishwar*, the common word used by Hindus for the supreme being. When the new Musalmani Bengali Common Language translation of the Gospels was published in Bangladesh in 1980, the word *Khoda* was used since that was the word commonly used by Muslims. Now in the year 2000 the complete Musalmani Bengali Common

Language Bible has been published with the word “Allah” because that has become the commonly-used word by Muslims and Christians from a majority community background. Conversely, the Scripture Union of Malaysia in its publications has been changing “Allah” to “Tuhan” when quoting the Indonesian translation of the Bible, *Terjemahan Baru.* The result is no distinction is made in the translation of YHWH and Elohim. The completely revised Malay Bible of 1996, restored the practice of translating Elohim as “Allah”. It was said that this was at the advice of the Malaysian church leaders, who considered the translations of 1912 and 1988 as not being exegetically accurate or faithful to the original texts. Thus, the rendering of the divine names returned to the precedent established in the history of the Malay/Indonesian translations since 1629. (See: Soesilo, op. cit, pp. 4 and 8).

[24] From the above research, it can be seen that in spite of the word “Allah” is not the same as *Elohim* and *Theos* in the Bible, translators involved in translations of the Bible or revisions of the Bible in languages used by the majority Muslim community had used the word “Allah” because the word is commonly-used by the people in that language group to refer to their supreme being.

However, there are exceptions. In a recent Indonesian translation, *Kitab Suci: Torat dan Injil* (Jakarta: Bet Yesua Hamasiah, no date), in which the tetragrammaton is translated YAHWE and Elohim is transliterated as Eloim. This was done for the ideological objection to the use of "Allah" in the Bible. (See: Soesilo, op. cit., pp. 2f). The rationale for this is that "Allah" in its original usage refers to the pagan god of the Arab (i.e., prior to Islam advent). However, it should be noted that this group's version of the term for God in their translation is resisted by the main body, the Indonesian Bible Society (Lembaga Al Kitab Indonesia), which was responsible for the Al Kitab (1978) and the Al Kitab Kabar Baik, ("Good News Bible") (2004).

[25] In summary, judging from the many viewpoints and contentions that I have alluded before, we can conclude that the Christians themselves have not reached a consensus as to how to use the word "Allah", whether in their many translations and versions of the Bible or in their general usage of it and this simply demonstrates how contentious and controversial such a usage.

[26] "Allah" is not the God of the Bible. "Allah" is a proper name and the only God in Islam. The Holy Qur'an describes the

attributes of “Allah” in Surah Al-Ikhlas (“Purity”) (Chapter 112) as follows:

> “Say: He is Allah, The One and Only; Allah, the Eternal, Absolute; He begetteth not, nor is He begotten; And there is none Like unto Him.”.

[27] According to Abdullah Yusuf Ali, “The Meaning of the Holy Qurán” (Brentwood, Maryland: Amana Corporation, 1991), the verse, “He begetteth not, nor is He begotten”, negates the Christian idea of the godhead, “the Father”, “the only – begotten Son” and so on. The last part of Surah, “and there is none Like unto Him” warns “against Anthropomorphism, the tendency to conceive Allah after our own pattern, an insidious tendency that creeps in at all times and among all peoples.”. (p.6300).

[28] If the word “Allah” is to be employed in the Malay versions of the Herald to refer to God, there will be a risk of misrepresentation of God within Christianity itself, since the Christian conception of God as symbolised by the trinity is absolutely and completely dissimilar to the conception of Allah in Islam; in other words, the potential for confusion is not confined only to Muslims but also to Christians.

[29] The upshot from the foregoing discussion is that the usage of the word “Allah” in the Malay version of the Herald to refer to God is not the essential or integral part of the religion of Christianity. Therefore, such usage does not attract constitutional guarantee of Article 11(1) of the Federal Constitution. The question of translating God as “Allah” is still being hotly debated among Christians worldwide. It is also doubtful whether the opinion of the Respondent on the usage of the word “Allah” reflects that of Catholic majority.

Dated: 14 October 2013

Sgd.

(DATO’ MOHD ZAWAWI BIN SALLEH)
Judge
Court of Appeal
Malaysia

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IN THE COURT OF APPEAL OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO. W-01-1-2010

BETWEEN

1. **MENTERI DALAM NEGERI**
2. **KERAJAAN MALAYSIA**
3. **MAJLIS AGAMA ISLAM & ADAT MELAYU TERENGGANU**
4. **MAJLIS AGAMA ISLAM WILAYAH PERSEKUTUAN**
5. **MAJLIS AGAMA ISLAM NEGERI MELAKA**
6. **MAJLIS AGAMA ISLAM NEGERI JOHOR**
7. **MAJLIS AGAMA ISLAM NEGERI KEDAH**
8. **MALAYSIAN CHINESE MUSLIM ASSOCIATION**
9. **MAJLIS AGAMA ISLAM NEGERI SELANGOR … APPELLANTS**

AND

TITULAR ROMAN CATHOLIC ARCHBISHOP OF KUALA LUMPUR … RESPONDENT

[DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN RAYUAN & KUASA-KUASA KHAS)

PERMOHONAN SEMAKAN KEHAKIMAN NO: R1-25-28-2009

Dalam perkara keputusan Responden-responden bertarikh 7.1.2009 yang menyatakan bahawa Permit Penerbitan Pemohon untuk tempoh

1.1.2009 hingga 31.12.2009 adalah tertakluk kepada syarat bahawa Pemohon dilarang menggunakan istilah / perkataan “Allah” dalam “Herald – The Catholic Weekly” sehingga Mahkamah memutuskan perkara tersebut

Dan

Dalam perkara Permohonan untuk Perintah Certiorari di bawah Aturan 53, Kaedah 2(1) Kaedah-kaedah Mahkamah Tinggi 1980

Dan

Dalam perkara Permohonan untuk Deklarasi di bawah / aturan 53, Kaedah 2(2) Kaedah-kaedah Mahkamah Tinggi 1980

Dan

Dalam perkara Roman Catholic Bishops (Incorporation) Act 1957

DI ANTARA

TITULAR ROMAN CATHOLIC ARCHBISHOP OF KUALA LUMPUR … PEMOHON

DAN

1. MENTERI DALAM NEGERI ... RESPONDEN PERTAMA
2. KERAJAAN MALAYSIA RESPONDEN KEDUA]

CORAM:

MOHAMED APANDI BIN ALI, JCA
ABDUL AZIZ BIN ABDUL RAHIM, JCA
MOHD ZAWAWI BIN SALLEH, JCA

GROUNDS OF JUDGMENT

1. Introduction

[1] This appeal is concerned with and only with judicial review. It is an appeal against the decision of the learned High Court Judge, on a Judicial Review application, given on 31/12/2009, where the following reliefs were granted to the respondent:-

