Majlis Kawalan Tembakau Malaysia (menyaman melalui Pegawai Awamnya Muhammad Sha'ani bin Abdullah) & Ors v Menteri Kesihatan, Malaysia & Anor [2026] MLJU 3232

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

ALIZA SULAIMAN J

APPLICATION FOR JUDICIAL REVIEW NO WA-25-179-06 OF 2023

24 July 2026

Shanmuga Kanesalingam (with Kee Shu Min) (Kanesalingam & Co) for the applicants.
Nurhafizza Azizan (with Nur Idayu Amir and Afiq bin Zainal Abidin) (Federal Counsel, Attorney General's Chamber) for the respondent.
Khalidah Syahirah bt Mazlin (Fahri, Azzat & Co) for amicus curiae.

Aliza Sulaiman J:

GROUNDS OF JUDGMENT

Introduction

[1] The subject matter of challenge in this judicial review was the exemption ('**Impugned Exemption**') which formed part of the Poisons (Amendment of Poisons List) Order 2023 [*P.U.(A) 93/2023*] made on 31.3.2023 ('**Impugned Order**'), which the Applicants contended has legalised electronic cigarettes ('**e- cigarettes**') and vapes with nicotine such that these items can be sold freely without restrictions, including to those under 18 years of age.

[2] Initially, the Applicants sought an order of certiorari to quash that part of the Impugned Order with the Impugned Exemption and in the alternative, a declaration that the Impugned Exemption is void.

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

"*A. A declaration that the following part of the Poisons (Amendment of Poisons List) Order 2023 [P.U.(A)93/2023] ("**the Impugned Order**") made on 31st March 2023 inserting the following exemption to the poisons list set out in the First Schedule ("**the Poisons List**") to the Poisons Act 1952 [Act 366] ("**Act 366**") is irrational:*

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

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

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

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

[4] On 6.12.2023, the application by the Malaysian Medical Association ('**MMA**') to be appointed as *amicus curiae* in these proceedings was allowed.

[5] After having considered the cause papers, affidavit evidence and oral and written submissions by the parties and the *amicus curiae*, I had, on 15.5.2026, allowed the Applicants' application in encl. 19 for a declaration as prayed in Prayers A and B of the Revised Reliefs.

[6] These are my full grounds of judgment.

Background Facts

[7] The salient facts as discerned from the Statement pursuant to O. 53, r. 3 of the Rules of Court 2012 ('**RC 2012**') and the written submissions of the parties are as follows.

[8] The 1st Applicant is the Malaysian Council for Tobacco Control. It is an umbrella organisation of more than 40 civil society organisations whose mission is to control and, where possible, eliminate tobacco use in Malaysia. Its actions are guided by the World Health Organization Framework Convention on Tobacco Control ('**WHO FCTC**') to which Malaysia is a party.

[9] The 2nd Applicant, Malaysian Green Lung Association, is a non- governmental organisation with one of its main objectives is to advocate for tobacco control and a smoke-free environment.

[10] The 3rd Applicant runs as a non-profit organisation with the main object of advocating for the rights of children guided by the United Nations Convention on the Rights of the Child ('**CRC**').

[11] The 1st Respondent is a Minister of the Cabinet of the 2nd Respondent ('**R2**') and in charge of public health. At the material time, the Minister of Health ('**Minister**') was YB Dr. Zaliha Binti Mustafa. The Minister is responsible for exercising the functions under Act 366.

[12] Act 366 regulates the importation, possession, manufacture, compounding, storage, transport, sale and use of poisons.

[13] The Poisons Board is established by s 3 of Act 366 for purposes of the said Act and to advise the Minister.

[14] According to the Applicants, nicotine is toxic at 60 mg per ml (6%) concentration. A typical pack of cigarettes in Malaysia tends to contain 20 mg of nicotine, with each stick containing 1.0 mg of nicotine.

[15] Nicotine disposables or vape pods with 30mg per ml (3%) to 50 mg per ml (5%) nicotine were available in the Malaysian market at the time of filing of the application for judicial review on 30.6.2023. It was said that 5% nicotine devices cannot be found in countries which regulate vape, for example, the United States of America ('**USA**'), United Kingdom ('**UK**'), Australia, New Zealand and Indonesia where the maximum was 20 mg per ml (2%) to 30 mg per ml (3%).

[16] Nicotine is classified as a Group C poison under the First Schedule of Act 366. Basically, s 22 read with s 21 of Act 366 provide that Group C poisons shall not be sold or supplied by retail to any person except by a registered medical practitioner, dentist, veterinary surgeon or pharmacist as a medicine or for treatment.

[17] Up to 31.3.2023, there were two exemptions made to allow for nicotine use, namely –

(a) since the revision to Act 366 on 13.4.1989, "*tobacco*" was exempted from classification as a poison from the Poisons List. Tobacco products were however heavily regulated under the Food Act 1983 [*Act 281*], specifically under the Control of Tobacco Products Regulations 2004 ('**2004 Tobacco Regulation**s') made thereunder. The 2004 Tobacco Regulations regulate, among others, smoke-free environments; tobacco advertising, promotion and sponsorship; and tobacco packaging and labelling. The Regulations have been amended several times over the years and among its provisions was that the sale of tobacco products is prohibited to persons under the age of 18; and

(b) the Minister had, on 5.10.2022, pursuant to the Poisons (Amendment of Poisons List) Order 2022 [*P.U.(A) 309/2022*] exempted nicotine products in the form of patch or gum from the Poisons List. Nicotine products which perform medicinal purposes are regulated by the Sale of Drugs Act 1952 [*Act 368*], specifically under the Control of Drugs and Cosmetics Regulations 1984 [*P.U.(A) 223/1984*]).

[18] The popularity of e-cigarettes and vapes in recent years is a known fact. These items contain liquids with nicotine which are heated up and inhaled by users. Since such liquids are not made from tobacco, the Applicants contended that, prior to 31.3.2023, these were included within the definition of "*poison*" under Act 366.

[19] Sub-s 17(1) of Act 366 provides that "*No poison shall be sold or supplied to any person under eighteen years of age, otherwise than for purposes of the medical or dental treatment of such person.*". Sub-s 17(2) stipulates that any person contravening sub-s 17(1) shall be guilty of an offence against Act 366.

[20] Section 6 of Act 366 provides for the "*Power of Minister to amend Poisons List*" in these words:

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

[21] On 31.3.2023, the Minister made the Impugned Order, which reads as follows:

> "*POISONS ACT 1952*
>
> *POISONS (AMENDMENT OF POISONS LIST) ORDER 2023*
>
> *IN exercise of the powers conferred by* section 6 of the Poisons Act 1952 *[Act 366], the Minister, after consultation with the Poisons Board, makes the following order:*
>
> ***Citation***
>
> *1. This order may be cited as the* ***Poisons (Amendment of Poisons List) Order 2023***.
>
> ***Amendment of First Schedule***
>
> *2. The Poisons Act 1952 is amended in the First Schedule, in the Poisons List, in the list of "Alkaloids; the following: their salts, simple or complex; their quaternary compounds:", by substituting for the item "Nicotine" and the particulars relating to it the following item and particulars:*
>
> Names "Nicotine Part I Part II Group A Group B - - Group C All preparations unless exempted Group D Exempt - -
>
> (1) Tobacco
>
> (2) Product in the form of patch or gum to be used as an aid or smoking cessation, which is registered under the Drugs Control of and Cosmetics Regulations 1984
>
> (3) Preparation of a kind used for smoking through electronic cigarette and electric vaporizing device, in the form of liquid or gel".
>
> Made 31 March 2023 [KKM.600-18/2/95; PN(PU2)172/XIX]
>
> DR. ZALIHA BINTI MUSTAFA
>
> Minister of Health"

[22] According to the Applicants, the Poisons Board unanimously voted against the Impugned Exemption on medical and health grounds. Nevertheless, the Minister did not properly consider and engage the Poisons Board's decision, but proceeded to make the Impugned Order.

[23] The Applicants claimed that the Impugned Exemption –

(a) allowed e-cigarettes and vape products with nicotine to be sold openly and legally to anyone, including children and adolescents aged below 18 years, without any form of

regulation or control, as there was no legislation to regulate the same. This also meant that any level of nicotine content in these products was permitted. This was done despite overwhelming evidence of the dangers posed by electronic smoking devices and vape liquids, and the increased likelihood of vapes leading to nicotine addiction on the part of children; and

(b) was stated to be for the purpose of enabling excise duties to be imposed on e-cigarette and vape liquids containing nicotine. The Minister, through the Ministry of Finance ('**MoF**') thereupon put into effect an excise duty of 40 cents per ml on e-cigarettes and vape liquids with nicotine from 1.4.2023, and manufacturers must register their manufacturing activity with the Department of Customs by 30.4.2023.

