**IN THE HIGH COURT OF MALAYA AT GEORGETOWN**
**IN THE STATE OF PENANG**
**[JUDICIAL REVIEW APPLICATION NO. PA-25-13-02/2022]**

Dalam perkara permohonan semakan kehakiman untuk mendapatkan perintah deklarasi, *certiorari* dan *mandamus*

Dan

Dalam perkara seksyen 25(2) dibaca bersama perenggan 1 dalam Jadual kepada Akta Mahkamah Kehakiman 1964

Dan

Dalam perkara Aturan 53 Kaedah-Kaedah Mahkamah 2012

Dan

Dalam perkara Perkara 5 fasal (1) dan Perkara 13 fasal (1) Perlembagaan Persekutuan

**BETWEEN**

**1. EDWARD CARL GILBERT DAVIES**
**(Mendakwa sebagai tuanpunya tunggal COOLS WATERSPORT)**

**2. ZAIRUL HASNIZAL BIN ISMAIL**
**(Mendakwa sebagai tuanpunya tunggal MOAGANA ENTERPRISE)** **... APPLICANTS**

**AND**

**MAJLIS BANDARAYA PULAU PINANG ... RESPONDENT**

## GROUNDS OF DECISION

### Introduction

**[1]** This is an application for leave to file judicial review for orders of declaration, *certiorari* and *mandamus*. The Applicants wish to challenge the decision of the Respondent whereby their watercraft business has been ordered to be relocated from Zon Tanjung Bungah and Zon A to Zon D.

**[2]** The Applicants seek leave to file a judicial review application for the following reliefs (paragraph (1) of Enclosure 1):

> "(a) perintah deklarasi bahawa Pemohon 1 dan Pemohon 2 berhak mengendalikan lancang air, masing-masing, di Zon Pantai Tanjung Bungah dan Zon A;
>
> (b) perintah *certiorari* untuk membatalkan arahan penempatan semula operator sukan air yang dikeluarkan oleh Responden melalui surat bertarikh 12 April 2021, yang dimuktamadkan melalui surat Responden bertarikh 25 November 2021, dalam mana Pemohon 1 dan Pemohon 2 dipindahkan, masing-masing, dari Zon Pantai Tanjung Bungah dan Zon A ke Zon D;
>
> (c) perintah *mandamus* untuk mengarahkan Responden membaharui lesen lancang air Pemohon 1 dan Pemohon 2 bagi tahun 2022 untuk membenarkan mereka beroperasi, masing-masing, di Zon Pantai Tanjung Bungah dan Zon A;"

**[3]** The Applicants applied for an extension of time to file the judicial review application. Paragraph (2) of Enclosure 1 reads:

> "2. bahawa Pemohon 1 dan Pemohon 2 secara *inter partes* diberi pelanjutan masa untuk memfailkan Permohonan Semakan Kehakiman ini, selaras dengan peruntukan di bawah Aturan 53 kaedah 3(7) dan kaedah 3(8) Kaedah-Kaedah Mahkamah 2012, sekiranya tempoh masa pemfailan yang ditetapkan telah luput;"

**[4]** Pursuant to Order 53 rule 3(8) of the Rules of Court 2012, the application for extension of time is to be heard *inter partes*. The Respondent opposed the application for extension of time. I did not grant the extension of time. Here are my reasons.

## Background facts

**[5]** The decision challenged by the Applicants in the judicial review application herein is the decision made by the Respondent to relocate the water sports operations of the 1st Applicant and the 2nd Applicant as follows **("Impugned Decision")**:

| *Name of Water Sports Operator* | *Current Operation Zone* | *New Operation Zone* |
|---|---|---|
| Cools Watersport (1st Applicant) | Zone Tg. Bungah Beach | Zone D |
| Moagana Enterprise (2nd Applicant) | Zone A | Zone D |

**[6]** The Impugned Decision is set out in the Respondent's letters dated 12.4.2021 issued to the 1st Applicant and the 2nd Applicant respectively.

