

**DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)**

MAHKAMAH RAYUAN SIVIL NO : W- 01-70 TAHUN 2005

ANTARA

- 1. CHIN MEE KEONG**
- 2. SONG YOONG KHIN**
- 3. PETER KANG TEONG KENG**
- 4. LIM CHONG TIAM**
- 5. YEAP SWEE BEE**
- 6. LIM CHUI ANN**

(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

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 2. Song Yoong Khin
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... Pemohon-
Pemohon

Dan

Pesuruhjaya Sukan

... Respondan]

CORAM: James Foong Cheng Yuen, JCA
Low Hop Bing, JCA
Suriyadi bin Halim Omar, JCA

JUDGMENT OF SURIYADI HALIM OMAR, JCA

The appellants had filed a judicial review application, for an order that they be granted leave to apply for an order of certiorari, to remove a show cause letter dated 15th April 2005 and to quash the order of revocation of registration of the appellants' association, the Malaysia Taekwando Association (MTA). This body was the only sports body that was recognized by the World Taekwando Federation to run the World Taekwando style of taekwando, which is a recognized Olympic sport. This order of revocation of registration, dated 6th May was issued by the respondent under section 20 of the Sports Development Act 1997.

The order of revocation of registration came about as the Sports Commissioner had directed the MTA to amend its

constitution, to allow voting rights to clubs, a power of direction which was disputed by the appellants. It is not necessary in this case to detail out the full facts, but suffice to state that the MTA did not give in, resulting in the respondent deregistering the MTA. From the point of view of the appellants they had 2 options, namely, to appeal to the Minister under section 21 of the Sports Development Act 1997 or to go direct for judicial review. They opted for the latter avenue.

The appellants had sued on their own behalf and on behalf of the said Malaysia Taekwondo Association (MTA) pursuant to Order 53 Rule 2 (4) of the Rules of the High Court 1980. The relevant complete provision reads:

“Application (Order 53 r 2)

(1) An application for any of the reliefs specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 (other than an application

for an order of habeas corpus) shall be in Form III
A.

(2) An application for judicial review may seek any of the said relief, including a prayer for a declaration either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter.

(3) Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation.

Provided always that the power to grant an injunction shall be exercised in accordance with the provisions of section 29 of the Government Proceedings Act 1948 and section 54 of the Specific Relief Act 1950.

(4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

Leave (Order 53 r 3)

(1) No application under this Order shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for leave must be made ex parte to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.”

At the hearing before the High Court the appellants failed to obtain that leave hence the filing of this appeal. In brief the learned Judge had held that the judicial review application

was premature, and that the appellant must exhaust the domestic remedy first, before proceeding to the court for review. Apart from disagreeing with the court's above view, the memorandum of appeal also stated that the learned judge had erred in law in failing to make a distinction between the word "may" and "shall," and failing to rule that it was not mandatory to exhaust the remedy of appealing to the Minister let alone there was evidence of the latter's prejudices. The appellants had also canvassed that this issue of optional judicial review was a point of law and hence substantive in nature which required a full hearing.

The appeal was heard by us and allowed with costs in a majority decision. I was in the majority. I now lay down my reasons for agreeing to allow the appeal. The supporting statement pursuant to Order 53 Rule 3 (2) documentarily established the appellants as having the necessary locus standi. All 6 appellants indisputably were office bearers of the MTA, the 1st being the chairman, appellants 2, 3, and 4 as vice-chairmen, the 5th appellant as the secretary and the 6th

appellant as the treasurer. The 1st appellant in his affidavit had also affirmed that he had filed the action on behalf of himself and on behalf of the 2nd to the 6th appellants. In other words all had interest and some nexus with the MTA by virtue of their official position in it. They were interested in the well-being of the association and had not filed the application as mere busy bodies or mere cranky public-spirited citizens. Not only had the appellants lost their association but also their respective positions.

Elaborating on the locus standi issue further, both parties had agreed that the MTA had no legal rights or legal power to file the application. It was an unincorporated body and thus not a legal entity and without any legal personality (*Karting Club of Singapore v David Mak & Ors (1985) 2 MLJ 280*). That being so the only available solution was for the office bearers to take up the action. In *S. Kulasingam & Anor vs Commissioner of Lands, Federal Territory & Ors (1982) 1 MLJ 204* at 210 the court had stated:

”First, the Association as such has no standing and is incompetent to sue as a plaintiff. It is a body registered under the Societies Act, and section 9(c) thereof specifically provides that a society may sue in the name of its registered public officer. If there is no member registered as such, but we have not been told that that is so, then we would think that if it was at all necessary for the Association to sue jointly as a plaintiff *a representative claim by one or more of its office-bearers on behalf of all the members would be the solution* (emphasis supplied).”

In this case there was nothing wrong for the 6 of them to file the action on behalf of the other members. In fact even one person would have sufficed. Order 15 Rule 12 (1) promulgates:

“Where numerous persons have the same interest in any proceedings, not being such proceedings

as are mentioned in rule 13, the proceedings may be begun, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.”

In support of this representative action, even if there was no outward support for it, page 424, paragraph 15.12.5 of the *Malaysian High Court Practice 2003 Desk Edition*, reads:

“The representative plaintiff

If the plaintiff is claiming on behalf of himself and others (i.e. as a representative plaintiff), he may proceed without the consent of the members of the class: *Pan Atlantic Insurance Co & Republic Insurance Co v Pine Top Insurance Co (1988) 2 Lloyd’s Rep 505 at 509, HC*. The fact that there are two opposing factions within a native community does not prevent an action from being

a representative action: *Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors* (1990) 3 MLJ427.”

That takes care of the preliminary issue as it was clear that they had a standing to take up the action before the court (*Lim Cho Hock v Speaker Perak Legislative Assembly* (1979) 2 MLJ 85). Needless to say too if the locus standi issue were not established the leave application would have died a natural death; this issue may still be resubmitted by the respondents at the substantive hearing stage. A challenge on locus standi may be remounted at the subsequent hearing stage perhaps due to some changed circumstance.

The next stage was for the appellants to establish a prima facie case for leave, in that their application was not frivolous or vexatious (*George John v Goh Eng Wah Bros Film Sdn Bhd & 2 Ors* (1988) 1 MLJ 319). Having perused the evidence, apart from a personal interest by the respective appellants who had seen their association and respective positions becoming

history, the matter of public interest in this application was quite uppermost for consideration. This factor of public interest, which was submitted at the outset of the hearing, and as a consequence of deregistration by the respondent of the MTA on 1.1. 1998, had led to the country being deprived of a Taekwan Do representation at the Doha Meet, the Olympics and some other sporting event. Only by reinstatement as a sports body by the respondent (the Commissioner of Sports Malaysia), would Malaysia have a fighting chance to obtain some glory in international sporting meets, let alone the appellants redeem themselves.

The sister Taekwan Do body registered as the International Taekwan Do Federation could not represent the country as it was not an organization that was recognized by the World Taekwan Do Federation. In a word the intention, the action and the probable positive result that would ensue from a successful reinstatement, could never be construed as frivolous or vexatious. In fact these findings would have

sufficed for a High Court judge to grant “order in terms” for the leave application.

As the High Court judge had made certain findings, for the sake of completeness, I would like to touch on them. The High Court judge in her judgment had made much of the issue of domestic remedy in that the judicial review application was premature, whereby the appellants must exhaust it first before being entitled to apply for leave of the court. This was on the premise that as a certiorari order was a discretionary remedy it could be denied by her Ladyship if an alternative remedy was available. I now reproduce the relevant provisions, which had the availability of domestic remedy that led to the view. Sections 20 and 21 of the Sports Development Act 1997 (Act 576) read:

“Section 20:

Revocation or suspension of registration by Commissioner

20. (1) The Commissioner may revoke or suspend the registration of a sports body if the Commissioner is satisfied that such sports body—

(a) has been registered as a result of a fraud or a mistake or misrepresentation in any material particular;

(b) has failed to comply with any of the conditions imposed by the Commissioner under section 18;

(c) has contravened any provision of this Act or any regulations made thereunder;

(d) is inactive or is no longer a fit and proper entity to be registered to represent its sport in any State or in Malaysia;

(e) is hindering the development of the particular sport and it is in the public interest to revoke or suspend its registration;

(f) has failed or neglected to remedy any malpractice,” misconduct or irregularity on the part of its office bearers or its members within the period specified in the written notice given by the Commissioner; or

(g) is inactive, unco-operative or obstructive in the implementation of the regulations, policies or guidelines made under or pursuant to powers under this Act.

(2) Before revoking or suspending the registration of a sports body under subsection (1), the Commissioner shall give the sports body an opportunity to submit reasons, if any, against the proposed revocation or suspension.

Appeals

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

(a) in refusing to register such sports body;

(b) in imposing conditions on the registration of such sports body; or

(c) in revoking or suspending the registration of such sports body,

may, within thirty days from the date of the 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.”

The court, founded on the above section 21, had opined that by so not appealing to the Minister within 30 days of the Commissioner’s decision, such failure must be viewed unsympathetically. In the *Government of Malaysia & Anor v Jagdis Singh (1987) 2 MLJ 185* the Supreme Court also had held that:

“The first principle to note is that certiorari is a discretionary remedy primarily concerned with the prevention of excess or abuse of power rather than the final determination of individual rights. The jurisdiction is sometimes referred to as an “extraordinary” original jurisdiction of the High Court, supervisory in character rather than appellate or revisionary...

