

**IN THE FEDERAL COURT OF MALAYSIA (APPELLATE  
JURISDICTION) CIVIL APPLICATIONS NO:**

**08(i)-38-02/2025(W) & 08(i)-39-02/2025(W)**

**Pegum Negara Malaysia v Dato' Sri Mohd Najib bin Tun Hj  
Abd Razak**

**Unanimous decision:**

[1] There are 2 separate motions for application for leave to appeal to the Federal Court filed by the applicant, namely:

- (i) 08(i)-38-02/2025(W) – leave to appeal against the majority decision of the COA dated 6.1.2025 which allowed the respondent's appeal against the decision of the HC dated 3.7.2024 which dismissed the application for leave for judicial review; and
- (ii) 08(i)-39-02/2025(W) – leave to appeal against the entirety of the decision of the COA dated 6.1.2025 with regards to the Notice of Motion to adduce fresh or additional evidence dated 3.12.2024 (Enclosure 26).

[2] For both of the motions for application for leave to appeal to the Federal Court, the applicant had filed common proposed questions of law, namely:

- “ (1) Whether the principles established in Ladd v Marshall [1954] 3 All ER 745 (“Ladd v Marshall”) have been

codified or merely reflected in Rules 7(3A) of the Rules of Court of Appeal 1994 (“RCA 1994”) ;

- (2) Whether Rule 7(3A) of the RCA 1994 renders the principles in *Ladd v Marshall* concerning the admission of fresh or additional evidence in the Court of Appeal no longer applicable;
- (3) Whether Rule 7(3A) of the RCA 1994 imposes a higher threshold on parties seeking to introduce fresh or additional evidence by requiring proof of a “determining influence, “which exceeds the “important influence” threshold established in *Ladd v Marshall*;
- (4) At the leave stage for judicial review proceedings, whether the burden of proof regarding the existence of disputed fresh or additional evidence lies with the Attorney General (AG) in his capacity when acting solely under Order 53 Rule 3(3) of the Rules of Court 2012;
- (5) At the leave stage for judicial review proceedings, whether there is any legal obligation to compel any authority to confirm the existence of and provide

- copies of documents to the Applicant, particularly with respect to the AG, who is acting solely in his capacity under Order 53 Rule 3(3) of the Rules of Court 2012;
- (6) At the leave stage for judicial review proceedings, whether there is a distinction in the role and obligations of the Attorney General when acting solely in his capacity under Order 53 Rule 3(3) of the Rules of Court 2012 as opposed to when acting as a Respondent, particularly in the context of the duty to confirm the existence and/or admissibility of fresh or additional evidence. If such a distinction exists, what is the dividing line between these two roles?
- (7) In judicial review proceedings, whether the Applicant may introduce fresh or additional evidence that would have the legal effect of directly or indirectly challenging the decision of the Pardons Board.”

[3] The proposed questions 1, 2, 3 and 7 relate to the issue of admission of fresh or additional evidence. While the proposed questions 4, 5 and 6 relate to the issue of the role of the Attorney General (AG) in Judicial Review Proceedings.

[4] In our consideration of the applications for leave to appeal before us, we are guided by section 96 of the Courts of Judicature Act 1964 and the principles as laid down in the case of ***Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Another & Other Applications*** [2011] 1 CLJ 51.

[5] We are of the unanimous view that the proposed questions of law posed passed the threshold of section 96 of the CJA and that of ***Terengganu Forest*** for the reasons which we state in the following paragraphs.

[6] The questions posed are novel and questions of public importance which should be further ventilated before this Court.

These concerns:

- (a) the principles in adducing fresh evidence in Judicial Review proceedings. In this context it is in relation to the applicability of the principles as set out by ***Ladd v Marshall*** in light of Rules 7 (3A) of the RCA 1994. There appears to be some differences in the wordings of the requirements between *Ladd v Marshall* and Rule 7(3A) of the Rules of the Court of Appeal 1994 (RCA 1994), namely:

- (i) The RCA 1994 states the availability requirement as an alternative requirement to the reasonable diligence requirement because of the word “or” present in Rule 7(3A);
- (ii) When the RCA 1994 introduces the word “determining influence” as compared to the words “important influence” in *Ladd v Marshall*, does that raise the threshold of requirement?
- (iii) The RCA 1994 appears to have dispense with the credibility requirement.
- (iv) Whether the aforesaid differences are significant, ought to be further argued and ventilated before this Court. Further it also raises the issue of whether Rule 7(3A) RCA 1994 dispenses entirely with the conditions as stipulated in ***Ladd v Marshall***.
- (v) The cases so far, indicate the uncertainty and the inconsistency adopted by our Courts of the application of Rule 7 (3A) of the RCA by the Courts. We have instances where:
  - (i) Courts that applied ***Ladd v Marshall*** while ignoring totally Rule 7 (3A) of RCA 1994; or