**[7]** The following chronology of events is relevant.

| *Date* | *Event* |
|---|---|
| 9.4.2021 | Impugned Decision made by the Respondent at the 'Mesyuarat Badan Penyiasatan Demerit Terhadap Operator Aktiviti Pantai & Air Jajaran Pantai Batu Feringgi, Puiau Pinang'. |
| 13.4.2021 | Impugned Decision communicated to the 1st Applicant vide letter dated 12.4.2021. |
| 13.4.2021 | Impugned Decision communicated to the 2nd Applicant vide letter dated 12.4.2021. |
| 21.4.2021 | The 1st Applicant wrote to the Respondent to request the Respondent to reconsider/review the Impugned Decision **("1st Applicant's Appeal").** |
| 22.4.2021 | The 2nd Applicant wrote to the Respondent to request the Respondent to reconsider/review the Impugned Decision **("2nd Applicant's Appeal").** |
| 13.7.2021 | Letter from the Respondent to the 1st Applicant stating that the 1st Applicant's Appeal is rejected and that the Impugned Decision is maintained. |
| 13.7.2021 | Letter from the Respondent to the 2nd Applicant stating that the 2nd Applicant's Appeal is rejected and that the Impugned Decision is maintained. |
| 25.11.2021 | Letter from the Respondent to the 1st Applicant to reiterate that the 1st Applicant's Appeal has been rejected and that the Impugned Decision is |

| | |
|---|---|
| | maintained. |
| 2.12.2021 | Letter from the solicitors of the 1st Applicant to the Respondent requesting that the 1st Applicant be allowed to continue his water sports operation at Zone Tg. Bungah Beach for 2 months from 2.12.2021, whilst the 1st Applicant considers his next course of action. |
| 16.2.2022 | Judicial review application filed at the Penang High Court |

**Computation of Time under Order 53 rule 3(6)**

**[8]** Order 53 rule 3(6) of the Rules of Court 2012 reads:

"An application for judicial review shall be made **promptly** and in any event **within three months** from the date when the grounds of application first arose or when the **decision is first communicated** to the applicant."

**[9]** The time prescribed under Order 53 rule 3(6) of the Rules of Court 2012 must be strictly complied with. (See the Court of Appeal case of *Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* [2010] 5 CLJ 123 at 150; the High Court case of *Samsiah Leman v. Ketua Polis Negara & Ors* [2015] 1 LNS 813).

**[10]** The court would have no jurisdiction to hear a judicial review application which has been filed out of time. (See the Federal Court case of *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 CLJ 193 at 207).

**[11]** Order 53 rule 3(6) of the Rules of Court 2012 stipulates that the 3 months' timeline starts to run from the date the decision was first communicated to the applicant. In *Abdul Rahman Abdullah*

*Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor* [2008] 6 CLJ 805, the Court of Appeal held that the time prescribed for filing judicial review application is calculated from the date the impugned decision was communicated to the applicant.

**[12]** From the above-mentioned chronology of events, the Impugned Decision was first communicated to the 1st Applicant and the 2nd Applicant respectively on 13.4.2021. vide the Respondent's letters dated 12.4.2021. This fact is not in dispute.

**[13]** The 3 months' period prescribed under Order 53 rule 3(6) of the Rules of Court 2012 would therefore commence on 13.4.2021. Consequently, the deadline for the Applicants to file judicial review against the Impugned Decision was on 13.7.2021. The judicial review application herein, which was filed on 16.2.2022, is out of time by about 6 months.

**[14]** The Applicants contend that the 3 months' period should only be calculated from 25.11.2021. Which was when their appeals to the Respondent to reconsider/review the Impugned Decision was rejected and communicated vide letter dated 25.11.2021.

**[15]** This contention is without merit. The decision which the Applicants seek to quash by way of judicial review is the Impugned Decision as set out in the Respondent's letters dated 12.4.2021. And not the decision of the Respondent as set out in its letter dated 25.11.2021.

**[16]** The Respondent's letter dated 25.11.2021 merely reiterates that the 1st Applicant's Appeal to the Respondent to reconsider/review the Impugned Decision is rejected. And that the Impugned Decision is maintained. The Respondent's letter dated 25.11.2021 should not be considered as a new decision or the communication of a new decision.

**[17]** I refer to the High Court case of *Tan Sri Abdul Aziz Zainai & Ors v. Lembaga Pengarah Bank Kerjasama Rakyat Malaysia Bhd* [2021] 1 LNS 2044. In that case, the decision sought to be impugned was communicated to the applicant in April 2019. The applicant had thereafter written to the respondent to request that the respondent review its earlier decision. The respondent however declined to do so. It was contended by the applicant that time to file judicial review application only commenced from the date of the respondent's rejection of the applicant's appeal.