[24] At the same time, the Ministry of Health ('**MoH**') had stated, during the previous administration and the tenure of the Minister, that legislation would be introduced to provide for a "*generational endgame*" ('**GEG**') to end the use of tobacco products by restricting its sale to children, thereby ending addiction to nicotine with the current generation.

[25] On 12.6.2023, the Minister tabled in Parliament for the First Reading a Bill entitled the Control of Smoking Products for Public Health Bill 2023 (D.R. 25/2023) ('**2023 Bill**'). The 2023 Bill contained provisions which would include e-cigarettes, vape devices and e-cigarette or vape liquids (with or without nicotine) within the ambit of its control and regulation. It prohibited the sale and purchase of smoking products for anyone aged below 18 years, including anyone born from 1.1.2017 (known as GEG).

[26] On 14.10.2023, leave for judicial review was granted.

[27] As mentioned earlier, Act 852 came into force on 1.10.2024.

The Legal Principles

[28] In *Nor Azlinda bt Mohd Abdullah v Jawatankuasa Tatatertib Kumpulan Bukan Eksekutif (JKTKBE) Tabung Haji & Ors* [2026] MLJU 580, this Court said:

> "*33. The legal principles which can be discerned from the case authorities as cited by the parties in the instant application may be summarised as follows:*
>
> > *(a) judicial review is not an appeal from a decision but a review of the manner in which the decision was made. The High Court does not sit in its appellate jurisdiction, but rather, in its supervisory jurisdiction. The Court is more concerned with the decision- making process and not the decision itself. The Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable. The Court is merely to quash the decision of the relevant authority, if required, and not to substitute the decision with what it thinks is the correct decision [see Harpers Trading (M) Sdn Bhd v National Union Of Commercial Workers* [1991] 1 MLJ 417 *(SC), Michael Lee Fook Wah v Menteri Sumber Tenaga Manusia Malaysia & Anor* [1998] 1 CLJ 227 *(CA) and Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 2 CLJ 1 *(FC)]; …*"

[29] The relevant case authorities which have expounded the legal principles which are applicable in an application for judicial review were also referred to in the following passage from the judgment of this Court in *Mohammad Izzuddin bin Zulkifly v Suruhanjaya Pasukan Polis & Ors* [2026] MLJU 1002 as follows:

> "*21. The renowned passage from the judgment by Lord Diplock in Council of Civil Service Unions & Ors. v. Minister for Civil*

Service [1985] 1 AC 374 *at pp 410 and 411 on judicial review of administrative actions, and as adopted by the Federal Court in R Rama Chandran v The Industrial Court Of Malaysia & Anor* [1997] 1 MLJ 145*, reads:*

> *"Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety".*

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.

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 KB 223 *). It 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.*

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that expressly laid down in the legislative instrument by which its jurisdiction is conferred even where such failure does not involve any denial of natural justice."

[see too, Minister of Home Affairs, Malaysia v. Persatuan Aliran Kesedaran Negara [1990] 1 CLJ (Rep) 186 *(SC)].*

22. The well-established Wednesbury principle of reasonableness as explicated in Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223 *specifies that a decision is unlawful where the decision-maker has –*

(a) *taken into account matters which ought not to have been considered;*

(b) *failed to take into account matters which ought to have been considered; or*

(c) *reached a conclusion so unreasonable that no reasonable authority could ever have arrived at it.*

23. In subsequent decisions by the Federal Court, we are reminded that not every case is amenable to the Rama Chandran approach and it all depends on the factual matrix and/ or the legal modalities of the case. In Ranjit Kaur a/p S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1*, it was held, among others, that:*

> *" **[16]** The Rama Chandran decision has been regarded or interpreted as giving the reviewing court a license to review without restrain decisions for substance even when the said decision is based on finding of facts. However, post Rama Chandran cases have applied some brakes to the courts' liberal approach in Rama Chandran. The Federal Court in the case of Kumpulan Perangsang Selangor Bhd v Zaid Noh* [1997] 1 MLJ 789 ; [1997] 2 CLJ 11 *after affirming the Rama Chandran decision held that there may be cases in which for reason of public policy, national interest, public safety or national security the principle in Rama Chandran may be wholly inappropriate."*

(see too, Kumpulan Perangsang Selangor Selangor Bhd v Zaid Noh [1997] 1 MLJ 789, *Petroliam National Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288 *and Alam Venture Sdn Bhd & Anor v. Abdul Aziz Abdul Majid & Ors* [2015] 5 CLJ 1*).*".

[30] Guided by these legal principles, I now embark on my analysis and findings of the issues which arose for consideration in the instant application.

The Grounds of Application

[31] It follows from the Revised Reliefs that the main grounds of application were that –

(a) the Minister had acted irrationally when she inserted the Impugned Exemption in the Impugned Order as –

(i) she failed to consult or adequately consult with the Poisons Board and therefore there was no effective consultation as required under s 6 of Act 366;

(ii) without seeking further views from the Poisons Board and properly consulting them and seeking further evidence, she proceeded to make the Impugned Order;

(iii) she did not properly consider the views and decision of the Poisons Board and there were no plausible or rational reasons to counter the Poisons Board's decision;

(iv) the stated reason for the Impugned Exemption is *ultra vires* Act 366. The ability to impose customs duties or to monetize a poisonous substance was not a permissible or rational reason to remove an otherwise poisonous substance from the list of poisons; and

(v) in the alternative, in acting on the wishes of the MoF and disregarding the decision of the Poisons Board, she acted *ultra vires* Act 366 by failing to apply and exercise her own independent judgment as is expected of a reasonable Health Minister that is responsible for health, rights and safety measures;

(b) Minister disregarded the following relevant considerations when she made the Impugned Order and included the Impugned Exemption, thereby rendering her actions irrational:

(i) by the Impugned Exemption, e-cigarettes and vape with nicotine could be freely sold to children;

(ii) the Impugned Exemption was contrary to the Ministry's own stated policy objectives of prohibiting tobacco products, e-cigarettes and vape for children below 18 years old, as well as for people born from 1.1.2007, and controlling the consumption of nicotine, as exemplified by the introduction of the 2023 Bill;

(iii) the Impugned Exemption ignored the prevailing research on nicotine addiction and the harm it causes, the uncertainty about how much worse nicotine through electronic products are, and the young persons are particularly attracted, and likely to become addicted, to nicotine through e-cigarettes or vapes; and

(iv) the Impugned Exemption is contrary to Malaysia's international commitments, and in breach of the legitimate expectation of the Applicants and the Malaysian public that the Minister would act in accordance with international norms. Malaysia signed the WHO FCTC in 2003 and became a party on 16.9.2005, soon after the WHO FCTC came into force on 27.2.2005. Article 5 of the WHO FCTC sets out the general obligations of the parties whereby paragraph 2(b) provides that each party shall, in accordance with its capabilities, "*adopt and implement effective legislative, executive, administrative and/or other measures … in developing appropriate policies for preventing and reducing tobacco consumption, nicotine addiction and exposure to tobacco smoke.*".

(v) Malaysia has also been a party to the CRC since 1995. Article 3 of the CRC requires that in all actions concerning children, "*the best interests of the child shall be a primary consideration*". Article 24 states that parties to the CRC shall "*recognize the right of children to the enjoyment of the highest attainable standard of health…*" [see Article 24(1)] and to "*develop preventive health care, guidance for parents and family planning education and services*" [see Article 24(2)(f)].

(vi) In the circumstances, the Impugned Exemption was made without due regard to the rights of the child, and was made contrary to the best interests of the child. Further, there was a failure to consult children or their representatives in breach of the CRC thus rendering the Impugned Exemption illegal or irrational;

(c) the Minister did not afford relevant stakeholders, including the Applicants, an effective right to be heard on the matter before making her decision, which deviated from all medical and health norms expected of a Health Minister even after the decision from the Poisons Board. Thus, there was a breach of the right to be heard; and

(d) the Impugned Order, and the power to make such an Order under s 6 of Act 366, was unconstitutional, being an excessive delegation of the power to make laws exclusively vested in Parliament by Article 66 of the Federal Constitution.

Amicus curiae

[32] MMA had applied to be appointed as amicus curiae to the Court for the following reasons:

(a) MMA is the largest professional body in Malaysia representing medical professionals with a membership of 16,427 nationwide and serves as the primary voice of the medical profession in Malaysia in matters which relate to the medical profession's sphere of interest which includes public health in Malaysia;

(b) with the presence and participation of the MMA, being one of the largest stakeholders in Malaysian public health, the medical profession itself gets to air its views on the Impugned Decision; and

(c) it is in the public interest for MMA to be heard.

