DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)

PERMOHONAN UNTUK SEMAKAN KEHAKIMAN NO: 25-212-07/2015

Dalam Perkara Bahagian II, Artikel 5, Perlembagaan Persekutuan

Dan

Dalam Perkara Seksyen 25(2) dan/atau perenggan 1, Jadual, Akta Mahkamah Kehakiman, 1964

Dan

Dalam Perkara Aturan 53, Kaedah-Kaedah Mahkamah 2012

Dan

Dalam Perkara keputusan oleh Responden pertama dan kedua berkenaan dengan garis panduan untuk pekeliling fi perubatan bagi warga asing dan keengganan berbincang tentang garis panduan tersebut

Antara

1. MICHAEL JEYAKUMAR DEVARAJ …PEMOHON

Dan

1. MENTERI KESIHATAN MALAYSIA
2. KEMENTERIAN KESIHATAN MALAYSIA
3. KERAJAAN MALAYSIA …RESPONDEN-RESPONDEN

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I Introduction

1. This is an application for leave to apply for judicial review for:

   1.1. a declaration that the 2nd Respondent had acted without lawful basis in making the decision dated 21.04.2015 and pursuant thereto, refusing to discuss the implementation of the new Medical Fee Order for foreigners made by virtue of the circular entitled Guidelines on the Implementation of the Fee Order (Medical) (Service Cost) 2014 (the "**Guideline**") which came into force on 01.01.2015 (the "**Decision**")[1];

   1.2. a declaration that the implementation of the Guideline is a violation of the Applicant's right to life; and

   1.3. an order of mandamus that the 1st and 2nd Respondent actively engage and discuss with the relevant authorities and bodies to ensure that any circulars released by the 2nd Respondent are in line with the precepts of public health as encapsulated under the objectives, visions and missions of the 2nd Respondent.

II Facts

A. The Guideline

2. The 2nd Respondent had, vide its letter-dated 29.12.2014[2], imposed a new Medical Fee Order for foreigners, which was to be enforced from 01.01.2015. Details and terms of the new Medical Fee Order were made available through the Guideline, which was attached to the letter.

3. In essence, the Guideline regulates the handling of foreigners in government clinics and hospitals. It includes the implementation of the

[1] Applicant's Affidavit in Support ("AIS"), Exhibit MJD-7, page 53
[2] Applicant's AIS, Exhibit MJD-1, pages 1-22

fee structure to be imposed on foreigners and the methods to deal with foreigners without valid travel documents. In this regard:

3.1. Most migrant workers in this country earn an income of about RM 900.00, which is the minimum wage;

3.2. The cost for foreigners to get checked for tuberculosis ("**TB**"), which includes the registration fee and fees for the basic tests, would be RM 92.00. The fee that was charged prior to the implementation of the Guideline was lower. The cost for the same for a Malaysian citizen would only be RM 1.00.

3.3. Point 10 of the Guideline deters undocumented foreigners from seeking medical treatment. To this end, all governmental health institutions are to report foreigners without documents to the Royal Malaysian Police ("**PDRM**") and the Immigration Department of Malaysia. Section 6 (3) of the Immigration Act 1959/63 provides for a mandatory whipping sentence of no more than six strokes on foreigners upon conviction for not possessing valid documents.

B. Press statement from CAHCP

4. The Coalition Against Health Care Privatisation ("**CAHCP**") is made up of 81 NGOs, trade unions and political parties in Malaysia. The CAHCP was formed to oppose further privatisation of the health care system and to insist on democratic accountability from the government on whatever new health care system that it plans to introduce.

5. The CAHCP had discussed the contents of the Guideline and on 12.02.2015, issued a press statement in response to the Guideline[3]. In this regard:

[3] Applicant's AIS, Exhibit MJD-3, pages 24-26

5.1. The press statement stressed that the Guideline would have a negative impact on the country's health environment as it deterred migrant workers from seeking medical attention;

5.2. This would lead to the transmission of infectious diseases such as TB, which would ultimately be detrimental to the health of ordinary Malaysians;

5.3. A suggestion was made that an immediate moratorium should be imposed on the Guideline and that the issue should be discussed with public health experts, infectious disease specialists and other competent parties; and

5.4. The press statement was endorsed by a total of twelve (12) Non-Governmental Organisations (the **"NGOs"**).

6. The Respondents and their representatives did not issue any statement in support or against the press statement issued.

