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09 September 2025

Heidy Quah Gaik Li v Kerajaan Malaysia (Civil Appeal No. B-01(A)-514-10/2023)

Court of Appeal Reinforces Free Expression in Landmark Section 233 CMA Ruling

by Lim Zhi Qian, Vicky & Siow Chan Wai, Shawn

INTRODUCTION

The Court of Appeal has recently delivered a landmark judgment in **Heidy Quah Gaik Li v Kerajaan Malaysia**, clarifying the limits of **Section 233(1)(a) of the Communications and Multimedia Act 1998 [1]** (“CMA”). Striking down the terms “offensive” and “annoy” as unconstitutional, the Court held that these words imposed an impermissible restriction on freedom of speech under **Article 10 of the Federal Constitution**.

This ruling highlights the judiciary’s constitutional role as guardian of fundamental liberties, reaffirming that any limitation on constitutional rights must be necessary, proportionate and firmly grounded within the permissible exceptions provided by the Constitution.

[1] Section 233(1)(a), Communications and Multimedia Act 1998

S233

For reference, **Section 233 of the CMA** provides as follows:

“233. Improper use of network facilities or network service, etc.

(1) A person who –

(a) by means of any network facilities or network service or applications service knowingly –

(i) makes, creates or solicits; and

(ii) initiates the transmission of,

any comment, request, suggestion or other communication which is obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person; or

(b) initiates a communication using any applications service, whether continuously, repeatedly or otherwise, during which communication may or may not ensue, with or without disclosing his identity and with intent to annoy, abuse, threaten or harass any person at any number or electronic address, commits an offence.”

BACKGROUND OF THE CASE



In June 2020, Heidy Quah, a social activist, published a Facebook post highlighting conditions at immigration detention centres during the COVID-19 pandemic. A year later, she was charged under Section 233(1)(a) CMA for transmitting an “offensive” message with intent to “annoy.”

Although the Sessions Court later granted her a discharge not amounting to an acquittal, she pursued a constitutional challenge to the validity of Section 233(1)(a). While the High Court dismissed her application, the Court of Appeal overturned that decision, ruling in her favour.

KEY FINDINGS OF THE COURT

1. Freedom of Speech and Public Order

The Court reaffirmed that freedom of expression is not absolute and may be restricted only on specific constitutional grounds such as public order, morality or defamation.

However, criminalizing speech that is merely “offensive” or made with intent to “annoy” does not fall within the category of public order. At most, such conduct might implicate law and order, but not the broader threshold of public order required to justify constitutional restrictions.

2. Proportionate Restrictions vs Absolute Prohibition

The Court reiterated that valid restriction must be proportionate and directed at a legitimate constitutional aim. By penalising trivial expressions that might irritate or upset an individual, **Section 233(1)(a)** effectively imposed a blanket prohibition on a wide spectrum of speech. This, the Court found, rendered the constitutional guarantee of free expression illusory.

3. Judicial Function in Constitutional Review

The Court emphasised that its role is not that of a language teacher searching for the meaning of vague words, such as “offensive” or “annoy.”, in a provision dealing with fundamental liberties.

Rather, the obligation of the Court is to ensure that legislation does not unjustifiably curtails constitutional protections. Where inconsistency arises, **Article 4(1) of the Federal Constitution** requires the Court to strike down the offending provision.

IMPLICATIONS

1.For Digital Platforms, Content Creators & the Public:

The decision relieves online platforms and individuals from the uncertainty of having to assess content against vague standards, which previously exposed them to criminal liability for ordinary speech.

2.For Constitutional Law:

The judgment reinforces that restrictions on fundamental liberties must be narrowly construed and proportionate to a legitimate aim. It confirms that mere annoyance or subjective offensiveness cannot justify criminal penalties.

3.On Future Legislation:

Parliament has amended Section 233 CMA (effective 11 February 2025) to replace “offensive” with “grossly offensive.” The Court of Appeal expressly refrained from ruling on the validity of this amendment, leaving open the question of whether the revised wording can withstand constitutional scrutiny in future challenges.



CONCLUSION

The Heidy Quah decision marks a significant step in the constitutional protection of online expression in Malaysia. By striking down vague and overbroad terms in **Section 233(1)(a) CMA**, the Court has ensured that the guarantee of free speech under **Article 10** is not reduced to form without substance.

Nevertheless, caution remains essential. the ruling narrows liability under the **CMA** but does not immunise individuals or organisations from other legal risks. Defamation, contempt, false communications and related statutory offences continue to apply. Content creators and the public should therefore exercise responsibility in online discourse, balancing robust expression with accuracy and respect for the law.

The views expressed herein are those of the author and do not necessarily reflect the views of the firm. Should you have any legal queries, corporate or otherwise, please feel free to reach out to the firm for further assistance.



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