DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)

RAYUAN SIVIL NO: W-01-70 TAHUN 2005

ANTARA

1.	CHIN MEE KEONG	-	PENGERUSI
2.	SONG YOONG KHIN	-	NAIB PENGERUSI
3.	PETER KANG TEONG KENG	-	NAIB PENGERUSI
4.	LIM CHONG TIAM	-	NAIB PENGERUSI
5.	YEAP SWEE BEE	-	SETIAUSAHA
6.	LIM CHUI ANN	=	BENDAHARI
	(sebagai ahli-ahli Majlis Pegawai di Malaysian Taekwondo Association)	....	PERAYU-PERAYU

DAN

PESURUHJAYA SUKAN - RESPONDEN

(Dalam Mahkamah Tinggi Malaya di Kuala Lumpur (Bahagian Rayuan dan Kuasa-Kuasa Khas)
Guaman Sivil No. R2-25-88-2005

ANTARA

1.	CHIN MEE KEONG	-	PENGERUSI
2.	SONG YOONG KHIN	-	NAIB PENGERUSI
3.	PETER KANG TEONG KENG	-	NAIB PENGERUSI
4.	LIM CHONG TIAM	-	NAIB PENGERUSI
5.	YEAP SWEE BEE	-	SETIAUSAHA
6.	LIM CHUI ANN	-	BENDAHARI
	(sebagai ahli-ahli Majlis Pegawai di Malaysian Taekwondo Association)	....	PEMOHON-PEMOHON

DAN

PESURUHJAYA SUKAN -------- RESPONDEN

CORAM: JAMES FOONG CHENG YUEN, JCA
LOW HOP BING, JCA
SURIYADI HALIM OMAR, JCA

JUDGMENT OF LOW HOP BING, JCA (DISSENTING)

1. APPEAL

[1] This is an appeal brought by the appellants-applicants ("the applicants") against the decision of the learned judge of the Kuala Lumpur High Court made on 9 August 2005, dismissing the applicants' application for leave to commence judicial review by way of certiorari under 0.53 r. 3(2) of the Rules of the High Court 1980.

11. FACTUAL BACKGROUND

[2] The applicants are suing on their own behalves and on behalf of the Malaysia Taekwondo Association ("the Association").

[3] The respondent is the Commissioner of Sports ("the Sports Commissioner").

[4] The Association was until 6 May 2005 a registered sports body pursuant to s18 of the Sports Development Act 1997 ("the Act") but on 6 May 2005 became an unregistered and unincorporated sports body with no legal personality.

[5] A reference to a section hereinafter is a reference to that section in the Act unless otherwise stated.

[6] Originally, the applicants sought leave to issue certiorari to remove the Sports Commissioner's show cause letter dated 15 April 2005 ("the show cause letter")

as well as the order of revocation dated 6 May 2005 made by the Sports Commissioner under s20 ("the revocation order"). However, the applicants have now confined themselves to the application for leave in relation to the revocation order only.

[7] The Association was formed in 1974 and is affiliated to the World Taekwondo Federation ("WTF") and the Olympic Council of Malaysia.

[8] The Association is the only sports body recognized by the WTF to run the WTF style of Taekwondo, which is a recognized Olympic sport.

[9] The Association has 17 full voting members representating 13 states, two Federal Territories, and one member each for two organizations viz the Malaysian Armed Forces and the Malaysian Universities Sports Council. There are therefore only 17 votes to represent about 300,000 practitioners of Taekwondo in Malaysia.

[10] The constitution of the Association provides for the admission of associated members who are individuals and who do not represent any state or district.

[11] On 13 April 2005, the Sports Commissioner received and considered the proposed amendments to the constitution of the Association including articles 5.8 and 6.4 specifically (collectively "the proposed amendments") passed at the biennial general conference on 27 March 2005, and was satisfied that there are reasons for him to take action to revoke the Association under s20(1)(e).

[12] Vide the show cause letter, the Sports Commissioner gave the applicants an opportunity within 14 days from the date thereof ie on or before 29 April 2005 to submit reasons, if any, against the proposed revocation.

[13] In response thereto, the Association vide letter dated 16 April 2005 informed the Sports Commissioner that the proposed amendments were only for the purposes of development of the sport and its management, and not otherwise, and would like to know how the proposed amendments could be hindering the development of the sport.