[33] Apart from the harm caused to public health as submitted by the Applicants, MMA objected to the Impugned Decision for the following reasons:

(a) it was made against technical advice given by subject matter experts in the Poisons Board, which also has a representative from MMA. Statutory bodies like the Poisons Board are in place to enable Ministers who are not subject matter experts to make informed and correct decisions with the public good as the foremost consideration. The Minister's wilful ignoring of the processes and practices designed as a systemic check and balance to her wide ministerial powers sets a dangerous precedent and paves the way for similar abuses in the future should her decision be allowed to stand. The correct course of action was for the Minister to wait for the coming into force of Act 852 before making the decision to remove nicotine liquids and gels from the Poisons List;

(b) it created a *lacuna* in the law regulating the sale of liquid nicotine and vape products. There is no law which prevents the sale of vape products to children or to regulate the sales of such products and their flavours, the concentration of nicotine, places in which such products can be sold, who may sell such products etc.; and

(c) it was contrary to prevailing international norms in regulating and restricting the sale of liquid nicotine and vape products. Countries within the ASEAN region which have banned the sales of e-cigarettes and classified nicotine as a poisonous substance are as follows:

(i) Singapore, where the sale of e-cigarettes is prohibited under s 16 of the Tobacco (Control of Advertisements and Sale) Act. Offences can result in fines up to SGD10,000, imprisonment for up to 6 months or both. Nicotine is classified as a poison under the Poisons Act 1938;

(ii) Thailand, s 42 of the Tobacco Control Act and s 20 of the Customs Act bans the sales and import of e- cigarettes, where violations can result in a fine of 5,000 Baht; and

(iii) Brunei, the sale of e-cigarettes is prohibited under the Tobacco Order 2005. The Order also specificizes the limits of nicotine and tar content in cigarettes (1.3 mg and 15 mg, respectively). Nicotine is classified as a poison under the Poisons Act 1957.

Other countries in the region have not completely ban e- cigarettes but have instead placed stringent regulations, for example:

- in Indonesia, e-cigarettes are allowed for, but under Article 150, *Undang-Undang No. 17 2023*, it mandates health warnings signs on products containing addictive substances like tobacco and e- cigarettes. The legislation also outlines that any e- cigarette device or liquid that contains nicotine must be registered with Indonesia's Ministry of Health before importation and failure to do so will result in penalties, fines or imprisonment. Nicotine is classified as an addictive substance;

- in the Philippines, e-cigarettes are allowed for sale under ss 6, 9, 8 and 12 of the Republic Act No. 11900 and the Department of Trade and Industry Administrative Order No. 22-16. These laws prohibit the sales of the products within 100 meters of a school or other facilities frequented by minors; set a minimum purchasing age of 18; and place a maximum nicotine concentration where the sale of e-cigarettes with nicotine concentrations above 65 mg/6.5 ml are banned and prohibited as specified in the s 18 of the Republic Act No. 11900.

- in the UK, the sale of e-cigarettes are allowed under the Tobacco Products and Nicotine Inhaling Products government also regulates all nicotine-containing products as medicines to ensure safety and effectiveness. The law limits e-cigarette liquid to 2ml and nicotine content to 20mg/ml. The minimum age to consume e-liquid is 18 years old. Nicotine is regulated under the Poisons Act 1972, in which it restricts the sale of high-concentration nicotine products only to registered pharmacists and listed sellers registered with the local authority;

- in the USA, e-cigarettes are allowed for sale and use and regulated by the Food and Drug Administration Tobacco Products Regulations. The minimum age for purchasing the product is 21 years old; and

- in Australia, the use of nicotine is regulated by the Federal Government under the Therapeutic Goods Act 1989. According to s 7 of the Act, purchasing e- liquids or vaping products containing nicotine for personal use from Australian retailers is illegal unless the products are registered by the Therapeutic Goods Administration. Nicotine is classified as a Schedule 4 prescription-only medicine under the National Poisons Standard and is listed as a Schedule 7 dangerous poison under the same Standard, highlighting its stringent control and regulation.

[34] MMA adopted the affidavits and submissions which were filed by the Applicants in support of the instant application. MMA did not sufficient materials before the Court and there was no dispute among the parties as regards the dangers posed by nicotine to public health.

Analysis And Findings of the Court

I. Preliminary Matters

[35] Before proceeding to discuss the Applicants' grounds of application, the following preliminary matters which were raised by the parties must first be addressed:

(a) whether the application was academic;

(b) whether the Minister's decision in making the Impugned Order was justiciable; and

(c) whether there should be "anxious scrutiny" of the Impugned Order.

- Whether the application has been rendered academic

[36] As outlined previously, the basis of the Applicants' application for judicial review was,

among others, that the Minister acted irrationally by failing to take into account relevant considerations such as the absence of any laws or regulations governing e- cigarettes and vapes, allowing unrestricted nicotine content and exposing children to these harmful products without any control.

[37] The Respondents countered that there were laws and regulation in place by way of Act 852 which was gazetted on 2.2.2024 and came into force on 1.10.2024 together with its subsidiary legislations.

[38] The purpose of Act 852 is to curb smoking habits among the public and to protect public health by regulating the sale, advertising and promotion of smoking products, including cigarettes, tobacco substitutes and vaping products such as e- cigarettes. It aims to prevent the sale and use of these products by minors and create a new generation free from tobacco and smoking materials through law enforcement and continuous public education. Act 852 also includes regulations on product registration, packaging, labelling and restrictions on point-of-sale displays and smoking in public areas. These are designed to reduce health risks associated with smoking and vaping in Malaysia.

[39] The Respondents submitted that with the entry into force of Act 852, there are no more gaps in the law relating to control of consumption and selling of e-cigarettes and vape to the public at large, especially to minors. As the power of the Court to make a declaratory judgment is discretionary, it will not make a declaratory judgment when the question raised is purely academic or the declarations can serve no useful purpose (see *Pedley v Majlis Ugama Islam Pulau Pinang & Anor* [1990] 2 MLJ 307, *Karpal Singh v Sultan of Selangor* [1987] CLJ (Rep) 686 and *Lim Cho Hock v. Government of the State of Perak & Ors.* [1980] 2 MLJ 149).

[40] In *Metramac Corporation Sdn Bhd v Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177, the Federal Court gave a useful guideline in dealing with the issue on whether a matter has been rendered academic. Of course, in that case, the question was answered in the context of an appeal where the Court said:

> "*The test, therefore, in deciding whether an appeal has become academic is to determine* ***whether there is in existence a matter in actual controversy between the parties which will affect them in some way****. If the answer to the question is in the affirmative the appeal cannot be said to have become academic. This test has found favour with a plethora of local cases such as Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v. Karpal Singh* [1992] 1 CLJ 36 ; [1992] 1 CLJ (Rep) 212; *Datuk Syed Kechik bin Syed Mohamed & Anor v. Board of Trustees of the Sabah Foundation & Ors* [1997] 1 CLJ 325 *and Raphael Pura v. Insas Bhd & Anor* [2003] 1 CLJ 61."
>
> (emphasis added).

[41] The above quoted test was further discussed by the Federal Court in *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2020] 3 CLJ 593 at p 620 as follows:

> "*[41]* ***A live, practical question subsequently becomes academic, when the factual context has changed irrevocably such that the outcome will no longer affect the parties in any way****. In such instances, the court will ordinarily decline to determine it. By way of illustration, in Bar Council Malaysia v. Tun Dato' Seri Arifin Zakaria & Ors And Another Reference; Persatuan Peguam-Peguam Muslim Malaysia (Intervener)* [2018] 10 CLJ 129 ; [2018] MLJU 1288 *(at [64] - [66]), the Federal Court held that the challenge to the constitutionality of the appointments of the Chief Justice and the President of the Court of Appeal became academic. Since the fundamental purpose of the application was to ensure that the two judges were removed from those positions, once they have resigned, "matters have changed irrevocably" and the factual substratum underlying the question no longer exists.*

[42] In contrast, ***a matter is not abstract, academic or hypothetical if the parties' rights and interests are actually affected****. In Nik Noorhafiz Nik Ibrahim & Ors v. PP* [2014] 2 CLJ 273 ; [2013] 6 MLJ 660 *(at [50], [65]), the appellants challenged the constitutionality of* s. 27 of the Police Act 1967, *which was subsequently repealed. The Court of Appeal (sitting as the apex court) held that the constitutional challenge did not become academic. The appellants, who have been convicted and fined under that section, had a direct interest to challenge their conviction and sentence.*

[43] The key question is thus ***whether there is a real and actual controversy between the parties which will affect their rights and interests****. Conceptually, the question is inextricably intertwined the test of locus standi, which requires a party to have been "adversely affected" in the sense that they have a "real and genuine interest in the subject matter" (Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 2 CLJ 525 ; [2014] 3 MLJ 145 *at [58]). A violation of a constitutional right gives rise both to a "real interest" for a party to bring the action and a "real controversy" between the parties to the action (Tan Eng Hong (supra) at [106]). As such, in the context of determining whether there is a real controversy in a constitutional challenge, attempts to sever the requirement of an actual controversy from the notion of standing would be "conceptually awkward, if not impossible" (Croome v. State of Tasmania* (1997) 142 ALR 397 *at 405-406). For the purposes of this case, we will frame the foregoing discussion in terms of the Metramac test of "actual controversy.*"

(emphasis added).