**[18]** In rejecting the applicant's contention, the Court said:

*"[12] Having perused the cause papers, I find that the Second Respondent's decision was made through a letter dated 12.4.2019 (Exhibit AAZ-6). The decision was communicated to the Applicants as admitted by them on 16.4.2019.*

*[13] Therefore, it is my view that any application for judicial review must be made within 3 months after 16.4.2019. The last date to file would be on 16.7.2019.* As *the present application* was *filed on 26.6.2020, there is a delay of almost 11 months.*

*[14] The Applicant argued on the status of the subsequent letters by the First and Second Respondent. As narrated above, after the said decision on 12.4.2019, the Applicant's solicitor wrote to the Second Respondent to review his earlier decision. The letter was dated on 5.8.2019 (Exhibit AAZ-7). ...*

*[15] The Second Respondent had responded through a letter dated 23.8.2019 and maintaining his earlier decision on 12.4.2019.* ***Thus, the Second Respondent's letter dated 23.8.2019 is not a decision in relation to the Applicants' application. It is just a reply to the Applicants' request to review the earlier decision.***

*[16] Further, I find that there is nothing under Act 202 that provides for an appeal or review against the Second Respondent's decision. Hence, to me* ***the letter dated 23.8.2019 should not be considered as a decision."***

**[19]** I also refer to the High Court case of *Amanggul Pirgul v. Ruslan Alias & 2 Ors* [2021] 1 LNS 1892. In that case, the impugned decision was first communicated to the applicant vide JPN's letter dated 12.5.2017. Subsequently, JPN issued 2 further letters, dated 17.8.2017 and 2.7.2020 respectively, to highlight the impugned decision.

**[20]** In dismissing the application for leave, the Court said:

*"[21] Based on the above case law, it is clear that* ***only one decision had been made*** *with regard to the Applicant's application for an IC which was decided by Mesyuarat Panel Jawatankuasa Khas Kad Pengenaian Sabah Bit. 07/2017 on 21.4.2017. That decision had been communicated to the Applicant through a letter from JPN Malaysia dated 12.5.2017. Thus, the last date for the Applicant to file the leave application fell on 11.8.2017 and it is my view that this Application was commenced out of time.*

*[22] Based on Alcatel-Lucent (supra) it is clear that both letters from JPN Malaysia dated 17.8.2017 and 2.7.2020 were* ***not a communication of a new decision.*** *Therefore, I am of the view that there is no revival of the cause of action and/or* ***no new decision has been made*** *with the issuance of those letters."*

**[21]** In the instant case, the Impugned Decision was made under the provisions of the *Personal Watercrafts (Penang) Enactment 1999* **("1999 Enactment").** Similar to the statutory provision in *Abdul Aziz Zainal* (*supra*), there is no internal appeal mechanism

prescribed under the 1999 Enactment for the Respondent to review or reconsider its own decision made thereunder.

**[22]** Therefore, the Respondent's letter dated 25.11.2021 (addressed to the 1st Applicant) cannot be considered as a separate and distinct decision that is amenable to challenge by way of judicial review. Instead, it is a mere affirmation of the Impugned Decision which had already been communicated to the Applicants on 13.4.2021.

**[23]** By the Applicants' own admission, the decision which they seek to quash is that contained in the Respondent's letter dated 12.4.2021. The Statement filed pursuant to Order 53 rule 3(2) of the Rules of Court 2012 reads:

"arahan penempatan semula operator sukan air yang dikeluarkan oleh Responden melalui surat bertarikh **12 April 2021,** *yang dimuktamadkan melalui surat Responden bertarikh 25 November 2021*, dalam mana Pemohon 1 dan Pemohon 2 dipindahkan, masing-masing, dari Zon Pantai Tanjung Bungah dan Zon A ke Zon D".

**[24]** This decision pertaining to the relocation of the respective Applicants' water sports operations was first communicated to the Applicants on 13.4.2021, vide letters dated 12.4.2021.