[14] Vide letter dated 6 May 2005, the Sports Commissioner informed the Association that the Sports Commissioner had considered and was not satisfied with the explanation contained in the Association's said letter. The Sports Commissioner had vide Form 5 decided to revoke the registration of the Association with effect from 16 May 2005 on the ground that the Association is hindering the development of the particular sport of taekwondo and that it is in the public interest to revoke its registration pursuant to s20(1)(e).

[15] The applicants alleged that the Minister has made various "uncontradicted, unretracted and unchallenged press statements" in the New Straits Times from 13 January 2005 to 4 May 2005, showing the Minister's prejudice and prejudgment.

[16] On 12 May 2005, the applicants applied to the Kuala Lumpur High Court for leave to issue certiorari. The learned judge had on 9 August 2005 refused leave. Hence the instant appeal before this Court.

III. TWO STAGES UNDER 053

[17] It is to be noted that the judicial review procedure under 053 provides for two stages.

[18] The first stage, available under 053 r3(1), necessitates the obtaining of leave, as no application for judicial review under 053 shall be made unless leave therefor has been granted in accordance therewith. This concerns the preliminary application under 053 r.2(2) for

leave to commence judicial review proceedings. Leave may be granted or refused **in limine** as the case may be. Illustrations of cases which concern the first stage in which leave has been refused in limine include:

(1) **QSR BRANDS BHD v SURUHANJAYA SECURITI & ANOR (2006) 2 CLJ. 532 CA** in which the High Court's leave refusal in limine was affirmed by the Court of Appeal;

(2) **TANG KWOR HAM v PENGURUSAN DANAHARTA NASIONAL BHD (2006) 1 CLJ. 927 CA** in which the Court of Appeal reversed the High Court's leave refusal in limine in **TANG KWOR HAM & ORS v PENGURUSAN DANAHARTA NASIONAL SDN. BHD & ORS (2003) 7 CLJ 205 HC;** and instead granted leave on appeal, but the Federal Court had on 6 July 2007 in **PENGURUSAN DANAHARTA NASIONAL**

BHD v TANG KWOR HAM & ORS AND ANOTHER APPEAL (2007) 4 CLJ 513 affirmed the High Court's leave refusal in limine, thereby overruling the Court of Appeal; and

(3) **TA WU REALTY SDN. BHD v KETUA PENGARAH HASIL DALAM NEGERI & ANOR (2004) 4 AMR 521 HC,** where leave was refused in limine by the High Court.

[19] The second stage is regulated by 053 r 4(1) and (2). That concerns the substantive application for certiorari after leave has been granted. Authorities which revolve around the second stage include:

(1) **GOVERNMENT OF MALAYSIA & ANOR v JAGDIS SINGH (1987)2 MLJ. 185 SC;**

(2) **KHOO AH IMM @ CHANG BEE KIAM & ORS v DATUK BANDAR KUALA LUMPUR & ANOR (1997)2 MLJ 602 CA;** and

(3) **TENAGA NASIONAL BHD v TEKALI PROSPECTING SDN. BHD (2002)2 MLJ 707 CA.**

[20] As the instant appeal arose from the High Court's leave refusal in limine at the first stage, I am of the view that only the authorities which expound on the ramifications of the first stage are directly relevant and merits consideration here. However, on the other hand, the authorities which deal with the second stage, after leave has been granted, are unlikely to be of any assistance in the determination of the instant appeal.

IV. FAILURE TO EXHAUST ALTERNATIVE REMEDY

[21] It was submitted by applicants' learned counsel Dato MS Murthi that this appeal is focused on one single point of law ie whether the High Court was right in refusing leave on the ground that the applicants have not exhausted the alternative remedy by way of an appeal to the Minister of Sports ("the Minister"). He added that the word "may" in s21 is permissive, and not compulsive and not mandatory, as opposed to the word "shall". He relied on the Court of Appeal judgment in **QSR BRANDS BHD,** supra**.**

[22] Learned senior federal counsel Ms Suzana Atan contended that the applicants being aggrieved by the revocation order made by the Sports Commissioner should first appeal under s21(1) to the Minister within 30 days of the notification of the Sports Commissioner's decision. The High Court agreed. The contention presented for the Sports Commissioner was sustained.

[23] Given that backdrop, the question which calls for determination in the instant appeal is whether the appellants are at liberty to leapfrog and circumvent the alternative remedy created in s21(1), so as to apply direct to the High Court for leave to commence judicial review under 053 ("the question").