[42] Applying the test on whether there is in existence a matter in actual controversy between the parties which will affect them in some way, I was persuaded by the Applicants' submission to answer the enquiry in the affirmative.

[43] Although with the enactment of Act 852 and its subsidiary legislation, the Impugned Order no longer directly causes harm to public health, nevertheless, the factual substratum of this application has not changed. This is because, as the analysis in the succeeding part of this judgment will show, –

(a) the Impugned Order has not been repealed;

(b) the Minister did not carry out conscious, meaningful, purposeful and effective consultation with the Poisons Board pursuant to s 6 of Act 366 before making the Impugned Order;

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

(d) the Minister breached the duty to protect public health and failed to act in accordance with Malaysia's international commitments under the WHO FCTC and CRC to prevent and reduce nicotine addiction when she made the Impugned Order and included the Impugned Exemption.

[44] Even if I am wrong and this application for judicial review has been rendered academic, in *Datuk Seri Anwar Ibrahim* (*supra*, at p 620), the Federal Court held that there are exceptional circumstances in which the Court may exercise its discretion to decide on a matter which has become academic:

"***[38]*** *The general rule is subject to an important proviso:* ***the court still retains a discretion to hear a matter which has become academic in exceptional cases. The discretion may be exercised in respect of important questions of public law, where the case does not involve a detailed consideration of the facts, or where a large number of similar cases need to be resolved. This discretion, even in the area of public law, should not be exercised unless there is a good reason in the public interest for doing so*** *(R v. Secretary of State for the Home Department ex p Salem* [1999] AC 450 *at 456; approved in Bar Council Malaysia v. Tun Dato' Seri Arifin Zakaria (supra) at [59]- [60]).*

> ***[39]*** *It is observed that in the limited cases where the court exercised its discretion to invoke this exception, the cases generally involved questions that became academic due to a subsequent change in circumstances after the case was filed (Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v. Arasa Kumaran* [2006] 4 CLJ 847 ; [2006] 6 MLJ 689 *at [6]; Teoh Eng Huat v. Kadhi, Pasir Mas & Anor* [1990] 2 CLJ 11 ; [1990] 1 CLJ (Rep) 277 ; [1990] 2 MLJ 300 *at 301).*"
>
> (emphasis added).

[45] Further, in *R (on the application of Hoareau and Another) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin), it was held at paragraph 20 that "*… the underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law.*".

[46] In my opinion, this case raises important questions of public law in relation to the alleged illegality and irrationality of the Impugned Order. Hence, the legality of the Minister's actions must be scrutinised for the purposes of improving good administration and in the wider public interest and the application should be decided on its merits.

- Whether the Minister's decision in making the Impugned Order was justiciable

[47] The Respondents vehemently argued that the Minister's decision was made pursuant to "*Belanjawan 2023*", which was approved by the Members of Parliament, and hence was a policy decision undertaken by the executive arm of government.

[48] The Respondents relied on the case authorities of *Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia* [2013] 2 MLJ 321 and *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277 (in particular paragraphs 26, 27, 91, 94, 107, 108, 112 and 113 of the judgment) to support the proposition that the Impugned Order fell within the category of decisions that require consideration of a multitude of important non-legal factors where the courts are not best placed to deal with the subject matter of the Applicants' grievances.

[49] Thus, the Respondents were of the firm position that issues relating to policy consideration was neither justiciable nor capable of judicial determination.

[50] I, however, was inclined to agree with the Applicants that the law on judicial review has developed to an extent that the courts are not limited to review the decision of the relevant authority by only challenging the lawfulness of the decision-making process; the power extends to scrutinising the decision as regards the process and substance to determine the reasonableness of the decision [see, *among others, Abu Bakar bin Salleh & Ors v Langkasuka Resort Sdn Bhd (Langkawi Beach Resort & Langkawi Airport Sdn Bhd (Hotel Helang)) & Anor* [2018] 1 MLJ 248 and *R Rama Chandran* (*supra*)].

[51] Unlike the facts in *Dr Michael Jeyakumar Devaraj* (*supra*) where the applicant challenged the decision of the Director of the Perak State Development Office in rejecting his application for funds from the Special Constituency Allocation for various projects and activities in the Sungai Siput constituency i.e. clearly involving policy consideration and management prerogative, in the instant application, the Impugned Order was as a result of the Minister carrying out her legislative function.

[52] The fact that the amendment was made to the Schedule of Act 366 does not make it have any lesser legislative force. The tax vape policy crystallised into the Impugned Exemption which applied as law throughout the country with public implications. The Minister's decision in making the Impugned Order was, to my mind, clearly justiciable.

[53] In any event, as submitted by the Applicants, a decision by the relevant authority which is a matter of policy may still be challenged and subject to judicial review on grounds such as violation of fundamental rights or breach of any provision of the arbitrariness or unreasonableness and others (see, for example, *Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional* [2015] MLJU 213, *Pathmanathan a/l Krishnan (also known as Muhammad Riduan bin Abdullah) v Indira Gandhi a/p Mutho and other appeals* [2016] 4 MLJ 455 and *R (on the application of A) v Secretary of State for the Home Department* [2021] UKSC 37).

[54] In conclusion, the decision to make the Impugned Order was not simply one "*… which involves the Government policy within the purview of the executives (Cabinet)*" and was not susceptible to judicial inquiry by this Court as contended by the Respondents. The Impugned Order was as a result of the Minister's delegated legislative function under s 6 of Act 366 and was amenable to judicial review.

- Whether there should be "anxious scrutiny" of the Impugned Order

[55] The Respondents cited *Council of Civil Service Unions* (*supra*) and *R Rama Chandran* (*supra*) in contending that the scope of the present judicial review falls outside of "anxious scrutiny" because the Impugned Order was not a piece of legislation which imposed any restrictions or compulsory action on the public. The public still has a choice whether to but and to consume e- cigarettes and vapes with nicotine. To equate the Impugned Exemption as infringing the right to health was too remote as the Impugned Order did not deprive the right to life or the right to health.

[56] On the other hand, the Applicants argued that the scope and intensity of judicial review in this case was indeed one of "anxious scrutiny" i.e. this Court should adopt a heightened level of scrutiny of the matter due to its gravity as it revolves around a fundamental liberty and human right to health. Interference with these rights by the executive should be more difficult to justify before the Court [see *Bugdaycay v Secretary of State for the Home Department* [1987] 1 All ER 940, *R v Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696 and *R Rama Chandran* (*supra*)].

[57] Article 5 and Article 8 (access to justice to seek the courts' protection) of the Federal Constitution were invoked by the Applicants. The right to life in Article 5 must be read prismatically and does not refer to mere existence but includes other rights such as the right to live in a healthy environment. Without health there is no life; the right to life must logically include the right to health.

[58] The Applicants drew my attention to the case of *R v Ministry of Defence ex parte Smith* [1996] QB 517 for the proposition that the Respondents should have a higher burden on them and a higher threshold to meet to justify the Impugned Exemption. This is because the greater the interference with human rights, the narrower the range of responses open to a rational

decision- maker and the more the court would require by way of justification before it could be satisfied that the decision was rational.

[59] Additionally, Malaysia has committed itself to recognising and protecting the right to health of its people by signing and ratifying international agreements and treaties.

[60] In my considered view, the basis upon which the instant application was made calls for this Court to focus on the material and evidence which was before the Minister at the time the decision was made, namely as of 31.3.2023. There has to be "anxious scrutiny" or a heightened level of inspection of the Impugned Exemption in the Impugned Order as it revolves around the fundamental right to health for which the Minister was tasked by statute and Parliament to protect public health and ensure, as far as possible, a clean and healthy environment for every person in Malaysia.

II. Issues

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

[61] The Respondents asserted that the Minister had taken into account all relevant considerations as evidenced by her affirmation in subparagraph 6(e) of the Affidavit In Reply (encl. 25) that

> "*setelah meneliti cadangan pengenaan duti eksais ke atas cecair atau gel mengandungi nikotin yang digunakan untuk rokok elektronik dan vape yang telah diluluskan oleh Dewan Rakyat pada 9.3.2023, konsultasi dengan Lembaga Racun dan fakta bahawa KKM dalam proses untuk membentangkan "RUU Kawalan Merokok 2023" di Parlimen, saya telah membuat keputusan pada 30.3.2023 supaya pengecualian diberikan kepada cecair atau gel mengandungi nikotin yang digunakan untuk rokok elektronik dan vape daripada kawalan di bawah Akta 366;*".