> "(1) Satu Perintah Certiorari untuk membatalkan keputusan Responden-Responden bertarikh 7 Januari 2009 bahawa Permit Penerbitan Pemohon untuk tempoh 1 Januari 2009 sehingga 31 Disember 2009 adalah tertakluk kepada syarat bahawa Pemohon dilarang menggunakan istilah/perkataan "Allah" dalam "Herald – The Catholic Weekly" sehingga Mahkamah memutuskannya;
>
> (2) Secara bersesama, deklarasi-deklarasi berikut:
>
> (i) Bahawa keputusan Responden-Responden bertarikh 7 Januari 2009 untuk kelulusan Permit Penerbitan Pemohon untuk tempoh 1 Januari 2009 sehingga 31 Januari 2009 adalah tertakluk kepada syarat bahawa Pemohon dilarang menggunakan istilah/perkataan "Allah" dalam "Herald – The Catholic Weekly" sehingga Mahkamah memutuskannya adalah salah di sisi undang-undang, batal dan tidak sah;
>
> (ii) Bahawa berdasarkan Perkara 3(1) Perlembagaan Persekutuan, Pemohon mempunyai hak di bawah perlembagaan untuk menggunakan istilah/perkataan Allah dalam "Herald – The Catholic Weekly" dalam perlaksanaan hak Pemohon bahawa agama selain daripada Islam boleh diamalkan secara aman dan harmoni di mana-mana tempat Persekutuan;

(iii) Bahawa Perkara 3(1) Perlembagaan Persekutuan yang menyatakan bahawa Islam adalah agama Persekutuan tidak memberi kuasa dan/atau memberi autoriti kepada Responden-Responden untuk melarang penggunaan istilah/perkataan “Allah” dalam “Herald – The Catholic Weekly”;

(iv) Bahawa menurut Perkara 10 Perlembagaan Persekutuan Pemohon mempunyai hak di bawah perlembagaan untuk menggunakan istilah/perkataan “Allah” dalam “Herald – The Catholic Weekly” dalam perlaksanaan hak Pemohon untuk kebebasan bersuara dan menyatakan pendapat;

(v) Bahawa menurut Perkara 11 Perlembagaan Pesekutuan Pemohon mempunyai hak di bawah Perlembagaan untuk menggunakan istilah/perkataan “Allah” dalam “Herald – The Cathoic Weekly” dalam perlaksanaan hak Pemohon untuk kebebasan beragama yang termasuk hak untuk menguruskan hal ehwal agama sendiri;

(vi) Bahawa berdasarkan Perkara 11 dan Perkara 12 Perlembagaan Persekutuan Pemohon mempunyai hak di bawah Perlembagaan untuk menggunakan istilah/perkataan “Allah” dalam “Herald – The Catholic Weekly” dalam perlaksanaan hak Pemohon berkenaan dengan pengajaran dan pendidikan umat Katolik dalam agama Kristian.”

The English translation of the above orders read as follows:-

“(1) an Order of Certiorari to quash the decision of the Respondents dated 7.1.2009 that the Applicant’s Publication Permit for the period 1.1.2009 until 31.12.2009 is subject to the condition that the Applicant is prohibited from using the

word “Allah” in “Herald - The Catholic Weekly” pending the Court’s determination of the matter;

(2) Jointly the following declarations:

(i) that the decision of the Respondents dated 7.1.2009 that the Applicant’s Publication Permit for the period 1.1.2009 until 31.12.2009 is subject to the condition that the Applicant is prohibited from using the word “Allah” in Herald - The Catholic Weekly” pending the Court’s determination of the matter is illegal and null and void;

(ii) that pursuant to Article 3(1) of the Federal Constitution the Applicant has the constitutional right to use the word “Allah” in “Herald - The Catholic Weekly” in the exercise of the Applicant’s right that religions other than Islam may be practiced in peace and harmony in any part of the Federation;

(iii) that Article 3(1) of the Federal Constitution which states that Islam is the religion of the Federation does not empower and/or authorize the Respondents to prohibit the Applicant from using the word “Allah” in Herald - The Catholic Weekly;

(iv) that pursuant to Article 10 of the Federal Constitution the Applicant has the constitutional right to use the word “Allah” in “Herald - The Catholic Weekly” in the exercise of the applicant’s right to freedom of speech and expression”;

(v) that pursuant to Article 11 of the Federal Constitution the Applicant has the constitutional right to use the word “Allah” in Herald - The Catholic Weekly” in the exercise of the Applicant’s freedom of religion which includes the right to manage its own religious affairs;

(vi) that pursuant to Article 11 and Article 12 of the Federal Constitution the Applicant has the constitutional right to use the word "Allah" in "Herald - The Catholic Weekly" in the exercise of the Applicant's right in respect of instruction and education of the Catholic congregation in the Christian religion.

[2] My learned brothers, Abdul Aziz bin Abdul Rahim, JCA and Mohd. Zawawi bin Salleh, JCA have read and approved this judgment. In addition, both of my learned brothers have respectively written separate supporting judgments. I agree with their methodological analysis and findings.

[3] I have read the appeal records and all the submissions and had given full consideration of the various views by the trial Judge and that of all the parties. It is my considered opinion that not all the issues raised in their respective views are relevant for purposes of this appeal. In this judgment, I shall place emphasis only on issues that in my view, have had bearings in deciding this appeal.

[4] As indicated above this is a judicial review case. I am therefore guided by trite law that a judicial review is not concerned with the merits of any administrative decision but rather with the **manner** the decision was made. A judicial review is not to be treated as an appeal. Corollary to that, the court can quash an administrative decision without substituting for its own. In short, the court is not performing an appellate function. On this trite law, it will

be suffice to refer to the celebrated case of ***Associated Provincial Picture Houses v Wednesbury Corp*** **[1948] 1 KB 223**, where Lord Greene MR, summed up as follows:-

> "The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them."

[5] The above ***Wednesbury*** case was cited with approval, and followed by our Supreme Court case ***Minister of Labour, Malaysia v Lie Seng Fatt*** **[1990] 2 MLJ 9.**

Facts of the case

[6] The 1st appellant in a letter dated 7/1/2009 addressed to the respondent approved the respondent's publication permit subject to the following conditions:-

> "(i) Permohonan penerbitan dalam Bahasa Melayu adalah dibenarkan, namun demikian, **penggunaan kalimah "ALLAH"** adalah dilarang sehingga mahkamah membuat keputusan mengenai perkara tersebut.
>
> (ii) Di dalam hadapan penerbitan ini, tertera perkataan "TERHAD" yang membawa maksud penerbitan ini adalah terhad untuk edaran di gereja dan kepada penganut Kristian sahaja. ("the said decision")."

[7] The respondent being dissatisfied with the said decision filed an Application for Judicial Review No: R1-25-28-2009 in the Kuala Lumpur High Court to quash the said decision.

