MALAYSIAN ADMINISTRATIVE LAW : RECENT CASE LAW DEVELOPMENT

Administrative lawyers who have followed closely the case law development in Malaysian Administrative Law over the last seven years or so will notice that our law has picked itself up gradually after the disastrous case of *United Engineers (M) Bhd* v *Lim Kit Siang*[1] and developed with greater momentum and confidence since of late. The following pages will be devoted to tracing and analysing that development. The cases covered in this article will be dealt with under four sub-headings of preventive detention, employment, interpretation of privative clauses, and public authorities' liabilities. It must be noted that this article only focuses selectively on the positive aspects of the development referred to.

I. PREVENTIVE DETENTION

There has been rather significant case law development in the area of preventive detention. The courts have always justified their intervention in this area by holding steadfastly to the policy that preventive detention laws must be strictly construed and the detaining authority must comply with all the mandatory procedural and technical requirements of the

1 [1988] 2 MLJ 12, SC. This case sounded the death knell to public interest litigation in this country.

laws with extreme regularity. Any procedural or technical impropriety will render the order of detention liable to be quashed or declared null and void. It has often been reiterated that the power to detain an individual must be expressed in clear and unequivocal language. Any detention not in accordance with the law is inconsistent with the fundamental liberty guaranteed under Article 5(1) of the Federal Constitution and the detainee is entitled to be set at liberty forthwith.

A few cases will suffice to illustrate the propositions adverted to and emphasised above. In *Rajoo* v *IGP & Ors*,[2] the Supreme Court held that Article 151(1)(b) of the Federal Constitution did not empower the Yang di-Pertuan Agong to allow an extension of time for the Advisory Board to consider the representations made by the detainee against his detention and make recommendations thereon to the Yang di-Pertuan Agong after the prescribed time period had expired because of the absence of section 39[3] of the Interpretation and General Clauses Ordinance 1948 from the 11th Schedule to the Constitution. In *Lee Weng Kin* v *Menteri Hal Ehwal Dalam Negeri & Ors*,[4] the Supreme Court emphasised that an unsigned order which was not authenticated or certified to be a true copy of the order signed by the Minister was not a copy of the Minister's order as required under the law.[5] In *Puvaneswaran* v *Menteri Hal Ehwal Dalam Negeri, Malaysia*,[6] the detaining authority failed to serve the requisite number of forms on the detainee immediately upon his being taken into custody. The High Court categorised this breach as a mandatory procedural defect. The court took the opportunity to lay down the test for determining a mandatory procedure - a mandatory procedure is one which is vital and goes to the root of the matter considering its importance and relation to the general object intended to be secured thereby, in which case it is mandatory and any non-compliance therewith cannot be condoned.[7]

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2 [1990] 2 MLJ 87.

3 This provision specifically allows an extension of time even though the application for an extension of time is made after the prescribed time period has expired.

4 [1991] 2 MLJ 472. See also *Sukumaran s/o Sundram* v *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor & 6 Other Cases* [1995] 3 CLJ 129. In *Sukumaran*, the Deputy Minister purportedly signed and issued some detention orders on the satisfaction of the Minister. The High Court held that the Deputy Minister must in exercising his function under the law act as a whole. He could not act partially on behalf of the Minister.

5 Restricted Residence Enactment 1933.

6 [1991] 3 MLJ 28.

7 This test has since been affirmed by the Supreme Court in *Aw Ngoh Leang* v *IGP & Ors* [1993] 1 MLJ 65.

Despite the presence of an elaborate privative clause in each preventive detention statute[8] and the oft-cited proposition that the subjective satisfaction of the Minister cannot be the subject of curial scrutiny, the Malaysian courts have nevertheless permitted a partial application of the substantive *ultra vires* doctrine to preventive detention cases. It is possible to attack the validity of a detention order by virtue of the fact that the ground of detention specified in the order is not within the scope of the preventive detention statute. In *Re Tan Sri Raja Khalid bin Raja Harun*,[9] the Supreme Court held that a corrupt ex-bank director could not be detained under the Internal Security Act 1960 on the ground that he posed no threat to the security of the Federation or any part thereof. Undue delay in the issue of an order is also a ground for vitiating the order for the reason that undue delay in the exercise of a power constitutes an abuse of discretion.[10] Acting mechanically or non-application of mind has also been used successfully by detainees in getting detention orders quashed or declared null and void. Stating two grounds of detention disjunctively in the detention order is objectionable on the ground of acting mechanically or non-application of mind.[11] It is also non-application of mind for a designated officer to transmit a report received by him under section 3(2)(b) of the Dangerous Drugs (Special Preventive Measures) Act 1985 to the Minister forthwith without considering at all whether he should or not transmit the report.[12]

Given more time, it is sincerely hoped that the courts will apply the whole of the extended *ultra vires* doctrine to preventive detention cases because theoretically there is nothing in law to prohibit such an extension.

