IN THE COURT OF APPEAL, MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO: J-02(A)-2100-11/2016

BETWEEN

MOHAMAD HASSAN BIN ZAKARIA … APPELLANT
[No. KP: 620602-08-6655]

AND

UNIVERSITI TEKNOLOGI MALAYSIA … RESPONDENT

[In the High Court of Malaya at Johor Bahru
In the State of Johor Darul Takzim
Application for Judicial Review No. 25-33-09/2015

In the Matter of the Respondent's rejection of the Applicant's application for optional retirement as conveyed to the Appellant vide the Respondent's letter dated 21.6.2015 ["Application for Retirement"] and appeals which were also rejected vide the Respondent's letters dated 5.7.2015 and 1.8.2015 ["Appeals on Application for Retirement"]

AND

In the Matter of the Respondent's meetings, namely Meeting of the Respondent's Board of Directors No. 83 dated 9.6.2015, Special Meeting of the Respondent's Board of Directors No. 2/2015 on 9.7.2015 and

the University Management Committee Meeting No. 16/2015 on 11.8.2015

AND

In the Matter of section 12 of the Pensions Act 1980 and/or section 12 of the Statutory and Local Authorities Pensions Act 1980

AND

In the Matter of Articles 8(1)(2) and 136 of the Federal Constitution

AND

In the Matter of an application for orders of certiorari, mandamus and/or other declaratory relief pursuant to the Courts of Judicature Act, Rules of Court 2012 and/or powers of the Court

Between

Mohamad Hassan Bin Zakaria … Applicant
[No. KP: 620602-08-6655]

And

Universiti Teknologi Malaysia … Respondent]

CORAM:

HAMID SULTAN BIN ABU BACKER, JCA

BADARIAH BINTI SAHAMID, JCA

MARY LIM THIAM SUAN, JCA

JUDGMENT OF THE COURT

Introduction

[1] The appellant is an Associate Professor of the Language Academy set up under the respondent, one of the public universities in the country. The appellant decided to retire early. He applied to the respondent for the necessary permission. His application was rejected. So, were his appeals. The appellant then applied to judicially review the respondent's decisions by seeking-

i. declaratory orders to the effect that the appellant is entitled and has fulfilled the requirements to optionally retire from the service of the respondent; and that the respondent's rejection of the appellant's application and appeals are invalid and wrong in law and/or are *mala fides*;
ii. an order of certiorari to quash the respondent's decisions;
iii. an order of mandamus directing the respondent to approve the appellant's application for early optional retirement.

[2] The application was dismissed by the High Court. On appeal, we reserved our decision after hearing submissions from both counsel with a direction that both parties were to hand in further written submissions on the order of mandamus, as we noticed that there were no submissions on this, be it at the High Court or before us. Both parties

have since filed further written submissions on this specific issue. We have taken those submissions together with the written and oral submissions already made into regard in coming to our decision.

Background

[3] In the Statement filed in support of the application for judicial review under Order 53 of the Rules of Court 2012, the appellant claims that the rejection by the respondent is tainted with illegality and irrationality. The appellant cites a civil action that he had taken against the respondent in 2014 as the basis for the respondent's rejection and other actions taken against him. According to the appellant, it all goes back to a defamation action initiated by one Rogayah Mohamed, a fellow employee, in 2003 [Johor Bahru Sessions Court Civil Suit No. 53-699-2003]. Since the defamation action was brought against the appellant in his capacity as employee of the respondent, he had legal representation arranged by the respondent. However, he lost in that defamation action and was ordered to pay RM250,000.00 as damages to the plaintiff there. Rogayah initiated bankruptcy proceedings against the appellant which led to the appellant ultimately settling the judgment sum.

[4] The appellant claimed that the conduct of the defamation action was "highly questionable and that the respondent was negligent in conducting it", reaching this conclusion based on the following:

i. the respondent and its lawyers had failed to obtain mandate and/or instructions of the appellant in respect of the defence and counterclaim;

ii. the respondent and its lawyers had failed to instruct its lawyers to prepare and file the necessary cause papers for the appeal within time;

iii. the respondent had failed to instruct its lawyers and had failed to attend Court when the appeal was fixed for Show Cause which resulted in the appeal being struck out.