[8] There is a long history as to how the letter issued by the 1st appellant (dated 7/1/2009) came about. The facts leading to or culminating in the letter of 7/1/2009 can be gleaned from the various earlier letters issued by the 1st appellant to the respondent, which are found as exhibits in their respective affidavits. The relevant letters in their chronological order are as follows:-

No.	Type of document	Dated	In the Record of Appeal
1.	Directive by Ministry prohibiting the usage of the words: "Allah", "Kaabah", "Solat" and "Baitullah" in all publications of other religion, besides Islam.	5/12/1986	Page 478 Vol. 4
2.	First admonition letter to the respondent for failure to comply with the directive dated 5/12/1986	27/5/1998	Page 284 Vol. 3
3.	First show-cause letter to the respondent for failure to abide with the admonition letter dated 27/5/1998.	17/7/2002	Page 292 Vol. 3
4.	Second admonition letter to the	11/10/2006	Page 303 Vol. 3

	respondent		
5.	Third admonition letter to the respondent	17/1/2007	Page 308 Vol. 3
6.	Forth admonition letter to the respondent	5/2/2007	Page 317 Vol. 3
7.	Second show-cause letter to the respondent	12/3/2007	Page 322 Vol. 3
8.	Prohibition Notice letter from the Ministry, with lengthy explanation as to the reasons why and how the matter had affected the peace and harmony in the country	24/4/2007	Page 330 Vol. 3
9.	Fifth admonition letter to the respondent	13/9/2007	Page 336 Vol. 3
10.	Approval of publication permit, with 3 conditions.	30/12/2008	Page 428 Vol. 3
11.	Letter in reply to respondent's complaint of the condition of the permit (as stated in document 10 above), whereby the 3 were watered down but the prohibition of the usage the name of "Allah" was still prohibited. This letter is the subject-matter of the judicial review application.	7/1/2009	Page 439 Vol. 3

[9] It is pertinent to note that the reason for the prohibition of the usage of the word "Allah" in the respondent's publication has been brought to the attention and knowledge of the respondent since the date of the issuance of the first letter (item 1 in the list above) on **5/12/1986**. The stand taken by the 1st appellant on the subject matter has always been consistent. In fact, it can be seen that the contents of the letters dated 27/5/1998, 11/10/2006, 17/1/2007, 5/2/2007 and 12/3/2007 (items: 2, 4, 5, 6 and 7 in the list above) are similar. The similar contents read as follows:-

> "Dimaklumkan bahawa Kerajaan sentiasa menjamin kebebasan beragama di Negara ini sepertimana termaktub di bawah Perkara 11 Perlembagaan Persekutuan. Namun demikian, pihak Kerajaan adalah **bertanggungjawab untuk mengelakkan sebarang kekeliruan** di kalangan masyarakat pelbagai agama yang mana sekiranya dibiarkan ianya **boleh mengancam keselamatan dan ketenteraman awam**. **Sensitiviti keagamaan amat perlu dihormati dan dipelihara oleh semua pihak**. Sebagai sebuah institusi agama yang mempunyai ramai penganut dari kalangan rakyat Malaysia berbilang kaum, pihak tuan juga mempunyai tanggungjawab yang serupa menjana keharmonian beragama masyarakat Malaysia."

[10] To fully appreciate the facts of the case, it is instructive for me to refer to the contents of the letter dated 24/4/2007 (item 8 in the list above) which contained extensive explanations of the Ministry's decision on the matter. As the letter is self-explanatory, it is proper to reproduce in toto the said letter, which reads as follows:-

“

Ruj. Kami: KKDN:PQ:1505 (8460)

Tarikh : 24 April 2007

Archbishop Murphy Pakiam
Titular Roman Katolik Archibshop Of Kuala Lumpur
Herald, Xavier Hall
Jalan Gasing
46 Petaling Jaya, Selangor

Tuan,

NOTIS LARANGAN PENGGUNAAN PERKATAAN ALLAH DALAM BAHAN PENERBITAN/CETAK BERTAJUK *HERALD – THE CATHOLIC WEEKLY*

Dengan hormatnya saya diarah merujuk kepada surat tuan bertarikh 27 Mac 2007 mengenai perkara di atas.

2. Kementerian telah meneliti surat tuan berkenaan dan mendapati ianya telah membangkitkan beberapa perkara mengenai Artikel 11(3) Perlembagaan Negara, surat Setiausaha Sulit Kanan, rujukan MDN/08(8) bertarikh 20 Ogos 2002 dan kenyataan YAB Perdana Menteri mengenai ‘Bible’ pada 19 April 2005. Memandangkan pihak tuan telah menyentuh perkara-perkara tersebut, pihak Kementerian ingin memberi penjelasan agar ianya dapat mengatasi kekeliruan mengenai perkara ini.

3. Perkara 3(1), Perlembagaan Persekutuan, ada menyebut bahawa *Agama Islam* adalah agama rasmi Persekutuan. Sungguhpun demikian, agama lain boleh diamalkan dengan aman dan damai di mana-mana bahagian Persekutuan. Selanjutnya Perkara 11 (1)(3)(a) Perlembagaan Persekutuan menyebut, setiap orang berhak menganuti dan mengamalkan agamanya dan, **tertakluk kepada Fasal (4)**, mengembangkannya, di samping

berhak menguruskan hal ehwal agamanya sendiri. Fasal 4, Perkara 11, Perlembagaan Persekutuan tersebut ialah:-

> *"Undang-undang Negeri, dan berkenaan dengan Wilayah-Wilayah Persekutuan Kuala Lumpur, Wilayah Persekutuan Labuan dan Putrajaya, undang-undang Persekutuan boleh mengawal atau menyekat pengembangan apa-apa doktrin atau kepercayaan agama di kalangan orang yang menganuti agama Islam";*

4. Berikutan itu, Negeri-negeri mewujudkan undang-undang / enakmen negeri masing-masing bagi mengawal pengembangan agama di kalangan orang Islam dengan masing-masing meluluskan perkataan / istilah agama Islam yang dilarang digunakan di dalam bahan penerbitan agama lain selain daripada agama Islam.

5. Memandangkan wujudnya perbezaan perkataan dan jumlah perkataan di antara undang-undang negeri, ianya telah menimbulkan kekeliruan di kalangan masyarakat tentang istilah / perkataan yang boleh dan tidak boleh juga digunakan dalam penerbitan agama lain khususnya apabila banyak bahan-bahan penerbitan agama Kristian dalam Bahasa Indonesia dibawa masuk ke Malaysia. Pada akhir tahun 1970an dan awal 1980an wujud kegelisahan masyarakat dan juga masalah penguatkuasaan di kalangan pegawai-pegawai agama di negeri-negeri memandangkan terdapat penerbitan yang sama dibenarkan di negeri tententu tetapi tidak dibenarkan di negeri yang lain.