II. EMPLOYMENT

Case law development in the area of public employment, in particular, has also added new dimensions to Administrative Law.

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8 For example, s 8B(1) of the Internal Security Act 1960.
9 [1988] 1 MLJ 182.
10 *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* v *Liau Nyun Fui* [1991] 1 MLJ 350, SC.
11 *Lim Thian Hok* v *Minister of Home Affairs & Anor and other applications* [1993] 1 MLJ 214, HC.
12 *Yap Hai Sing* v *Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1995] 3 AMR 2120.

Rohana & Anor v *USM*[13] initiated the concept of procedural fairness in disciplinary proceedings. In that case, the High Court quashed the disciplinary decisions made against two employees of Universiti Sains Malaysia on the grounds of personal bias, failure to allow pre-hearing discovery of evidence and documents in the possession of the Disciplinary Authority, coaching witnesses what to say in the hearing and substantive *ultra vires*. The Court also held that in certain cases there might be a duty on the part of the administration to provide reasons for its decisions.

In *Puspadewi Singam* v *UM*,[14] the High Court declared null and void the decision of the University of Malaya to medically board out an employee who had a long history of illness and medical leave. The Court did so on, *inter alia*, the ground that the Medical Board had committed an error in law in recommending to the University to board out an employee when the medical opinions sought did not certify that the employee was sick and unfit to work. The Medical Board, it was held, had committed an error of law in that it had arrived at a decision which no reasonable tribunal would have made.[15]

The High Court in *Syed Mahadzir bin Syed Abdullah* v *Ketua Polis Negara & Anor*[16] insisted for the first time that natural justice applied to a case of compulsory retirement on medical grounds under section 10(5)(a) of the Pensions Act 1980. The Court categorised the function of the Medical Board under section 10(5)(a) as quasi-judicial in nature and emphasised that it had adverse consequences on the affected officer. Hence, compliance with the rules of natural justice was necessary as in dismissal cases. As the Medical Board in that case had not complied with the rules of natural justice in the process of boarding out the affected officer, his employment had, therefore, not been validly terminated.

The High Court in *Re Sarjit Singh Khaira*[17] quashed the decision of the Sarawak State Public Service Commission to dismiss an employee on the ground that there was no basis for the dismissal. The applicant

13 [1989] 1 MLJ 487.
14 [1991] 2 AMR 41:3035.
15 The Supreme Court affirmed the decision of the High Court on appeal. The decision, however, was unreported.
16 [1994] 3 MLJ 391.
17 [1995] 3 MLJ 112.

in that case was a public officer in Sarawak. He was purportedly transferred by the State Secretary who did not possess the power to do so because the said power was vested by law in the State Public Service Commission. The applicant refused to obey the transfer order and he was dismissed by the State Public Service Commission on the ground that he had refused to obey a lawful order contravening Order 69 of the General Orders. The High Court quashed the dismissal on the ground that the purported transfer order was unlawfully issued and applicant's refusal to obey it was, therefore, not a contravention of Order 69. As the applicant committed no breach of discipline, there was accordingly no basis for the purported disciplinary action. The Court further held that an unlawful transfer order could not subsequently be validated by the State Public Service Commission by way of delegation of power under the Sarawak State Constitution.[18]

Case law has hitherto established a general rule that failure to accord an oral hearing in disciplinary proceedings against a public officer under General Order 26(4)[19] of the General Orders, Chapter D would not affect the validity of the proceedings so long as the statutorily prescribed procedure is observed.[20] The procedure referred to only required that the officer disciplined be given an opportunity to make written representations after which the Disciplinary Authority could proceed to decide on the question of dismissal. The statutory procedure was silent on the question of oral hearing.[21] In *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman* v *Setiausaha Suruhanjaya Pasukan Polis & Ors*,[22] the Court of Appeal advanced the law slightly further by holding that cases may arise where, in the light of peculiar facts, the failure to afford an oral hearing may result in the decision arrived at being declared a nullity or quashed. This ruling may have far-reaching consequences in that other procedural rights may be similarly implied not only in the context of disciplinary proceedings against public officers but also those of employees of statutory bodies.

