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FEB 19 — On 9 February 2010 the Federal Court (Alauddin Mohd Sheriff PCA, Arifin Zakaria CJ (Malaya), Zulkefli Ahmad Makinudin, Mohd Ghazali Mohd Yusoff and Abdul Hamid Embong FCJJ) handed down a unanimous decision on Nizar v Zambry. The judgment of the court was read by Chief Judge, Malaya Arifin Zakaria.

The judgment is 40 pages long on A4 size paper and if you have the stamina to persevere to

the end of the judgment you would have realised that these judges of the highest court in the land have, under the pretext of interpretation, decided that the Sultan of Perak has the power to dismiss the incumbent Menteri Besar Nizar when the Laws of the Constitution of Perak does not confer any executive power on the Sultan for so doing.

If the Sultan has no power to dismiss Nizar then, we should ask, how could the Federal Court commit such a devastating error to their reputation as judges of the highest court in the land?

The inability of these judges to pick out the one real point that matters

That is why the ability to pick out the one real point that matters is so important. That is why young advocates learnt how to spot it very early in their career if they are not to bore the judge, whom they are addressing, to tears. This is what Sir Patrick Hastings — he was one of the great advocates of his day before and after World War II — had to say about the ability to seize upon the one vital point that is to be found in any case; see his book

Cases in Court

, p 333:

“The ability to pick out the one real point of a case is not by itself enough; it is the courage required to seize upon that point to the exclusion of all others that is of real importance.”

The late Lord Justice Salmon in his article, *Some Thoughts on the Traditions of the English Bar*, was also of the same view. He said:

But remember this, in few cases, however complex, is there usually more than one point that matters. Very seldom are there more than two and never, well hardly ever, more than three. Discover the points that really matter. Stick to them and discard the rest. Nothing is more irritating to a tribunal than the advocate who takes every point possible and impossible. To do so is a very poor form of advocacy because the good points are apt to be swept away with the bad ones. Stick to what matters.

In the case of Nizar v Zambry, the only point that matters in the appeal is whether the Sultan of Perak has any executive power to remove a Menteri Besar who had been appointed by him under Article 16(2)(a).

Any astute lawyer or judge can see at once that there is only one point that matters in the

appeal, and that point is whether the Sultan of Perak has any executive power to sack his Menteri Besar and to appoint another to take his place. Yet these five myopic Federal Court judges were unable to see that this is the only point that matters in the appeal when every budding young lawyer knows about it instinctively.

These five myopic judges were lost in a quagmire of confused thinking caused by their own incompetence. They found themselves deep in the forest unable to see the wood for the trees. Does this mean that we have a bunch of incompetent judges who sit in the highest court in the land?

Article IV of The Laws of The Constitution of Perak says, “the Mentri Besar” means the officer appointed by virtue of Article XII. Article XII says:

(1) His Royal Highness shall appoint by instrument under his sign manual and State Seal, a Menteri Besar pursuant to paragraph (a) of Clause (2) of Article XVI.

And paragraph (a) of Clause (2) of Article XVI says:

(1) His Royal Highness shall appoint an Executive Council.

(2) The Executive Council shall be appointed as follows, that is to say -

(a) His Royal Highness shall first appoint as Mentri Besar to preside over the Executive Council a member of the Legislative Assembly who in his judgment is likely to command the confidence of the majority of the members of the Assembly; and

(b) He shall on the advice of the Mentri Besar appoint not more than ten nor less than four other members from among the members of the Legislative Assembly;

That was how Nizar came to be appointed the Menteri Besar. He was appointed by the Sultan of Perak to be the Menteri Besar by the application of the provision of Article 16(2)(a) of the Constitution of Perak shortly after the State General Election of 2008. The provision of Article 16(2)(a) gives the Sultan of Perak the executive power to appoint a Menteri Besar “who in his judgment is likely to command the confidence of the majority of the members of the Assembly”.

