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## Election Petition – Are Preliminary Objections Appealable?

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This alert aims to discuss the Federal Court case of *Wan Sagar Wan Embong v Harun Taib* [2009] 1 CLJ 457 where the relationship between preliminary objection raised in election petitions at the High Court was examined and whether a ruling against such a preliminary objection is appealable to the Federal Court.

### The Right To Appeal Is A Creature Of Statute

It is trite principle that the right to an appeal is not an inherent right - there must be a specific statutory provision which allows matters to be escalated to the Appeal Court. As enunciated in the case *Auto Dunia Sdn Bhd v Wong Sai Fatt* [1995] 3 CLJ 485:

*“The right to appeal is a creature of statute, so that unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal, no appeal lies”.*

Historically, the right to appeal against a determination of the Election Judge in election petitions is barred by Section 33(4) and Section 36 of the Election Offences Act 1954 (EOA):

*“Section 33 Appointment and powers of Election Judge*

- (4) *Unless otherwise ordered by the Chief Judge, all interlocutory matters in connection with an election petition may be dealt with and decided by any Judge of the High Court whose decision shall be final.”*

*Section 36 Determination of Election Judge*

- (1) *At the conclusion of the trial of an election petition, the Election Judge shall –*

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- (a) *Determine whether the candidate whose return or election is complained of was duly returned or elected or whether the election is void, and shall certify such determination to the election commission or to the state authority, as the case may be, and upon certificate being given such determination shall be final.*
- (b) *Pronounce such determination in open court."*

The words "*such determination shall be final*" in Section 36 of the EOA appears to suggest the concept of *functus officio*, reflecting the finality of the Election Judge's powers when presiding on election petitions. In 2002, Parliament removed the words "*and shall certify such determination to the election commission or to the state authority, as the case may be, and upon certificate being given such determination shall be final*" from Section 36 of the EOA and introduced a new Section 36A to create such right to appeal:

*"Section 36A Appeal*

- (1) *The petitioner or a candidate whose return or election is complained of may appeal against the determination of an Election Judge".*

While there is no debate captured in the Hansard in relation to the introduction of Section 36A, the amendment made to the EOA reflects Parliament's intentions to allow election petitions to be appealable i.e. presenting a statutory avenue to the aggrieved parties to have their claims ventilated beyond the High Court.

## Appeals On Preliminary Objections

However, the amendment does not make clear whether interlocutory matters such as preliminary objection is appealable. The Federal Court in *Gan Joon Zin v Fong Kui Lun & Ors* [2004] 3 CLJ 729 held that:

*"On the other hand, Section 33(4) was not amended. The words "whose decision shall be final" are still*

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*there. This can only mean that whereas Parliament intended to provide the right of appeal against the determination of the Election Judge as mentioned in Section 36, it did not intend to provide the right of appeal against a decision made in an interlocutory matter mentioned in Section 33.”*

Quite clearly, *Gan Joon Zin* highlighted that notwithstanding the amendment to Section 36 of the EOA and Parliament’s introduction of Section 36A, the provision concerning appeal for interlocutory matters are still confined within the walls of Section 33(4) of the EOA. The absence of such amendments to that section demonstrates the intention of the Parliament to bar appeals in relation to preliminary objection. It was only in *Wan Sagar* that the appeal scope was extended to include preliminary objections, albeit with certain limitations imposed.

## *Wan Sagar*

The Appellant, a Barisan Nasional candidate, lost to the Respondent, a Parti Islam Se Malaysia candidate by a majority of 406 votes in the 2008 General Elections. The Appellant had contested for a seat in the Terengganu State Legislative Assembly. The Appellant filed an election petition at the High Court to challenge the election of the Respondent. The Respondent then raised a preliminary objection, which was upheld by the Election Court Judge.

The Appellant’s election petition was struck out and subsequently, the Appellant appealed to the Federal Court.

The Respondent’s main contention was that a ruling on preliminary objection is not appealable in light of the express wording of Section 33(4) of the EOA i.e. “*final and not appealable*”. Identical arguments from *Gan Joon Zin* were also reiterated by the Respondent.

The Federal Court disagreed with the Respondent’s argument. In doing so, the apex court interpreted the words “*trial of an election petition*” in Section 36 widely so as to include the trial of “*any issue relating to the petition, be it by way of a preliminary issue*”. Hence, this broadened definition of “*trial*” allows a ruling on preliminary objection to be appealable.

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The Federal Court opined that:

*“As in the instant case, the election judge had allowed the preliminary objection taken up by the respondent at the outset of the hearing and on that basis the petition was struck out. That, in our opinion, is a trial of the election petition filed by the petitioner, as it cannot be denied that the election judge had, in so doing, tried the issue before him. And by ordering that the petition be struck out the election judge had brought the election petition to its conclusion.”*

In reaching this decision, the Federal Court referred to the English case of *Bozson v Altrincham Urban District Council* [1903] 1 KB 547 which imposed a test in determining whether a matter is interlocutory or not:

*“It seems to me that the real test for determining this question ought to be this:*

*Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.”*

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Hence, *Wan Sagar* ruled that if such an interlocutory application crosses this threshold where it completely disposes a party's rights, the matter is appealable under Section 36 notwithstanding the existence of Section 33(4) of the EOA.

## Conclusion

In the strict realm of election petitions, a preliminary objection is commonly raised to strike off election petitions for the failure to comply with both substantive and procedural requirements of election law. Due to the strict black letters of the law, the Courts are generally quick to strike off election petitions for reason of non-compliance (see: *Sazali bin Kamilan* [2013] 9 CLJ 782 and *Mohd Nazri Hj Din* [2009] 3 CLJ 221). Hence, the decision in *Wan Sagar* is welcomed as it prevents the decision of an Election Judge from being

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sealed and this ruling is a clear authority that a ruling on preliminary objection is appealable to the Federal Court.

Authored by Ezzamel Zarif, a pupil with the firm's Dispute Resolution practice

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