There is said to be a subsidiary rule to the effect that certiorari is not normally issued if the applicant has an alternative remedy available to him because the rationale is that he should first make use of the domestic remedy provided for him instead of invoking the writ jurisdiction.”

Khoo Ah Imm @ Chang Bee Kiam & Ors v Datuk Bandar Kuala Lumpur & Anor [1997] 2 MU 602 at page 608 had occasion to state that –

“Now, it is well settled that certiorari is one of those remedies in public law which cannot be claimed *ex debito justitiae*, but is a discretionary remedy. An applicant who makes out a case may yet be denied the remedy on a number of grounds, depending on the facts and circumstances of each case....

One of the grounds on which the remedy of certiorari may be withheld is where the supplicant is able to obtain better or at least equally efficacious relief either in other proceedings or at

an alternative forum. Sometimes, the alternative remedy is given by statute

The above was the law of the day as regards the remedy of certiorari.

The respondent in its submission had come out rather strongly when it inter alia submitted:

“The process envisaged by Parliament clearly intends the remedying of any matter related to sports development in the country to be dealt with in accordance with the processes prescribed. Any appeal against any appeal against any decision of the Sports Commissioner is to be dealt with by the Minister who is aided by a Sports Advisory Panel. This Sports Advisory Panel is empowered to make recommendations to the Minister. If persons, assuming the Appellants are even for one moment can be said to be within that category can come to court without having first pursued the matter in the manner intended by Parliament, it can be said that Parliament

may have legislated in vain. Matters concerning sports, its development and its administration were wisely considered by Parliament to be better resolved outside the realm of the courts until the appropriate moment.”

As said above, the High Court had found itself bound by the above legal pronouncements and the strong submission by the respondent, more so when section 21 was supposedly quite succinct in its contents. The Court had concluded:

“With regards to the various grounds of objection raised by the learned Senior Federal Counsel, in relation to the leave application, I am of the opinion that one issue alone would suffice for this court to decide whether leave for the judicial review ought to be granted in particular the non-exhaustion of remedies. From the submissions made by both parties I am inclined to agree with the learned Federal Counsel that the applicants failed to make use of the domestic remedy provided for under the Sports Development Act 1997. To my mind the application before me is premature. It is explicit that S 21 (1)

(c) of the said Act provides that any sports body aggrieved by a decision of the Sports Commissioner in revoking its registration may appeal to the minister within 30 days of the notification of the Commissioner's decision. I am also of the view that it is improper at this stage to assume that the minister has prejudged the matter and therefore prejudiced at this early stage. I am also in agreement with the learned Federal Counsel that Parliament's intention is provided for in Act 576 and in the exercise of my discretion and for the reasons above, I hereby refused leave and dismissed the application with costs."

As regards the law pertaining to a certiorari being a discretionary remedy, and the consequential actions to be undertaken subsequently, especially when there is a domestic remedy at hand after leave has been obtained, I have no quarrel with it as reproduced above. The all paramount question in this case is, must the issue of domestic remedy be canvassed and decided by the judge at this early stage i.e. at the stage of the leave application? Before discretion is to be

applied a judge must be appraised of all the facts first. Nothing must be arbitrary. Here the scenario was as follows: the judge had no affidavit in reply to peruse and consider, an incomplete set of evidential and legal argument regarding the factor of domestic remedy, the appellants were harping on some other equally serious issue let alone supported by evidence that the Minister could be biased, to expect the judge to apply his discretion correctly then (as regards the issue of alternative remedy), was an unreasonable expectation.

In fact as there was no affidavit in reply the appellants should have won hands down in the circumstances of the case. Surely the purpose of leave would be defeated if such a substantive matter such as this must be resolved at such an early stage. Recently too, in *QSR Brands Bhd v Suruhanjaya Sekuriti & Another* (2006) 2 CLJ 532 the Court of Appeal, when dealing with a similar issue, had ruled that the question of exhaustion of domestic remedy was not an issue at the leave stage. The issue of alternative remedy went to the merit of the

substantive application, with the court only to gauge whether the application before it was frivolous or not.

The appellants in the course of the appeal had stated that the wording of section 21 was such that it was open to another interpretation, in that the court was an alternative remedy to that of a decision by a Minister. This submission was legalistic and could not be brushed off off-handedly. Nothing was stated that the doors of the court were shut in the circumstances of the case, especially when the Minister, prima facie as per the newspaper cuttings, holding the same view as the respondent had already directed the MTA to amend the constitution, a partial stance which did not bode well for the appellants. Whether this interpretation of the appellants was correct or otherwise, similarly as in the above explanation, should only be resolved at the stage after leave had been granted and not before. It was substantial enough to deserve a full blown hearing.

For the reasons supplied I had allowed the appeal with costs.

Dated this 9th day of August 2007

Suriyadi Halim Omar
Judge, Court Of Appeal
Malaysia

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