**[25]** The words *"yang dimuktamadkan melalui surat Responden bertarikh 25 November 2021* "appear to be self-serving. Since there is no issue that the Impugned Decision, as communicated vide the Respondent's letters dated 12.4.2021, is a preliminary decision that is subject to final confirmation.

**[26]** In *Abdul Rahman Abdullah Munir* (*supra*), the Court of Appeal also did not accept the applicant's argument that time does not start to run under Order 53 rule 3(6) of the then Rules of the High Court 1980 because the respondent had entered into

dialogue with the applicants and had represented to them that the matter was still under consideration.

**[27]** The Court said (at page 820-821):

*"[45] The appellants on the other hand, argue that the decision made on 10 June 2003 was* ***not a decision or not a final decision. It was, they said, merely a preliminary decision*** *not yet communicated to the public.*

*[46] Learned counsel also submitted that the first respondent was obliged to engage the owners and residents of the condominium notwithstanding that purported decision of 10 June 2003.*

*[47] Subsequently the first respondent had* ***entered into a dialogue*** *with the owners and residents of the condominium for almost one year.*

*[48] On 22 December 2004, DKORA wrote to the first respondent seeking confirmation that the first respondent would not use the buffer land as a burial ground. In that letter DKORA* ***gave a one week time frame for the first respondent to reply,*** *if not the first respondent would be deemed to have made a contrary decision ie, to allow the buffer land to be used as a burial ground.*

*[49] The first* ***respondent did not respond*** *to that letter.*

*[50] The appellants now take the stand that the actual decision was made on 5 January 2005 (one week after the first respondent received the letter ie, on 27 December 2004). Thus, there had not been any delay.*

*[51] The appellants contended that to assert that a decision* was *already made on 10 June 2003 is erroneous.*

*[52] They further contended that the first* ***respondent had represented to them that the matter was still under consideration.***

*[53] The learned* ***judge found that there was a delay in making this application. We agree.***

*[54] In our view, the appellants knew of the decision made by the first respondent on 10 June 2003 when it was communicated to their representative on 8 November 2003. By this date the buffer land had been cleared for the project. "*

**[28]** It is my finding that the 3 months' period prescribed under Order 53 rule 3(6) of the Rules of Court 2012 for the Applicants to file judicial review against the Impugned Decision commenced on 13.4.2021.

**Extension of Time**

**[29]** The court has power to extend time for the Applicants to file the judicial review application. This is provided under Order 53 rule 3(7) of the Rules of Court 2012 which reads:

"The Court may, upon an application, extend the time specified in rule 3(6) if it considers that there is a **good reason** for doing so."

**[30]** Whether an extension of time ought to be granted or otherwise is an exercise of judicial discretion. It is for the court to examine and determine whether there are good reasons for it to do so.

**[31]** In *Wong Kin Hoong* (*supra*), the Federal Court said (at page 203):

*"[18] A common factor in the above provisions is that an* ***application for leave for judicial review must be made promptly***

*but the court may upon application and if it considers that there is good reason for doing so, extend it. Thus,* ***whether an extension of time ought to be granted or otherwise is an exercise of judicial discretion.*** *And it is a well-settled principle that an appellate court will rarely interfere with the court exercise of judicial discretion unless it is clearly satisfied that the discretion had been exercised on a wrong principle."*

**[32]** The basis for the Applicants' application for extension of time is as follows:

(a) The Applicants went through internal channels *(saluran dalaman*) to appeal against the Impugned Decision before coming to court;

(b) The Applicants were waiting for the Respondent to make a decision on their respective appeals.

**[33]** The Applicants seem to blame the Respondent for being slow to respond to the 1st Applicant's Appeal and the 2nd Applicant's Appeal. Which response, according to the Applicants, only came vide the Respondent's letter dated 25.11.2021. Thereby resulting in the judicial review application being filed in February 2022.

**[34]** To my mind, the fact that the Applicants had respectively made appeals to the Respondent to reconsider/review the Impugned Decision and were awaiting the Respondent's response to the Appeals cannot be 'good reason' for me to exercise my discretion to extend time. As mentioned earlier, the 1999 Enactment does not provide for an internal appeal mechanism. Hence any appeals to the Respondent to reconsider/review the Impugned Decision would be superfluous. In fact, the Respondent is not obliged to entertain or even respond to the appeals.