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18 In that case, the State Public Service Commission had also purportedly delegated the power to transfer to the State Secretary after he had issued the transfer order unlawfully.

19 Now reg 28(3), Public Officers (Conduct and Discipline) Regulations 1993.

20 *Najar Singh* v *Government of Malaysia* [1976] 1 MLJ 203; *Ghazi bin Mohd Sawi* v *Mohd Haniff bin Omar* [1994] 2 MLJ 114.

21 So is the current regulation under reg 28(3), Public Officers (Conduct and Discipline) Regulations 1993.

22 [1995] 1 MLJ 308.

The Court of Appeal has recently applied its creative ingenuity in interpreting in Articles 5 and 8 of the Federal Constitution in *Tan Tek Seng* v *Suruhanjaya Pendidikan & Anor.*[23] First, it gave a broad and liberal meaning to the word 'life' in Article 5 to include the right to livelihood. Secondly, it observed that the combined effect of Articles 5 and 8 guaranteed fair procedure and also a fair and just punishment. In the light of this interpretation, the institution of disciplinary proceedings against a public officer has to observe procedural fairness and the doctrine of proportionality besides complying with the hearing requirement of Article 135(2). It is very likely that procedural fairness, in particular, may be extended to all rights protected under the Constitution in the near future.[24]

In another equally important recent case, *Hong Leong Equipment Sdn Bhd* v *Liew Fook Chuan*,[25] the Court of Appeal again invoked Articles 5 and 8 as the fountain of procedural fairness by imposing a duty to provide reasons upon decision-makers. That case involved an industrial dispute which was brought to the attention of the Minister under the Industrial Relations Act 1967. Under section 20(3), the Minister has a discretion of referring the dispute to the Industrial Court for an award. One of the questions raised was whether the Minister was under a duty to give reasons for not referring a dispute to the Industrial Court. On this issue, the Court observed at pages 536 and 537 that:

> ... as a general rule, procedural fairness, which includes the giving of reasons for a decision, must extend to all cases *where a fundamental liberty guaranteed by the Federal Constitution is adversely affected*[26] in consequence of a decision taken by a public decision-maker. Whether a particular right is a fundamental liberty, and therefore falls within the wide encompass of any of the articles under Pt II of the Federal Constitution is a question that has to be dealt with on a case by case basis. Suffice to say that the instant appeals are concerned with a fundamental liberty.[27]

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23 [1996] 1 MLJ 261.

24 As this is a very moot and substantial contention, the writer does not wish to elaborate on this point in this article.

25 [1996] 1 MLJ 481.

26 Emphasis added to indicate the scope of the duty imposed.

27 The Court in this case also took the opportunity to clarify that under our law there are two avenues available to a litigant to apply for mandamus. The said remedy may either be obtained under the Specific Relief Act 1950 or the Rules of the High Court 1980.

III. INTERPRETATION OF PRIVATIVE CLAUSES

The Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd* v *Transport Workers' Union*[28] favoured the proposition that the esoteric dichotomy between an error of law and an error of jurisdiction be discarded for the purpose of reviewing the decisions of inferior tribunals in the face of an ouster or privative clause. According to the Court, the decision of an inferior tribunal or any other public decision-making authority is reviewable on the ground of an error of law. The following pronouncements of the Court will be of great interest to administrative lawyers:

> An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision-taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded, where resort is had to an unfair procedure ..., or where the decision reached is unreasonable, ...
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> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an *Anisminic*[29] error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.
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> Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunized from judicial review by an ouster clause however widely drafted.
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> It follows ... that the decision of the Board in *Fire Bricks*[30] and all those cases approved by it are no longer good law.[31]

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28 [1995] 2 MLJ 317, CA.

29 The full citation of the case of *Anisminic* referred to in the passage quoted is *Anisminic Ltd* v *Foreign Compensation Commission* [1969] 2 AC 147.

30 *South East Asia Fire Bricks Sdn Bhd* v *Non-Metallic Mineral Products Manufacturers' Employees Union & Ors* [1980] 2 MLJ 165. The Privy Council in this case perpetuated the error of law and error of jurisdiction dichotomy.

31 [1995] 2 MLJ 317, 342.