[24] In my judgment, the relevant provisions of the Act which merit consideration are ss.20(1)(e), 21(1) and 21(2).

[25] S.20(1)(e), where relevant, provides as follows:-

> *"Revocation ……………. of registration by Commissioner.*
>
> *20.(1). The Commissioner may revoke …………. the registration of a sports body if the Commissioner is satisfied that such sports body-:*
>
> (a) ……………………………………….
>
> *(b)……………………………………….*

(c) ……………………………………….

(d)………………………………………

(e) is hindering the development of the particular sport and it is in the public interest to revoke ………………. its registration".

[26] S.21(1) and (2), where relevant, read:

"Appeals

21.(1) Any sports body aggrieved by a decision of the Commissioner -

(a) in revoking or suspending the registration of such sports body;

(b) ………………………………………………

(c) ………………………………………………

(d)………………………………………………

(e)……………………………………………

(f) ………………………………………………

(g) ……………………………………………

may, within thirty days from the date of notification of the decision of the Commissioner, appeal to the Minister whose decision thereon shall be final.

(2) Before making any decision under subsection (1), the Minister may refer the matter to the Sports Advisory Panel".

[27] Upon a true construction of the above provisions, it is abundantly clear to me that the revocation of registration of a sports body by the Sports Commissioner under s20(1) would give rise to the applicant's right, exercisable within thirty days from the date of the notification of the decision of the Sports Commissioner, to appeal to the Minister under s21(1). The Minister's decision thereon shall be final. However, before making

any decision on the appeal from the Sports Commissioner's decision under s21(1), the Minister may refer the matter to the Special Advisory Panel under s.21(2).

[28] In applying for leave under 053 r.2(2), instead of preferring an appeal to the Minister under s.21(1), the applicants have not exercised and indeed have abandoned their rights in having chosen not to exhaust the alternative remedy made available to them under s21(1).

[29] Are the applicants entitled to do so?. The answer may be ascertained by an analysis of the authorities cited for the parties herein.

[30] In QSR BRANDS BHD, supra, cited for the applicants, the appellant company was the target company in a take-over bid made by Kulim (Malaysia) Bhd, the second respondent. Being unhappy with this,

the appellant's board engaged the Securities Commission, the first respondent, in some correspondence. On 14 October 2005, the Securities Commission wrote, refusing an extension of time for the appellant's board to take the usual steps with regard to the take-over bid in accordance with the Take-Over Code. The appellant then applied for leave to issue judicial review proceeding against the Securities Commission. The High Court refused leave on two grounds viz:

(1) that the appellant had failed to exhaust the alternative remedy; and

(2) that the appellant lacked the standing or locus standi to make the application.

[31] The appeal against the High Court's leave refusal was dismissed by the Court of Appeal, not on the first ground but on the second ground ie lack of locus standi.

Hence, the leave refusal in limine was affirmed by the Court of Appeal on the second ground.

[32] In relation to the argument based on the first ground ie failure to exhaust an alternative remedy, GOPAL SRI RAM JCA enunciated the relevant principles as follows:

(1) Arguments such as the availability of an alternative remedy go to the merits of the substantive application for judicial review and ought never to be dealt with at the leave stage, as the sole question at that stage is whether the application if frivolous: **MOHAMED NORDIN BIN JOHAN v ATTORNEY GENERAL MALAYSIA (1983) CLJ.271(Rep)SC; JP BERTHELSEN v DIRECTOR GENERAL OF IMMIGRATION, MALAYSIA & ORS (1986)2 CLJ 409 SC;** and **TANG KWOR HAM v**

PENGURUSAN DANAHARTA NASIONAL BHD (2006) CLJ. 927 CA;

(2) The existence of an alternative remedy does not automatically and without more oust the court's judicial review jurisdiction;

(3) The correct approach is for the judicial review court to take into account the availability of the alternative remedy in deciding whether to exercise its discretion to grant relief on the substantive application;

(4) The discretion is still with the courts, but where there is an appeal provision available to the applicant, certiorari should not normally issue unless there is shown:

(a) a clear lack of jurisdiction;

(b) a blatant failure to perform some statutory duty; or

(c) in appropriate cases, a serious breach of the principles of natural justice: JAGDIS SINGH, supra;