6. Berikutan itu, isu ini telah menjadi begitu sensitif dan ia telah dikategorikan sebagai isu keselamatan. Kerajaan berikutnya membuat keputusan isu ini ditangani oleh Kementerian

Keselamatan Dalam Negeri yang mengawal selia bahan penerbitan yang tak diingini berdasarkan seksyen 7(1) Akta Mesin Cetak Dan Penerbitan 1984 yang antara lain menyebut:-

> "Jika Menteri berpuas hati bahawa apa hasil penerbitan mengandungi apa-apa tulisan yang mungkin memudaratkan keselamatan atau berlawanan dengan mana-mana undang-undang, dia boleh menurut budi bicara mutlaknya melalui perintah yang disiarkan dalam Warta melarang pencetakan, pengimportan, penerbitan, penjualan, pengedaran atau pemilikan penerbitan yang berkenaan".

7. Justeru itu pada 2 Disember 1981 Kerajaan telah mewartakan larangan terhadap Al-Kitab di Malaysia melalui Warta Kerajaan P.U.(A) 15/82 di bawah Seksyen 22 Akta Keselamatan Dalam Negeri. Setelah mengambil kira rayuan badan-badan agama Kristian ketika itu, Kerajaan telah memberikan **pengecualian khas** melalui *Warta* Kerajaan P.U.(A) 134 bertarikh 13 Mei 1982 bahawa pemilikan penerbitan atau penggunaan Al-Kitab adalah hanya dibenarkan di dalam gereja oleh orang-orang yang beragama Kristian di seluruh Malaysia.

8. Dalam pada itu, perbezaan perkataan dan jumlah perkataan di dalam undang-undang negeri terus menimbulkan kekeliruan dan kegelisahan di kalangan masyarakat apabila pelaksanaan tindakan penguatkuasaan terhadap penggunaan istilah / perkataan di dalam penerbitan agama lain tidak dijalankan secara berkesan. Sehubungan itu, Kerajaan telah membuat keputusan pada 19 Mei 1986 bahawa daripada keseluruhan 16 perkataan larangan, menetapkan empat perkataan itu ***Allah, Kaabah, Solat*** dan ***Baitullah*** adalah merupakan istilah / perkataan khusus agama

Islam yang tidak boleh diguna pakai dalam bahan penerbitan agama lain kecuali bagi menerangkan konsep-konsep berkaitan dengan agama Islam. Berikutan itu Kementerian telah mengeluarkan surat pemberitahuan keputusan Bil KKDN.S.59/3/6/A Klt.2 bertarikh 5 Disember 1986 kepada penerbit-penerbit agama Kristian bagi mematuhi keputusan ini.

9. Mengenai surat balasan daripada Setiausaha Sulit Kanan Kepada YAB Menteri Dalam Negeri bertarikh 20 Ogos 2002, ia adalah merupakan surat makluman secara bertulis kepada pihak tuan, bahawa beliau telah memanjangkan permohonan pihak tuan tersebut kepada Bahagian tertentu di dalam Kementerian ini. Oleh itu anggapan tuan bahawa ia merupakan suatu keputusan adalah tidak betul dan berikutan itu, alasan tuan untuk terus menggunakan perkataan ALLAH dalam penerbitan *HERALD – THE CATHOLIC WEEKLY* juga tidak betul.

10. Mengenai kenyataan YAB Perdana Menteri dan Menteri Keselamatan Dalam Negeri pada 19 April 2005, bahawa kitab *Bible* dalam bahasa Melayu TIADA masalah di negara ini ialah tertakluk kepada syarat yang dinyatakan dengan jelas di muka hadapan penerbitan berkenaan dengan perkataan **BUKAN UNTUK ORANG ISLAM** dan *Bible* berbahasa Melayu tersebut dijual di premis-premis agama Kristian sahaja.

11. Kesimpulannya, Kerajaan telah memutuskan penggunaan istilah atau perkataan Allah, Kaabah, Baitullah dan Solat hanya khusus untuk digunakan di dalam mana-mana bahan penerbitan / cetak berkaitan agama Islam dan tidak boleh digunakan di dalam penerbitan agama lain.

12. Walau bagaimanapun, pihak Kerajaan juga membenarkan penerbitan bertajuk *Al-Kitab* berbahasa Melayu digunakan oleh semua penganut agama Kristian di negara ini di dalam gereja-gereja sahaja dan TIDAK di tempat-tempat lain. Kebenaran ini tidak meliputi lain-lain penerbitan agama Kristian selain daripada Bible berbahasa Melayu iaitu *Al-Kitab*.

13. Kerajaan sentiasa mengamalkan kebebasan beragama seperti mana termaktub di bawah Perlembagaan Persekutuan. Namun, Kerajaan bertanggungjawab untuk mengelakkan sebarang kekeliruan di kalangan masyarakat pelbagai agama yang mana sekiranya dibiarkan ia akan mengancam keselamatan dan ketenteraman awam. Sensitiviti keagamaan amat perlu dihormati dan dipelihara oleh semua pihak. Sebagai sebuah institusi agama yang mempunyai ramai penganut dari kalangan rakyat Malaysia berbilang kaum, pihak tuan juga mempunyai tanggungjawab yang serupa dalam menjaga keharmonian beragama masyarakat Malaysia.

14. Melalui penjelasan ini, adalah diharapkan agar pihak tuan dapat memahami isu larangan penggunaan empat perkataan khusus ini dan tidak lagi mengulangi kesalahan seumpama ini pada keluaran penerbitan tuan yang akan datang. Pihak tuan sebagai Pemegang Permit diingatkan kepada Syarat no. 11, *Syarat-Syarat Permit Penerbitan* yang dinyatakan di halaman belakang *Sijil Permit Penerbitan* iaitu pemegang permit hendaklah mematuhi dan tidak melanggar apa-apa arahan yang dikeluarkan di masa ke semasa oleh Kementerian. Kegagalan pihak tuan untuk mematuhi arahan ini akan mengakibatkan tindakan tegas iaitu sama ada digantung permit penerbitan atau pembatalan permit akan diambil terhadap penerbitan tuan tanpa diberi sebarang notis lagi.

15. Sila akui penerimaan surat ini dalam tempoh 14 hari daripada tarikh surat ini dikeluarkan di dalam akuan penerimaan seperti di lampiran.

Sekian, dimaklumkan.

"BERKHIDMAT UNTUK NEGARA"

Saya yang menurut perintah,

t.t.

(CHE DIN BIN YUSOH)
B.p. Ketua Setiausaha

Kementerian Keselamatan Dalam Negeri

Salinan kepada :

i. Ketua Setiausaha

ii Timbalan Ketua Setiausaha (Keselamatan)"

[11] The fact that the essence of the above explanations were given to the respondent, over the years, can be seen in the last paragraph of the fifth admonition letter dated 13/9/2007, (item 9 in the above list), which reads as follows:-

"3. Kementerian telah **berkali-kali memberi peringatan** kepada tuan supaya sentiasa mematuhi Syarat No. 11 Syarat-Syarat Permit Penerbitan yang menghendaki penerbit mematuhi dan tidak melanggar apa-apa arahan yang dikeluarkan dari masa ke semasa oleh Kementerian. Oleh yang demikian, dengan ini pihak tuan hendaklah **memberhentikan penggunaan perkataan 'Allah'** di dalam penerbitan **"Herald – The Catholic Weekly"**.

