KNOWLEDGE & INSIGHTS

The Invocation of the Review Jurisdiction of the Federal Court of Malaysia & The Incumbent is not the Office

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INTRODUCTION

Rule 137 of the Rules of the Federal Court 1995[1] recognises the Federal Court of Malaysia's ("***Federal Court***") inherent power to *inter alia* review previous decisions in order to prevent an injustice or an abuse of process. Over the years, this rule has been resorted to by litigants where they find themselves unable to ground an application on an express rule in the Rules of the Federal Court 1995. Rule 137 has been mostly utilised to set aside decisions handed down by the Federal Court.

This article seeks to examine the recent decision of the Federal Court in *Yong Tshu Khin & Anor v Dahan Cipta Sdn Bhd & Anor and other appeals*[2].

At the outset, disclosure is made that our Tan Sri Dato' Cecil Abraham, Mr. Rishwant Singh and Dato' Sunil Abraham have appeared as counsel in a number of the cases cited in this article, the majority of which have been to oppose attempts to review a decision of the Federal Court save in *Chia Yan Tek v Ng Swee Kiat*.[3]

SCOPE OF RULE 137 OF THE RFC

The Rules of the Federal Court 1995 ("**RFC**") is subsidiary legislation and came into force on 24th June 1994. The RFC was enacted pursuant to sections 16(a) and 17 of the Courts of Judicature Act, 1964.[4]

Rule 137 of the RFC ("**Rule 137**") reads as follows:

> "*Inherent powers of the Court*
>
> 137. *For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.*"

[1] PU (A) 376/1995.
[2] [2020] MLJU 1983.
[3] [2001] 4 CLJ 61.
[4] Act 91.

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A plain reading of Rule 137 appears to confer upon the Federal Court a wide power to reopen, rehear and re-examine its previous decisions, judgements, or orders on its merits in order to prevent injustice and/or abuse of the process of the court.

The first ever review application that was brought before the Federal Court was in *Chia Yan Tek v Ng Swee Kiat*.[5]

THE DAWN OF THE REVIEW APPLICATION – CHIA YAN TEK V NG SWEE KIAT

On 19th December 2000, the then Chief Justice of the Federal Court of Malaysia ("***Chief Justice***") was due to retire. There was one particular decision of the Federal Court that was due before he retired and, on that day, the Chief Justice signed a document which was to be his decision. That decision was to be read out in open Court. The other two Judges of the Federal Court intimated their concurrence with the Chief Justice's decision, and, with that, the decision of the Chief Justice was to be the decision of the Federal Court. This having been done, the Deputy Registrar was instructed to write to the solicitors for the parties and to fix 22nd December 2000 for the Federal Court to pronounce judgement. At the end of the day on 19th December 2000, the then Chief Justice retired having reached the constitutionally mandated age of retirement.

By 22nd December 2000, the day when the Federal Court was to pronounce judgement, another Judge of the Federal Court had also retired. As such, come 22nd December 2000 when the Deputy Registrar was to pronounce judgement in open court, there was only one of the original panel of three Judges who was still a Judge of the Federal Court. The remaining two, including the then Chief Justice, had retired and, as such, were no longer serving Judges of the Federal Court.

On 22nd December 2000, the Deputy Registrar of the Federal Court pronounced the brief decision of the Federal Court in the presence of solicitors and counsel for the parties. The appeal was allowed. No grounds were given. The Order that was drawn up reflected the date 22nd December 2000. All three judges were reflected in the Order as constituting the coram on that day.

The respondent, having not succeeded, challenged the decision of the Federal Court. This was in the year 2000 when they were no Malaysian decisions which supported such a novel proposition: The setting aside of a decision of the apex court. As it turned out, the application was primarily based on the inherent jurisdiction of the Federal Court as confirmed in Rule 137. Such an application was unprecedented and entirely novel in Malaysia at the time.

The applicant/respondent cited four (4) other authorities to support this novel application: *section* 78(1) *Courts of Judicature Act*, 1964; *Rule* 63 *Rules of the Federal Court* 1995; the decision of the court of criminal appeal in Singapore of *Ramachandran a/l Suppiah v PP*[6] and a decision of the Supreme Court of India in *Surendra Singh & Ors v State of Uttar Pradesh*.[7]

[5] [2001] 4 CLJ 61.
[6] [1992] 2 SLR 707.
[7] AIR 1954 SC 194.

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After hearing argument, the Federal Court allowed the review application and, for the first time, set aside its earlier decision. The Federal Court ordered the appeal to be re-heard before a different panel. In so doing, the Federal Court held, for the first time (following the decision of the Supreme Court of India), that judgements of our courts take effect from the date of pronouncement in open court in the presence of parties and members of the public. A judge must remain a judge of the court in question at the time of pronouncement of judgement in open court.

With this judgement, it became clear that a judge having reached a decision in the quiet of his/her chambers, after studying the papers and the evidence, and having fixed a date for parties to be present in open court, was, so to speak, entitled to change his/her mind at any time before pronouncement of the decision in open court.

In reaching this decision in 2001, the Federal Court created precedent and set the stage for the very many challenges to its decisions in the years to come. As of 2020, the law reports in Malaysia are replete with decisions of the Federal Court (including the Court of Appeal, where it is the final court of appeal) pertaining to its review jurisdiction.

BROAD CATEGORIES PERMITTING REVIEW

In the roughly two decades that have passed since the decision of *Chia Yan Tek v Ng Swee Kiat*, the Federal Court has more or less settled the law on review applications. An applicant must show a substantial or serious miscarriage of justice and that the impugned decision falls within one of the following established categories[8]:

(a) where there was coram failure;

(b) where the decision had been obtained by fraud or suppression of material evidence;

(c) where there was a clear infringement of statutory law (to be contrasted with an alleged misinterpretation or mis-application of the law);

[8] See *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 MLJ 385; MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun [2002] 2 MLJ 673; Dato' Seri Anwar bin Ibrahim v PP [2004] 3 MLJ 517; Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd and another application [2005] 3 MLJ 1; Chan Yock Cher v Chan Teong Peng [2005] 4 CLJ 101; Adorna Properties Sdn Bhd v Kobchai Sosothikul [2006] 1 MLJ 417; Joceline Tan Poh Choo & Ors v V Muthusamy [2007] 6 MLJ 485; Tan Sri Eric Chia Eng Hock v PP (No 1) [2007] 2 MLJ 101; Chu Tak Fai v Public Prosecutor [2007] 1 MLJ 201; Abdul Ghaffar bin Md Amin v Ibrahim bin Yusof [2008] 3 MLJ 771; Sia Cheng Soon v Tengku Ismail bin Tengku Ibrahim [2008] 3 MLJ 753; Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 6 CLJ 1; Anantha Kiruisan RSR @ Anantha Krishnan v Teoh Chu Thong [2008] 4 MLJ 559*, *Badan Peguam Negara v Kerajaan Malaysia [2009] 2 MLJ 161*; *Raja Petra Raja Kamarudin v Menteri Dalam Negeri [2010] 4 CLJ 25; Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No. 3) [2010] 2 MLJ 141; Dato' Seri Anwar Ibrahim v Public Prosecutor [2010] 7 CLJ 397*; *Dato' Abu Hasan Sarif v Dato Dr Abdul v Dato' Dr Abd Isa Ismail [2012] 2 MLJ 429; Amalan Tepat Sdn Bhd v Panflex Sdn Bhd [2012] 2 MLJ 168; Bellajade Sdn Bhd v CME Group Bhd & Another Application [2019] 8 CLJ 1; Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications [2013] 4 MLJ 351; Dato' Seri Anwar bin Ibrahim v Public Prosecutor [2014] 3 MLJ 774; Halaman Perdana Sdn Bhd & Ors v. Tasik Bayangan Sdn Bhd [2014] 3 CLJ 681; Dato' Seri Anwar bin Ibrahim v Public Prosecutor [2017] 1 MLJ 273; Kerajaan Malaysia v Semantan Estates (1952) Sdn Bhd [2019] 2 MLJ 609; TR Sandah Ak Tabau & 7 Ors v Director of Forests, Sarawak & Anor [2019] 10 CLJ 436.*

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(d) where an application for review had not been heard but, through no fault of any party, a court order was inadvertently entered as though the application had;

(e) where court bias can be shown;

(f) where the integrity of a court's decision has been critically undermined;

(g) where the court completely failed to understand a clearly articulated point;

(h) where the court orders an appeal to be allowed when it actually means to dismiss; and

(i) where it can be demonstrated that the judge read the wrong papers.

The list is not exhaustive. It is clear that the categories justifying review are neither fixed nor closed. New cases and novel circumstances will, undoubtedly, arise from time to time, and, therefore, the reader will have to watch the space, so to speak.

However, the jurisdiction is, as clearly stated in many decisions of our Federal Court, to be exercised sparingly and in clearly exceptional cases. What is also very clear is that a review does not lie where the reviewing party questions the decision of a court on its merits. Admittedly, this would have to be read with the list set out above.

THE CURRENT POSITION – YONG TSHU KHIN & ANOR V DAHAN CIPTA SDN BHD & ANOR AND OTHER APPEALS[9]

There is no better decision to exemplify the large number of review applications that have been filed over the years than the seven review applications that recently came up and were heard together before the Federal Court on 19th August 2020. The Federal Court rendered a single judgement in these seven review applications on 30th November 2020.

Our Tan Sri Dato' Cecil Abraham and Mr. Rishwant Singh appeared as counsel for the successful respondents in five of the seven review applications.

All seven review applications involved one main point: coram failure. All the applicants took the point that the person occupying the offices of the immediate past Chief Justice and/or President of the Court of Appeal suffered some constitutional defect in their appointment. Accordingly, this impaired either (i) the constitution of the bench that heard the appeals or the applications for leave to appeal; and/or (ii) the decisions rendered in said appeals or leave applications.

In resisting the review applications, the respondents drew the Federal Court's attention to the fact that the constitutionality (or otherwise) of the appointment of the judges in question to the offices of Chief Justice and President of the Court of Appeal were matters of some public debate. The legal fraternity was

[9] [2020] MLJU 1983.

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well aware of (and to an important extent, participated in this debate). Certainly, counsel who appeared either before the Federal Court presided over by the then Chief Justice or the then President of the Court of Appeal were well aware of the competing points of view on the question of the constitutionality of the said appointments. One had, in fact, issued various press statements on the subject. For reasons that were not addressed in argument or affidavit, these points were neither brought up at case management before or during the hearing of the appeals or the leave applications before the Federal Court. These points were only raised once the appellants/applicants found themselves unsuccessful.

After hearing arguments, the Federal Court held that these arguments need not be considered. It held that the *de facto* doctrine was a sufficient answer to the points advanced by the applicants.

THE APPOINTMENTS

The question that arose as to the appointment of the two persons who occupied the offices of Chief Justice and President of the Court of Appeal was, briefly as follows. The former Chief Justice, when he was shortly due to retire, advised the King that upon his successor's retirement as Chief Justice, that his successor be appointed an Additional Judge of the Federal Court and, thereafter, be further appointed as Chief Justice for a period of three years. Similar advice was given insofar as the then President of the Court of Appeal was concerned but for a shorter period: two years. The King accepted this advice and consented to said appointments. This had never been done and hence gave rise to discussion as to its constitutionality.

The person who occupies the office of Chief Justice determines the members of the Federal Court who sit to hear matters. If the Chief Justice is present at a hearing, he/she presides. The President of the Court of Appeal is the second most senior Judge of the Malaysian superior courts and determines the members of the Court of Appeal who sit to hear any appeal. If the Chief Justice administratively empanels the President of Court of Appeal to sit in the Federal Court, the President of the Court of Appeal presides in the absence of the Chief Justice.

THE APPLICANTS' ARGUMENTS

The applicants in the seven review motions took issue with the appointments of the Chief Justice and President of the Court of Appeal. They argued that the appointments were unconstitutional and, therefore, these persons were not Judges and could not exercise the powers that came with the offices. As such in an instance where the Chief Justice had delivered the decision of the Federal Court, said decision was not, constitutionally, a decision of the Federal Court. In other cases where the Chief Justice had empaneled judges to sit and hear matters in the Federal Court, that administrative decision was not his to make for the same reason. In either case, the decisions rendered by the Federal Court was liable to be set aside.

In two of the seven motions, the President of the Court of Appeal had in fact retired when the decision of the Federal Court was read out in open court. The President of the Court of Appeal had, however, written grounds for his decision in which he had dissented from the majority. This decision was adopted and read out by the other minority Judge. The decision of the Federal Court, therefore, was 3:2 in the respondents' favour.

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The applicants applied to set aside the majority judgement on the basis that although in the minority, the decision of the President of the Court of Appeal was nevertheless a decision of the Federal Court and this tainted the entire judgement of the Federal Court, both majority and minority.

THE DE FACTO DOCTRINE

To fully appreciate the doctrine, one must bear in mind the distinction between the person and the office. The office, in this case, is that of the Chief Justice of the Federal Court and the President of the Court of Appeal. These offices are creatures of the Federal Constitution. An office exists whether or not a person has been appointed to fill that office. Once this is appreciated, the distinction between the office *per se* and the person who is appointed to that office becomes clear.

The *de facto* doctrine is a creature of the common law. It has been applied by the courts of the United Kingdom, the United States, New Zealand, Australia, India and even in Malaysia. In one decision of the American courts, the doctrine has been traced back to the 14th century.

There are two limbs to the doctrine. The first is that a decision of a judge is not to be challenged collaterally. Stated simply, a dispute between parties cannot descend into a dispute as to the judge's lawful occupation of his seat as a judge. If the appointment of a judge is to be challenged, it ought to be challenged in proceedings specifically brought for that purpose. And the judge should be a named party to those proceedings. In *Yong Tshu Khin & Anor v Dahan Cipta Sdn Bhd & Anor and other appeals*[10], the former Chief Justice and the former President of the Court of Appeal were not named parties to the seven review applications. It would appear, therefore, that in the seven review applications, the parties had descended to attacking the appointment of the immediate past Chief Justice and President of the Court of Appeal as a ground to re-litigate the dispute.

The second limb to the doctrine is, where the first limb is satisfied and the appointment of the judge is held to be invalid in such direct proceedings, the decisions taken by the judge whilst in office are nevertheless saved. The reasoning is that so long as the judge in question was appointed under colour of some lawful authority (in this case, having been appointed by the King on advice) the judge's actions and decisions may be saved even if the appointment is later found invalid.

As an aside, it should be noted that the appointment of the past Chief Justice and the past President of the Court of Appeal have not been found invalid by any court of competent jurisdiction at this point in time.

The Federal Court examined the *de facto* doctrine and past decisions of the English, Indian and American courts that had occasion to apply it. These courts examined the doctrine and found that the need for the doctrine was necessitated by public policy. A judge may have his title impeached only after some time has passed. During this time, the judge may have heard civil and criminal matters and reached decisions that have been put into effect. Are those decisions and convictions to be set aside? And at what cost to society, the public interest, the public purse and certainty in judicial administration and decision-making?

[10] [2020] MLJU 1983.

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Decisions of the Indian courts state that the doctrine was engrafted as a matter of public policy and necessity. It served to protect the public interest and individuals involved in *bona fide* official acts where such persons exercised duties of an officer without actually being such an officer, strictly, in point of law. The *de facto* doctrine states that although this person's appointment as a public officer is not recognised *de jure* (that is, in law) by virtue of the particular circumstances, these persons are nevertheless officers in fact. Hence, the *de facto* doctrine. The decisions and acts performed in such office, therefore, are such which public policy requires that the law considers valid––where performed *bona fide*.

The last point for consideration is whether the *de facto* doctrine has application to appointments to a constitutional office. The applicants in the two *Faithmont Estates* review applications[11] argued that the doctrine may well save statutory appointments, but they could not save constitutional appointments. The Chief Justice and President of the Court of Appeal were constitutional offices. This argument was given short shrift because it was uncontroversial that the Supreme Court of India had, on at least one occasion, applied the doctrine to a judicial appointment that was provided for under the Constitution of India.

The legal effect of a dissent

The last important decision that the Federal Court had to make was whether the action of the dissenting judge adopting the 'judgement' of the then retired President of the Court of Appeal invalidated the decision of the entire Federal Court. The Federal Court confirmed that as a matter of general law, minority judgements do not have the force of law. In this case, the minority judgement did not affect the validity of the majority judgement. As a matter of statutory law, the majority judgement conveyed the decision of the Court and the matter ended there.

COST CONSIDERATIONS

For many years, many a failed applicant (for leave to appeal to the Federal Court) or an appellant (in an appeal before the Federal Court) has almost invariably applied for a review of the adverse decision–– almost as if a review was a third tier of appeal. Going by past decisions, a dismissal of a review application generally attracted an order of costs in the range of RM10,000 to RM30,000.

In *Bellajade Sdn Bhd v CME Group Bhd and another appeal*[12], the Federal Court allowed a review application based on coram failure. The majority judges of the Federal Court, in the appeal, had purported to adopt grounds of judgement written by the same President of the Court of Appeal (who had retired by the time a decision was pronounced by the remaining Judges in open court). The decision of the Federal Court was, we submit, correctly set aside. The party who opposed the review application (who was unsuccessful) then applied to review the Federal Court's decision to review. This second review was dismissed. The author is given to understand that when it came to the subject matter of costs (for the review of the review order), the respondent sought a figure of RM20,000 as costs. The Federal Court, of its own motion, awarded RM100,000 in costs.

[11] The said review applications are referred to and reported in *Yong Tshu Khin & Anor v Dahan Cipta Sdn Bhd & Anor and other appeals* [2020] MLJU 1983.
[12] [2019] 8 CLJ 1.

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In another review application that was dismissed by the Federal Court on 12th March 2020 involving a challenge to the Sultanate of Terengganu,[13] the failed applicant, Tengku Sulaiman bin Tengku Halim was ordered to pay costs of RM100,000. The Federal Court had initially offered the respondents costs in the sum of RM300,000 each but this was reduced after taking into account the applicant's plea of impecuniosity.

In *Yong Tshu Khin & Anor v Dahan Cipta Sdn Bhd & Anor and other appeals*,[14] the three successful respondents sought RM300,000 for each of the three review applications. They (*i.e.*, principally Dahan Cipta Sdn Bhd, N. Letchumanan and MMCE Properties Sdn Bhd) were awarded RM100,000 each. In the related two review applications involving Faithmont Estates Sdn Bhd, the Federal Court awarded RM50,000 for each of the two review applications.

COMMENTARY

Arising from the latest decision of the Federal Court in *Yong Tshu Khin & Anor v Dahan Cipta Sdn Bhd & Anor and other appeals*[15] it is clear that the Federal Court has now closed the controversy in so far as challenges to the appointments of the past Chief Justice and President of the Court of Appeal are concerned. At the same time, the Federal Court has re-adopted the restrictive approach to review applications subject to the broad categories discussed above. This re-statement of the approach to review applications being limited to clearly exceptional cases appears to have been borne out by the significant increase in review applications that have been filed over the years by unsuccessful parties in the Federal Court.

As such, if it was not clear before, it should now be clear that unless the case has clear merits and is clearly exceptional, the Federal Court's first consideration is the importance of the public policy principle of there being a need for finality in the litigation process. Rule 137 was not passed to merely prevent an injustice. It was passed to also avoid an instance of an abuse of court process. There is some degree of irony in the fact that the Federal Court has held that its review jurisdiction has been the subject of abuse by litigants. This is one explanation for the resulting large costs awards.

[13] Federal Court Review Application No. 08(R)-1-3/2019(T), *Tengku Sulaiman bin Tengku Halim v Tengku Muhammad Ismail Ibni Al-Wathiqu Billah Sultan Mizan Zainal Abidin*.
[14] [2020] MLJU 1983.
[15] [2020] MLJU 1983.

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