**[35]** The Applicants themselves have respectively affirmed that they *"tidak menerima keputusan tersebut"*. Therefore, they should have taken prompt action to challenge the Impugned Decision in court. And not merely make an appeal to the Respondent to reconsider/review its own decision and wait for the Respondent to respond on the appeal.

**[36]** In *Abdul Aziz Zainal* (*supra*), the applicants had likewise blamed the respondents' action for their delay in filing the judicial review application. In rejecting the applicants' application for extension of time, the Court said:

*"[27] From the reason given by the Applicants, they are saying the Respondents caused their delay. To me, this is just an excuse. Upon perusal of the cause papers, I find that the Applicants knew and were aware on the decision making process to cease the Act 202.*

*[28] This is evident when the Applicants wrote to the Second Respondent on 18.3.2019. When their application was rejected on 12.4.2019, again they wrote to the Second Respondent to consider his earlier decision.*

*...*

*[32] I have scrutinized the explanation of the delay proffered by the Applicants. Apart from blaming the Respondents for causing the delay, I find that there is nothing advanced by the Applicants to show that they had a good reason or any reason at all for that matter, for failing to file the application promptly. Thus, this application should be dismissed in limine."*

**[37]** Even if l was minded to consider the 1st Applicant's Appeal and the 2nd Applicant's Appeal as a basis to extend time, by July 2021, the Respondent had already responded officially to the 1st

Applicant's Appeal and the 2nd Applicant's Appeal i.e. vide the Respondent's letters dated 13.7.2021.

**[38]** Vide the Respondent's said letters dated 13.7.2021, the 1st Applicant and the 2nd Applicant were respectively informed that their appeal has been rejected by the Respondent. And that they are to abide by the Respondent's decision to relocate their water sports operations, as directed in the Respondent's letters dated 12.4.2021.

**[39]** Therefore by 13.7.2021, the Applicants already knew that the Impugned Decision is maintained. Yet, the judicial review application herein was only filed in February 2022, some 6 months after receipt of the Respondent's letters dated 13.7.2021. Interestingly, the Applicants left out mention of the Respondent's letters dated 13.7.2021 in the Statement filed pursuant to Order 53 rule 3(2) of the Rules of Court 2012 and their respective affidavit verifying facts.

**[40]** I am of the view that the Applicants cannot rely on the Respondent's letter dated 25.11.2021 to justify any further delay on the part of the Applicants in filing for judicial review. The Respondent's letter dated 25.11.2021 (addressed to the 1st Applicant) makes reference to the 1st Applicant's Appeal and states that the Impugned decision is maintained. Therefore, the letter dated 25.11.2021 is a mere affirmation/reiteration of what had already been conveyed to the 1st Applicant previously vide the Respondent's letter dated 13.7.2021.

**[41]** The basis for the issuance of the Respondent's letter dated 25.11.2021to the 1st Applicant was explained. Namely, the 1st Applicant continuing to operate his water sports activities at the Tanjong Bungah Beach Zone, in defiance of the Impugned Decision for him to relocate to Zone D. And therefore needed to be reminded of the Impugned Decision.

**[42]** By relying on the Respondent's letter dated 25.11.2021 to justify their application for extension of time, the Applicants are in effect suggesting that every new letter which may be issued by the Respondent pertaining to the 1st Applicant's Appeal or the 2nd Applicant's Appeal constitutes fresh ground for extension of time. That, in my opinion, would make a mockery of the provisions of Order 53 rule 3(6) of the Rules of Court 2012.

**[43]** If there is basis to the Applicants' contention, then every applicant for judicial review would be able to justify an application for extension of time simply by issuing letter after letter to the decision maker requesting that he reconsiders/reviews his earlier decision. And then wait for the decision maker to respond to such letters.

**[44]** What if the Respondent had not issued the letter dated 25.11.2021 ? Would the Applicants then contend that they ought to be granted an indefinite extension of time? Or that the non-response from the Respondent is basis for a judicial review itself? The Court of Appeal in *Abdul Rahman Abdullah Munir* (*supra*) certainly did not accept such contention.