Sila akui penerimaan surat ini melalui **Akuan Penerimaan** seperti di lampiran." *(emphasis added)*

3. The relevant laws

[12] The impugned decision that formed the *bone* of contention in the judicial review application was made pursuant to the granting of the permit to publish by the Minister. The relevant law is the **Printing Presses and Publications Act 1984 [Act 301]**. This relevant law is prior to the amendments made to the Act vide amendment **Act A1436**, which came into force on 15/7/2012.

[13] **Section 6** of the **Act 301** reads as follows:-

"**6. Grant of permit.**

(1) The Minister may in his absolute discretion grant -

(a) to any person a permit to print and publish a newspaper in Malaysia; or

(b) to any proprietor of any newspaper in Singapore a permit allowing such newspaper to be imported, sold, circulated or distributed in Malaysia.

(2) The Minister may at any time revoke or suspend a permit for any period he considers desirable.

(3) The Minister may impose as a condition of the grant of a permit that the proprietor of the newspaper in Singapore shall establish and maintain a place of business within Malaysia or

shall appoint persons within Malaysia authorised to accept service of any notice or legal process on behalf of the proprietor and shall furnish the Minister with, and cause to be published in such manner as the Minister may direct, a list containing the names and addresses of such persons.".

[14] Pursuant to the powers conferred by **Section 26(2)(d) of the Act,** the Minister specified the conditions of the permit by way of a subsidiary legislation, **P.U.(A) 305/1984** and known as **Printing Presses And Publications (Licences And Permits) Rules, 1984**. The conditions of permit, as found in Form B in the First Schedule of the above-said Rules, reads as follows:-

"*CONDITIONS OF PERMIT*

1. The permit number shall be printed immediately below the title of the newspaper.

2. Eight copies of every issue and edition of the newspaper shall be delivered to the Ministry of Home Affairs immediately after it is printed.

3. The major part of the contents of the newspaper shall be limited to the affairs of Malaysia.

4. The format of the newspaper shall comply with the sample/mockup that has been submitted together with the application for this permit.

5. The scope and contents of the newspaper shall be restricted to those specified in this permit.

6. **The newspaper shall not publish any material, photograph, article or other matter which is prejudicial to or is likely to be prejudicial to public order, morality, security, the relationship with any foreign country or government, or which is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to the public interest or the national interest.**

7. The newspaper shall not in any manner misrepresent facts relating to incidents of public order and security occurring in Malaysia.

8. The permit shall not in any manner be transferred, assigned or otherwise placed under the control of any person other than the permit holder without the prior permission of the Minister of Home Affairs.

9. (i) Where the permit holder is a partnership, the partners shall not be changed without the prior consent of the Minister.

   (ii) Where the permit holder is a company, no directors shall be changed without the prior consent of the Minister.

10. The permit holder shall notify the Minister of Home Affairs of any change of members of the Editorial Board or any change in the shareholding of the company which affects the power to direct the management and policy of the company.

11. **The permit holder is required to comply with and not to contravene any directive from time to time issued by the Minister of Home Affairs.**

12. The conditions of this permit may be amended at any time by notification in writing by the Minister of Home Affairs to the permit holder.".

[15] Besides the provisions of the **Act**, the relevant laws pertaining to this appeal are **Article 3** in **Part *I* of the Federal Constitution and the Fundamental Liberties Articles** in **Part *II* of the Constitution**. I shall deal specifically with the respective Articles in the course of my judgment.

4. Issues to be determined

[16] Upon perusal of the appeal records and the submissions filed herein, I conclude that the central issue in this appeal is whether the imposition of the conditions of the publication permit, to the effect that the usage of the word "Allah" is prohibited in the Malay version of the publication of the "Herald – The Catholic Weekly" ("the Herald"), was in accordance with law or otherwise.

[17] To recapitulate, the impugned conditions as contained in para 2 of the letter dated 7/1/2009 (at page 439 of the Appeal Records Vol. 3) reads as follows:-

"2. Untuk makluman pihak tuan, Bahagian ini telah membuat pertimbangan semula ke atas kelulusan permohonan permit penerbitan bai penerbitan dengan tajuk di atas dan keputusannya adalah seperti berikut:

(i) Permohonan penerbitan dalam Bahasa Melayu adalah dibenarkan, namun demikian, **penggunaan kalimah "ALLAH" adalah dilarang** sehingga mahkamah membuat keputusan mengenai perkara tersebut.

(ii) Di halaman hadapan penerbitan ini, tertera perkataan **"TERHAD"** yang membawa maksud penerbitan ini adalah terhad untuk edaran di gereja dan kepada penganut Kristian sahaja.".

[18] The respondent has no quarrel with the 2nd condition in sub-para 2(ii) above.

5. Grounds of Appeal

[19] The 1st and 2nd appellants that represent the public authority (or the administrative authority) that made the impugned decision, submitted 3 main grounds in support of their appeal:-

(i) that the Minister had acted within his ministerial function and powers and in accordance with the **Printing Presses and Publications Act 1984**;

(ii) that the prohibition of the usage of the word "Allah" is in the interest of public safety and public order; and

(ii) that the said decision was legal and reasonable.

[20] The other appellants adopted the submissions of the learned Senior Federal Counsel, counsel for the 1st and 2nd appellants but emphasized on the need to protect Islam as the religion of Malaysia *vis-à-vis* the provisions of **Article 3(1)** and **Article 11(4) of the Federal Constitution**.

6. My analysis

[21] Upon reading the records of appeal and giving due weight to the respective submissions, my analysis of the legal issues in this appeal are as follows.

[22] The power to impose conditions in a permit under the **Printing Presses and Publications Act** by the Minister is not in dispute. The law gave him such power and even if it is not so provided, the law gave him such implied powers. This is as provided for under **Section 40 of the Interpretation Acts, 1948** and **1967**, which reads as follows:-

> "**Implied power**
>
> **40.** (1) Where a written law confers a power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.
>
> (2) Without prejudice to the generality of subsection (1) –

(a) power to make subsidiary legislation to control or regulate any matter includes power to provide for the same by licensing and power to prohibit acts whereby the control or regulation might be evaded;

(b) power to grant a licence, permit, authority, approval or exemption includes power to impose conditions subject to which the licence, permit, authority, approval or exemption is granted; and

(c) where a power is conferred on any person to direct, order or require any act or thing to be done, there shall be deemed to be imposed on any person to whom a direction, order or requisition is given in pursuance of the power a duty to comply therewith.".