C. Parliamentary debates

7. On 19.03.2015, the Applicant was given an opportunity to take part in the address of the Yang di-Pertuan Agong in Parliament[4]. The Applicant raised the following issues with the 1st Respondent:

7.1. The statistics in the Malaysian Medical Association's publication stated that the rate of new cases for TB in Malaysia increased from 61 cases for every 100,000 citizens in 1990 to 81 cases for every 100,000 citizens in 2014. This was an increase of 30% over a period of 25 years. The number of new TB cases on the

[4] Applicant's AIS, Exhibit MJD-4, pages 27-32

other hand increased from 10,000 cases in 1990 to 24,711 in 2014;

7.2. The Applicant then referred to the Guideline and stated that the requirement to report undocumented foreigners to the PDRM and the Immigration Department was against the principles of public health;

7.3. The Applicant averred that such a policy would deter undocumented foreigners with TB or potential TB from obtaining proper treatment and medication. This would then expose Malaysian citizens to TB as the undocumented foreigners shared the same working environment and public space; and

7.4. The Applicant concluded by stating that the health care system should be excluded from the steps taken to control undocumented migrant workers. The main role of a health care system is to control the transmission of infectious diseases. Early identification and effective treatment are among the best methods to restrict the transmission of infectious diseases.

8. On 25.03.2015, during the siting of Parliament, the 1st Respondent was given the opportunity to address all the health issues raised by several MPs over the past few days. However, the 1st Respondent did not address the issues raised by the Applicant as stated in the foregoing paragraph[5].

D. The Decision

9. The Applicant, as the Secretary of CAHCP, prepared a letter dated 10.03.2015 to request a date to meet the 1st Respondent or his deputy to discuss the issue arising out of the Guideline because CAHCP was

[5] Applicant's AIS, Exhibit MJD-5, pages 33-51

of the considered view that the Guideline would bring detrimental consequences to the health of Malaysians. This letter was signed by Dr. Subramaniam Pillai, the President of CAHCP and was sent by hand to the 1st Respondent's office in Putrajaya[6].

10. An official in the 2nd Respondent's Financial Division replied vide his letter dated 21.04.2015[7]. The letter stated that the Guideline issued by the 2nd Respondent was to explain the new medical fee order for foreigners that would be implemented in stages from 2012. There was no response to CAHCP's request for a meeting to discuss the issues. This was taken as a refusal to discuss the dire issues arising from the implementation of the Guideline.

III Submission

11. It is submitted that the Applicant satisfies the necessary pre-requisite for the granting of leave. To this end, the sole question to be decided during this stage is whether the application filed herein is frivolous. As recognized by Gopal Sri Ram JCA (as he then was) in ***QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532***[8] where his Lordship at pp. 537-538 stated:

"[3] The very first point that we would make is that arguments such as the availability of an alternative remedy go to the merits of the substantive application for judicial review and ought never to be dealt with at the leave stage. ***The sole question at the leave stage is whether the application is frivolous****. As Raja Azlan Shah LP observed in Mohamed Nordin bin Johan v. Attorney General, Malaysia [1983] CLJ 271 (Rep); [1983] 1 CLJ 130; [1983] 1 MLJ 68:*

[6] Applicant's AIS, Exhibit MJD-6, page 52
[7] Applicant's AIS, Exhibit MJD-7, page 553
[8] Ikatan Autoriti Pemohon [IAP] Tab#13, p.70

We allowed the appeal and granted the appellant leave to apply for an order of certiorari because we are of the view that the learned judge was wrong in refusing leave as the point taken was not frivolous to merit refusal of leave in limine and justified argument on a substantive motion for certiorari.

[4] And as Abdoolcader SCJ said in JP Berthelsen v. Director-General of Immigration, Malaysia & Ors [1986] 2 CLJ 409; [1986] CLJ (Rep) 160:

At the outset of the hearing of the appeal before us we were of the view ex facie that leave should in fact have been granted in the court below as the point taken by the appellant was not frivolous to merit refusal of leave in limine and justified argument on a substantive motion for certiorari.

[5] In Tang Kwor Ham v. Pengurusan Danaharta Nasional Bhd [2006] 1 CLJ 927, this court in its majority judgment sought to collect and discuss the several authorities on the subject and concluded as follows:

To paraphrase in less elegant language what has been said in these cases, the High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous*. If, for example, the applicant is a busybody, or the application is made out of time or against a person or body that is immunised from being impleaded in legal proceedings then the High Court would be justified in refusing leave in limine. So too will the court be entitled to refuse leave if it is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable, eg, proceedings in Parliament (see Article 63 of the Federal Constitution).*

That is a view to which we adhere."