The aforesaid rulings[32] of the Court of Appeal were cited with approval, *albeit* strictly *obiter*, by the Federal Court in *Hoh Kiang Ngan* v *Mahkamah Perusahaan Malaysia & Anor.*[33] This approach has been keenly awaited by administrative lawyers. If it is adopted and affirmed *per curiam* by the Federal Court in the near future, the interpretation of ouster or privative clauses will then become a simple task, *viz*, no ouster or privative clauses can exclude judicial review if an inferior tribunal has committed an error of law howsoever widely drafted they may be. The new approach will also lead to an expansion of the scope of judicial review over the decisions of inferior tribunals. In the light of this development, the decisions of inferior tribunals made in the course of inquiry may still be open to review on two grounds, *viz*, errors of law and the no evidence rule.

IV. PUBLIC AUTHORITIES' LIABILITIES

In *Penang Development Corporation* v *Teoh Eng Huat & Anor*,[34] a statutory corporation empowered by law and under a duty to construct and sell dwelling houses sought to escape contractual liability arising from the late delivery of a house by relying on the defences of *ultra vires* and illegality. The corporation pleaded that the contractual provisions regarding the delivery of vacant possession and payment of damages for late delivery of vacant possession were *ultra vires* certain laws[35] and illegal. Both the High Court and the Supreme Court rejected the defences primarily on the ground that the business venture entered into by the corporation was something which it was empowered by law and under a duty to enter into. This case is significant in that a statutory corporation set up by the Government to enter into business ventures cannot escape contractual liability by pleading public law defences if it has committed a breach or breaches of contract .

32 Save for the last para.
33 [1995] 3 MLJ 369, 390.
34 [1992] 2 MLJ 97.
35 The enactment setting up the corporation and the Housing Developers (Control and Licensing) Rules 1970. The latter contained provisions regarding the time during which vacant possession must be delivered and payment of damages for late delivery of vacant possession.

In a very recent case, *Tropiland Sdn Bhd* v *Majlis Perbandaran Seberang Perai*,[36] the High Court in an application for judicial review included an award of damages against a local authority for committing an *ultra vires* action maliciously. The Court held that a claim for damages may be included in an application for judicial review. Such a claim can only be made in addition to a claim for prerogative remedies or declaration or injunction. Damages can only be awarded provided that an authority has manifestly and gravely disregarded the legal limits on the exercise of its powers with resultant loss, in which case damages is the logical remedy for the loss caused by the unlawful administrative action.[37] It must be admitted that the award of damages against a public authority in an application for judicial review is unprecedented in this country and is most welcomed in a common law system in which the courts are by tradition most reluctant to award damages against the administration.

V. CONCLUDING REMARKS

In the light of the foregoing brief discussion, it is obvious that the Malaysian Administrative Law has taken rather significant strikes particularly in the last couple of years. Administrative lawyers can now feel the pulse and pangs of metamorphosis taking place in the arena of Administrative Law. The pace of development is gathering more momentum and getting more exciting. Perhaps, what lies ahead of us may be even more exciting. In this context, it may be pointed out here that a few areas of our law are still rather antiquated or unsatisfactory and, therefore, need to be reviewed. In particular, it is sincerely hoped that the rule as to *locus standi* in public interest litigation could be made more liberal so as to enable "public spirited citizens to vindicate the rule of law and get unlawful action stopped"[38] in an appropriate application for judicial review of the legality of an administrative action. Perhaps, it is also time to rethink whether we want to seriously promote the

36 [1996] 4 MLJ 16.

37 Authorities cited and relied upon are: Clive Lewis, *Judicial Remedies in Public Law*, 1992; Wade, *Administrative Law*, 6th ed., 1988; Carol Harlow, *Compensation and Government Torts*, 1982; M Taggart, *Judicial Review of Administrative Action in the 1980s*.

38 The oft-cited dictum of *IRC* v *National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.

proposition of the Federal Court in *Pengarah Tanah dan Galian, WP* v *Sri Lempah Enterprises Sdn Bhd*[39] that *"[e]very legal power must have legal limits"*[40] as a rule of general application to all discretionary powers without any exception. In other words, in a system based on the Rule of Law, all discretions, howsoever wide they may be, must be open to judicial review.

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39 [1979] 1 MLJ 135 at 148.

40 Emphasis added to indicate that this is a cardinal aspect of the Rule of Law which forms the basis of our system. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene.