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Judicial Review

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Chapter 2

JUDICIAL REVIEW

While Parliament remains the principal legislator, other administrative bodies, agencies and authorities may likewise be conferred with law-making powers by Parliament. The growth of delegated or subsidiary legislation in the form of rules, by-laws, regulations, orders or other instrument is reflective of government's increased role in administration. Under the Malaysian legal system, the delegation of powers to members of the executive such as the minister is common. He is generally conferred with discretionary powers to make decisions pertaining to the particular issues at hand. It is also common to find within Acts of Parliament, what is known as ouster or privatise clauses, wherein it will be enacted that a minister's or other executive's decision on any matter shall be regarded as final and may not be questioned in court. The delegation of broad discretionary powers, coupled with the ouster of the jurisdiction of courts have contributed to the healthy growth of administrative law in Malaysia, and an active and at times interventionist judiciary has seen to it that there is a richness of case law and case precedent which sets out the rules and principles regarding this subject.

1. PROCEDURE

It has been long acknowledged that judicial review is not an appeal – in the process of exercising judicial review over the inferior tribunals, the superior courts exercise merely a supervisory jurisdiction as opposed to an appellate jurisdiction.[117]

Application for judicial review requires leave of court. Order 53 rule 1(1) of the

[117] *Hotel Equatorial (M) Sdn Bhd v Nat. Union of Hotel, Bar & Restaurant Workers* [1984] 1 MLJ 363; *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155.

Rules of the High Court provides that no application for an order of mandamus, prohibition or certiorari shall be made unless leave has been granted in accordance with this rule. The procedure for leave is set out under Order 53 rule 1(2), which provides for the application for leave to be made ex parte and supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits to be filed before the application is made, verifying the facts relied on. This requirement has been judicially interpreted as imposing upon the party a duty to disclose material facts, the breach of which could result in the order being set aside.[118]

Judicial review in Malaysia follows closely the law in the United Kingdom, that is, through the issue of the prerogative writs of certiorari, mandamus and prohibition developed by the Court of King's Bench. Declaration and Injunction, developed by the Court of Chancery, are also added to the list of prerogative writs.

2. LEGAL BASES FOR REVIEW BY HIGH COURT

There are several legal bases upon which the High Court will review the decision of an inferior tribunal or an administrative body or a member of the executive. They can be summarized as follows:

(i) Illegality, that is, where a wrong decision has been made, whether due to taking into account irrelevant matters or not taking into account matters which are relevant;

(ii) rationality, which refers to unreasonable decisions, the yardstick of the doctrine of unreasonableness being the English case of *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*,[119] and

(iii) Procedural impropriety, which refers to the need to follow the rules of procedural fairness or natural justice.

Where statute contains an ouster clause, the basis for review had been that judicial review would not lie except for errors of law, which affects the jurisdiction of the tribunal or administration (what is commonly known at common law as

[118] *Tuan Haji Sarip Hamid v Patco Malaysia Bhd* [1995] 2 MLJ 442.
[119] [1948] 1 KB 223.

jurisdictional errors of law). However, since the decision of the House of Lords in *Anisminic v Foreign Compensation Commission*,[120] this legal basis has been altered – judicial review will now be effected for mere errors of law (or errors of law on the face of the record) as opposed to jurisdictional errors of law.[121] In Malaysia, there was initial confusion as Malaysian courts felt bound by a Privy Council decision on appeal from Malaysia, that is, the case of *South East Asia Firebricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union*,[122] which decided that judicial review will only lie for jurisdictional errors of law, and not errors of law on the face of the record. However, in 1995, the Malaysian Court of Appeal delivered judgment in the case of *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union*,[123] which affirmed that judicial review will lie for all errors of law and is not restricted to jurisdictional errors of law. Since this decision, the Malaysian judiciary has adopted a pro-active and interventionist approach in judicial review, culminating in the case of *R. Rama Chandran v The Industrial Court*,[124] which decided that in the exercise of judicial review, the tribunal's decision may be reviewed "for substance as well as process", and that should the decision be found to be wrong, the court had the power to mould the appropriate relief and award it to the party concerned instead of remitting the case back to the tribunal for a re-hearing. This decision has gone much further than the House of Lords' decisions, and has greatly expanded the scope of the doctrine of judicial review in Malaysia, so much so in effect, there is really no difference anymore between a review and an appeal.

3. THE DOCTRINE OF PROPORTIONALITY

The Malaysian courts have begun to apply the doctrine of proportionality borrowed from the continental *droit administratif* with the case of *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan*.[125] In that case, it was decided that by virtue of

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[120] [1969] 2 AC 147.
[121] Upheld, since then, by other Court of Appeal and House of Lords' decisions, for example *Re A Company* [1980] 1 All ER 284 (CA); *Re Racal Communications* [1981] AC 374 (HL); *Page v Hull University Visitor* [1993] 1 All ER 97 (HL).
[122] [1980] 2 MLJ 165.
[123] [1995] 2 MLJ 317.
[124] [1997] 1 MLJ 145.
[125] [1996] 1 MLJ 261.

the constitutional guarantee of certain fundamental liberties, "fair and just punishment" must be imposed, that is, the sentence had to suit the offence and the offender without being disproportionate as to shock the conscience.

4. CONCLUSION

Post – *Rama Chandran* and *Tan Teck Seng*, the Malaysian courts appear to retreat from their pro-active and interventionist stance. Subsequent decisions on judicial review had not picked up from where the earlier cases had left off. For example, in the case of *Ng Hock Cheng v Pengarah*,[126] the Federal Court appeared to disapprove of the proportionality principle. Similarly, there are decisions, which have not applied the greatly expanded scope of judicial review formulated in the case of *R Rama Chandran*. For example, in *Michael Lee v Menteri Sumber Manusia*,[127] the court observed that the exercise of discretionary power was vested in the Minister, not the courts, and that when this discretion is challenged, the court must be vigilant and resist any temptation to convert the jurisdiction of the court to review into a consideration of the case on its merits as if on appeal. The result is that there is some uncertainty at the moment regarding the scope of the doctrine of judicial review.

[126] [1998] 1 MLJ 153.
[127] [1997] 4 AMR 4258.