[62] The Minister also averred in paragraphs 12 and 19 of encl. 25 that the Government's decision in imposing excise duty on e- cigarettes and vape products was in accordance with Article 6 of the WHO FCTC which states that:

> "Article 6
>
> *Price and tax measures to reduce the demand for tobacco*
>
> 1. *The Parties recognize that price and tax measures are an effective and important means of reducing tobacco consumption by various segments of the population, in particular young persons.*
> 2. *Without prejudice to the sovereign right of the Parties to determine and establish their taxation policies, each Party should take account of its national health objectives concerning tobacco control and adopt or maintain, as appropriate, measures which may include:*
>
> (a) *implementing tax policies and, where appropriate, price policies, on tobacco products so as to contribute to the health objectives aimed at reducing tobacco consumption; and*
>
> (b) *prohibiting or restricting, as appropriate, sales to and/or importations by international travellers of tax- and duty-free tobacco products.*
>
> 3. *The Parties shall provide rates of taxation for tobacco products and trends in tobacco consumption in their periodic reports to the Conference of the Parties, in accordance with* Article 21.".

[63] The Applicants submitted at length with reference to numerous medical articles, news articles and reports; media statements by MoH, National Poison Centre and Malaysian Pharmacists Society; statements and videos by the WHO; and brochures that –

(a) e-cigarettes and vaping are actually a "trap";

(b) E-Cigarette or Vaping Products Use Associated Lung Injury ('**EVALI**') may cause death, permanent lung injury and other non-respiratory diseases;

(c) e-cigarettes or vaping products are dangerous and have been associated with various physical injuries, including burns due to explosions or damage;

(d) e-liquid contains propylene glycol (PG), vegetable glycerin (VG), nicotine, flavourings and other psychoactive substances;

(e) nicotine is a highly addictive drug that poses significant health risks. On 28.3.2023, the Malaysian Pharmacists Society ('**MPS**') issued a Media Statement that the decision to make the Impugned Order would be "*detrimental to the health and safety of the Malaysian public and is not in the national interest*", citing studies that show nicotine use can lead to cardiovascular disease, lung disease and cancer. MPS also stated that nicotine use during pregnancy can harm the developing foetus and lead to complications during childbirth;

(f) e-cigarette is a potential source of exposure to toxic metals due to leaching of metals from the metal coil;

(g) the use of e-cigarettes or vape products will generate second hand aerosol, exposing the public to microparticle materials and various toxic substances contained in the vapour produced by the users; and

(h) the medical and scientific community has been unequivocal on the dangers of e-cigarettes and vapes. A summary from the medical articles, reports and news articles can be seen in exhibit **MCTC-12**.

[64] The Applicants additionally provided detailed submissions on –

(a) e-cigarettes and vape products and their dangers; scientific research, expert opinion and MoH's position;

(b) level of nicotine content not being regulated;

(c) increase of use of e-cigarettes and vapes among youths;

(d) smoking initiation due to use of e-cigarettes and vapes was a factor ignored by the Minister;

(e) the Minister having overreached her powers under Act 366 and breached her duty to protect health; policy to reduce nicotine use and Malaysia's international commitments under the CRC and WHO FCTC; and legitimate expectations;

(f) economic and tax revenue reasons cannot triumph over public health;

(g) taxation from e-cigarettes and vape products with nicotine was too little compared to the public healthcare costs for EVALI and lung-related diseases caused by the products;

(h) taxation will not achieve the desired impact; and

(i) engagement and breach of the constitutional right to life including the right to health under Article 5 of the Federal Constitution and international human rights law.

[65] The Applicants were aggrieved by the fact that the Impugned Exemption had legalised e-cigarettes and vapes with nicotine, and they can be sold freely without restrictions including those under 18 years of age, and that there were no regulations in force

[66] I have scrutinised the Respondents' affidavits and I find, in paragraph 16(b), encl. 25, the Minister affirmed that

> "*Perintah Racun tersebut dilaksanakan adalah bagi tujuan pengenaan cukai terhadap produk-produk tersebut dan ini merupakan salah satu inisiatif yang diambil bagi mengurangkan kebolehdapatan produk-produk tersebut …*".

[67] During the Parliamentary Debates in the Dewan Rakyat Special Chamber on 12.6.2023 (see exhibit MCTC-6 in the Affidavit In Support, encl. 3), the Minister said "*… **Apabila kerajaan membuat keputusan untuk mengenakan duti eksais kepada nikotin gel**. Saya sebutkan tadi nikotin gel, bukan nikotin dalam bentuk-bentuk yang lain. Kita lihat kesannya pada jangka masa yang panjang dan keuntungannya kepada kita dari sudut kita dapat mengawal dan kemudian memastikan anak-anak kita dalam generasi yang dilahirkan pada 1 Januari 2007 itu juga akan kita dapat elakkan daripada ketagihan produk-produk merokok termasuklah vape dan nikotin ini. **Jadi, apabila kerajaan telah melakukan sedemikian the due process ialah kita kena mengeluarkan nikotin gel daripada Akta Racun. Kalau kita tidak berbuat demikian, proses untuk kita hendak duti eksais dan selainnya itu kita tidak dapat laksanakan. Oleh sebab itu, kita mengambil pendekatan sebegitu** tetapi bukan bermakna kita bersetuju dengan tindakan itu.*" (emphasis added; see too, the statement made by Tuan Lukanisma Awang Sauni, Deputy Health Minister in the Dewan Negara sitting on 21.6.2023 in the same exhibit that the Impugned Exemption "*… was in line with the government's collective decision to impose excise duties on such products, as previously announced by Yang Amat*

[68] Further, in paragraphs 7 - 10, encl. 26, Johan Bin Mahmood @ Johan Mahmood Merican, the then Secretary General of the Treasury had affirmed on 5.10.2023 that:

> "*7. Saya sesungguhnya menyatakan bahawa kronologi fakta berhubung dengan Perintah yang Dipertikaikan tersebut adalah seperti berikut:-*
>
> (a) *pada masa yang material, industri vape di Malaysia telah bernilai RM 2.27 bilion. Pada 24.2.2023, semasa pembentangan Belanjawan 2023, YB Menteri Kewangan telah membentangkan cadangan bagi pengenaan duti eksais ke atas cecair atau gel yang mengandungi nikotin di dalam rokok elektronik dan vape (" **cadangan tersebut** "). Dewan Rakyat telah meluluskan Belanjawan 2023 pada 9.3.2023;*
>
> (b) *lanjutan daripada itu, MOF telah memaklumkan kepada Kementerian Kesihatan Malaysia (" **KKM** ") supaya mengambil tindakan selari dengan cadangan tersebut daripada kawalan di bawah Akta Racun 1952 [Akta 366] (" **Akta 366** ");*
>
> (c) *Bagi melaksanakan cadangan tersebut, pindaan terhadap beberapa perundangan Kewangan telah dibuat melalui pindaan- pindaan seperti berikut pada 29.3.2023:*
>
> i. *Perintah Duti Eksais (Pindaan) 2023;*
>
> ii. *Peraturan-Peraturan Eksais (Pindaan) 2023;*
>
> iii. *Perintah Duti Eksais (Langkawi) (Pindaan) 2023;*
>
> iv. *Perintah Duti Eksais (Tioman) (Pindaan) 2023;*
>
> v. *Perintah Duti Eksais (Labuan) (Pindaan) 2023; dan*

vi. *Perintah Duti Eksais (Pangkor) (Pindaan) 2023 Kesemua pindaan-pindaan ini berkuatkuasa mulai 1.4.2023.*

(d) *pada 30.3.2023 KKM telah mewartakan pengecualian bagi penggunaan cecair nikotin dalam cecair atau gel di dalam rokok elektronik dan vape dari Akta 366 melalui pindaan Perintah Racun (Pindaan Senarai Racun) 2023 [" **P.U.(A) 93** "];*

(e) *Melalui satu siaran media bertarikh 2.4.2023, MOF telah memaklumkan bahawa duti eksais pada kadar 40 sen akan dikenakan bagi setiap mililiter cecair atau gel mengandungi nikotin yang digunakan untuk rokok elektronik dan vape mulai 1.4.2023 dan telah memberikan tempoh bermula 1.4.2023 sehingga 30.4.2023 bagi membenarkan pengilang tempatan yang mengeluarkan cecair atau gel mengandungi nikotin untuk mendaftarkan diri kepada Jabatan Kastam Diraja Malaysia. Pendaftaran awal dalam tempoh yang ditetapkan ini boleh mengelakkan pengilang dikenakan kompaun atas kesalahan lewat berdaftar. Pendaftaran awal ini akan memastikan pematuhan industri yang menyeluruh serta pengutipan duti eksais sebanyak 40 sen bagi setiap milliliter cecair atau gel yang mengandungi nikotin hanya akan mula dikuatkuasakan bermula pada 1.5.2023; dan*