[5] The appellant then sued the respondent claiming that the respondent was in breach of contract and was negligent in failing to act in the appellant's best interest and presenting the best possible case ["Civil Suit"]. The appellant's principal relief in the Civil Suit is an order of indemnity for the defamation suit. This was in 2013.

[6] On 23.2.2015, the appellant decided to opt for an early retirement from the service of the respondent – see page 132 R/R 2/1. In his application, the appellant cited family welfare and personal grounds [demi menjaga kebajikan keluarga dan peribadi], elaborating further what he meant by this:

> "Pertama, persaraan ini akan memberi peluang kepada saya menumpu perhatian kepada ibu dan ibu mertua yang sedang sakit dan juga menambah masa dan aktiviti keluarga. Kedua, saya juga mendapati kerjaya sekarang telah menyebabkan stress yang telah menjejaskan tekanan darah saya. Ketiga, persaraan pilihan ini akan membenarkan saya menambah pendapatan kewangan keluarga bagi menangani situasi kewangan saya."

[7] His application was supported by his immediate faculty and by the respondent's management committee. Despite that support, the

application was rejected on 21.6.2015. No reasons were given. The appellant decided to find out why his application was rejected. His enquiries yielded an email dated 24.6.2015 sent by one Azri Hohad from the respondent telling the appellant that the decision had something to do with a case, that is, an action in Court:

> "…ianya adalah berkaitan dengan peraturan sedia ada kerajaan yang tidak membenarkan mana-mana staf yang ada kes dengan sesuatu organisasi dilepaskan sehingga kes berkenaan selesai."

[8] The respondent has since distanced itself from this email, claiming that it was unofficial and not binding on the respondent. In a subsequent affidavit in reply, the respondent has also averred that the email is irrelevant and of no effect as it cites an outdated and revoked guideline - Surat Pekeliling Perkhidmatan Bil. 1 Tahun 1991 is said to have been revoked by Surat Pekeliling Perkhidmatan Bil. 4 Tahun 2003. In any case, that was the reason for the decision of the respondent's board of directors.

[9] The appellant appealed. His appeal *vide* letter dated 5.7.2015 was rejected on 12.7.2015; and the appellant followed up with another appeal on 1.8.2015. That appeal, too, was rejected on 11.8.2015. No reasons were offered by the respondent in any of the instances.

[10] As far as the appellant is concerned, his application was rejected because of the Civil Suit that he had filed against the respondent. The appellant has challenged that basis of rejection, claiming that it renders the whole decision as one which is:

i. illegal and irrational;
ii. an act of bad faith;
iii. an unreasonable exercise of power, takes into account of improper considerations and fails to take into account relevant matters;
iv. without just cause or excuse;
v. without and/or in excess of jurisdiction;
vi. perverse.

[11] The appellant claimed that since 2014, he has been 'punished' by the respondent for the Civil Suit that he had initiated in 2013. The rejection by the respondent is said to be reflective of a "systematic attempt to deprive the appellant of his academic development and achievement"; and a display of bad faith and "blatant impropriety" on the part of the respondent. The appellant who had been offered a fellowship with Cornell University, USA sought the respondent's consent and support to accept that offer of fellowship. That application was rejected with the respondent telling the appellant to utilize his own leave, own capabilities and personal liability to fulfil the invitation by Cornell University USA by saying "memandangkan pihak saudara telah memulakan prosiding menyaman Universiti yang difikirkan secara budibicara menangguhkan apa-apa kemudahan sokongan akademik ke atas saudara".

[12] The appellant also claimed that the respondent's unreasonable exercise of power and taking into account of improper considerations to hinder his academic endeavours signified "blatant impropriety by the

respondent." The rejection of his retirement application is an act of bad faith and "is a continuation of such act".

[13] The appellant also alleged that when the respondent held that the Civil Suit formed the basis of rejection of the appellant's application for optional retirement, this conclusion was not only perverse, it "is diametrically contrary with its decision to allow the optional retirement of the Applicant's wife, Dr Wan Fara Adlina." By this, the appellant contended that the respondent had misdirected itself in fact and in law, in particular, to act fairly towards its employees and to treat applications for optional retirement equally among its employees. For the same reason, the decision is in bad faith and in breach of the rules of natural justice.

[14] The decision is further alleged to be perverse and devoid of plausible justification that no reasonable body of persons or tribunal in similar circumstances would have reached; and that on the evidence available before it, the respondent reached absurd results and/or reached results absurdly such that the decision factually lacks any rationally probative basis. The appellant makes these allegations for the following reasons; that the respondent:

a. failed to consider that the appellant had sufficient grounds and fulfilled the statutory requirement for optional retirement;

b. failed to take into account that -

i. the appellant has met the minimum requirement for optional retirement;

ii. the respondent has no future for the appellant since it decided to put an end to providing further support to his academic qualities;

iii. the appellant is in need of retirement in order to care for his handicapped daughter who has avascular necrosis and rheumatic arthritis;

c. misdirected itself in fact and in law when it arrived at a perverse conclusion that the Civil Suit is a bar to granting optional retirement without offering any legal basis whatsoever thus depriving the appellant of his personal right;

d. failed to take into account relevant matters, in particular –

i. the fact that it had allowed the optional retirement of the appellant's wife which appeal rested on the same grounds;

ii. the Civil Suit has no bearing on the appellant's termination as it is a negligence and indemnity suit;

iii. that no disciplinary action has been meted out against the appellant, past or present.

e. ought not to have substituted its own interpretation of the requirements of optional retirement laid down by the Public Services Department and/or any written law;

f. by means of ill will and/or bad faith has systematically denied the appellant's academic development by reason of the Civil Suit;

[15] On 31.1.2016, the Civil Suit was allowed after a full trial. In substance, the respondent was ordered to indemnify the appellant for the damages he had to bear in the defamation suit. The respondent has since appealed [24.2.2016]. The appeal was dismissed on 3.11.2016.

[16] In their affidavits in reply, the respondent denies all the allegations. Specifically, it denies obstructing the appellant from accepting the offer of fellowship from Cornell University. It instead explained that it had previously given the appellant study leave for the same purpose from 13.12.1991 to 26.12.1994 to the University of Pennsylvania, New York, USA, which leave was extended till the appellant's return where he reported for work on 21.6.1997. The respondent has also offered its views and explanations on the defamation case and the events related to the Civil Suit; which we do not feel the need to elaborate since the present appeal is not about those matters.

[17] What is of concern in this appeal is the appellant's application for optional retirement. In that regard, the respondent avers that it was an exercise of discretion under section 12(1) of the Statutory and Local Authorities Pensions Act 1980; and denies all allegations of bad faith. The respondent explained that the application was rejected after taking into consideration the fact that in view of the appellant's expertise and experience, his services in developing the academia of the respondent was still required. In exercising its discretion, the respondent has to ensure that the University's needs and interests are taken into account and that all applications are determined on a 'case by case' basis in order to avoid "ketandusan dan kekurangan" or a depletion of its

experienced teaching staff – see paragraphs 23 and 24 of affidavit in reply affirmed on 10.3.2016 at pages 213 of R/R. Such decision made on a case to case basis, as illustrated by how the appellant's application is treated differently from his wife's application which was approved, is said to be just, fair, correct, rational and reasonable having regard to all that is relevant and in accordance with the law.

Decision of the High Court

[18] Before the High Court, the focus of submissions was on the lack of reasons on the respondent's part with the respondent arguing that there is no statutory obligation on its part to give reasons for its rejection of the application. The reason set out in the email relied on by the appellant is said to not contain the actual reason for the rejection.

[19] The learned Judge found that the although the respondent had not given any reason for its decision, the learned Judge was not prepared to infer, on the facts, that the respondent had no valid reasons for its decision. While recognizing that the trend of the law has been towards an increased recognition of the duty upon the decision maker to give reasons, and that such trend is consistent with current development towards increased openness in matters of government and administration, the trend proceeds on a case by case basis. It was his lordship's view that the law does not at present recognize a general duty to give reasons for administrative decisions, citing in support, the Federal Court's decision in ***Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan*** [1999] 3 MLJ 1.

[20] Consequently, the learned Judge found that the appellant had failed to prove that the respondent had transgressed the principles of procedural impropriety, illegality or irrationality in arriving at the impugned decision. The learned Judge also did not find any evidence of malice on the part of the respondent in making its decision.

Our Decision

[21] We will take the issue on the duty to give reasons first, whether there exists such a duty at all. The respondent's argument is that there is none at all required under the Statutory and Local Authorities Pensions Act 1980, in particular section 12(1) which reads as follows:

> 12. (1) An appropriate authority may, with the approval of the pensions authority on the employee's application, consent to the retirement of an employee on or after attaining the age of forty years.
>
> (2) Where an employee who is appointed before the commencement of this section retires under subsection (1), such employee may be granted a pension only on attaining the age of –
>
> (a) forty-five years for-
>
> (i) a female employee; and
>
> (ii) an employee of the fire service holding the rank of sub-officer and below; or
>
> (b) fifty years for a male employee, other than an employee referred to in subparagraph (ii) of paragraph (a).

[22] It is quite evident from the terms of section 12(1) that the respondent has discretion when it comes to the question of early retirement or what is frequently described as optional retirement as opposed to compulsory retirement. It is for the respondent to consent or withhold such consent to retirement. That is apparent from the use of the words “may” and “consent”. It is also fairly evident that the exercise of that discretion is left to the appropriate authority; and when it decides to give or refuse its consent, no reasons need be forthcoming. Again, quite in the nature of optional retirement, it really must be on a case by case basis, dependent on the applicant, the grounds or reasons proffered for the request, and the so many circumstances that may present in any given application.

[23] In the present appeal, no reasons were offered, whether on the first occasion when the rejection was decided on 9.6.2015; or subsequently when the appeals suffered the same fate.

[24] We are fully aware that when considering whether the Court should exercise its special powers of supervision over the inferior tribunals, which would include decisions made by statutory bodies such as the respondent and its board of directors, the Courts do not sit on appeal; we do not delve into the merits of the matter under the consideration of the inferior tribunal. The review is over the decision making process in order to discern if the impugned decision is flawed on the ground of procedural impropriety. The Courts however, will scrutinize the decision to ensure that it is a just and fair decision which is not tainted with or by illegality, irrationality and proportionality. And, it is in this latter respect that the Courts will examine not just the process but also the substance of the decision.

[25] This is evidently the position as it stands today from the Federal Court's decisions and the Court of Appeal's decisions in the following landmark cases: ***R Rama Chandran v The Industrial Court of Malaysia*** [1997] 1 MLJ 145; ***Kumpulan Perangsang Selangor Bhd v Zaid Noh*** [1997] 1 MLJ 789; ***Petroliam Nasional Berhad v Nik Ramli Bik Hassan*** [2004] 2 MLJ 288; ***Ranjit Kaur a/p Gopal Singh v Hotel Excelsior (M) Sdn Bhd*** [2010] MLJ 1; ***Tenaga Nasional Berhad v Yahaya bin Jusoh*** [2014] 1 MLJ 483; ***I & P Seriemas Sdn Bhd & Anor v Tenaga Nasional Berhad*** [2016] 1 MLJ 261.

[26] We agree with the submissions of learned counsel for the respondent that not every case is amenable to what has since become known as the *Rama Chandran* approach, where the Courts do not just review the decision of the tribunal on the procedure but also on the merits; substitute a different decision in place of the tribunal's without remitting the matter to the tribunal for re-adjudication; and thereafter order consequential relief. The exercise of such "controlled activism" and the fine balance between review and appeal largely depends on the factual matrix and/or the legal modalities of the case; it is a matter of judicial discretion of the reviewing judge – see remarks by Steve Shim CJ (Sabah and Sarawak) in ***Petroliam Nasional Berhad v Nik Ramli Bik Hassan*** [*supra*]. The Court must be careful that it does not stand accused of usurping the function and power of the decision making body. Such intervention must be avoided especially where sound and proper reasoning have been proffered or the particular circumstances are not appropriate for such degree of scrutiny. This was expressed by the Federal Court in ***Ranjit Kaur a/p Gopal Singh v Hotel Excelsior***

(M) Sdn Bhd and the majority decision of the Court of Appeal in ***I & P Seriemas Sdn Bhd & Anor v Tenaga Nasional Berhad***.

[27] In ***Ranjit Kaur a/p Gopal Singh v Hotel Excelsior (M) Sdn Bhd***, the Federal Court addressed the concern of whether *Rama Chandran*, described as the "*mother of all those cases*" had changed the approach to be adopted in judicial review cases. The Federal Court said:

> "[16] …post *Rama Chandran* cases have applied some brakes to the Courts' liberal approach in *Rama Chandran*. The Federal Court in *Kumpulan Perangsang Selangor Bhd v Zaid Noh* [1997] 1 MLJ 789; [1979] 2 CLJ 11 after affirming the *Rama Chandran* decision held that there may be cases in which for reason of public policy, national interest, public safety or national security the principle in *Rama Chandran* may be wholly inappropriate.
>
> [17] The Federal Court in *Petroliam Nasional Berhad v Nik Ramli Bik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625, again held that the reviewing Court may scrutinize a decision on its merits but only in the most appropriate cases and not every case is amenable to the *Rama Chandran* approach. Further, it was held that a reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plain irrationality, even where the reviewing judge might not have come to the same conclusion."

[28] Consequently, a reviewing judge will not, generally, intervene in the findings of the tribunal unless it is shown to be based on grounds of illegality or is proved to be plainly irrational. In other words, the occasion when the reviewing judge would interfere and disturb findings of the tribunal must necessarily be exceptional and where there is clear evidence of infirmities breaching the *Wednesbury* principles, a view

shared by the Court of Appeal in ***Tenaga Nasional Berhad v Yahaya bin Jusoh*** [2014] 1 MLJ 483. There must also be some measure of restraint where the impugned decision is one which is reached based on the credibility of witnesses. Such decisions are generally not amenable to judicial review unless of course, it is shown that the facts do not support the conclusion arrived at, or where the findings are arrived at by taking into consideration irrelevant matters, or had failed to take relevant matters into consideration. On these occasions, such decisions are always subject to judicial review – per Raus Sharif FCJ [as His Lordship then was] in ***Ranjit Kaur a/p Gopal Singh v Hotel Excelsior (M) Sdn Bhd*** [supra]; and again by the Federal Court in ***Wong Yuen Hock v Syarikat Leong Assurance Sdn Bhd & Another Appeal*** [2016] 1 MLJ 268.

[29] A distinction however, seems to have emerged between decisions of inferior tribunals and decisions made by the executive. While the "*parameter of judicial intervention in the decision of inferior tribunal which has no nexus to the executive is wider*" such that the Courts are prepared to substitute and/or vary the decision of the inferior tribunal, the same cannot be said when it comes to decisions by the executive, especially where there are other reasonable options available to enable the executive to review its decision. This was expressed by Hamid Sultan JCA in ***Menteri Kewangan & Anor v Wincor Nixdorf (M) Sdn Bhd & Another Appeal*** [2016] 4 MLJ 621:

> [3] We take the view that the jurisprudence articulated by His Lordship must only be applied in extremely rare and urgent cases where there is no alternative relief as it will impinge on the supervisory jurisdiction of the High Court when it relates to executive decision as opposed to inferior tribunals.

[30] A careful read of that judgment reveals that His Lordship did say that:

> "The test for intervention appears to be that the decision is in defiance of logic and demonstrates patent injustice on the face of record requiring immediate judicial intervention."

[31] Reverting to the instant appeal, the learned Judge perused the affidavits and the written submissions of both parties before concluding that the appellant had failed to prove that the respondent had transgressed the *Wednesbury* principles. The learned Judge further did not find evidence of malice. The only issue that concerned the Court was that the decision was made without any reason being given, and whether then the Court could infer that there were no valid reasons. His lordship was disinclined to so infer as there was no general duty to give reasons for the statutory bodies such as the respondent simply because there is no statutory obligation to do so. His Lordship cited the decision in ***Batu Malay a/l Thandy v Saulinardi & Anor*** [2015] 2 MLJ 364 in support.

[32] We propose to deal with this issue from three respects. The first is the lack of reasons at the material time of decision; the second is the provision of some explanation post decision but before the appeals lodged by the appellant; and the third, the explanation offered in the affidavits filed in response to the application for judicial review. Regardless the scenario, whether it was on 9.6.2015 when the

respondent rejected the application for optional retirement, or on 9.7.2015 or 11.8.2015 when the appeals were rejected, no reasons were ever given. Learned counsel for the respondent submitted that the respondent cannot be faulted for not providing any reasons because there is no statutory obligation to state reasons. And, the learned Judge agreed.

[33] With respect, we cannot agree with that proposition. In the first place, while the Court of Appeal in ***Batu Malay a/l Thandy v Saulinardi & Anor*** [*supra*] agreed with the decision of the High Court that "*there was no general duty to give its reasons for its decision as there was no statutory obligation to do so*", that view was not expressly in relation to an application for judicial review. That case concerned an appeal against a decision of the disciplinary board [DB] under the provisions of the Legal Profession Act 1976. The High Court had found that under section 103D of the Legal Profession Act, the DB was not bound to follow the findings and recommendations of the disciplinary committee and that there were no provisions requiring the DB to give reasons for its decision, especially section 103D(3). It was in that context that the Court of Appeal expressed that view. Section 103D has since been amended to require the DB to give reasons where it chooses not to follow the findings and recommendations of the disciplinary committee. Without that amendment, arguably, the DB is still obliged to give reasons for its decision.

[34] While the learned Judge may have acknowledged that "*consistent with current development towards an increased openness in matters of government and administration*," that there is a "*trend…towards an increased recognition of the duty upon the decision maker of many kinds*

to give reasons", his Lordship went on, quite correctly to say that this *"trend proceeds on a case by case basis*."

[35] But, it is his lordship's next remarks that there is no "*sight on the established position of the common law that there is a general duty universally imposed on all decision ma*kers" and that this view was "*reaffirmed in Reg v Secretary of State for the Home Department, ex p Doody [1994] 1 AC 531 that the law does not at present recognize a general duty to give reasons for administrative decisions*" citing ***Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan*** [1999] 3 MLJ 1, that we find objection to. For a start, these decisions have not been considered in full; and in any case, those were not the final remarks and views of the Federal Court in ***Majlis Perbandaran Pulau Pinang***.

[36] A careful read of the Federal Court's decision in ***Majlis Perbandaran Pulau Pinang*** at pages 61 to 64 will show that the Federal Court, was addressing the point of the duty to give reasons in the third sense under the concept of legitimate expectation. The Federal Court decided to take the opportunity to "…*say a few words on the ambit of the duty to give reasons on the part of a decision-maker in the rapidly developing field of administration and where the Courts exercise supervisory jurisdiction over the acts of subordinate authority*." The views expressed by the Federal Court were careful and well considered, after examining the decisions of *Breen v Amalgamated Engineering Union & Ors* [1971] 2 QB 175, *Rohana bte Ariffin & Anor v Universit Sains Malaysia* [1989] 1 MLJ 487, *Doody v Secretary of State for the Home Department* [1993] 3 All ER 92, and *Dr Stefan v The General*

Medical Council [1999] 1 WLR 1293. And, with respect, the Federal Court's view is not in the terms concluded by the learned Judge.

[37] This is what the Federal Court had to say on the duty to give reasons. According to the Federal Court in ***Majlis Perbandaran Pulau Pinang***, Lord Denning in *Breen v Amalgamated Engineering Union & Ors* had observed that where a person '*has some right or interest, or legitimate expectation of which it would not be fair to deprive him without a hearing or reasons given, then these should be afforded him accordingly, as the case may demand*'. The Federal Court recognized that this principle "has also been invoked in the *case of Rohana bte Ariffin & Anor v Universit Sains Malaysia [1989] 1 MLJ 487 where it was ruled that a reasoned decision can be an additional constituent of the concept of fairness*."