[23] Imposition of a condition in a licence or permit is an exercise of the discretion of the Minister. Such discretion must not be unfettered or arbitrary. Such exercise of discretion must be reasonable. What is reasonable depends on the facts and circumstances of the case. What is a justifiable circumstances depends on the necessity of the occasion. This concept of fairness, i.e., as a safe-guard against unfettered discretion, is embodied in the provisions of **section 93(1)** and **section 95 of the Interpretation Acts**. **Section 93(1)** provides as follows:-

"**Construction of provisions as to exercise of powers and duties**

93. (1) Where a written law confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

(2) Where a written law confers a power or imposes a duty on the holder of an office as such, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed by the holder of the office for the time being or by a person duly appointed to act for him.".

[24] In empathy of the above, **section 95 of the Interpretation Acts** reads as follows:-

"**95.** (1) Where a written law confers power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also conferred as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.

(2) Without prejudice to the generality of the foregoing –

(a) power to control or to regulate any matter includes power to provide for the same by the licensing thereof and power to prohibit acts whereby the control or regulation might be evaded;

(b) power to grant a licence, permit, authority, approval or exemption includes power to impose conditions subject to which the licence, permit, authority, approval or exemption is granted.".

[25] The only issue before me is whether the exercise of the discretionary power to impose the impugned condition was in accordance to law.

[26] To appraise as to whether such a condition was in accordance to law, it needs to be analysed whether it was *ultra vires* the Act and/or in contravention of the fundamental liberties of the respondent, under the **Federal Constitution**.

[27] From the reading of the specific provisions of the **Printing Presses and Publications Act 1984** and the Rules made thereunder, it is my judgment that, read with the provisions of s**ection 93(1)** and **section 95** of the **Interpretations Acts 1948 and 1967**, the decision to impose the condition in the permit is well within the law. In short, the decision is within the function and statutory powers of the Minister. It is *intra vires* the **Printing Presses and Publications Act 1984**.

[28] On the issue of the exercise of discretion in imposing the condition of prohibiting the usage of the word 'Allah' by the respondent in the Malay versions of the Herald, I could not agree more than what was decided by this court in ***Arumugam a/l Kalimuthu v. Menteri Keselamatan Dalam Negeri & Ors*** **[2013] 5 MLJ 174, [2013] 4 AMR 289.**

[29] That case dealt with issues of irrationality and illegality. It was held in ***Arumugam's*** case that the issue of irrationality is intertwined

with the discretionary power of the Minister. And it dwelt with the objective balancing of the statutory and constitutional framework and the sensitivities of the community. Without repeating the principles discussed and decided therein, it is pertinent to state the appraisal of the facts by the Minister in the appeal before us has been correctly done, namely by way of it being **subjectively objective**. This is in line with the rationale in the Federal Court decision in ***Darma Suria Risman v. Menteri Dalam Negeri & 3 Ors*** **[2010] 1 CLJ 300**. That brings the matter to the related constitutional issues pertaining to this appeal.

7. Constitutional issues

[30] It is my judgment that the fundamental liberties of the respondent in this case, has to be read with **Article 3(1) of the Federal Constitution**. **Article 3(1)** reads as follows:-

> "3. (1) Islam is the religion of the Federation; but other religions may be practiced **in peace and harmony** in any part of the Federation.
>
> (2) In every State other than States not having a Ruler the position of the Ruler as the Head of the religion of Islam in his State in the manner and to the extent acknowledged and declared by the constitution of that State, and, subject to that Constitution, all rights, privileges, prerogatives and powers enjoyed by him as Head of that religion, are unaffected and unimpaired; but in any acts, observances of ceremonies with respect to which the Conference of Rulers has agreed that they should extend to the Federation as a whole each of the other Rulers shall in his

capacity of Head of the religion of Islam authorize the Yang di-Pertuan Agong to represent him.

(3) The Constitution of the States of Malacca, Penang, Sabah and Sarawak shall each make provision for conferring on the Yang di-Pertuan Agong the position of Head of the religion of Islam in that State.

(4) Nothing in this Article derogates from any other provision of this Constitution.

(5) Notwithstanding anything in this Constitution the Yang di-Pertuan Agong shall be the head of the religion of Islam in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya; and for this purpose Parliament may be law make provisions for regulating Islamic religious affairs and for constituting a Council to advise the Yang di-Pertuan Agong in matters relating to the religion of Islam.".

[31] It is my observation that the words "**in peace and harmony**" in **Article 3(1)** has a historical background and dimension, to the effect that those words are not without significance. The Article places the religion of Islam at par with the other basic structures of the Constitution, as it is the 3rd in the order of precedence of the Articles that were within the confines of **Part *I* of the Constitution**. It is pertinent to note that the fundamental liberties Articles were grouped together subsequently under **Part *II* of the Constitution**.

[32] **Article 3(1)** has a chequered history. Originally it was not in the draft proposed by the Reid Commission. As unfolded in the pages of history, the insertion of **Article 3(1)** came about after objections, negotiations, discussions and consensus between all the stake-holders, including from various racial and religious groups. It came about by the **White Paper** known as the Federation of Malaya Constitutional Proposals 1957. Paragraphs 57 and 58 of the **White Paper** reads as follows:-

> "57. There has been included in the proposed Federal Constitution a declaration that Islam is the religion of the Federation. This will in no way affect the present position of the Federation as a secular State, and every person will have the right to profess and practice his own religion and the right to propagate his religion, though this last right is subject to any restrictions imposed by State law relating to the propagation of any religious doctrine or belief among persons professing the Muslim religion.
>
> 58. The position of each of Their Highnesses as head of the religion in his State and the rights, privileges, prerogatives and powers enjoyed by him as head of that religion will be [19] unaffected and unimpaired. Their Highnesses have agreed however to authorize the Yang di-Pertuan Agong to represent them in any acts, observances or ceremonies agreed by the Conference of Rulers as extending to the Federation as a whole.".

[33] In short, **Article 3(1)** was a by-product of the **social contract** entered into by our founding fathers who collectively produced the **Federal Constitution**, which is recognized as the Supreme Law of the country. It is my judgment that the purpose and intention of the

insertion of the words: "**in peace and harmony**" in **Article 3(1)** is to protect the sanctity of Islam as the religion of the country and also to insulate against any threat faced or any possible and probable threat to the religion of Islam. It is also my judgment that the most possible and probable threat to Islam, in the context of this country, is the propagation of other religion to the followers of Islam. That is the very reason as to why **Article 11(4) of the Federal Constitution** came into place.

[34] Pursuant to the empowering provisions of **section 57(2) of the Evidence Act 1950**, in the course of writing this judgment, I have resorted aid to appropriate books of reference. On this point, perhaps it is appropriate to quote Professor Andrew Harding in his book **"Law, Government and the Constitution in Malaysia"** published in 1996, at page 201, who wrote as follows:-

> "The relationship between Islam and the Constitution has been discussed in Chapter 8 as one of the important general features of the Constitution. It emerged from that discussion that freedom of religion is both of importance in itself in a multi-religious society such as Malaysia, and that this principle is in no way contrary to the principle that Islam is the religion of the Federation. It is therefore to be expected that freedom of religion is specifically safeguarded in the Constitution.
>
> Art. 11(1) says that '[e]very person has the right to profess and practice his religion and, subject to Clause (4), to propagate it.' Art. 11(4) allows the States to legislate for the control or restriction of the propagation of any religious doctrine among

persons professing Islam. Thus Art. 11, while safeguarding freedom of religion, draws a distinction between *practice* and *propagation* of religion. The States have in fact exercised their right to enact restrictive laws such as are envisaged by Art. 11(4); and since the States include Penang and Melaka, where Islam is not even the state religion, it seems that the restriction of proselytism has more to do with the preservation of public order than with religious priority.".