**[45]** The Court said (at page 822):

> *"[58] To say that the decision was only made on 5 January 2005 after the first respondent had failed to revert to their letter of 22 December 2004, is fallacious. We also find it* ***ludicrous for the appellants to hold the view that a decision was only arrived at when the first respondent failed to respond*** *to the one- week time period ultimatum in their letter. The* ***latter was not duty-bound to respond*** *to what we feel, corresponded to a threat.*

*[59] Thus, our view is that no decision was made by the first respondent pursuant to that letter.* ***No decision need in fact be made as it was already made earlier.***

*[60] An application for a judicial review under 0. 53 RHC is intended to impugne a decision. This is central to any judicial review. The appellants contended that there was a "deemed decision" by the first respondent made on 5 January 2005 when it failed to revert to the appellants' letter of 22 December 2004.*

*[61] It is thus crucial to first identify definitely what the decision is that is sought to be impugned. This has to be the actual date, (see Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama Serbaguna Sungai Gelugor Dan Tanggungan [1999] 3 CLJ 65 FC). The* ***appellants interpretation towards the first respondent's non-response to their letter makes no sense*** *and far stretching one's imagination. This would give rise to an artificial meaning to the word "decision". The date of the decision too becomes fictitious which makes the computation of the statutory time limit under O. 53 RHC indeterminable. "*

**[46]** It should be pointed out that the Respondent's letter dated 25.11.2021was addressed to the 1st Applicant only and had made specific reference to the 1st Applicant's Appeal. Thus in any event, the 2nd Applicant cannot rely on the Respondent's said letter to justify his application for extension of time.

**[47]** Even if, for the sake of argument, the Respondent's letter dated 25.11.2021could form a basis for an extension of time; that however does not mean that the Applicants have 3 months therefrom to file for judicial review. It is still for the Applicants to satisfy the court that they took prompt action following from the 25.11.2021 letter to justify the court extending time.

**[48]** In this regard, there is no explanation given by the Applicants for their inaction during the period between 25.11.2021 and 16.2.2022, when the judicial review application herein was filed. The fact that the 1st Applicant appointed solicitors subsequent to receipt of the Respondent's letter dated 25.11.2021 and was considering his next course of action indicate that the 1st Applicant has intention to challenge the Impugned Decision in court. But yet no prompt action was taken.

**[49]** In the circumstances, I find that there is no 'good reason' shown by the Applicants to justify an extension of time up to 16.2.2022 for them to file the judicial review application herein. The Applicants did not take prompt action to challenge the Impugned Decision which was first communicated to them on 13.4.2021.

**[50]** In an application for extension of time, the court ought not to consider the merits or otherwise of the judicial review application. (See *Wong Kin Hoong* (*supra*, at page 207)).

**[51]** Furthermore, it is immaterial, when considering an application for extension of time, whether the Applicants' delay in filing the judicial review had caused any prejudice to the Respondent or otherwise. (See the High Court case of *Mohd Ismail Abd Ghani v. Ketua Pengarah Pendaftaran Negara & Anor* [2011] 5 CLJ 660 at 668).

**Submission by the Applicants**

**[52]** Firstly, the Applicants contend that there are good reasons for the court to extend time because:- (a) no warning was stated in the Respondent's letters dated 12.4.2021 to inform the Applicants that the decision is final and no appeal shall be entertained; and (b) no instruction was stated in the said letters that an application by way of judicial review has to be filed

within 3 months if the Applicants are not satisfied with the decision.

**[53]** This contention is misconceived. There is no legal requirement or obligation on the part of the Respondent to:- (a) 'warn' the Applicants that the Impugned Decision communicated vide the Respondent's letters dated 12.4.2021 is final and that no appeal shall be entertained; or (b) 'advise' the Applicants that any challenge against the Impugned Decision must be taken up by way of judicial review within a certain time.

**[54]** Ignorance of the law is not a 'good reason' to justify an extension of time under Order 53 rule 3(7) of the Rules of Court 2012. (See the High Court cases of *Raja Kumar Rajoo v. Pengerusi Lembaga Tatatertib Polis DiRaja Malaysia, Bukit Aman, Kuala Lumpur and others* [2014] 1 LNS 802; *Chnq Teik Wei v. Pengerusi, Lembaqa Penceqahan Jenayah & Ors* [2021] 1 LNS 2306).