It is submitted for the reasons that follow that the application herein is not frivolous.

A. Real and genuine interest

12. It is submitted that the Applicant as a citizen of Malaysia has a real and genuine interest in the manner in which his health is affected by any action and/or inaction by the Respondents. In this regard:

12.1. ***Order 53 rule 2(4), Rules of Court 2012[9] ("ROC")*** provides:

"Any person who is adversely affected by the decision, action or omission in relation to the exercise of the public duty or function shall be entitled to make the application."

12.2. The Federal Court has recently in ***Malaysia Trade Union Congress ("MTUC") & Ors v Menteri Tenaga, Air dan Komunikasi & Anor [2014] 3 MLJ 145[10]*** decided that it is sufficient for a litigant in an application under Order 53 to show that he has a 'real and genuine interest' as opposed to showing there is an 'infringement of a private right or the suffering of special damage'. In deciding that MTUC had the requisite locus standi, Hasan Lah FCJ stated the following:

"Therefore, in determining the locus standi to sue, the court has to exercise caution in applying the English cases. In our view for an applicant to pass the "adversely affected" test, the applicant has to at least show he has a real and genuine interest in the subject matter. It is not necessary for the applicant to establish infringement of a private right or suffering of special damage."

[9] IAP(1) Tab#6, pp. 45-47
[10] IAP(1) Tab#14, pp. 95-96

It is pertinent to note that the Federal Court affirmed the test propounded in ***QSR Brands***.

12.3. The Applicant is not a busybody and has a genuine interest in the matter.

a. TB is a contagious and airborne disease. It ranks as the second leading cause of death from a single agent after the Human Immunodeficiency Virus (**"HIV"**). In Malaysia, there were 24,711 news cases of TB in 2014, with about 1,600 deaths excluding TB/HIV co-infection deaths;

b. The mortality rate for TB is 5.3 deaths in every 100,000 Malaysian residents, which represents the highest amongst all infectious diseases in Malaysia. The rate of new cases for TB[11];

c. Migrant workers are required to undergo medical screening before entering Malaysia and on a yearly basis while in Malaysia. In 2014, 47% of the migrant workers that failed their medical screening were diagnosed with TB. This amounted to a total of 17,891 migrant workers and the same were sent back to their home country[12]; and

d. Approximately 2,000,000 undocumented foreign workers do not go through any medical screening upon entry and do not go for yearly medical screenings. These individuals represent a major cause for the rise in TB cases.

[11] Applicant's AIS, Exhibit MJD-8, page 54
[12] Applicant's AIS, Exhibits MJD-9, MJD-10 and MJD-11 at pages 55, 56 and 57 to 60 respectively

12.4. The foregoing directly pertains to the Applicant's right to live in a healthy environment, free of infectious diseases, especially TB. The Applicant is clearly not a mere bystander or busybody. As observed by Abdul Hamid Embong FCJ in ***Affin Bank Bhd v Mohd Kassim Ibrahim [2013] 1 CLJ 465***[13]:

"[16] The basis for seeking the declarations here is for the court to declare those right and entitlements of the respondent and any deprivation thereto pursuant to the alleged breach of contract by the appellant, had directly affected those rights and entitlements. The respondent was therefore a person with the proper locus standi to claim those rights. ***He was not a mere bystander nor a busybody. In other words, so long as the respondent has a real or genuine interest in having his legal position declared, he can come to court to seek for a declaratory judgment****."*

12.5. Further to the above, the matters in issue herein directly relate to the Applicant's entitlement to have his health safeguarded from any infectious illness and/or disease. This has been guaranteed by the relevant international legal standards for health and the local statutes pertaining to issues of health. In this regard:

a. Insofar as the international legal standards for health is concerned:

i. Article 25 of the Universal Declaration of Human Rights 1948[14] provides that:

"everyone has the right to a standard of living adequate for the health and well-being of himself

[13] IAP(1) Tab#15, pp. 118-119
[14] IAP(1) Tab#1, p.2

and his family including food, clothing and medical care."

ii. Article XI of the American Declaration of the Rights and Duties of Man 1948[15] provides that:

"every person has the right to the preservation of his health through sanitary and social measures relation to food, clothing, housing and medical care, to the extent permitted by public and community resources."

iii. Point 11 of Part 1 of the European Social Charter 1961[16] provides that:

"everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable."

iv. Point 11 of Part 2 of the European Social Charter 1961 provides that:

"with a view to ensuring the effective exercise of the right to protection of health, the Contracting Parties undertake, either directly or in co-operation with public or private organizations, to take appropriate measures designed inter alia:

(1) to remove as far as possible the causes of ill-health;

[15] IAP(1) Tab#2, p. 4
[16] IAP(1) Tab#3, pp. 10 , 13

(2) to provide responsibility in matters of health; and

(3) to prevent as far as possible epidemic, endemic and other diseases."

b. The World Health Organization (the **"WHO"**) has been active in Malaysia since the time of independence in 1957. To this end, the WHO and the 1st Respondent had signed the basic agreement for collaboration in 1961. The purpose of the same was to give effect to the resolutions and decisions of the United Nations and WHO relating to technical advisory assistance on issues of health. It is contended by virtue of the said agreement, the 3rd Respondent impliedly agreed to give sufficient regard to the foregoing international legal standards for health.

c. Additionally, since 1957, the 3rd Respondent has passed many laws regarding health issues. These laws were enacted to serve multiple purposes such as identifying products detrimental to health, bringing awareness to various diseases, setting up medical institutions and managing human resources involved in the health sector. The said pieces of legislation are in line with the international legal standards as enumerated in sub-paragraphs to 12.5a. Amongst the relevant provisions are as follows:

i. The preamble to the Medical Act 1971[17] provides:

"An Act to consolidate and amend the law relating to the registration and practice of medical

[17] IAP(1) Tab#7, p. 48

practitioners and for national purposes to provide for certain provisions with regard to a period of service in the public services after full registration as a medical practitioner; and to make provision for purposes connected with the aforesaid matters."

ii. The preamble to the Environment Quality Act 1974[18] provides:

"AN Act relating to the prevention, abatement, control of pollution and enhancement of the environment, and for purposes connected therewith."

iii. Section 13(1) of the Food Act 1983[19] provides:

"Any person who prepares or sells any food that has in or upon it any substance which is poisonous, harmful or otherwise injurious to health commits an offence and shall be liable, on conviction, to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding ten years or to both."

iv. The Tobacco Products Control Act 1993 [20] discusses many issues to protect health. Section 2(1) of the Act prohibits the smoking of tobacco products in any public place.

[18] IAP(1) Tab#8, p. 49
[19] IAP(1) Tab#9, p. 50
[20] IAP(1) Tab#10, pp. 51-54

v. Section 7(1) of the Prevention & Control of Infectious Diseases Act 1988[21] provides:

"An authorised officer may-

(a) enter into and medically examine any vehicle at any time upon its arrival in Malaysia;

(b) medically examine any person, animal or article on board such vehicle; and

(c) take such samples as may be necessary for the purpose of determining the sanitary condition of such vehicle or article or the state of health of such person or animal."

12.6. Article 5(1) of the Federal Constitution[22] (the **"FC"**) guarantees the "life" and liberty" or every person.

a. "Person" includes the Applicant.

b. "Life" is to be understood as not referring to mere existence. "It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life." (see ***Tan Tek Seng @ Tan Chee Meng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771[23] (CA)*** cited with approval by the Federal Court in ***R Rama Chandran v The Industrial Court of Malaysia and Anor [1997] 1 CLJ 147[24]*** and

[21] IAP(1) Tab#11, p. 55
[22] IAP(1) Tab#5, p. 39
[23] IAP(1) Tab#17, pp.213- 215
[24] IAP(1) Tab#18, p.266

Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 3 CLJ 507[25]).

c. As such, the right to life under Article 5(1), FC must necessarily include the right to proper healthcare. FC. The Supreme Court of India in ***Consumer Education & Research Centre & Ors v Union of India 1995 AIR 922***[26] observed that the right to health and medical care is a fundamental right under Article 21 of the Indian Constitution (similar to Article 5(1), FC). In doing so reference was made to an earlier Supreme Court decision in ***Bandhua Mukti Morcha v Union of India & Others 1984 AIR 802***[27] which held that the right to live with human dignity, enshrined in Article 21, derives its life-breath from the directive principles of the State policy.

d. It is to be noted that in ***Bandhu Mukti Morcha (supra)***, the Indian Supreme Court referred to the Directive Principles of State Policy in formulating its view. This however was not to be viewed as a distinguishing feature. The Court of Appeal in ***Tan Tek Seng (supra)*** observed:

"Now it is true that the Federal Constitution, unlike the Indian Constitution, does not contain any Directive Principles of State Policy. Nevertheless, it is plain from the copious and continuous stream of beneficial legislation that is presented at almost every siting of Parliament and from the voluminous subsidiary legislation that is promulgated periodically, that the elected Government is set on improving the lot of the common man. Almost on a daily basis we see regulations being

[25] IAP(2) Tab#19, pp.323- 344
[26] IAP(2) Tab#20, pp.363- 364
[27] IAP(2) Tab#21, pp.367- 416

made to better the living and working conditions of our labour force. There are ceaseless and untiring efforts by the elected Government, through its several agencies, to provide basic amenities and to improve the quality of life of the masses. Steps are being constantly taken to guard against any deterioration in the quality of the environment in which the populace live and work. Indeed, it is the declared policy of the Government to provide housing, water, electricity and communication systems to the far flung areas of our country. And one can plainly see the ceaseless exertions on the part of the elected Government to achieve the targeted policy.

In my judgment, the Courts should keep in tandem with the national ethos when interpreting provisions of a living document like the Federal Constitution, lest they be left behind while the winds of modern and progressive change pass them by. Judges must not be blind to the realities of life. Neither should they wear blinkers when approaching a question of Constitutional Interpretation. They should, when discharging their duties as interpreters of the supreme law, adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution. Such as objective may only be achieved if the expression "life" in Article 5(1) is given a broad and liberal meaning."

12.7. Viewed in this light, there is an obligation placed on the Respondent to ensure that the Applicant's health is safeguarded against infectious illness and/or diseases, in this case TB. This is especially when:

a. The cost for migrant workers to get checked for TB is too expensive in light of their low salary;

b. Undocumented migrant workers would not get themselves checked if it exposed them to prosecution which would result in severe punishment; and

c. The impact of the Guideline as deterrence to both documented and undocumented migrant workers, a major cause of the rise of TB, from getting checked and being treated for the same.

B. Adversely affected

13. There is no basis in law and fact for the 1st Respondent to have come to the Decision. It is therefore reasonably argued that the Decisions were not countenanced by law and thus illegal. In this regard, further to the points made in the preceding paragraphs, the Decision clearly contravened the Applicant's right under Article 5(1) as described above. Illegality is a recognized basis for judicial review. As Lord Diplock stated in ***Council of Civil Service Unions and Ors v Minister for the Civil Service [1985] AC 374***[28] at p. 410:

"By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable,"

CCSU (supra) was cited with approval by the Federal Court in ***Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama***

[28] IAP(2) Tab#22, pp.453- 454

Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65[29].

14. Additionally, the Decision on the face of it is irrational or unreasonable in the realm of administrative law, a further recognized head of review. Lord Diplock further said, at pp. 410-411:

"By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 K.B. 223). I applies to ***a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.*** *Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker."*

14.1. Further, the Guideline and Decision is irrational and disproportionate as it was made without any reasonable basis. The 1st and 2nd Respondent had, amongst others, failed to consider:

a. any of the matters mentioned in paragraphs 5, 7 and 12.3;

b. the objectives, visions and missions of the 2nd Respondent, which ultimately was to uphold the right to

[29] IAP(2) Tab#23, pp.468- 545

health by providing a high quality healthy system based on a preventive approach[30];

c. that one of the most recognised means to control TB is to ensure early diagnosis and treatment so that the sources of transmission of TB can be kept to a minimum[31]; and

d. that foreign workers contribute to a large sum to the country's gross domestic product. In 2005, the contribution amounted to RM 17 billion, as compared to net outflow of RM 5.4 billion in the form of remittances to the worker's home countries. A total of RM 1.9 billion was collected from levies on foreign workers in 2004[32].

C. Arguable case

15. In view of the above, it is submitted that the Applicant has an arguable case.

16. It is submitted that the Guideline and Decision made by the 2nd Respondent goes to the very heart of the right to life under Article 5(1), FC and the right to live in a "reasonably healthy and pollution free environment" to which the Applicant has a legitimate expectation. As observed by Gopal Sri Ram JCA (as he then was) in ***Tan Tek Seng (supra)*** where at p. 801b he stated:

"Adopting the approach that commends itself to me, I have reached the conclusion that the expression "life" appearing in Article 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and

[30] Applicant's AIS, Exhibit MJD-13, page 63 to 65
[31] Applicant's AIS, Exhibits MJD-14 and 15, pages 66 to 67 and page 68 respectively
[32] Applicant's AIS, Exhibit MJD-16, page 69

gainful employment and to receive those benefits that our society has to offer to its members. It includes the right to live in a reasonably healthy and pollution free environment. For the purposes of this case, it encompasses the right to continue in public service subject to removal for good cause by resort to a fair procedure."