[35] On **Article 11(4)**, Professor Dr. Shad Saleem Faruqi in his book entitled **"Document of Destiny the Constitution of the Federation of Malaysia"**, published in 2008, at pages 138-139, wrote:-

"**Propagation of religion to Muslims:** Under Article 11(4) of the Federal Constitution, non-Muslim may be forbidden by State law from preaching their religion to Muslim. Many Muslims complain that this part of the "social contract" is not being observed by some evangelical groups, some of whom are from abroad. On many occasions in recent years news has spread like wild fire that thousands of Muslims have converted or are waiting to convert to Christianity. Invariably this raises tensions.

In turn, many non-Muslims complain that Article 11(4) amounts to unequal treatment under the law because Muslims are allowed to propagate their religion to non-Muslims. It is respectfully submitted that Article 11(4) is part of the pre-Merdeka "social contract". It's aim is to insulate Muslims against a clearly unequal and disadvantageous situation. During the colonial era, many non-indigenous religions were vigorously promoted by the merchants, the military and the missionaries of the colonial

countries. Even today, the proselytizing activities of many Western-dominated religious movements that are internationally organised and funded have aroused resentment in many Asian and African societies. Some aspects of their activities, like seeking deathbed conversions, generous grant of funds to potential converts and vigorous proselytising activities among minors have distinct implications for social harmony. Prof. Harding is of the view that Article 11(4) was inserted because of public order considerations. According to him the restriction on proselytism has more to do with the preservation of public order than with religious priority. To his view, one may add that Malays see an inseparable connection between their race and their religion. Any attempt to weaken a Malay's religious faith may be perceived as an indirect attempt to erode Malay power. Conversion out of Islam would automatically mean deserting the Malay community due to the legal fact that the definition of a 'Malay' in Article 160(2) of the Federal constitution contains four ingredients. Professing the religion of Islam is one of them. A Pre-Merdeka compromise between the Malays and the non-Malays was, therefore, sought and obtained that any preaching to Muslims will be conducted only by authorised Syariah authorities. Missionary work amongst Muslims – whether by non-Muslims or Muslims – may be regulated by state law under the authority of Article 11(4) of the Federal Constitution.".

[36] The alleged infringement of the fundamental liberties of the respondent can be negated by trite law that any freedom is not absolute. Freedom cannot be unfettered, otherwise like absolute power, it can lead to chaos and anarchy. Freedom of speech and expression under **Article 10(1)** are subjected to restrictions imposed

by law under **Article 10(2)(a).** Freedom of religion, under **Article 11(1)**, as explained above is subjected to **Article 11(4)** and is **to be read** with **Article 3(1**).

8. Exercise of discretion

[37] As stated at the beginning of the judgment in a judicial review case, all the reviewing court need to deliberate and consider is the manner as to **how** the deciding authority made the decision. Was it made in an arbitrary manner without considering any relevant fact?

[38] On the facts of this case, perhaps it is appropriate to refer what the Minister had affirmed in his Affidavit In Reply to indicate as to how he came about to make the decision to impose the impugned condition on the Herald. The explanations and reasons given for imposing such condition can be seen in paragraphs 9.4, 11, 23 and 46 of the Affidavit In Reply (can be seen from pages 261 to 297 of the Appeal Records, Vol. 2). It is suffice to quote what was said in para 46 of the said Affidavit In Reply, which reads as follows:-

> "46. Saya selanjutnya menyatakan bahawa penggunaan kalimah Allah yang berterusan oleh Pemohon boleh mengancam keselamatan dan ketenteraman awam kerana ia boleh membangkitkan kekeliruan di kalangan umat Islam. Ini adalah kerana walaupun Pemohon mendakwa kalimah Allah yang digunakan di dalam penerbitannya merupakan terjemahan perkataan "God" tetapi di kalangan rakyat Malaysia, kalimah "Allah" secara matannya merujuk kepada Tuan Yang Maha Esa bagi penganut agama Islam.".

[39] It may be recalled that earlier in this judgment I reproduced the full text of the Ministry's letter dated 24/4/2007. It must be observed that at paragraph 5 of the said letter the respondent was informed of the unrest and ill feeling within the community that may lead to a disruption of the even tempo of the community.

[40] "Potential disruption of the even tempo of the community" is a basis to restrict the fundamental liberties of freedom of expression and freedom to practice one's religion. It is so when any particular activity comes within the scope of being prejudicial to public order. The concept of "potentiality to disturb the even tempo of the community" emerged in India: ***Kishori Mohan Bera v. The State of West Bengal*** **[1972 (3) SCC 845]**, which *inter alia* held that:-

> **"**`Public Order', 'law and order' and the 'security of the State' fictionally draw three concentric circles, the largest representing law and order, the next representing public order and the smallest representing security of the State. Every infraction of law must necessarily affect order, but an act affecting law and order may not necessarily also affect the public order. Likewise, an act may affect public order, but not necessarily the security of the State. The true test is not the kind, but the potentiality of the act in question. One act may affect only individuals while the other, though of a similar kind, may have such an impact that it would disturb the even tempo of the life of the community. This does not mean that there can be no overlapping, in the sense that an act cannot fall under two concepts at the same time. An act, for

instance, affecting public order may have an impact that it would affect both public order and the security of the State.".

[41] This concept was later adopted by the Indian Supreme Court in the case of ***Collector and District Magistrate v. S Sultan*** **AIR [2008] SC 2096**, where Dr Arjit Pasayat J. wrote as follows:-

> "The crucial issue, therefore, is whether the activities of the detune were prejudicial to public order. While the expression 'law and order' is wider in scope in as much as contravention of law always affects order. 'Public order' has a narrower ambit, and public order could be affected by only such contravention which affects the community or the public at large. Public order is the even tempo of life of the community taking the country as a whole or even a specified locality. The distinction between the areas of 'law and order' and 'public order' is one of the degree and extent of the reach of the act in question on society. **It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of the public order**. If a contravention in its effect is confined only to a few individuals directly involved as distinct from a wide spectrum of public, it could raise problem of law and order only.".