Article XVIII (2) is the only other provision in the State Constitution where the Sultan “may act in his discretion in the performance of the” functions stated in Clause 2 of Article 18. Paragraphs (a) and (b) of Clause 2 read:

(2) His Royal Highness may act in his discretion in the performance of the following functions (in addition to those in the performance of which he may act in his discretion under the Federal Constitution) that is to say -

(a) the appointment of a Mentri Besar,

(b) the withholding of consent to a request for the dissolution of the Legislative assembly,

After the Sultan has appointed a Menteri Besar under Article 16(2)(a), then, has he the executive power to remove him? The answer is definitely no, because the only executive power left for the Sultan in which he “may act in his discretion” — after a Menteri Besar has been appointed under Article 16(2)(a) — in respect of the Menteri Besar can only be found in Article 18(2) (a) and (b). Apart from Article 18(2)(a) and (b) there is no other executive power bestowed on the Sultan concerning the position and status of the Menteri Besar. The Sultan, therefore, has no executive power under the Perak Constitution to remove a Menteri Besar.

Nor has he any power under Article 16(6) and (7) to dismiss or remove him.

Article XVI (6) and (7) say:

(6) If the Mentri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, ... he shall tender the resignation of the Executive Council.

(7) Subject to Clause (6) a member of the Executive Council other than the Menteri Besar shall hold office at His Royal Highness' pleasure, but any member of the Council may at any time resign his office.

By Clause (6) a Menteri Besar who ceases to command the confidence of the majority of the Legislative Assembly "shall tender the resignation of the Executive Council". But what if any member of the Executive Council or all of them including the Menteri Besar — for the Menteri Besar is also a member of the Council — were to refuse to resign?

Clause (7) provides the answer to this question. It says, "Subject to Clause (6) a member of the executive Council other than the Menteri Besar shall hold office at His Royal Highness' pleasure, but any member of the Council may at any time resign his office."

Clause (7) clearly says that members of the Executive Council hold office at the pleasure of the Sultan. The Sultan can remove them from the office of Executive Councillors if they refuse to resign. But the Menteri Besar, once appointed by the Sultan, does not hold office at the Ruler's pleasure. Therefore, Nizar, once he had been appointed the Menteri Besar by the application of paragraph (a) of Clause (2) of Article 16, cannot thereafter be removed from office by the Sultan. This is because Clause (7) says the Menteri Besar does not hold office at the pleasure of the Ruler.

Therefore, even if the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, the Sultan has not the executive power to remove him as Menteri Besar. That being the case, the only way to remove a Menteri Besar is to obtain a vote from the Legislative Assembly to remove him. Alternatively, the Sultan may dissolve the Legislative Assembly if requested by the appointed Menteri Besar — who is Nizar as he cannot be removed by the Sultan — to do so under Article 16(6).

Therefore, the legitimate Menteri Besar of Perak is still Nizar, and not Zambry. Then, how could the Federal Court give such a perverse decision in favour of the usurper Zambry when the Constitution of Perak does not confer any executive power on the Sultan for him to do so? This is especially so when Nizar is still in office as the Menteri Besar — a position he still holds in accordance with the law.

Are these Judges docile lions under the throne?

Is it because the judges were docile lions under the throne who are beholden to the monarch?

In *What Next in the Law*, page 335, Lord Denning tells us that:

It was Francis Bacon in his Essay, Of Judicature, who said:

'Let judges also remember that Solomon's throne was supported by lions on both sides; let them be lions, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty.'

According to Francis Bacon (who was Lord Chancellor during the reign of King James I) judges are lions under the throne; being circumspect (it means cautious, prudent or discreet) that is to say, being timid and docile they do not check or oppose any points of sovereignty of the monarch.

Now you can see why the timid lions being circumspect as the monarch's liege they would rather not check nor oppose any points of the sovereignty of the monarch. 'Yes, Yes, Yes.' whimpered the cowardly lions. But why should they be sycophants when Sultan Azlan Shah

himself have said that judges are not beholden to Kings, Presidents or Prime Ministers? See Sultan Azlan Shah's *Constitutional Monarchy, Rule of Law and Good Governance*, Professional Law Books and Sweet & Maxwell Asia, 2004, p 59:

The judges are not beholden politically to any Government. They owe no loyalty to Ministers. ...They are "lions under the throne" but that seat is occupied in their eyes not by Kings, Presidents or Prime Ministers but by the law and their conception of the public interest. It is to that law and to that conception that they owe their allegiance. In that lies their strength.

This quotation comes right from the horse's mouth, the Sultan of Perak has said it himself that it is to the law that judges owe their allegiance. Therein lies their strength. They are not lions under the throne of Kings, Presidents or Prime Ministers.