NATURAL JUSTICE AND THE CONSTITUTION: RECENT CASES FROM THE COURT OF APPEAL

I. INTRODUCTION

The doctrine of natural justice has long been a bulwark against the arbitrary exercise of administrative power. Since its modern rebirth with *Ridge* v *Baldwin*[1] in the 1960s the English common law courts have constructed a formidable body of case law defining the procedural constraints under which administrative power must operate. Built upon the concepts of *audi alteram partem* and *nemo judex in causa sua*, natural justice has evolved into a flexible doctrine that seeks to ensure procedural fairness in administrative decision-making. However embedded as it is in the British constitutional system, the doctrine is subordinate to the ultimate supremacy of the Parliament. Parliament may "by the use of apt but clear words" expressly dispense with elements of natural justice in specific instances.[2] Whether or not this renders the doctrine vulnerable to significant restriction by the legislative branch in the context of Britain's unique constitutional environment, the subordination of the doctrine to the legislature can be a concern in constitutional systems lacking the unwritten restraints prevailing in the United Kingdom.

Early in its legal development Malaysia embraced the doctrine of natural justice and over the years the Malaysian common law has incorporated

1 [1964] AC 40.
2 De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th Ed, 1995, p 475; Wade & Forsyth, *Administrative Law*, 7th Ed, 1994, p 570.

English developments in this area.[3] However in Malaysia, as in any legal system based on a written constitution, for a restraint on governmental power to have enduring vitality it must ultimately be grounded in the supreme law. Although firmly rooted in Malaysian common law, until quite recently the notions of procedural fairness that underlie the rules of natural justice had not been clearly defined in constitutional terms. That began to change in 1995 with a remarkable series of decisions by the newly created Court of Appeal. Those decisions and their impact on Malaysian constitutional and administrative law are the subjects of this article.

II. CASES

The foundation for what can perhaps be characterized as the emerging constitutional doctrine of administrative fairness was laid in early 1995 with the Court of Appeal's decision in *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman* v *Setiausaha Suruhanjaya Pasukan Polis & Ors.*[4]

The case concerned the dismissal of a police officer on charges of misconduct. The plaintiff, an assistant superintendent in the Royal Malaysian Police Force, was informed of the charges against him by letter from the secretary of the Police Services Commission. The charges were "most carefully framed and with utmost particularity, so that the plaintiff should have had no difficulty understanding their purport and in responding to them."[5] The letter gave the plaintiff an opportunity to respond which he did giving the commission a full explanation of his conduct. In his response he also requested access to certain official records and an oral hearing before an independent tribunal. The documents requested by the plaintiff were provided to him and shortly thereafter he submitted a further written response to the charges. The commission, however, did not act on his request for an oral hearing.

Some months later plaintiff was informed by letter of his dismissal. The letter stated that the Police Services Commission had considered plaintiff's explanations and "'serta lain-lain maklumat' (meaning, no doubt, other information relevant to the charges), in coming to its decision".[6] This

3 See *B Surinder Singh Kanda* v *The Government of the Federation of Malaya* [1962] MLJ 169; *Wong Kwai & Anor* v *President Town Council, Johore Bahru* [1970] 2 MLJ 164; *Mak Sik Kwong* v *Minister of Home Affairs Malaysia* [1975] 2 MLJ 168; *Ketua Pengarah Kastam* v *Ho Kwan Seng* [1977] 2 MLJ 152; *Rohana bte Ariffin & Anor* v *Universiti Sains Malaysia* [1989] 1 MLJ 487; and *Shamsiah bte Ahmad Sham* v *Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364.

4 [1995] 1 MLJ 308.

5 *Ibid* 313.

6 *Ibid* 313-314.

"other information" was not identified in the letter nor was there any evidence presented that it was ever disclosed to the plaintiff for his response. Plaintiff unsuccessfully challenged his dismissal in the High Court, alleging that the Commission's action violated his rights under article 135(2) of the Federal Constitution.

On appeal plaintiff raised two issues. Plaintiff's primary submission was that the Commission's failure to provide him an oral hearing on the charges violated article 135(2) of the Federal Constitution. His alternative argument was that he had not been given a reasonable opportunity to be heard because he had not been given an opportunity to comment on all the information that was subsequently used against him.

The plaintiff framed these issues in the traditional terminology of natural justice. The Court of Appeal, however, chose to recast his arguments. Instead of the rules of natural justice, the Court of Appeal considered the issues raised to be more appropriately described as involving procedural fairness. Suggesting themes that it was to return to in subsequent cases, the Court of Appeal observed that the notion of procedural fairness raised larger issues of constitutional dimension, particularly the impact of article 8(1) of Federal Constitution:

> At the heart of the plaintiff's primary submission lies the concept of procedural fairness in its widest application. I prefer the term 'procedural fairness' to the traditional nomenclature 'rules of natural justice'. It is a concept that includes but is not limited to the rules of natural justice. It is a very interesting area of the law. When I commenced writing this judgment, I was sorely tempted to deal with the full breadth of the argument advanced by counsel. It would have involved, amongst other matters, a historical examination of the concept of procedural fairness, a discussion on the effect upon administrative actions of the humanizing provisions of art 8(1) as explained by the Privy Council in *Ong Ah Chuan* v *PP* [1981] AC 648 at pp 670-671; [1981] 1 MLJ 64 at pp 70-71 and, of course, a consideration of the full impact of the landmark decision in *Dewan Negeri Kelantan & Anor* v *Nordin bin Salleh & Anor* [1992] 1 MLJ 697. It is, as I have said, a very interesting area of the law that has offered me much temptation to enter upon a discussion of it.[7]

As tempted as the Court of Appeal was, it left the analysis of the constitutional implications of procedural fairness for another day, choosing instead to deal with the issues raised by counsel within the framework of existing doctrine.[8]

---

7 *Per* Gopal Sri Ram JCA at 315.

8 The Court reasoned that under the facts of the case any discussion of the constitutional dimensions of procedural fairness would merely be obiter dicta: *ibid* 315.

Turning to plaintiff's submissions, the Court easily dispensed with plaintiff's primary contention. Relying on well-established precedent, the Court found that "the right to be heard does not in all cases include the duty to afford an oral hearing . . . "[9] And, while it acknowledged that there may be instances where the denial of an oral hearing may violate a litigant's right to be heard, this, the Court of Appeal found, was not such a case. On the contrary, the charges here were well drafted with full particulars and plaintiff was given sufficient opportunity to rebut the allegations made. In the Court's view, the plaintiff had not been prejudiced by the absence of an oral hearing.

Plaintiff's second argument the Court of Appeal found more compelling. Plaintiff contended that he had been denied his opportunity to be heard under article 135(2) because he had not been afforded the opportunity to comment on all the materials used against him. Relying on the Privy Council's decision in *B Surinder Singh Kanda* v *The Government of the Federation of Malaya*[10] and the more recent decision of the Supreme Court in *Shamsiah bte Ahmad Sham* v *Public Services Commission*,[11] the Court of Appeal concluded that "fair procedure includes the duty of an arbiter not to take into account matters that have not been first put to the accused and he given an opportunity to rebut or to comment upon the same".[12] Accepting plaintiff's submission on this point, the Court allowed the appeal and ordered plaintiff's reinstatement.

In the second case, *Tan Tek Seng* v *Suruhanjaya Perkhidmatan Pendidikan & Anor*,[13] the Court of Appeal in a majority decision[14] returned to the issue of procedural fairness and squarely addressed its relation to the fundamental freedoms enshrined in the Federal Constitution.

The appellant in this case was the headmaster of a primary school. He had been entrusted with RM$3,179, representing the unpaid salary of the school's gardener who had not reported for work for several months. Under existing regulations the appellant was obligated to return the money to the state education department. He did not do so. When asked for the money the appellant falsely told the department that he had already sent it back. Eventually appellant returned the money to the department.

---

9 *Ibid* 316; see also *Najar Singh* v *Government of Malaysia & Anor* [1976] 1 MLJ 203 and *Ghazi bin Mohd Sawi* v *Mohd Hanifff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114.

10 [1962] MLJ 169.

11 [1990] 3 MLJ 364.

12 *Supra* n 4 at 320.

13 [1996] 1 MLJ 261.

14 Gopal Sri Ram JCA joined by Ahmad Fairuz J, with NH Chan JCA dissenting.

Despite having returned the money, appellant was charged with criminal breach of trust by retention under section 409 of the Penal Code (FMS Cap 45). He was convicted by the Sessions Court and sentenced to six months imprisonment. Appellant appealed. The High Court upheld the finding of guilt but given what it considered to be extenuating circumstances the High Court exercised its authority under s 173A(ii) of the Criminal Procedure Code (FMS Cap 6) to set aside the conviction and punishment. Instead, it bound the appellant over on good behaviour for a period of three years on a bond of $5,000.

After the disposition of the criminal case, the State Education Department wrote to the Secretary of the Education Service Commission (the first respondent) and recommended that the appellant be demoted but continue in service. The Commission however did not accept the department's recommendation. Instead, treating the order of the High Court as a conviction, the Commission summarily dismissed appellant without affording him the opportunity to be heard. Appellant challenged unsuccessfully his dismissal in the High Court and this appeal followed.

Appellant raised two arguments: first, the Commission's decision to dismiss appellant without first affording him a hearing violated article 135 of the Federal Constitution; and second, under the circumstances of the case the Commission's decision to dismiss appellant rather than demote him was so harsh, unfair and unjust as to be unconstitutional.

Before addressing counsel's submissions directly the Court of Appeal propounded what it characterized as an overview of the law of procedural fairness in Malaysia and in so doing set a new course for Malaysian jurisprudence in administrative law.

Not surprisingly the Court of Appeal began by acknowledging the influence English case law on natural justice has had in Malaysia. It however quickly sought to distance itself from the common law doctrine, noting the fundamental gulf between the English doctrine developed without reference to a written constitution and that of Malaysia:

> English common law, which lacks the distinct advantage of a supreme law contained in a written constitution, has had to grope about in the dark and unlit passages of constitutional and administrative law, and undergo a rather slow and gradual development.....In my judgment, it is wholly unnecessary for our courts to look to the courts of England for any inspiration for the development of our jurisprudence on the subject under consideration. That is not to say that we may not derive useful assistance from their decisions. But we have a dynamic written constitution, and our primary duty is to resolve issues of public law by having resort to its provisions.[15]

15 *Per* Gopal Sri Ram JCA at 281.

Having established that issues of procedural fairness are questions of constitutional dimension, the Court turned to an exposition of the two provisions it considered relevant: articles 5(1) and 8(1).[16]

The Court began its analysis of article 8(1) by referring to the recent Supreme Court decision in *Dewan Undangan Negeri Kelantan & Anor* v *Nordin bin Salleh & Anor.*[17] In *Nordin* the Supreme Court established that the test of whether state action infringes a fundamental right is "whether that action directly affects the fundamental rights guaranteed by the Federal Constitution, or that its inevitable effect or consequence on the fundamental rights is such that it makes their exercise ineffective or illusory."[18]

The Court then turned to Indian case law and, in particular, the decision of the Indian Supreme Court in *Smt Maneka Gandhi* v *Union of India,*[19] a landmark in the development of Indian administrative and constitutional law.[20] In *Maneka Gandhi* the Indian Supreme Court addressed the relationship between the fundamental right to equality guaranteed by article 14 of the Indian Constitution and procedural fairness addressed, if not up to that point guaranteed, by article 21. The Indian Supreme Court eschewed the traditional approach of reasonable or rational classification which had been accepted equal protection doctrine and opted instead for a broader interpretation of article 14 emphasizing fairness and reasonableness as the essence of equality. The Court then employed the newly enunciated principle of reasonableness as the standard by which a procedure required by article 21 would be judged. As quoted by the Court of Appeal here, the Indian Court stated:

> Now, the question immediately arises as to what is the requirement of art 14: what is the content and reach of the great equalizing principle enunciated in this article? There can be no doubt that it

16 The articles provide:
5(1) No person shall be deprived of his life or personal liberty save in accordance with law.
8(1) All persons are equal before the law and entitled to the equal protection of the law.
In the past questions have been raised as to the interpretation to be given to the term 'law' used in these sections, in particular whether law included both substantive as well as procedure. (See *Karam Singh* v *Mentert Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129; *Re Tan Boon Liat @ Allen & Anor* [1977] 2 MLJ 108; *Ong Ah Chuan* v *PP* [1981] 1 MLJ 64; *S Kulasingam & Anor* v *Commissioner of Lands Federal Territory & Ors* [1982] 1 MLJ 204) The Court here interpreted law to include both substantive as well as procedural law.

17 [1992] 1 MLJ 697.

18 [1996] 1 MLJ 261, 283.

19 AIR 1978 SC 597.

20 See MP Jain, *Indian Constitutional Law*, 4th Ed, 1994, pp 474, 582-584.

> is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate here what was pointed out by the majority in *EP Royappa* v *State of Tamil Nadu* (1974) 2 SCR 348: AIR 1974 SC 555, namely, that 'from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and, arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that is unequal both according to political logic and constitutional law and is therefore violative of art 14'. Art 14 strikes at arbitrariness in State action and ensures fairnes and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades art 14 like a brooding omnipresence and the procedure contemplated by art 21 must answer the test of reasonableness in order to be in conformity with art 14. It must be 'right and just and fair' and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of art 21 would not be satisfied.[21]

Although acknowledging that reasonable or rational classification has formed the basis of equal protection doctrine in Malaysia as well,[22] the Court of Appeal in *Tan Tek Seng* felt compelled to accept this more expansive interpretation of equality:

> By reason of the decision of our Supreme Court in *Nordin's* case I do not think it is open to me to ignore the new approach to the construction of art 8(1). Indeed, it would be wrong, both on principle and authority, for me to stubbornly cling on to an archaic and arcane approach to the construction of art 8(1). I would therefore adopt the test suggested by the Supreme Court of India in *Maneka Gandhi* and apply it to the present case.[23]

Interestingly, the Court of Appeal does not make explicit the connection it sees between *Nordin's* case and the Indian approach to equal protection. Read literally, *Nordin* establishes a test that allows a court to determine whether state action infringes fundamental rights. It does not address the definition of fundamental rights themselves. The Court of Appeal, however, seems to be interpreting *Nordin* more broadly. It suggests that

---

21 [1996] 1 MLJ 261, 284.
22 See *Datuk Harun bin Hj Idris* v *PP* [1977] 2 MLJ 155.
23 *Ibid* 285.

Nordin can be taken as standing for the proposition that constitutional protections should be interpreted in a manner that best affords the chance that the exercise of the freedoms would be meaningful; in other words, an interpretation of the constitution that avoids rendering the fundamental rights "ineffective or illusory". Given that the art 8(1) is in pari materia with article 14 of the Indian Constitution, the Court of Appeal accepted the broader, more flexible scope afforded by the Indian case law as providing a better vehicle by which to realize the promise of equality underlying article 8(1).

The Court of Appeal also accepted the link between equality and procedural fairness made by the Indian court. Although cognizant of the difference in language between article 5(1) and article 21, it did not find that the inclusion of the word, "procedure" in article 21 and its absence in article 5(1) as representing any difference in principle.[24] Finding article 5(1) substantially the same as article 21 enabled the Court of Appeal to conclude, as the Indian Supreme Court had, that the effect of article 5(1) and 8(1) considered together was to render unconstitutional any procedure prescribed by law that would be "found to be arbitrary or unfair or the procedure adopted in a given case is held to be unfair."[25]

Of course, the protection granted by article 5(1) is limited to "life or personal liberty". As to the interpretation of the word "life", the Court of Appeal had surprisingly little trouble extending the concept to include more than mere existence and it readily accepted the more expansive interpretation found in Indian and American case law:[26]

> Adopting the approach that commends itself to me, I have reached the conclusion that the expression 'life' appearing in art 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society

---

24 Article 21 provides that 'No person shall be deprived of his life or personal liberty except according to procedure established by law.' The absence of the term 'procedure' in article 5(1) has been the basis for rejecting Indian jurisprudence on due process, see *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129, 150; but also *Re Tan Boon Liat @ Allen & Anor* [1977] 2 MLJ 108. The Court of Appeal citing the development of a 'broader and more liberal view' of constitutional interpretation that it saw as having taken place since *Karam Singh*, concluded that the difference in the language between the two articles did not create any distinction in principle: p 286.

25 *Ibid* 286.

26 Previously courts had taken a narrow view of the meaning of these terms. For further discussion see *infra*.

> has to offer to its members. It includes the right to live in a reasonably healthy and pollution free environment. For the purposes of this case, it encompasses the right to continue in public service subject to removal for good cause by resort to a fair procedure.[27]

Having established its position on a general doctrine of procedural fairness under articles 5(1) and 8(1), the Court addressed its application in the context of public employees governed by Article 135(2) which provides in part:

> No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:

The Court considered article 135(2) as giving "effect to the joint operation of articles 5(1) and 8(1) in the context of the dismissal of public servants."[28] As article 135(2) was a specific provision incorporating procedural fairness, reliance on the wider provisions of articles 5(1) and 8(1) would be unnecessary save in two areas:

> In the first category will fall cases in which a determination has to be made as to the nature and extent of a fair procedure that is required to be applied to the facts of a particular case. The second category comprises of those cases in which the punishment imposed is found to be disproportionate to the nature of the misconduct found to have been committed in a given case. Thus, the requirement of fairness which is the essence of art 8(1), when read together with art 5(1), goes to ensure not only that a fair procedure is adopted in each case based on its own facts, but also that a fair and just punishment is imposed according to the facts of a particular case.[29]

It is significant to note here that in this passage the Court of Appeal has added a new element to its concept of fairness. Up to now the Court has been treating fairness as a means of judging the constitutionality of procedures employed in administrative decision-making. Introduced in the decision for the first time is the concept of proportionality of punishment. Although proportionality has been accepted by the English courts in a few of instances since it was first raised by Lord Diplock in *Council for Civil Service Unions* v *Minister of State for the Civil Service*,[30] the idea that an administrative decision could be so disproportionate as to render it *ultra vires* the administrator's authority had heretofore not been recognized as part of Malaysian administrative law, or within the purview of article 5(1).

---

27 *Ibid* 288.
28 *Ibid* 289.
29 *Ibid* 289-290.
30 [1985] AC 374,410; De Smith, Woolf and Jowell, *supra* n 2 at pp 593-598.

Content merely to introduce the concept, the Court of Appeal does not develop its reasoning on proportionality here, but as we will see the Court returns to the subject later in the decision and addresses it in more detail.

Having established the constitutional framework of procedural fairness, the Court addressed the specific issues raised on appeal.

Appellant was dismissed by letter without the opportunity to be heard. The Commission acted under the proviso (a) of Article 135(2) which excludes from the protection of 135(2) those cases "where a member of such a service is dismissed or reduced in rank on the ground of conduct in respect of which a criminal charge has been proved against him". Appellant contended that by virtue of the High Court's action binding him over under section 173A of the CPC, he had not been "convicted" within the meaning of the pertinent administrative regulations and therefore did not fall within the scope of the proviso.

Although the Court of Appeal acknowledged that appellant may not have had a conviction entered against him, the test under the proviso was not whether he had been convicted of a criminal charge, but whether a criminal charge had "proved against him". As to this the Court had no doubt. In the binding over proceeding, the Judicial Commissioner expressly upheld the Sessions Court finding of guilt. The Court of Appeal held therefore that appellant was not entitled to be heard under article 135(2).

On the issue of punishment appellant raised two points: first, he contended that he was entitled under article 135(2) to be heard on the kind of punishment that ought to be imposed; and second, that the extreme punishment of dismissal on the merits of the case was so harsh and unjust as to be unconstitutional.

Analysis of these issues again turned on a review of Indian case law. Article 311(2) of the Indian Constitution which addresses dismissal of public employees was found by the Court of Appeal to be substantially the same as article 135(2). Indian case law cited by the Court of Appeal provided that a conviction on a criminal charge did not automatically entail dismissal. On the contrary, before an employee may be dismissed the disciplinary authority must consider whether the "'conduct which has led to his conviction was such as warrants the imposition of a penalty and, if so, what that penalty should be'".[31]

On the issue of the punishment, the Court of Appeal cited a number of decisions of the Indian Supreme Court holding that "'[w]here the court

31 *Ibid* 295, quoting *Union of India* v *Tulsiram Patel* AIR 1985 SC 1416, at 1477.

finds that the penalty . . . is arbitrary or grossly excessive or out of all proportion to the offence committed . . . the court will also strike down the impugned order'".[32]

Applying the approach of the Indian courts, the Court of Appeal concluded that prior to determining punishment the disciplinary authority "must call for and peruse the record of the criminal proceedings and take into account all the relevant circumstances of the case . . . It should then decide whether the public servant in question has committed misconduct. If it decides that he has, then it must go on to decide which of the several punishments prescribed by General Order 36 it ought to impose".[33] In making its inquiry however, the disciplinary authority need not afford the public servant an opportunity to be heard. But, in deciding the punishment it must act fairly and reasonably: "If it acts arbitrarily or unfairly or imposes a punishment that is disproportionate to the misconduct, then its decision, to this extent becomes liable to be quashed or set aside."[34] Under the facts of this case the Court of Appeal found that the punishment of dismissal was too severe and the Court ordered appellant be reduced in rank as originally suggested by the department.

In the final case of the trilogy, *Hong Leong Equipment Sdn Bhd* v *Liew Fook Chuan and another appeal*,[35] we see the Court of Appeal in its majority decision[36] building on the foundation it had so recently laid in *Abdul Malek Muzaffar* and *Tan Tek Seng* and begin the process of delineating the constitutional doctrine of administrative fairness.

Hong Leong Equipment dealt with the dismissal of a senior executive with the Hong Leong Group. The executive, respondent in the case before the Court of Appeal, had worked as an executive for the Group since 1977. In late 1989 the company sought from the respondent an explanation concerning a conflict of interest he may have had in a property transaction involving the company. A few weeks later respondent was asked to respond to a second allegation of misconduct concerning an alleged position he had taken with another company. The respondent's written responses to these charges did not satisfy the company and in early 1990 respondent was

32 *Ibid* 296, quoting *Union of India* v *Tulsiram Patel* AIR 1985 SC 1416, at 1477; see also *Shankar Dass* v *Union of India* AIR 1985 SC 772, quoted at pp 294 & 295; *Union of India* v *Parma Nanda* AIR 1989 SC 1185, quoted on p 296; and *Ranjit Thakur* v *Union of India* AIR 1987 SC 2386.

33 *Ibid* 298.

34 *Ibid* 298.

35 [1996] 1 MLJ 481.

36 Gopal Sri Ram JCA joined by Ahmad Fairuz JCA, with Siti Norma Yaakob JCA issuing a separate concurring opinion.

formally charged with three instances of misconduct.[37] A domestic inquiry was held. Each of the three charges was put to respondent and he was given an opportunity to respond. Respondent was informed later by letter that he was dismissed.

Upon his dismissal respondent filed a complaint with the Director General of Industrial Relations pursuant to section 20(1) of the Industrial Relations Act 1967. A conciliatory meeting was held but the parties failed to reach an agreement. Respondent then wrote to the Deputy Director alleging that his dismissal was the result of actions by a vindictive rival in the company. The letter ended with respondent's request that his case be referred to the Industrial Court for an award. The matter was then referred to the Minister under section 20(3) of the Industrial Relations Act for his decision whether or not to refer the case to the Industrial Court. The Minister decided not to refer the matter. Respondent then filed an application for certiorari to quash the Minister's decision and for an order of mandamus to compel the Minister to refer the dispute to the Industrial Court. The High Court granted the relief sought and this appeal followed.

On appeal the main issues dealt with the scope of the Minister's discretion under section 20(3), the extent to which the facts upon which the exercise of his discretion is based are subject to review by the Court, and, most pertinent to the discussion here, whether the Minister must furnish reasons for his ultimate decision whether or not to refer the matter to the Industrial Court.

Section 20(3) provides that "[u]pon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court for an award." The provision does not provide the Minister guidelines regarding the exercise of that discretion. All parties, however, agreed that the Minister's discretion was not unfettered and the Court had no hesitation in observing that "the exercise of discretion under s 20(3) may be quashed, if in its exercise, there was committed one or more 'Anisminic errors' or if the decision arrived at was tainted with 'Wednesbury unreasonableness'".[38] The Court of Appeal went further, however, ruling that the Minister's discretion was limited to a determination as to whether the representations made by the claimant were frivolous or vexatious. Relying primarily on the decision of the Supreme Court in *Minister of Labour, Malaysia* v *Lie Seng Fatt*,[39] the Court held that if an examination

37 The third charge was based on an allegation that the respondent had been engaged and/or had an interest in another outside company.

38 *Ibid* 511.

of the facts made available to the Minister "reveals that the representations made under s 20(1) are neither perverse, frivolous nor vexatious, a decision not to refer is liable to be quashed by an order of certiorari".[40]

In reaching this conclusion the Court necessarily rejected appellants' contention that a court was not entitled to examine the facts presented to the Minister. To the contrary, after reviewing *Minister of Labour, Malaysia* v *Lie Seng Fatt*,[41] along with *Minister of Labour, Malaysia* v *National Union of Journalists, Malaysia*[42] and *Minister of Labour, Malaysia* v *Chan Meng Yuen & Anor*,[43] the Court concluded that "it is the solemn duty of a court to undertake a meticulous examination of the facts that were made available to the Minister".[44]

The Court of Appeal then addressed the question whether the Minister was obligated to give reasons for his decision not to refer the matter to the Industrial Court. The Court began with a review of the position taken by the English common law and the conflicting decisions rendered by the Malaysian courts.[45] As it had done in *Tan Tek Seng*, once having acknowl-

39 [1990] 2 MLJ 9.
40 [1996] 1 MLJ 481, 519.
41 [1990] 2 MLJ 9.
42 [1991] 1 MLJ 24.
43 [1992] 2 MLJ 337.
44 [1996] 1 MLJ 481, 519.
45 The court noted that at English common law an administrative decision-maker was traditionally not required to give reasons. The absence of such duty was thought to derive originally from the absence of any parallel duty on the common law judges to give reasons for their decisions. The Court concluded its examination of the English common law position by observing that this position has recently changed to the extent that now in appropriate circumstances the common law will imply a duty to give reasons. (See pp 526-531)

The position of the common law in Malaysia was found to be substantially different. To begin with, the Court noted that Malaysian judicial policy has been that judges are duty bound to give reasons for their decisions. In fact, failure to give reasons is a violation of the Judges' Code of Ethics subjecting a judge to possible removal under Art 125(3) of the Federal Constitution.

As for decisional law, the Court found it to be divided. It cited the Federal Court opinion in *Pemungut Hasil Tanah, Daerah Barat Daya Pulau Pinang (Balik Pulau)* v *Kam Gin Paik & Ors* [1983] 2 MLJ 390, holding that under the Land Acquisition Act 1960 the Collector was not obliged to give reasons for his award. Cited in support of the proposition that reasons should be given by an administrative decision-maker were the decisions in *Government of Malaysia & Ors* v *Loh Wai Kong* [1979] 2 MLJ 33, *Pahang South Union Omnibus Co Bhd* v *Minister of Labour and Manpower & Anor* [1981] 2 MLJ 199 and *Rohana bte Ariffin & Anor* v *Universiti Sains Malaysia* [1989] 1 MLJ 487.

edged the influence the English common law, the Court drew attention to the absence of a written constitution in the English system. Referring to its own decisions in *Abdul Malik Muzaffar* and *Tan Tek Seng*, the Court of Appeal left no doubt that issues not only of procedural fairness but of arbitrariness in general were now governed by articles 5(1) and 8(1) of the Federal Constitution:

> I have made these observations in order to emphasize the existence in the Federal Constitution of provisions, such as arts 5(1) and 8(1), which are of wide import and contain principles that are capable of meeting any issue of public law that arises for decision. The combined effect of these two articles is to require all state action to be fair and just; and they strike at arbitrariness even in the discharge of administrative functions.[46]

As to the specific issue of requiring a statement of reasons, the Court of Appeal concluded:

> In my judgment, as a general rule, procedural fairness, which includes the giving of reasons for a decision, must be extended to all cases where a fundamental liberty guaranteed by the Federal Constitution is adversely affected 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.[47]

---

46 *Ibid* 532.

47 *Ibid* 536-537. The Court recognised that there would be cases where it would not be feasible or desirable to provide procedural fairness or, at least not the "full breadth of procedural fairness" provided for in the Court's decision. (p 537) To illustrate the "feasibility postulate", the Court of Appeal cited the restriction on procedural fairness in land acquisition matters and the case of *S Kulasingam. (Ibid)* But most significant was the court's recognition that procedural fairness could be limited in matters of public safety and national security:

> Again, national security, public safety or public interest are considerations that may exclude procedural fairness in a particular case. The burden of showing that reasons for a decision ought not to given lies, or course, upon the public decision-taker. And his mere *ipse dixit* upon the question is inconclusive. There must be some basis or material for suggesting that questions of public safety, public interest or national security or one or more of these are involved. In some cases, it may be quite plain and obvious from the very subject matter that they are. In others, it may not be so. Ultimately, it is for the courts to determine whether, upon the facts and circumstances of a particular case, the plea ought to be upheld : p 537.

It is worth noting that although it acknowledged that public interest concerns may override the individual's right to procedural fairness, the Court of Appeal reserved the ultimate determination of that issue to the courts.

Returning to the case at hand, the Court concluded that the Minister had not acted in accordance with law and that under the facts of the case the lower court had not erred in issuing an order of certiorari quashing the Minister's decision and an order of mandamus ordering the Minister to refer the case to the Industrial Court.

III. DISCUSSION

The three cases summarized here represent a potentially significant development in Malaysian administrative law. For the first time we see the procedural protections underlying the rules of natural justice being given constitutional status, thereby insulating them from the possibility of elimination by the Parliament through ordinary legislation. Moreover, the cases mark a significant extension of the protections afforded. Through its more generous interpretation of articles 5(1) and 8(1) the Court of Appeal has extended the concept of fairness to include both procedural and substantive matters, bringing the severity of an administrative decision under constitutional examination for the first time. To better understand the magnitude of the change these cases may portend one needs to appreciate the prior development of article 5(1).

In the past, the common law doctrine of natural justice developed independently from the constitutional protection guaranteed in article 5(1). While the Malaysian courts were developing a substantial body of case law on natural justice, the same could not be said for the protections afforded by article 5(1) and its companion article 13(1). Early decisions took a narrow view of the protection afforded by articles 5(1) and 13(1). Interpreting the phrase 'save in accordance with law' found in each article to include only substantive law and not procedure, courts limited the scope of the articles to a simple determination as to whether or not executive action was taken pursuant to enacted law.[48] Neither the procedure used to reach a decision nor the substance of the decision itself was considered within the purview of the court. Characteristic of this early view was that expressed by the Federal Court in *Arumugam Pillai* v *Government of Malaysia*:[49]

48 See LA Sheridan & Harry E Groves, *The Constitution of Malaysia*, 4th Ed, 1987, p 44; also Kevin Tan Yew Lee, Yeo Tiong Min and Lee Kiat Seng, *Constitutional Law in Malaysia & Singapore*, 1991, pp 424-434.

49 [1975] 2 MLJ 29; see also *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129; *Comptroller-General of Inland Revenue* v *N.P.* [1973] 1 MLJ 165; *Andrew s/o Thamboosamy* v *Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 2 MLJ 156.

> [W]henever a competent Legislature enacts a law in the exercise of any of its legislative powers, destroying or otherwise depriving a man of his property, the latter is precluded from questioning its reasonableness by invoking Article 13(1) of the Constitution, however, arbitrary the law might palpably be . . . . So long as the method of recovery is laid down by the law, I do not see how it can be challenged.[50]

Although the Federal Court retreated somewhat from this position in the late 1970s in *Tan Boon Liat* v *Menteri Hal Ehwal Dalam Negeri & Ors*,[51] it was not until the Privy Council decision in *Ong Ah Chuan* v *PP*[52] that 'law' as used in article 5(1) was interpreted as imposing any requirement of procedural fairness on executive action.

In *Ong Ah Chuan*, a criminal case out of Singapore, the Privy Council addressed the extent to which natural justice was protected by articles 9(1) and 12(1) of the Singapore Constitution, articles identical to articles 5(1) and 8(1) of the Federal Constitution. The Privy Council held that the term 'law' as used in articles 9(1) and 12(1) refers "to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the constitution".[53] The Federal Court adopted the Privy Council's reasoning in the 1984 criminal case of *Che Ani bin Itam* v *PP* [54] stating that "[i]t is now firmly established that 'law' in the context of such constitutional provisions as Article 5,8 and 13 of the Constitution refers to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation at the commencement of the Constitution".[55]

The effect *Che Ani bin Itam* v *PP* had on administrative law, however, was minimal. Whatever protection natural justice afforded under article 5(1) was limited to governmental action depriving individuals of "life" or "personal liberty". "Personal liberty" had been interpreted as limited to actions taken against the person or body of an individual.[56] And, although

---

50 *Ibid* 30.
51 [1977] 2 MLJ 108.
52 [1981] 1 MLJ 64.
53 *Ibid* 71.
54 [1984] 1 MLJ 113.
55 *Ibid* 114-115; see also *Cheow Siong Chin* v *Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors* [1986] 2 MLJ 235, 238.
56 See *PP* v *Tengku Mahmood Iskander* [1973] 1 MLJ 204; and *Government of Malaysia & Ors* v *Loh Wai Kong* [1979] 2 MLJ 33.

the term "life" had not been given an authoritative interpretation by the courts, reference to it had occurred in cases challenging the mandatory death penalty.[57] The effect of the treatment given to these terms was to limit the scope of article 5(1) to matters of criminal procedure and preventive detention.

However, even assuming that the *Ong Ah Chuan* rationale had been applied to a broader range of administrative matters, its impact may have nonetheless been limited. In *S Kulasingam & Anor* v *Commissioner of Lands, Federal Territory & Ors*,[58] a case involving the compulsory acquisition of land, the Federal Court accepted the Privy Council's reasoning and incorporated natural justice within the meaning of "law" found in article 13(1). However, it held that the rules so incorporated also included the acknowledged power of the Parliament to eliminate the procedural protections the rules themselves afforded. Thus, although recognized by the constitution, the rules of natural justice were made subordinate to the will of the Parliament, effectively limiting the scope of constitutional protection available.[59]

Against this backdrop the Court of Appeals decisions can be seen as a definite break with the past. Unlike these earlier decisions the Court of Appeal here did not attempt to fit Malaysian doctrine within the common law tradition.[60] While acknowledging the debt owed the English common law, the Court of Appeal emphasized that the doctrine of procedural fairness did not derive from English case law but was founded independently on the Malaysian constitution. In *Hong Leong Equipment* the Court of Appeal was explicit:

> While the decisions of English courts are of undoubted utility, it must not be forgotten that they are reached without the benefit of

57 See *Public Prosecutor* v *Lau Kee Hoo* [1983] 1 MLJ 157 and *Public Prosecutor* v *Yee Kim Seng* [1983] 1 MLJ 252.

58 [1982] 1 MLJ 204.

59 See Mohd Ariff Yusof, "Saving 'Save inaccordance with law'" [1982] 9 JMCL 155.

60 The Court of Appeal could have drawn on common law precedent to develop its thoughts on procedural fairness and proportionality. With reference to both statement of reasons and proportionality, the English Courts have been moving towards a position close to that the enunciated by the Court of Appeal in these cases. As we have seen, proportionality has been accepted by the English courts. (See De Smith, Woolf and Jowell, *supra* n 2 at pp 593-598.) And, although there is still no general requirement that an administrative decision-maker give a statement of reasons, the English courts "will now invariably infer a requirement of fairness in the decision-making process in the absence of a clear contrary intent manifest in the relevant statutory or other framework. It is part of that requirement of fairness that the obligation to give reasons is being extended by the courts pragmatically from one situation to another" (De Smith, Woolf and Jowell, *supra* n 2 at pp 472-473.)

> a written constitution. Much the same may be said of decisions emanating from Australia and New Zealand where there are absent any provisions resembling our arts 5(1) and 8(1).
> We, on the other hand, have the Federal Constitution which declares itself as the supreme law of the Federation. I am therefore of the view that while the decisions of the courts of these countries may be useful guides, we ought not to slavishly follow them in disregard to the provisions of the Federal Constitution.[61]

And later,

> I have made these observations in order to emphasize the existence in the Federal Constitution of provisions, such as arts 5(1) and 8(1), which are of wide import and contain principles that are capable of meeting any issue of public law that arises for decision. The combined effect of these two articles is to require all state action to be fair and just; and they strike at arbitrariness even in the discharge of administrative functions. *Procedural fairness is accordingly part of our law, not by reason of the application of English cases, but because of the terms of arts 5(1) and 8(1).* (Citations omitted) (emphasis added)[62]

Setting the foundation of procedural fairness in the Federal Constitution represents a fundamental reorientation of the basis of administrative law. For the Court of Appeal, administrative law is no longer a creature of the common law created and developed by the English common law courts, but a branch of Malaysian constitutional law. Doctrinal development then does not depend necessarily on the meaning given to the basic precepts of natural justice, but the principles embedded in articles 5(1) and 8(1). To interpret these principles the Court of Appeal looked, not to English common law, but to the constitutional case law of India.

Accepting Indian precedent as persuasive authority was key to the outcome in these decisions. Although Indian precedents have long been cited in Malaysian decisions, Malaysian courts have been hesitant to embrace some of the more liberal positions taken by the Indian courts;[63] not so in these cases. Rather than relying on the neutral term "law" in article 5(1) as the conduit through which the rules of natural justice would be absorbed from pre-existing common law as had been done in *S Kulasingam & Anor*, the Court of Appeal in *Tan Tek Seng* embraced the rationale of *Maneka Gandhi* which in turn enabled it to ground a more expansive notion of fairness and reasonableness firmly in the Constitution under

---

61 [1996] 481, 531.
62 *Ibid* 532.
63 See for example *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri*, *supra* n 49 and *Phang Chin Hock* v *Public Prosecutor* [1980] 1 MLJ 70.

article 8(1). Thus, the Court not only avoided subjecting its notion of fairness to the limitations of the common law doctrine, but was able to extend the scope of protection to include both procedural and substantive matters.

But most significantly, the Court of Appeal's willigness to accept *Maneka Gandhi* was a clear indication that it was prepared to interpret the Constitution liberally. Although it is accepted that the constitution should not be interpreted narrowly or pedantically,[64] courts in the earlier cases appeared reluctant to venture too far from a literal reading of the text. The Court of Appeal demonstrated no such hesitation. Throughout these decisions the Court of Appeal interpreted the Constitution and existing precedent liberally with a view to carrying out what it saw as the underlying purpose and intent of the articles. At several key junctures the Court of Appeal extended constitutional doctrine into territory not previously visited by the courts in Malaysia. Its use of the *Nordin* decision in *Tan Tek Seng* as the basis for incorporating *Maneka Gandhi* into Malaysian constitutional law, its willingness to extend the concept of fairness to include substantive matters, and its embrace of an expansive definition of "life" in article 5(1) are all evidence of the Court of Appeal's willingness to stretch the boundaries of constitutional law and represent perhaps the most telling feature of these decisions.

Lastly, as we contemplate the new ground broken by these decisions, it is prudent to note that the decisions do raise a number of questions. For example, what is the scope of the constitutional requirement of fairness? Through the expanded definition of life under article 5(1) has all administrative activity that was previously governed by the rules of natural justice been brought under its sway? Or to put it another way, does administrative fairness truly apply to all state action as the Court suggested in *Hong Leong Equipment*? If not, do the common law rules of natural justice still apply to those matters not covered by article 5(1)? Now that administrative fairness is considered a constitutional doctrine, can or should the courts revisit the case law established under the rules of natural justice? For instance, is it now open to the courts to re-examine the case law pertaining to the right to an oral hearing relied upon by the Court of Appeal in *Abdul Malek Muzaffar*? Or the cases pertaining to the right to a pre-decisional hearing?

---

64 *Dato Menteri Othman bin Baginda & Anor* v *Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, 32; *Merdeka University Berhad* v *Government of Malaysia* [1981] 2 MLJ 356; and *Tun Datu Haji Mustapha bin Datu Harun* v *Tun Datuk Haji Mohamed Adnan Robert, Yang Di-Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (No 2)* [1986] 2 MLJ 420, 462.

The most pressing question, however, is whether the doctrine enunciated by the Court of Appeal will survive at all. To date the Federal Court has not spoken and it remains to be seen how the Federal Court will react to the changes wrought by the Court of Appeal. However, regardless of the immediate outcome, I think it is fair to say that the Court of Appeal has taken a major step in shaping the future of administrative law in Malaysia. Through this series of decisions the Court of Appeal has made out a strong argument for a more assertive approach in interpreting and applying the protections afforded by the Constitution and that can only be welcome news for the future of administrative law in Malaysia.

Peter S Crook*

* Associate Professor
Faculty of Law
University of Malaya