[42] It is my judgment that, based on the facts and circumstances of the case, the usage of the word "Allah" particularly in the Malay version of the Herald, is without doubt, do have the potential to disrupt the even tempo of the life of the Malaysian community. Such publication will surely have an adverse effect upon the sanctity as envisaged under **Article 3(1)** and the right for other religions to be practiced in **peace and harmony** in any part of the Federation. Any

such disruption of the even tempo is contrary to the hope and desire of peaceful and harmonious co-existence of other religions other than Islam in this country.

[43] Based on the reasons given by the Minister in his Affidavit In Reply, it is clear that he was concerned with national security and public order.

[44] When such exercise of discretion by the Minister becomes a subject of a judicial review, it is the duty of the court to execute a balancing exercise between the requirement of national security and public order with that of the interest and freedom of the respondent. As a general principle, as decided by case law, the courts will give great weight to the views of the executive on matters of national security. It is suffice to refer to what Lord Woolf C.J. said in ***A, X and Y v. Secretary of State for the Home Department*** **[2004] QB 335**, which reads as follows:-

> "Decisions as to what is required in the interest of national security are self-evidently within the category of decisions in relation to which the court is required to show considerable deference when it comes to judging those actions.".

[45] In other words, there is no particular standard of proof to show that the decision was based on national security. In such circumstances, as the case at hand, since the Minister concerned is in-charge of internal security, it is not for the court to probe for strong evidential proof of national security. It must be inferred that the

Minister's decision, involving national security, is rational. (See: ***R v. Secretary of State for the Home Department Exp. Mc Quillan*** **[1995] 4 All E.R 400**; and ***R v. Secretary of State for the Home Department, ex parte Hosenball*** **[1977] 3 All E.R 452**).

[46] In ***Hosenball's*** case, Lord Denning MR (at page 461 of the citation above) wrote as follows:-

> "The Secretary of State, as I have said, declined to give those particulars. He declined to add anything to the short statement enclosed in the first letter. It seems to me, if you go through those requests one by one, even including (e) on which counsel for Mr Hosenball so much relies, it is apparent that if the Secretary of State complied with that request it would be quite possible for a clever person, who was in the know, to track down the source from which the Home Secretary got the information. That might put the source of the information himself in peril. Even if not in peril, that source of information might dry up. Rather than risk anything of the kind, the Home Secretary was quite entitled to say: 'I am sorry but I cannot give you any further information.'
>
> *Conclusion*
>
> **There is a conflict here between the interests of national security on the one hand and the freedom of the individual on the other. The balance between these two is not for a court of law. It is for the Home Secretary.** He is the person entrusted by Parliament with the task. In some parts of the world national security has on occasions been used as an excuse for all sorts of infringements of individual liberty. But not in England. Both during the wars and after them, successive ministers have discharged

their duties to the complete satisfaction of the people at large. They have set up advisory committees to help them, usually with a chairman who has done everything he can to ensure that justice is done. They have never interfered with the liberty or the freedom of movement of any individual except where it is absolutely necessary for the safety of the state. **In this case we are assured that the Home Secretary himself gave it his personal consideration, and I have no reason whatever to doubt the care with which he considered the whole matter.** He is answerable to Parliament as to the way in which he did it and not to the courts here.

I would dismiss the appeal.".

9. Conclusion

[47] Applying the law to the facts and circumstances of the case and bearing in mind the principles to be taken in dealing with judicial review as laid down in the often-quoted case of ***Council of Civil Service Union & Ors v. Minister for the Civil Service*** **[1985] 1 AC 374**; **[1984] 4 All E.R 935,** it is my considered finding that the Minister has not acted in any manner or way that merit judicial interference on his impugned decision.

[48] In the circumstances and the facts of the case I am also mindful of the Latin maxims of "*salus populi suprema lax*" (the safety of the people is the supreme law) and "*salus republicae suprema lax*" (the safety of the state is the supreme law) do co-exist and relevant to the doctrine that the welfare of an individual or group must yield to

that of the community. It is also my reading that this is how the element of "in peace and harmony" in **Article 3(1)** is to be read with the freedom of religion in **Article 11(1) of the Federal Constitution**.

[49] On the available evidence too, I am satisfied that sufficient material have been considered by the Minister in discharging his function and statutory power under the **Printing Presses And Publications Act 1984**. Although the test under the written law is subjective, there are sufficient evidence to show that such subjective decision was derived by considering all facts and circumstances in an objective manner. Thus, there is no plausible reason for the High Court to interfere with the Minister's decision.

[50] Last, but not least, it is my judgment that the right of the State Legislature to enact laws, to ensure the protection and sanctity of Islam, under **Article 11(4)** is constitutional. I may add that such constitutional right of the States, especially where there are Rulers who are heads of the religion of Islam, fortified the position of Islam in the Federation that it should be immuned to any threat or attempt to weaken Islam's position as the religion of the Federation. It is also my judgment that any act or attempt of propagation on the Islamic population by other religion is an unlawful act.

[51] For completeness, I note that from a quick research on the history of the language of the Bible, it is clear that the word "Allah" does not appear even once as the name of God or even of a man in

the Hebrew Scriptures. The name “Allah” does not appear, even once in either the Old or New Testaments. There is no such word at all in the Greek New Testament. In the Bible world, God has always been known as **Yahweh**, or by the contraction **Yah**. That being the historical fact it can be concluded that the word or name “Allah” is not an integral part of the faith and practice of Christianity, in particular that of the Roman Catholic Church.

[52] I do not intend to make this judgment to be a study of comparative religions. The appeal today is not the proper forum. However, I must state that to refuse to acknowledge the essential differences between religions will be an affront to the uniqueness of world religions. To begin with, due recognition must be given to the names given to their respective Gods in their respective Holy books; such as “Yahweh” the God of the Holy Bible; “Allah” the God of the Holy Quran and “Vishnu” the God of the Holy Vedas.

[53] With the above historical and religious fact, I could not find any plausible reason as to why the respondent is adamant on using the word “Allah” in its weekly newsletter, particularly in its Malay version. Since “Allah” is never an integral part of the faith of the respondent, it is reasonable to conclude that the intended usage will cause unnecessary confusion within the Islamic community and is surely not conducive to the peaceful and harmonious tempo of life in the country. This conclusion is fortified by the fact that the majority population in this country is Malay and whose religion is Islam. A

fortiori, under **Article 160 of the Federal Constitution**, a "Malay" is defined as "a person who professes the **religion of Islam**, habitually speaks the Malay language, …".

[54] It is the constitutional duty of all stakeholders who believed in the rule of law to uphold and protect the Constitution. It is my judgment that the application for judicial review on matters of the nature as in this appeal militates against the spirit of "peaceful and harmonious" co-existence of other religion in this country.

[55] For reasons as explained above, I have no hesitation to allow the appeal by the appellants. I, therefore, allow the appeal. All orders by the High Court in this matter are set aside.

[56] And as agreed between the parties, there is no order as to costs.

Sgd.

DATO' SRI HAJI MOHAMED APANDI BIN HAJI ALI
Judge
Court of Appeal, Malaysia
Putrajaya

Dated this 14th day of October 2013.

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