(5) An applicant for <u>certiorari</u> is not normally obliged to have exhausted his rights of appeal within the administrative hierarchy: **LAI CHENG CHEONG v SOWARATNAM (1983)1 CLJ. 282 FC; R v POSTMASTER GENERAL Exp. CAR MICHAEL (1928) 1KB 291;** nor need an applicant have, before he can apply for that remedy, exhausted his right of appeal to a court of law: **THE KING v WANDSWORTH JUSTICES (1942) 1 KB 281.**

[33] His Lordship concluded "that it is only at the hearing of the substantive motion for judicial review that

the existence of an alternative remedy becomes relevant. A fortiori, it is a matter which does not fall to be considered on a leave application."

[34] It is to be noted that in relation to the alternative remedy issue, QSR BRANDS, supra, followed the majority judgment of the Court of Appeal delivered by GOPAL SRI RAM JCA in **TANG KWOR HAM AND ORS v PENGURUSAN DANAHARTA NASIONAL BHD (2006)1 CLJ.927** where the applicants sought leave to commence judicial review in the High Court. I dismissed the application and refused leave in limine: see **TANG KWOR HAM &ORS v PENGURUSAN DAHANARTA NASIONAL BHD & ORS (2003) 7 CLJ 205** HC. However, the Court of Appeal allowed the appeal and granted leave to commence judicial review proceedings. On further appeal, in **PENGURUSAN DANAHARTA NASIONAL BHD v TANG KWOR HAM & ORS AND ANOTHER APPEAL** supra, the Federal Court reversed the majority judgment of the Court of Appeal. The

Federal Court in the judgment delivered by ALAUDDIN MOHD. SHERIFF FCJ ("the Federal Court judgment") upheld the High Court's leave refusal in limine.

[35] The Federal Court was requested to consider three questions of law viz:

(1) What is the proper test to be applied in an action for leave for judicial review?

(2) What amounts to a decision of a public authority within the meaning of 0.53 of the Rules of the High Court 1980? and

(3) Does S.72 of the Pengurusan Danaharta Nasional Berhad Act 1998 oust the jurisdiction of the courts to entertain an application for judicial review?

[36] At the hearing of the appeal before the Federal Court, it was intimated to the parties that the Federal Court would only consider Question 3, to which all parties agreed and counsel made their submissions. The Federal Court answered Question 3 in the affirmative and held in para 52 thereof that the Court of Appeal in granting leave to issue an application for certiorari under 053 r 3 had run counter to s72 of the Pengurusan Danaharta Nasional Berhad Act 1998 which provides Danaharta with insulation or immunization in the following words:

> "Limit on the grant of orders of court.
>
> 72. Notwithstanding any law, an order of a court cannot be granted -
>
> a) which stays, restrain or affects the powers of the Corporation, Oversight Committee, Special

Administrator or Independent Advisor under this Act;

b) which stays, restrains or affects any action take, or proposed to be taken, by the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;

c) which compels the Corporation, Oversight Committee, Special Administrator or Independent Advisor to do or perform any act,

and any such order, if granted, shall be void and unenforceable and shall not be the subject of any process of execution whether for the purpose of compelling obedience of the order or otherwise." (see also **DANAHARTA URUS SDN. BHD KEKATONG SDN. BHD (BAR COUNCIL**

MALAYSIA, INTERVENER) (2004) 2 MLJ 257 FC; (2004) 1 CLJ. 701 FC: and **NAGA JAGUH DEVELOPMENT SDN. BHD v DANAHARTA URUS SDN. BHD (2005) 3 CLJ. 818 HC)**

[37] In Paras 21, 23 and 24 of the Federal Court judgment, ALAUDDIN MOHD SHERIFF FCJ observed that the majority judgment of the Court of Appeal had held that the High Court should not have gone into the merits of the case at the leave stage. His Lordship added that the majority judgment of the Court of Appeal itself went further to consider the merits of the application at the leave stage ie whether the appellant Danaharta was in fact amenable to judicial review.

[38] In the light of the Federal Court judgment, I am of the view that the High Court is at liberty and indeed duty bound to consider any point raised, including the alternative remedy point, at the first stage of leave

application under 053 r3(1). The consideration of whether leave should be granted or refused in limine involves an exercise of discretion. That discretion must be exercised according to established judicial principles, having regard to all the facts and circumstances of each particular case.

[39] In this connection, it needs to be observed that where there is an appeal provision available to the applicants herein, certiorari should not normally issue unless the applicants can discharge the burden of proving any of the following exceptional circumstances:

(a) there is a lack of jurisdiction on the part of the Sports Commissioner in relation to the decision complained of ie the revocation order;

(b) there is a blatant failure by the Sports Commissioner to perform some statutory duty;

(c) the Sports Commissioner has committed a serious breach of the principles of natural justice, or

(d) illegality. (see TA WU REALTY, supra, at p.526 lines 4 to 11.)

[40] Upon a proper perusal of the factual background alluded to above, I am of the view that the applicants have failed to establish any of the above exceptional circumstances against the Sports Commissioner. I am unable to find any fact falling within the compass of exceptional circumstances.

[41] Most importantly, the Sports Commissioner by issuing the show cause letter to the applicants had given the applicants an opportunity of being heard. That is clearly in compliance with the fundamental rules of natural justice. On the part of the Sports Commissioner, there is not an iota of a breach, less so a

serious breach, of the fundamental principles natural justice.

[42] Allegations were actually directed against the Minister. However, the Minister is not a party to the proceedings before the High Court nor in the appeal herein. These allegations which the applicants had made against the Minister are in my view irrelevant to the consideration of the application before the High Court and now the instant appeal. Those allegations would only be called into question and consideration, if at all, when there is an application for leave to commence judicial review against the Minister. Until then, I should refrain from venturing any speculation.

IV. CONCLUSION

[43] As the applicants herein are unable to prove the existence of any of the above exceptional circumstances against the Sports Commissioner, the answer to the question is in the negative. Hence, I hold that the High

Court has rightly refused leave in limine at the first stage. I therefore dismiss this appeal with costs and affirm the decision of the High Court. Deposit to the Sports Commissioner on account of taxed costs.

Dated this 6 August 2007.

(DATUK WIRA LOW HOP BING)
Court of Appeal Judge
PUTRAJAYA

Counsel for the Appellant

Y.Bhg. Dato' M.S. Murthi
(M/s Murthi & Partners)

Counsel for the Respondent

Cik Suzana Atan
(Jabatan Peguam Negara)

REFERENCE:

QSR BRANDS BHD v SURUHANJAYA SECUTIRI & ANOR (2006) 2 CLJ. 532 CA;

TANG KWOR HAM v PENGURUSAN DANAHARTA NASIONAL BHD (2006) 1 CLJ.927 CA;

TANG KWOR HAM & ORS v PENGURUSAN DANAHARTA NASIONAL SDN. BHD & ORS (2003) 7 CLJ 205 HC;

PENGURUSAN DANAHARTA NASIONAL BHD v TANG KWOR HAM & ORS AND ANOTHER APPEAL (2007)4 CLJ 513

TA WU REALTY SDN. BHD. v KETUA PENGARAH HASIL DALAM NEGERI & ANOR (2004) 4 AMR 521 HC;

GOVERNMENT OF MALAYSIA & ANOR v JAGDIS SINGH (1987) 2 MLJ.185 SC;

KHOO AH IMM @ CHANG BEE KIAM & ORS v DATUK BANDAR KUALA LUMPUR & ANOR (1997) 2 MLJ 602 CA;

TENAGA NASIONAL BHD v TEKALI PROSPECTING SDN. BHD (2002) 2 MLJ 707 CA;

MOHAMED NORDIN BIN JOHAN v ATTORNEY GENERAL MALAYSIA (1983) CLJ. 271 (Rep) SC;

JP BERTHELSEN v DIRECTOR GENERAL OF IMMIGRATION, MALAYSIA & ORS (1986) 2 CLJ 409 SC;

LAI CHENG CHEONG v SOWARATNAM (1983) 1 CLJ. 282 FC;

R v POSTMASTER GENERAL Exp. CAR MICHAEL (1928) 1 KB 291;

THE KING v WANDSWORTH JUSTICES (1942) 1 KB 281.

DANAHARTA URUS SDN. BHD. KEKATONG SDN. BHD (BAR COUNCIL MALAYSIA, INTERVENER) (2004) 2 MLJ 257 FC;

(2004) 1 CLJ. 701 FC;

NAGA JAGUH DEVELOPMENT SDN. BHD. v DANAHARTA URUS SDN. BHD. (2005) 3 CLJ. 818 HC