Summary – Grounds of Judgment Yakin Tenggara & Ors

[1] There are seven (7) review motions before us and we shall refer to them as the 'Yakin Tenggara Motions', the 'Yong Tshu Khin Motions', the 'Tan Boon Lee's Motion' and 'Tan Wei Hong's Motion'.

[2] All the seven review motions raise a common point and further specific points peculiar to their circumstances.

[3] The common point alleges coram failure, in that the appointments of Tun Md Raus bin Sharif as Chief Justice and of Tan Sri Zulkefli bin Ahmad Makinudin as President of the Court of Appeal (collectively, the 'two Judges') were respectively invalid. Arguments were advanced to the effect that the advice given by the outgoing Chief Justice, Tun Arifin bin Zakaria, to the Yang di-Pertuan Agong to appoint the two Judges as Additional Judges of the Federal Court was invalid because such advice may only be given by a sitting Chief Justice to take effect during his tenure, and that in any event, the two Judges could not have occupied their respective positions as Chief Justice and President of the Court of Appeal as Additional Judges of the Federal Court on a proper interpretation of Article 122(1A) of the Federal Constitution ('FC'). Accordingly, it was argued that Tun Raus was not entitled to empanel the Federal Court which heard the appeals and in any event, that the two Judges were not entitled to sit in these cases (if they sat).

[4] In this judgment, we shall first deal with the common point followed by the specific points.

[5] For convenience, in our discussion on the common point our reference to 'applicants' refers globally and collectively to all the applicants in all the motions and likewise, our references to respondents refers to all parties who opposed the argument. In the interest of time, we will not read out our full grounds, except to state the gist as follows.

[6] The applicants' arguments in essence, is that the appointments of the two Judges were invalid having been made *ultra vires* the FC. The thrust of the respondents' rebuttal is that the validity of the two Judges' appointments cannot be challenged collaterally and that even if their appointments are deemed invalid, their decisions (both judicial or administrative) are saved by the 'de facto doctrine'. In reply, the applicants acknowledge the existence of the doctrine but argued that it does not apply to constitutional appointments.

[7] What is the de facto doctrine and why does it exist? The respondents rested their arguments on the case of *Malayan Estates* which held that the decisions of a judge or judicial arbiter can be deemed valid even if his appointment is invalid on grounds of public policy. The Federal Court arrived at this conclusion by relying heavily on the judgment of the Indian Supreme Court in *Gokaraju Rangaraju v State of Andhra Pradesh* (1981) 3 SCC 132 ('*Gokaraju*').

[8] The decision in *Gokaraju* cited and approved a long line of authorities which also made similar observations as regards the validity and integrity of decisions of administrative or judicial bodies whose appointments were subsequently deemed to be invalid. We do not propose to set out those authorities. Suffice to conclude the principles distilled from them as follows.

[9] The de facto doctrine exists to preserve the integrity of judicial decisions for at least one of two reasons. Firstly, it insulates the de facto judge's decision from collateral attack. Otherwise, unsuccessful private litigants will reserve the point as an ammunition to attack the judge's lack of authority as a ground to re-litigate their case or to have the outcome changed for the reason that the judge who heard their case was no judge at all. Doing so would be to put the prestige and integrity of justice and the justice system into jeopardy and disrepute. Secondly, even if a judge's appointment is set aside *de jure*, meaning that his appointment is directly and successfully assailed in proceedings against him be it in *quo warranto* or other proceedings, all decisions made by him either judicially or administratively are saved – not so much to save the integrity of that judge per se, but to save the integrity of the judgment of the Court.

[10] Now, in these cases before us, the challenge is clearly a collateral one because the validity of the appointments of the two Judges was not raised before them during the hearing of the appeals proper. Neither was the argument raised by the applicants herein in separate proceedings. The respondents argued that this failure gives rise to estoppel and waiver. These arguments, to our mind, are not relevant because the de facto doctrine makes it quite plain that the validity of a judge's appointment cannot be raised in collateral proceedings. In other words, the plea of waiver or estoppel is not necessary considering that in the first place, the validity of a judge's appointment cannot be attacked collaterally.

[11] In any event, even if we were to accept the argument that the two Judges' appointments were unlawful, their decisions remain protected by the de facto doctrine. The two main conditions for the doctrine to apply,

as gleaned from the authorities, are that firstly, the judges whose appointments were assailed are not mere intruders or usurpers but who hold office under some colour of lawful authority. There is no doubt that the appointments of the two Judges were made under the FC, except that the propriety of such appointments is in issue. The two Judges are therefore not usurpers in the sense of the word as there is some legal basis for their appointments. The other condition for the doctrine to apply is that the de facto judge cannot himself rely on it for his own protection. That is not the case here and as such the application of the doctrine is not excluded.

[12] With that, the only question that remains to be addressed is whether the de facto doctrine applies to constitutional appointments. The applicants speaking primarily through learned counsel Datuk Seri Gopal Sri Ram, contended that the doctrine cannot apply to constitutional appointments. They sought to distinguish the authorities cited by the respondents, especially *Malayan Estates* and *Gokaraju* for the point that the appointments concerned in those cases were in respect of inferior tribunals and not Superior Courts.

[13] With respect, we do not agree. It is our view that the de facto doctrine (the rule and its exceptions) applies equally to constitutional appointments.

[14] Further, learned counsel Datuk Seri Gopal Sri Ram, with whom other counsel for the applicants agreed, appeared to suggest that the scope of the doctrine should be confined to subordinate officers and judicial arbiters and that accordingly, the doctrine cannot apply to Superior Court judges. Again, with respect, we do not agree. The danger the de

facto doctrine seeks to avoid is the chaos and confusion that may be occasioned in the event the appointment of a decision-maker is found to be invalid and the stain that that might leave on the administration of justice.

[15] While the judgments of Magistrates and Sessions Court judges are subject to appeal or review (as the case may be), the decisions of Superior Court judges are weightier especially those of the Federal Court, being the final court of appeal. In addition, administrative decisions of the Chief Justice or President of the Court of Appeal such as their discretions to empanel the Federal Court or the Court of Appeal, respectively carry significant ramifications. If the decisions of a Superior Court Judge are not preserved by the de facto doctrine, the entire justice system might crumble to dust if such appointments are later deemed invalid.

[16] Learned counsel for the respondent in Tan Boon Lee's motion, Mr Su Tiang Joo, referred us to Article 125(8) of the FC for the argument that the provision constitutionally encapsulates the de facto doctrine.

[17] We do not find it necessary to dwell on Article 125(8) within the context of these review motions as we have already observed that upon the application of the authorities, irrespective of Article 125(8), the de facto doctrine applies.

[18] Accordingly, it is our considered view that the applicants are not entitled to collaterally challenge the validity of the appointments of the two Judges through these review motions. In any case, even if they were successful in that challenge, the decisions of the two Judges will continue

to stand by virtue of the de facto doctrine. It therefore follows that the common point in all the review motions fails.

[19] We will now proceed to address the specific points raised in each set of motions.

The Yakin Tenggara Motions

[20] The Yakin Tenggara Motions concern the decision of the Federal Court dated 10.10.2018. The five-member panel which originally heard the case consisted of Zulkefli Ahmad Makinudin PCA, Ramly Ali FCJ, Azahar Mohamed FCJ, Balia Yusof Hj Wahi FCJ and Alizatul Khair Osman Khairuddin FCJ. However, by the time the case came up for decision, Zulkefli PCA had resigned. The decision of the Federal Court was split 3-1 with Ramly Ali FCJ delivering the decision of the majority and Balia Yusof FCJ for the minority. In delivering the minority judgment, Balia FCJ said this:

> "The judgment as set out below was prepared by Tan Sri Zulkefli bin Ahmad Makinudin, the then President of the Court of Appeal, prior to his retirement. I concur with and adopt the judgment."

[21] The applicants' complaint is that Balia Yusof FCJ was not entitled to adopt the 'judgment' of Zulkefli PCA who at the time had already resigned (though the word Balia FCJ used was 'retirement'). Accordingly, the applicants place significant reliance on the judgment of this Court in *Bellajade Sdn Bhd v CME Group Bhd and another appeal* [2019] 5 MLJ 141 ('*Bellajade*') to argue that the decision of the Federal Court dated 10.10.2018 is bad and is liable to be set aside.

[22] In *Bellajade*, the majority of the Federal Court purported to adopt the judgment of Zulkefli PCA, who like in this case, had already resigned. A differently constituted panel of this Court allowed the motion for review, set aside the judgment of the previous panel and ordered that the appeals be reheard.

[23] The respondents' submission, as we understand it, is that *Bellajade* is entirely distinguishable. That case concerned the invalidity of the majority judgment. Here, the respondents argue, the 'adoption' was of a minority judgment and that the majority judgment still stands as valid having been delivered by an uneven number of three judges. We find merit in this contention.

[24] It is trite law that dissenting judgments have no force of law, although they play an important role in subsequent cases in the development of the law.

[25] What happened in the instant case is in stark contrast to *Bellajade* where the 'majority judgment' was not the opinion of the remaining judges. It was that of a person who was a non-remaining judge. The 'majority judgment', in that case, did not therefore legally exist in accordance with section 78(2) of the CJA.

[26] Here, *Bellajade* applies only to the extent of invalidating the minority judgment. But, upon a purposive construction of section 78(2) of the CJA, the majority judgment stands independently of the minority judgment and it having been delivered by the majority of the remaining judges of the Court, is valid. For all intents and purposes, the judgment impugned in this

case did represent the views of 'the three remaining judges' and hence it is valid.

[27] As such, we find no merit in the Yakin Tenggara Motions and they are accordingly dismissed with costs.

The Yong Tshu Khin Motions

[28] The Federal Court decision giving rise to the Yong Tshu Khin Motions was delivered on 9.7.2018. The panel consisted of Raus Sharif CJ, Hasan Lah FCJ, Azahar Mohamed FCJ, Balia Yusof Hj Wahi FCJ and Alizatul Khair Osman Khairuddin FCJ. The decision was read out by Azahar Mohamed sitting alone but the judgment was signed by Raus Sharif CJ.

[29] Two counsel argued the review motions namely, Dato' Loh Siew Cheang ('Dato' Loh') and Mr Ling Young Tuen ('Mr Ling'). The points they canvassed were different and we shall address them in turn beginning with the jurisdictional issue raised by Mr Ling.

[30] Mr Ling argued that the Federal Court panel which delivered the judgment was not of a duly constituted Court. His argument is that Azahar Mohamed FCJ was not entitled to deliver the judgment sitting alone as that violates section 78(1) of the CJA 1964 which, according to counsel, requires that where a judge is 'absent' the proceedings can continue provided that the number of judges in the coram is not less than two. In support of his submission, Mr Ling made reference to the judgment of this Court in *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1 ('*Chia Yan Tek*').

[31] With respect, *Chia Yan Tek* is the answer to the very issue raised by Mr Ling. It follows that we are not persuaded by Mr Ling's argument. Azahar Mohamed FCJ sitting alone to read out the judgment of Raus Sharif CJ is justified under Rule 63 of the Rules of the Federal Court 1995. The four other judges in the panel still legally existed when the decision was delivered. As such there is no legal incapacity affecting the coram to bring into effect section 78(1) of the CJA 1964. We therefore find no merit in Mr Ling's argument that there was coram failure. This brings us to Dato' Loh's submission.

[32] Dato' Loh argued that firstly, the Federal Court did not have jurisdiction under section 96(a) of the CJA 1964 to make the decision. Secondly, there was a breach of natural justice as the applicants were not heard on certain matters which learned counsel argued were not in issue in the Courts below. Thirdly, that the decision was erroneous.

[38] The review process is not intended to give the losing litigant a second bite at the proverbial cherry. Motions for review are not meant to operate as another tier of appeal. It is confined to the very specific purpose to prevent a manifest miscarriage of justice. While 'miscarriage of justice' is not an easy phrase to define, the development of our case law makes it abundantly clear that the correctness of a decision of the Federal Court is not, per se, a valid reason to seek a review of it. The public policy reason for setting this high threshold is premised on a simple fact that there must be finality to litigation, and if we might add: due respect to the decision of the final court of appeal.

[39] We accept Dato' Loh's general submission that a breach of natural justice is indeed a valid ground of review under rule 137 of the RFC 1995.

[40] Nonetheless, having perused the judgment of the Federal Court dated 9.7.2018, we find no reasons for review. Five very lengthy leave questions were framed and the Court considered them and dealt with them accordingly. We are therefore not persuaded by the contentions of Dato' Loh. It is our view that the Yong Tshu Khin Motions do not cross the threshold of review under rule 137 and they are accordingly dismissed with costs.

Tan Boon Lee's Motion

[41] The Federal Court panel which heard the appeal comprised Raus Sharif CJ, Zulkefli Ahmad Makinudin PCA, Richard Malanjum CJSS, Aziah Ali FCJ and Prasad Sandosham Abraham FCJ. The High Court and the Court of Appeal concurrently held that the applicant is not a vexatious litigant. However, in a decision dated 26.9.2017, this Court reversed the said concurrent findings and in doing so, declared the applicant a vexatious litigant.

[42] The applicant complained that there has been occasioned a breach of natural justice on account that the Federal Court did not provide written grounds of judgment. Mr Ramkarpal's argument on the facts is that the Federal Court should have provided reasons for its decision to reverse the concurrent decisions of the High Court and the Court of Appeal. Further, leave to appeal to the Federal Court was allowed indicating that the appeal was of public importance. Learned counsel submits that surely, grounded on these facts, the Court should have been minded to provide written reasons for its decision.

[43] Lest we be misunderstood, we are not setting a precedent that judges, at any level of the judicial hierarchy, are not required to provide written judgments for their decisions. The extent of the duty to give reasons depends on the subject-matter as well as the facts and circumstances of each and every case.

[44] In terms of subject-matter, it is settled judicial practice of this Court that it does not typically give written reasons for the dismissal or the grant of leave applications.

[45] In the present case, we appreciate that it is less than ideal that the applicant was not provided with written reasons for this Court's reversal of the High Court and Court of Appeal's concurrent decisions. Having said that, we must remember that we are here dealing with an application for review. Is there a breach of a right so prejudicial that it has occasioned a miscarriage of justice such that the decision delivered on 26.9.2017 should be set aside altogether?

[46] Apart from the fact that the decisions of the lower Courts were concurrent, and that the Federal Court had reversed it, the applicant has not satisfied us that there has been a substantial miscarriage of justice within the meaning of rule 137. We have considered the general submission of counsel for the applicant that the failure to provide reasons given the background of the applicant's case amounts to injustice and that the consequence of such an order declaring him to be a vexatious litigant denies him access to justice. Mr Ramkarpal had further submitted that given the infrequency of such orders, it would be useful to have general guidelines on the issue for the future. With respect, we are unable to accept how these arguments reflect a serious miscarriage of justice.

[47] It is well within the power of the Court to declare litigants as vexatious. The applicant was represented by counsel and he had the right to ventilate his arguments. This was done. Even if the Court had provided reasons, it would not have changed the fact that the applicant would remain a vexatious litigant without any further right of appeal. And, the fact that the issue was of public importance does not automatically suggest that the failure to explain the decision amounts to a serious injustice to the applicant.

[48] For the foregoing reasons, we find no serious miscarriage of justice that had been occasioned to the applicant such that the threshold of rule 137 has been met.

[49] Accordingly, we find Tan Boon Lee's Motion to be without merit and is dismissed with costs.

Tan Wei Hong's Motion

[50] In Tan Wei Hong's Motion, the specific complaint against the decision of the Federal Court dated 28.11.2017 is that there was a coram failure on account that the Federal Court did not consider at all the leave question posed in the case. The decision was a unanimous one delivered by a panel consisting of Raus Sharif CJ, Zulkefli Ahmad Makinudin PCA, Ramly Ali FCJ, Zaharah Ibrahim FCJ and Balia Yusof Haji Wahi FCJ. The grounds of judgment were delivered post-decision dated 22.5.2018.

[51] With respect, we cannot see how such a complaint amounts to coram failure. Be that as it may, Ms Sitpah, counsel for the applicants

argued that grave prejudice has been occasioned to the applicants by the failure of this Court to answer the sole leave question posed in that case.

[52] It is a trite practice of this Court that even where this Court had granted leave, a subsequent panel of this Court need not answer the leave question or questions posed if the circumstances do not require it.

[53] As the cases have shown, it was the prerogative of the Court to decide, on the facts, whether the leave question warranted an answer. We have perused the judgment for ourselves. The Federal Court was essentially dealing with appeals against decisions of the High Court and the Court of Appeal against striking out, which naturally concerns the issue of discretion of the lower courts and necessarily involves issues of fact. It was the prerogative of the Court not to answer or consider the leave question.

[54] As such, we fail to see how the applicants in Tan Wei Hong's motion have suffered prejudice in the way Ms Sitpah suggests much less that the decision was bad on account of coram failure. Accordingly, we find the motion to be bereft of any merit and it is dismissed with costs.

Conclusion

[55] To conclude, it is our view that the common point in all review motions alleging coram failure is without merit. The appointments of the two Judges and their decisions are both saved by the de facto doctrine. Further, the specific points alleging coram failure, breach of natural justice, or general injustice in the respective sets of motions are also without merit.

[56] It follows that all the seven review motions are dismissed with costs.

Dated: 30 November, 2020.

(TENGKU MAIMUN BINTI TUAN MAT)
Chief Justice,
Federal Court of Malaysia.

**Note: This is merely a summary to help assist in the understanding of the final judgment of the Court. The final judgment is the authoritative text.*