(f) *Selanjutnya, perundangan subsidiri tambahan telah diwartakan di bawah Akta Eksais 1976 dan Akta Kastam 1967 bagi membolehkan produk disposable e- cigarette dan electric vape yang mengandungi cecair atau gel bernikotin turut dikenakan duti eksais berkuatkuasa 1.5.2023 seperti berikut:-*

i. *Perintah Duti Eksais (Pindaan) (No. 2) 2023;*

ii. *Perintah Duti Kastam (Pindaan) 2023;*

iii. *Perintah Duti Kastam (Pengecualian) (Pindaan) (No.2) 2023;*

iv. *Perintah Duti Kastam (Barang- Barang di Bawah Perjanjian Komprehensif dan Progresif bagi Perkongsian Trans-Pasifik) (Pindaan) 2023; dan*

v. *Perintah Duti Kastam (Barang- Barang Berasal dari Negara- Negara ASEAN) (Tatanama Tarif Berharmonis ASEAN dan Perjanjian Perdagangan Barangan Asean) (Pindaan) (No. 3) 2023.*

*8. Saya sesungguhnya menyatakan bahawa **Perintah yang Dipertikaikan adalah perlu bagi melaksanakan Belanjawan 2023 yang telah dipersetujui dan diluluskan oleh Dewan Rakyat bagi mengenakan dan mengutip duti eksais ke atas cecair atau gel yang mengandungi nikotin di dalam rokok elektronik dan vape**.*

9. Saya sesungguhnya menyatakan bahawa sekiranya Perintah yang Dipertikaikan ini dibatalkan, ia akan memberi kesan kepada perundangan- perundangan subsidiari lain seperti di perenggan 6 (c) dan (f) di atas dan seterusnya menjadikan kutipan duti eksais oleh Kerajaan adalah tidak sah.

10. Saya sesungguhnya menyatakan bahawa hasrat kerajaan melalui Belanjawan 2023 telah menampakkan hasil apabila duti eksais ke atas produk cecair atau gel bernikotin yang digunakan dalam rokok elektronik dan vape telah diperolehi mulai Mei 2023 sehingga Ogos 2023. Sepertimana yang diumumkan dalam Belanjawan 2023, Kerajaan telah bersetuju bahawa separuh daripada hasil duti eksais ini akan diperuntukkan semula kepada Kementerian Kesihatan sebagai usaha untuk meningkatkan kualiti perkhidmatan kesihatan."

(emphasis added).

[69] Based on the Respondents' affidavits in encls. 25, 26 and 42, it was apparent that the main factor in making the Impugned Exemption in the Impugned Order was due to the fact that, during the tabling of the nation's 2023 Budget on 24.2.2023, the Honourable Minister of Finance had proposed to impose excise duties on e-cigarettes and vape liquids containing nicotine. The House of Representatives had approved the 2023 Budget on 9.3.2023. The MoF then informed MoH "*supaya mengambil tindakan selari dengan cadangan tersebut daripada kawalan di bawah Akta Racun 1952*". By legalising liquid or gel nicotine in e-cigarettes and vapes, R2 may tax the products and the revenue collected will be channelled towards health initiatives by MoH.

[70] Hence, despite recognising that e-cigarettes and vape liquids were dangerous to health and that Malaysia was obliged to regulate and restrict their supply, sale and use, the Minister

proceeded to make the Impugned Order, which included the Impugned Exemption, to give effect to the decision regarding taxation.

[71] Additionally, the enactment of Act 852 strengthened the Applicants' argument that the Impugned Exemption was irrational as it shows that there was a legal lacuna in regulating e-cigarettes and vape products with nicotine during the material period and that Parliament had never intended to allow vape products to be unregulated.

[72] YB Datuk Seri Dr. Dzulkefly bin Ahmad who affirmed *Afidavit Tambahan Responden Pertama (4)* on 23.10.2024 (encl. 93) averred, among others, that "*… setelah Akta 852 ini berkuat kuasa, telah terdapat undang-undang komprehensif yang mengawal selia penggunaan dan penjualan sediaan nikotin yang digunakan dalam rokok elektronik dan peranti pengewapan elektronik dalam bentuk cecair atau gel.*".

[73] Hence, before Act 852 came into operation, there was no comprehensive law to govern the matter.

[74] I was satisfied that the Applicants have established that the Minister's decision in making the Impugned Exemption, motivated primarily by economic reasons of tax benefits and revenue collection, prior to the implementation of Act 852, was unreasonable and irrational. Clearly, the Minister took into account irrelevant considerations and disregarded relevant considerations

[75] The 1st Issue was thus answered in the affirmative.

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

[76] Section 3 of Act 366 provides for the "*Establishment of Poisons Board*" in these terms:

> "***3.***
>
> (1) *For the purpose of this Act and to advise the Minister generally thereon, there shall be established an advisory board, called the Poisons Board, consisting of the members following:*
>
> (a) *the Director General of Health who shall be an ex-officio member;*
>
> (b) *one pharmacist holding office in the service of the Government to be appointed by the Minister;*
>
> (c) *one officer of the Department of Chemistry to be appointed by the Minister;*
>
> (d) *one officer of the Department of Agriculture to be appointed by the Minister;*
>
> (e) *one officer of the Veterinary Department holding office in the service of the Government to be appointed by the Minister; and*
>
> (f) *eight persons ordinarily resident in Malaysia and not in the service of any Government in the Federation to be appointed by the Minister who shall be nominated as follows:*
>
> (i) *one by the Malaysian Medical Association;*
>
> (ii) *one by the Malaysian Medical Council established under the Medical Act 1971;*
>
> (iii) *one by the Malaysian International Chambers of Commerce and Industry;*
>
> (iv) *one by the Associated Chinese Chambers of Commerce and Industry of Malaysia;*
>
> (v) *one by the Malay Chambers of Commerce;*

(vi) *one by the Associated Indian Chambers of Commerce, Malaysia;*

(vii) *one by the Malaysian Pharmaceutical Association; and*

(viii) *one by the Malaysian Rubber Producer's Council.*

(2) *Every member, other than the ex officio members, shall, unless he shall sooner resign, hold office for a period of three years or such shorter period as the Minister may in any particular case determine from the date of his appointment.*

(3) *Any person ceasing to be member of the Board shall be eligible for reappointment.*

(4) *The Minister may appoint a person similarly qualified to be a temporary member of the Board during the incapacity through illness or during the absence from Malaysia of any member, other than an ex officio member, of the Board:*

Provided that no person shall be appointed in the place of a member nominated under paragraph (1)(g) except upon the nomination by the body by which such member was nominated.

(5) *Every such temporary member shall be deemed to be a member of the Board.*".

[77] In paragraphs 10 and 11 of encl. 42, the Minister made the following averments on the matter pertaining to consultation with the Poisons Board under s 6 of Act 366:

"*10. Merujuk kepada perenggan 7 Afidavit Jawapan Pemohon-Pemohon (Lampiran 31), saya telah dinasihati oleh Peguam Kanan Persekutuan dan sesungguhnya menyatakan bahawa:-*

(a) *memandangkan Menteri Kesihatan bukan salah seorang daripada anggota Lembaga Racun, kehadiran Menteri Kesihatan semasa mesyuarat Lembaga Racun adalah tidak diperlukan;*

(b) *saya juga menyatakan bahawa* Seksyen 6 Akta Racun 1952 *tidak menetapkan kaedah konsultasi yang perlu dilakukan sama ada melalui perbincangan atau mesyuarat bersama Menteri Kesihatan dan Lembaga Racun;*

(c) *Konsultasi di bawah* Seksyen 6 Akta Racun 1952 perlu dibaca bersekali dengan fungsi Lembaga Racun seperti yang diperuntukkan di bawah Seksyen 3 Akta Racun 1952 *iaitu memberi nasihat kepada Menteri Kesihatan;*

(d) *Keputusan dan hasil Mesyuarat Lembaga Racun ke-97 yang diadakan pada 29.3.2023 telah dimaklumkan kepada Menteri Kesihatan oleh Pengarah Kanan Perkhidmatan Farmasi, Kementerian Kesihatan Malaysia yang merupakan Pengerusi Mesyuarat Lembaga Racun ke-97;*

(e) *Menteri Kesihatan telah mengambil maklum hasil perbincangan dan keputusan Mesyuarat Lembaga Racun ke-97 sebelum membuat Keputusan yang Dipertikaikan;*

(f) *Walau apapun, kuasa untuk membuat Perintah Pengecualian adalah merupakan kuasa Menteri Kesihatan seperti yang diperuntukkan di bawah* Seksyen 6 Akta Racun 1952; *dan*

(g) *tiada sebarang peruntukkan undang- undang yang memerlukan Menteri Kesihatan memberikan sebarang justifikasi mahupun alasan terhadap keputusan pengecualian tersebut serta peruntukkan dilakukan diantara Menteri Kesihatan dan Lembaga Racun jika terdapat sebarang percanggahan dalam perbincangan.*

11. Saya menafikan perenggan 8 Afidavit Jawapan Pemohon-Pemohon (Lampiran 31), dan sesungguhnya menyatakan bahawa Menteri hanya perlu mendapatkan konsultasi daripada Lembaga Racun dan bukan persetujuan daripada Lembaga Racun bagi melaksanakan pindaan terhadap cadangan perintah tersebut.".

[78] The crux of the Respondents' submission was that –

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

opinion or views; it does not mean to consent. The relevant excerpt from the cited case at pp 570 - 571 is as follows:

> "*Before we make known of our decision regarding the application made to us by the appellant yesterday the effect of which whether this quorum should continue to sit with or without YA Datuk Hj. Mokhtar bin Hj. Sidin, we feel we should explain the relevant provision of the Federal Constitution relating to the appointment of judges of the High Court, of the Court of Appeal and of the Federal Court. That provision is* art. 122B(1) *and it reads:*
>
> > *122B. (1) The Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Courts and (subject to* Article 122C) *the other judges of the Federal Court, of the Court of Appeal and of the High Courts shall be appointed by the Yang di-Pertuan Agong, acting on the advice of the Prime Minister, after consulting the Conference of Rulers.*
>
> *The intention of this article is clear ie, the Yang di- Pertuan Agong must act on the advice of the Prime Minister. However, the Yang di-Pertuan Agong is required to* ***consult*** *the Conference of Rulers before making the appointment. To consult means to refer a matter for advice, opinion or views. For a quick reference as to the meaning of this word, I refer to the Black's Law Dictionary, the latest edition which is the seventh edition, the word "consultation" carries the meaning inter alia thus:*
>
> > *The act of asking the advice or opinion of someone ... consult vb.*
> >
> > *To "consult" does not mean to "consent". The Federal Constitution uses the words "consent" and "consult" separately. For example the word "consent" is used in* art. 159(5) *of the Constitution which states that the amendments to certain provisions of the Constitution cannot be passed by Parliament without the "consent" of the Conference of Rulers. The Black's Law Dictionary provides for the meaning of the word "consent" thus: "Agreement, approval or permission as to some act or purpose esp. given voluntarily by a competent person."*
>
> *So in the matter of the appointment of judges, when the Yang di-Pertuan Agong* ***consults*** *the Conference of Rulers, he does not seek its "consent". He merely consults. So when the Conference of Rulers gives its advice, opinion or views, the question is, is the Yang di-Pertuan Agong bound to accept. Clearly he is not. He may consider the advice or opinion given but he is not bound by it.*"; and

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

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

[80] In *Supreme Court vs Union of India* on 6 October 1993, the Indian Supreme Court had interpreted the word "*consultation*" under Articles 124(2) and 217(1) of the Indian Constitution on the appointment of Judges to the Supreme Court and High Court. The Applicants' counsel provided a useful summary of the main findings of the Supreme Court as follows:

(a) "*consultation*" under the said Articles is mandatory (see paragraph 475 of the judgment); and

(b) "*consultation*" means that –

(i) during consultation, the consultor will not generally ignore the consultee's advice except for good reasons especially when a public authority is tasked with a duty that involves consulting with another qualified authority (see paragraph 222);

(ii) mere formal compliance does not suffice; full and effective consultation necessitates the exchange of views and the consideration of counterproposals (see paragraphs 222, 223 and 229); and

(iii) in the event that the consultor departs from the opinion of the consultee, the former is obligated to provide cogent and convincing reasons justifying the former's actions (see paragraph 225).

[81] In addition, the Applicants cited other cases from India such as *Chandramouleshwar Prasad v. Patna High Court & Others AIR* [1970] SC 370; *Ashish Handa, Advocate v. Hon'ble the Chief Justice of High Court of Punjab & Haryana AIR* 1996 SC 1308; *Ashok Tanwar & Anr. v. State of H.P. & Ors., AIR* 2005 SC 614; *N. Kannadasan v. Ajoy Khose & Ors.* (2009) 7 SCC 1; and *State of Gujarat & Another v. Gujarat Revenue Tribunal Bar Association & Another JT* 2012 (10) SC 422 in support of the contention that –

(a) the object of consultation is to render its process meaningful, so that it may serve its intended purpose;

(b) consultation requires the meeting of minds between the parties that are involved in the consultative process, on the basis of material facts and points, in order to arrive at a correct, or at least a satisfactory solution;

(c) consultation or deliberation can neither be complete nor effective, before the parties make their respective points of view, known to the other or others, and discuss and examine the relative merits of their views. If one party makes a proposal to the other who has a counter proposal in mind, which is not communicated to the proposer, a direction issued to give effect to the counter proposal without any further discussion with respect to such counter proposal, with the proposer cannot be said to have been issued after consultation; and

(d) where a decision itself is thickly clouded by non- consideration of the most relevant and vital aspect, the ultimate appointment is vitiated not because the appointee is not desirable or otherwise, but because mandatory statutory requirement of consultation has not been rendered effectively and meaningfully.

[82] In *Regina v North and East Devon Health Authority, Ex parte Coughlan* [2001] QB 213, the English Court of Appeal emphasised that consultation must be carried out properly:

> "***108*** *It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper,* ***consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken****: R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168."

(emphasis added).

[83] Back to local shores, in *Dr. Vijaya Kumar a/l Vasudeavan & Ors v Majlis Perubatan Malaysia & Ors* [2008] MLJU 59, the High Court had this to say about sub-s14(3) of the Medical Act 1971 [*Act 50*]:

"*… Under subsection (3) of* section 14, the power to register medical graduates from unrecognized universities (without requiring them to undergo the examination prescribed by section 12(1)(aa) of the Medical Act 1971) *is conferred on the Minister of Health and not on the Cabinet. The provision is very clear on this. The provision reads:*

> *(3) Notwithstanding anything to the contrary contained in this Act, any person may be fully registered under this section subject to such restrictions and conditions as may be stipulated by the Minister, provided that the person seeking registration under this subsection possesses a qualification with respect to which the Minister, after consulting the Council, is satisfied that it is adequate.*

The Cabinet cannot exercise this power; nor can the Minister of Health surrender this power to the Cabinet. ***The Minister must exercise his own discretion. Even then, the Minister cannot act alone. He acts in consultation with the Malaysian Medical Council****. For the subsection says:*

> *… after consulting the council …*

True, the Minister is not bound by the views of the Council. But nonetheless he must seek its view and must respect and give due consideration to the Council's view *. …*"

(emphasis added).

[84] In this case, there was no physical meeting between the Minister and the Poisons Board. Although Act 366 does not expressly require such a physical meeting to take place, after having received the unanimous decision of the Poisons Board to reject the proposed Impugned Exemption on 29.3.2023, it was reasonable to expect the Minister to engage with the Poisons Board and have further discussions or exchange of views on this important issue affecting public health. Instead, on the next day (30.3.2023), the Minister immediately decided to make the Impugned Order, which she then signed on 31.3.2023. No reasons were given by the Minister in acting against the advice of the Poisons Board.

[85] The Minister evidently treated the consultation requirement as a formal compliance with Act 366 whereas in its true meaning, consultation must be effective and real, and not mere lip service. Effective consultation necessitates the exchange of views and consideration of counterproposals. This was clearly absent in this case.

[86] Furthermore, as alluded under the 1st Issue, based on the Respondents' affidavits in encls. 25, 26 and 42, a decision had already been made for the imposition of excise duties on e-cigarettes and vape products and inevitably, the Impugned Exemption in the Impugned Order had to be made. To put it crudely, it was a "done deal".

[87] This lends credence to the Applicants' submission that the Respondents treated the consultation as a mere formality resulting in the overwhelming evidence of the dangers posed by e-cigarettes and vape liquids and the increased likelihood of vapes leading to nicotine addiction on the part of children being ignored.

[88] The consultation provision in s 6 of Act 366 would be rendered otiose if the Minister was allowed to amend the Poisons List based on her absolute discretion and irrespective of the health experts who have expressed their views and advised her to the contrary.

[89] This case is a perfect example of a Minister considering seemingly tax benefits and acting on an executive decision on taxation to make the Impugned Order as opposed to basing her decision on public health reasons.

[90] The Applicants relied on the case of *Supreme Court vs Union of India* (*supra*) for another reason; the legal principle of "*primary of opinion*" (see paragraphs 32 - 59 of the judgment, and especially paragraphs 37, 40 and 41), which was elucidated in paragraph 25 and summarised by the Applicants as follows:

(a) the question of primacy arises when there is a lack of agreement among the functionaries; and

(b) the disagreement should be resolved by determining who is best equipped to achieve the purpose and perform the task satisfactorily. On the facts of the Indian case, primacy was about determining which constitutional functionary was best equipped to make the proper choice in the appointment process, and not about deciding their relative importance or establishing a winner.

[91] The Applicants submitted that, considering the functions of the Poisons Board and the deliberate insertion of the words "*after consultation with the Poisons Board*" in s 6 of Act 366, the Minister should accept the opinion of the Poisons Board unless there are convincing reasons otherwise, which should be tabled for the Board's further review. The primary of the Board's opinion should have the greatest weight and finality unless for very good reasons known to the Minister and disclosed to the Board.

[92] No submission was made by the Respondents to rebut the Applicants' resort to the "*primary of opinion*" argument.

[93] I find the Applicants' submission to be most persuasive, especially in light of the detailed analysis on the duty to give reasons, including where there is no statutory duty to do so, by the Federal Court in *Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors And Other Appeals* [2023] 5 CLJ 167. The Court explicated that, even when there is no express statutory gives rise to an obligation to give reasons for an administrative decision. This obligation enables an affected individual to challenge the legality of the decision. Further, in line with the purpose and object of the Federal Territory (Planning) Act 1982 [*Act 267*] which emphasises public participation, the appropriate approach was for the decision maker to provide reasons to the public at the time of the decision. This would allow the public to give their views.

[94] The Minister, in consulting with the Poisons Board, should have communicated her reasons for rejecting the Board's views and for not having any further engagement on the issues before making the Impugned Order. This she did not do.

[95] In the final analysis, the 2nd Issue must be answered in the affirmative.

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

[96] The Applicants submitted that s 6 of Act 366 was unconstitutional because it sought to amend the primary Act without any parliamentary scrutiny. This provision is a piece of delegated legislation known as the "*Henry VIII clause*" i.e. a clause which enables a primary legislation to be amended or repealed by subordinate legislation, with or without further parliamentary scrutiny.

[97] In paragraph 25 of the judgment by Lord Neuberger in *R (The Public Law Project) v Lord Chancellor* [2016] 3 WLR 387, His Lordship said that "*When a court is considering the validity of a statutory instrument made under a Henry VIII power, its role in upholding Parliamentary supremacy is particularly striking, as the statutory instrument will be purporting to vary primary legislation passed into law by Parliament.*".

[98] The Applicants then drew the attention of the Court to *Craises on Legislation, A Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation*, Twelfth Edition, Sweet & Maxwell Ltd, 2021 and *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 23rd edition, Butterworths, 2004 in submitting that there exist many safeguards for delegated legislation in the United Kingdom and multiple Parliamentary procedures for the scrutiny of delegated legislation, which are currently absent in this country.

[99] The Applicants further referred to *Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly* 1986 AIR 1571 ; 1986 SCR (2) 278 and *Dunnes Stores v. Revenue Commissioners & Ors* [2020] 3 IR 480 to illustrate how the Supreme Courts in India and Ireland, respectively, dealt with the issue of the "*Henry VIII clause*".

[100] It was posited that s 6 of Act 366, which does not set out the criteria upon which the Minister is to exercise her powers to amend the Poisons List other than a duty to consult the Poisons Board, must be considered to be inconsistent with Article 66 of the Federal Constitution, being excessive delegation of legislative power.

[101] Article 66 of the Federal Constitution reads as follows:

> "***Exercise of legislative power***
>
> ***66.***
>
> (1) *The power of Parliament to make laws shall be exercised by Bills passed by both Houses (or, in the cases mentioned in* Article 68, *the House of Representatives) and, except as otherwise provided in this Article, assented to by the Yang di-Pertuan Agong.*
>
> (2) *Subject to* Article 67, *a Bill may originate in either House.*
>
> (3) *When a Bill has been passed by the House in which it originated it shall be sent to the other House; and it shall be presented to the Yang di-Pertuan Agong for his assent when it has been passed by the other House and agreement has been reached between the two Houses on any amendments made in it or when it is required to be so presented under* Article 68.
>
> (4) *The Yang di-Pertuan Agong shall within thirty days after a Bill is presented to him assent to the Bill by causing the Public Seal to be affixed thereto.*"

[102] Article 66 of the Federal Constitution provides that the exercise of legislative power is by Parliament, which shall ordinarily make laws by Bills passed by both Houses of Parliament and upon receiving the Royal Assent.

[103] Pursuant to paragraph 2(1)*(b)* of the Interpretation Acts of 1948 and 1967 [*Act 388*], Part I of Act 388 applies to Act 366 being an Act revised under the Revision of Laws Act 1968 [*Act 1*].

[104] Section 15 of Act 388 provides that the Schedule to an Act shall be construed and have effect as part of the Act. As such, the power granted by s 6 of Act 366 to the Minister to amend the Schedule to Act 366 is *ultra vires* the legislative power of Parliament enshrined in Article 66 the Federal Constitution.

[105] According to the Applicants, the Henry VIII clause-type provisions have yet to be discussed by the Malaysian courts and the examples of such provisions are s 11 of the Customs Act 1967 [*Act 235*], s 6 of the Excise Act 1976 [*Act 176*] and s 4 of the Local Government Elections Act 1960 [*Act 473*].

[106] I pause here to acknowledge the Applicants' counsel's exemplary conduct in the oral submission and the Supplementary Submissions (encl. 110) as regards Prayer C of the Revised Reliefs where he was candid in submitting that declarations on unconstitutionality are generally made as a last resort and a court will not lightly strike down legislation. Thus, if prayer A and B was considered by the Court as sufficient to provide adequate relief and preserving the rule of law, then prayer C may not be necessary (see paragraph 288 in the judgment by Tun Tengku Maimun Tuan Mat CJ in *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759 at p 856 on the presumption of constitutionality).

[107] In my view, it was not necessary for the Court to make a determination on the 3rd Issue and prayer C of the Revised Reliefs as the 1st and 2nd Issues and prayers A and B of the Revised Reliefs were sufficient and would achieve the purposes of –

(a) upholding the rule of law by affirming that the Minister acted irrationally;

(b) promoting accountability of the executive by recognising that the decision-making process was legally flawed;

(c) providing guidance for future conduct by clarifying the scope and limits of the Minister's powers under s 6 of Act 366; and

(d) protecting the public interest by ensuring that decisions affecting public health must comply with statutory and procedural safeguards, including proper consultation.

Conclusion

[108] Based on the affidavit evidence and for the foregoing reasons, I was satisfied that the Applicants have proven, on a balance of probabilities, that the Minister –

(a) failed to fulfil her obligation to carry out conscious, meaningful, purposeful and effective consultation with the Poisons Board pursuant to s 6 of Act 366, before making the Impugned Order;

(b) acted unreasonably by taking into account irrelevant considerations and disregarding relevant considerations when she made the Impugned Order that included the Impugned Exemption; and

(c) breached her duty to protect public health and failed to act in accordance with Malaysia's international commitments under the CRC and WHO FCTC to prevent and reduce nicotine addiction when she made the Impugned Order and included the Impugned Exemption.

[109] In *R (on the application of South West Care Homes Ltd) v Devon County Council* [2012] EWHC 1867 (Admin) at paragraphs 60 - 62, the court exercised its discretion not to grant a quashing order but instead granted a declaration that the Defendant unlawfully failed to consult the claimants before reaching the decision as –

(a) the declaration would vindicate the rule of law since it reflects the terms of the judgment that there was unlawful failure of consultation; and

(b) "*granting a declaration can serve a valuable function in guiding future conduct. A declaration is a flexible and proportionate remedy: it can be tailored to fit the facts of the particular case before the court and to reflect the particular breach of public law which the court has identified.*"

(see too, *R v Secretary of State for Social Services, Ex p. Association of Metropolitan Authorities* [1986] 1 All ER 164 at pp 175 and 176).

[110] Based on the foregoing reasons, the Applicants have established their case to move the Court to exercise its discretion to grant the declaratory reliefs as prayed.

[111] The Applicants' application in encl. 19 for a declaration as sought in Prayers A and B of the Revised Reliefs was therefore allowed with no order as to costs.

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