17. The decision of the Court of Appeal is consistent with the jurisprudence on what matters are "amenable to judicial review". The Federal Court considered the question in the context of which actions should be dealt with by way of judicial review in ***Ahmad Jefri Mohd Jahri v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865***[33]. James Foong FCJ stated:

*"**[21]** In view of this, **let us begin by first asking ourselves a preliminary question: is the appellant's complaint or grievance amenable for judicial review** (before even considering whether the procedure adopted by him is appropriate)? If his complaint is not amenable for judicial review then there is no dispute as to the procedure adopted since he is at liberty to commence his action by way of writ or originating summons. So first we have to determine the parameters of matters which are amenable for judicial review.*

***[22] It is widely accepted that not every decision made by an authoritative body is suitable for judicial review. To qualify there must be a sufficient public law element in the decision made. For this, it is necessary to examine both the source of the power and the nature of the decision made; whether the decision was made under a statutory power**."*

18. This is given context by the following passage from **Halsbury's Laws of England 4th Edition Vol.1 (1), paragraph 64**[34]:

[33] IAP(2) Tab#24, p. 559
[34] IAP(1) Tab#12, p. 58

"In general terms, '[for] a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive power' and that decision must affect the private rights of some person or deprive another of some benefit which he had been allowed to enjoy, and expect to enjoy in the future or which he has a legitimate expectation of acquiring or enjoying."

19. Refining this analysis, Dyson LJ in ***R (on the application of Beer) v Hampshire Farmers' Marker Ltd [2003] EWCA Civ 1056, [2004] 1 WLR 233***[35] stated, at paragraph 16:

"It seems to me that the law has now been developed to the point where, unless the source of power clearly provides an answer, the question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavor or character to bring it within the purview of public law. It may be said with some justification that this criterion for amenability is very broad, not to say question-begging. But it provides the framework for the investigation that has to be conducted. ***There is a growing body of case law in which the question of amenability to judicial review has been considered. From these cases it is possible to identify a number of features which point towards the presence or absence of the requisite public law element****."*

20. The administrative power of the 2nd Respondent in respect of the issuance of guidelines is clearly one of an administrative nature, and one made in public law. All the criteria laid down in the authorities cited above are established on the facts.

[35] IAP(2) Tab#25, pp 587- 588

21. Decisions made in the exercise of such power qualify as decisions that are amenable to judicial review having regard to the foregoing. Such power is circumscribed by the constitutional guarantees, the rules of natural justice that permeate through the guarantees set out in Part II of the Federal Constitution (see ***Ong Ah Chuan v Public Prosecutor [1981] 1 MLJ 64***[36]). Put simply, the power is not absolute and unfettered (see ***Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135***[37] at p. 148). The discussion on Article 5(1), FC refers. The rights derived from the said article must be safeguarded and any attempt to deny the same must be susceptible to judicial review. This is an arguable proposition.

22. In view of the foregoing, it is respectfully submitted that there is sufficient basis for this Honourable Court to grant leave to the Applicant. The implications of a dismissal of the leave application would be that the Guideline is allowed to stand, notwithstanding the risks of the Applicant and other individuals of being exposed to TB. Such a conclusion would not be in accord with any reasonable understanding of the character of guidelines issued by the 2nd Respondent in light of the matters stated above.

D. Relief sought

23. The only issue is therefore whether this Honourable Court is empowered to make orders giving effect to the rights described above, in particular the right to live in a "reasonably healthy and pollution free environment" which is housed in Article 5(1), FC.

24. This Honourable Court is so empowered. Paragraph 1 of the Schedule to the Courts of Judicature Act 1964 gives the High Court the power to make any order to give effect to the rights under Part II FC. It states:

[36] IAP(2) Tab#26, p. 605
[37] IAP(2) Tab#27, p. 621

*"**The power to issue to any person** or authority directions, orders or writs, including writs of the nature or habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or **for any purpose**."*

Dated 2nd day of September 2015

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Counsel for the Applicant
Malik Imtiaz Sarwar
(with Pavendeep Singh)

This Applicant's Submission is filed by Messrs Malik Imtiaz Sarwar for the Defendant with an address of service at E3, Taman Tunku Apartments, Taman Tunku, Bukit Tunku, 50480, Kuala Lumpur

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