- (ii) Courts that applied solely Rule 7 (3A) RCA 1994 without taking into consideration ***Ladd v Marshall***; or
- (iii) Courts that attempted to reconcile both but failed to elaborate with clarity.
- (iv) In our present case the majority decision applied ***Ladd v Marshall*** without considering at all Rule 7 (3A) RCA 1994. The minority decision assumes that Rule 7(3A) of the RCA 1994 codifies the principle of ***Ladd v Marshall*** without further elaboration, although Rule 7(3A) of the RCA does not expressly codify the 3 limb test established in ***Ladd v Marshall***.
- (v) given the different approaches adopted by the courts, more so in the present appeal in dealing with the admissibility of fresh or additional evidence, it is imperative for this court to clarify with certainty the applicability of the principles set by ***Ladd v Marshall*** in light of Rules 7 (3A) of the RCA 1994.
- (vi) the questions posed are of public importance which can provide guidance to the courts as to

the correct approach to adopt in dealing with admission of fresh or additional evidence; and

- (b) the questions posed are also in relation to the role of the AG at the leave stage in JR Proceedings vis-à-vis whether the AG is duty bound under the law to confirm the existence of and supply copies of impugned documents, and whether the AG has an obligation to defend or verify the evidence at the leave stage of the Judicial Review proceedings in view of the provision of 0 53 Rules of Court 2012. This is also in light of cases like ***Peguam Negara Malaysia v Chin Chee Keow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan)*** [2019] 1 MLJ 307; ***Association of Bank Officers, Peninsula Malaysia v Malayan Commercial Bank Association*** [1990] 3 MLJ 228. The majority decision in the Court of Appeal held that the fact there is no rebuttal affidavit from the applicant challenging the existence and the authenticity of the addendum is rather compelling. The majority then applied ***Ng Hee Thoong & Anor v Public Bank Bhd*** [1995] 1 MLJ 28. This decision implies that the AG is required to take an adversarial stand to defend or contest by filing affidavit at the leave stage in Judicial Review Proceedings under 0 53 ROC.

[7] On the issue which was raised by the respondent that the applicant would not be prejudiced as the applicant is not prevented from arguing further in the substantive hearing at the High Court on the admission of the fresh and additional evidence; we disagree with such a stand by the respondent. This is because by allowing the fresh and additional evidence by the Court of Appeal, the applicant can no longer argue in the High Court on the admissibility of the fresh or the additional evidence, as the High Court is bound by the decision of the COA to admit the fresh or additional evidence. In that context, the applicant would certainly be prejudiced.

[8] We therefore allow the applications for leave in both motions in enclosure 1 premised on all the questions of law proposed. No order as to costs.

Date 28.4.2025

**[For convenience we have attached Annexure A and Annexure B on the requirements under Ladd v Marshall and Rule 7 of the Rules of the Court of Appeal 1994]**



## Annexure A

### The requirements in Ladd v Marshall:

To admit fresh or additional evidence, the applicant must show:

- (i) the evidence could not have been obtained with **reasonable diligence** for use at the trial;
- (ii) the evidence must be such that, **if given**, it would probably have an **important influence** on the result of the case, although it need not be decisive; and
- (iii) the evidence must be such as is presumably to be believed, or in other words, **it must be apparently credible**, although it need not be incontrovertible.

## Annexure B

### Rule 7 of the Rules of the Court of Appeal 1994

“(1) The Court shall have all the powers and duties, as to amendment or otherwise, of the appropriate High Court, together with full discretionary power to receive further evidence by oral examination in Court, by affidavit, or by deposition taken before an examiner or Commissioner.

(2) Such further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.

(3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, such further evidence, save as to matters subsequent as aforesaid, **shall be admitted on special grounds only**, and not without leave of the Court.

(3A) At the hearing of the appeal further evidence shall not be admitted unless the Court is satisfied that-

- (a) at the hearing before the High Court or the subordinate court, as the case may be, **the new evidence was not available** to the party seeking to use it, **or** that

reasonable diligence would not have made it so available; and

- (b) the new evidence, **if true**, would have had or would have been likely to **have had a determining influence** upon the decision of the High Court or the subordinate court, as the case may be.”