**[55]** Secondly, the Applicants say that they have appealed to the Respondent and have then been continuously in touch with the officers of the Respondent, including the mayor, and praying for the Impugned Decision to be revoked. It was only after the Respondent issued the letter dated 25.11.2021 that the Applicants purportedly realised they have exhausted all the internal avenues of appealing to the Respondent, and that they should now go to the court.

**[56]** This argument is devoid of merit. To recap, the 1st Applicant's Appeal and the 2nd Applicant's Appeal cannot be 'good reason' to justify an extension of time. The Respondent had already responded officially to the Applicants' respective Appeals in July 2021 i.e. vide letters dated 13.7.2021. The Applicants did not disclose the Respondent's said letters in the cause papers filed by them.

**[57]** The Respondent's letter dated 25.11.2021, which is addressed only to the 1st Applicant, is a mere affirmation/reiteration of what had already been conveyed to the 1st Applicant previously vide the Respondent's letter dated 13.7.2021. In any event, the 1st Applicant did not take any prompt action after receipt of the Respondent's letter dated 25.11.2021. The 1st Applicant cannot assume that he has a further 3 months therefrom to file for judicial review, considering that he was already out of time by then.

**[58]** In *Amanggul Pirgul* (*supra*), the court did not accept the contention of the applicant that he made appeals to Jabatan Pendaftaran Negara but only received an answer to his appeal on 2.7.2020 as a ground to justify his delay in filing for judicial review. The Court said:

*"[29] ... the following points were offered by the Applicant for the delay in filing the leave application for judicial review in his Affidavit:-*

> *(iii) The Applicant then alleged that he* ***made a few appeals to JPN Malaysia but only received the answer that his appeal had been rejected*** *on 2.7.2020 and had immediately appointed solicitors to represent him after that;...*

*[30] Even with the presumption that the Applicant had made an appeal to the JPN Malaysia, although the Applicant did not even make available sufficient material except for the letter from JPN Malaysia dated 2.7.2020 to the Applicant's wife, there is* ***no provision for appeal*** *with regards to the Applicant's application for issuance of 1C. Thus, the Applicant should have filed the Application within three (3) months from the decision first being communicated to him on 12.5.2017"*

**[59]** Thirdly, the Applicants say that no compound was issued by the Respondent to them for operating the business of watercraft without licence in Zon Tanjung Bungah and Zon A following the impugned Decision. Which placed them under the 'legitimate impression' that their appeals is still being considered.

**[60]** This argument is untenable. Merely because the Respondent did not take action to issue compounds against the Applicants for their failure to comply with the Impugned Decision, in my view, does not give rise to a 'legitimate impression' or 'legitimate expectation' that the Impugned Decision is not final and need not be complied with. Moreover, 'legitimate expectation' cannot and should not override a statutory power vested in the decision maker. (See the Federal Court case of *North East Plantations Sdn Bhd v. Pentadbir Tanah Daerah Dungun & Satu Lagi* [2011] 4 CLJ 729 at 747).

**[61]** It should also be pointed out that vide the Respondent's letter dated 13.7.2021 to the 1st Applicant and the 2nd Applicant respectively to inform them that their Appeals cannot be considered, the Applicants were reminded to comply with the Impugned Decision and warned of the possible consequences of non-compliance.

**[62]** Fourthly, the Applicants suggest that the issue of time is a mere 'technical aspect of the law'. The Applicants complain that the Respondent should not be allowed to 'take advantage' of such technical aspect to escape the consequence of breaching the constitutional rights of the Applicants.

**[63]** Flowever, the law is that the time frame prescribed under Order 53 rule 3(6) of the Rules of Court is not a mere technicality. But is fundamental and goes to the jurisdiction of the court to hear the application for leave under Order 53 rule 3(2) of the Rules of Court 2012.

**[64]** In *Wong Kin Hoong* (*supra*), the Federal Court held (at page 207):

> *''[30] In conclusion, we are of the view that the* ***time frame in applying for judicial review prescribed by the Rules is fundamental.*** *It* ***goes to jurisdiction*** *and once the trial judge had rejected the explanation for the delay for extension of time to apply for judicial review, it follows that the court no longer has the jurisdiction to hear the application for leave for judicial review.* ***Whether the application has merits or not, is irrelevant."***

**[65]** Lastly, the Applicants complain that the Impugned Decision was made out of the blue and no reason was stated in the Respondent's letters dated 12,4.2021. That they were not given any right to be heard before the Respondent made the Impugned Decision.

**[66]** The Applicants allege that the Respondent is aware that they have been licensed previously to operate in Zon Tanjung Bungah and Zon A, and considerable amount of time, energy, money and resources have been spent by them to set up and run a successful watercraft business in the designated areas. The Applicants further allege that there is no official complaint lodged, let alone disciplinary actions taken, against them, which would have necessitated the Respondent to make the Impugned Decision.

**[67]** I did not address those allegations as they go to the merits of the judicial review. The Federal Court in *Wong Kin Hoong* (*supra*) expressly held that the merits or otherwise of the judicial review need not be considered by the court when determining an application for extension of time under Order 53 rule 3(7) of the Rules of Court 2012.

**[68]** Having decided not to grant an extension of time (under paragraph (2) of Enclosure 1), it must follow that I would have no jurisdiction to hear the application for leave (under paragraph (1) of Enclosure 1).

**[69]** In *Ravindran P. Muthukrishnan v. Malaysian Examinations Council* [1984] 1 CLJ Rep 320 at 322, the Federal Court held:

> *"In our view the whole issue is clearly one of jurisdiction. In the event only the first consideration of the Judge is relevant.* ***Since the Judge rejected the explanation for the delay it follows that the Court had no jurisdiction to hear the application for leave*** *for an order of certiorari.* ***Whether the application for an order of certiorari had merits or not was irrelevant. "***

**Conclusion**

**[70]** In summary, it is my finding that:

(a) The Impugned Decision which the Applicants seek to quash by way of judicial review was first communicated to the Applicants on 13.4.2021 vide the Respondent's letter dated 12.4.2021. The 3 months' period prescribed under Order 53 rule 3(6) of the Rules of Court 2012 ended on 13.7.2021. The judicial review application herein, filed on 16.2.2022, is therefore filed out of time;

(b) The fact that the Applicants had appealed to the Respondent to reconsider/review the Impugned Decision is not 'good reason' to justify an exercise of the court's discretion to extend time under Order 53 rule 3(7) of the Rules of Court 2012. In any event, the Applicants' respective appeals were rejected by the Respondent and the Applicants were informed of the same vide the Respondents' letter dated 13.7.2021. The Applicants did

not take prompt action thereafter to challenge the Impugned Decision in court.

**[71]** In the premises, I did not grant the extension of time prayed for by the Applicants in paragraph (2) of Enclosure 1. I made no order as to costs.

**Dated:** 11 OCTOBER 2022

**(QUAY CHEW SOON)**
Judge
High Court of Malaya, Penang
Civil Division NCvC 1

**COUNSEL:**

*For the applicants - Shamsher Singh Thind; M/s SS Thind*

*For the respondent - Christina Siew; M/s Lim Kean Siew & Co*

**Case(s) referred to:**

*Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd [2010] 5 CLJ 123*

*Samsiah Leman v. Ketua Polis Negara & Ors [2015] 1 LNS 813*

*Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 CLJ 193 at 207*

*Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor [2008] 6 CLJ 805*

*Tan Sri Abdul Aziz Zainai & Ors v. Lembaga Pengarah Bank Kerjasama Rakyat Malaysia Bhd [2021] 1 LNS 2044*

*Amanggul Pirgul v. Ruslan Alias & 2 Ors [2021] 1 LNS 1892*

*Mohd Ismail Abd Ghani v. Ketua Pengarah Pendaftaran Negara & Anor [2011] 5 CLJ 660*

*Raja Kumar Rajoo v. Pengerusi Lembaga Tatatertib Polis DiRaja Malaysia, Bukit Aman, Kuala Lumpur and others [2014] 1 LNS 802*

*Chnq Teik Wei v. Pengerusi, Lembaqa Penceqahan Jenayah & Ors [2021] 1 LNS 2306*

*North East Plantations Sdn Bhd v. Pentadbir Tanah Daerah Dungun & Satu Lagi [2011] 4 CLJ 729*

*Ravindran P. Muthukrishnan v. Malaysian Examinations Council [1984] 1 CLJ Rep 320*

**Legislation referred to:**

Rules of Court 2012, O. 53 r. 3(2), (6), (7), (8)

Rules of the High Court 1980, O. 53 r. 3(6)