[38] The Federal Court went on to consider the House of Lords' decision in *Doody v Secretary of State for the Home Department*, noting that Lord Mustill, speaking for the House of Lords, said at page 110:

> "I accept without hesitation … that the law does not at present recognize a general duty to give reasons for an administrative decision. Nevertheless it is equally beyond question that such a duty may in appropriate circumstances be implied …"

[39] The Federal Court then observed that on the facts in *Doody*'s case, "*the House of Lords had reversed the decision of the Court of Appeal on this point and had granted the declarations prayed for. In doing so the House grounded its decision on the requirement of fairness.*

Lord Mustill's speech made a wide ranging survey of natural justice jurisprudence generally and, in particular, the duty to give reasons. From p 325 of the report on Doody, we see that the requirement of fairness or natural justice depends upon the context of the decision."

[40] The Federal Court next cited an article based on a talk by Michael Beloff QC given at the Law Society of Singapore and published in the *Law Gazette* of the Law Society of Singapore of February 1999 which states the following:

> Although a right to reasons has not yet been recognized as a pervasive aspect of fair procedure, it is becoming less an exception, than a rule subject to exceptions, not least because reasons enable the Court to exercise their supervisory role more effectively when they can detect whether a decision is not flawed by error. *Ex p Doody* [1994] 1 AC 531; *R v UFC; ex p Dental Institute* [1999] 1 WLR 242.

[41] The Federal Court did not stop there; it proceeded to look at a then "*very recent and, as yet, unreported Privy Council case of Dr Stefan v The General Medical Council*." That decision has since been reported in ***Dr Stefan v The General Medical Council*** [1999] 1 WLR 1293. In that decision, the Privy Council examined the relevant legislation and concluded that there was no express statutory obligation therein requiring the Health Committee of the General Medical Council to state its reasons for suspending the registration of Dr Stefan indefinitely on account of her fitness to practice being seriously impaired. The Privy Council was also not able to "*spell out an implied obligation to state reasons*". However, the Privy Council found that the Committee had the power to give reasons and added:

> "that giving reasons can be beneficial and assist justice: (1) in a complex case to enable the doctor to understand the Committee's reasons for finding against him; (2) where guidance can usefully be provided to the profession, especially in difficult fields of practice such as the treatment of drug addicts; and (3) because a reasoned finding can improve and strengthen the appeal process."

[42] Despite the above finding, the Privy Council in ***Dr Stefan v The General Medical Council*** decided to consider what it described as "*the alternative approach – that of the Common Law*". The Privy Council recognized that the proposition here is that there should be a general duty to give reasons. The advantages for such a requirement is quite obvious, "*rehearsed*" according to the Privy Council and they include "*strengthening the decision-making process, increasing public confidence in that process and enabling affected parties to immediately know the strengths and weaknesses of their respective cases, and to facilitate appeal where that course is appropriate*." At the same time, the Privy Council acknowledged that "*there are also dangers and disadvantages in a universal requirement for reasons. It may impose an undesirable legalism into areas where a high degree of informality is appropriate and add to delay and expense. The arguments for and against the giving of reasons were explored in the Justice-All Souls Report (Administrative Justice: Some Necessary Reforms, 1988). Another summary can be found in R v Higher Education Funding Council; ex p Institute of Dental Surgery [1994] 1 All ER 651, [1994] 1 WLR 242 at p 256*."

[43] Be that as it may, the Privy Council was alert to the fact that there is a "*trend … towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. This trend is consistent with current development towards an increased openness in matters of government and administration. But the trend is proceeding on a case by case basis (R v Royal Borough of Kensington and Chelsea; ex p Grillo [1996] 28 HLR 94), and has not lost sight of the established position of the common law that there is no general duty, universally imposed on all decision-makers. It was reaffirmed in R v Secretary of State for the Home Department; ex p Doody [1994] 1 AC 531 at p 564 that the law does not at present recognize a general duty to give reasons for administrative decisions*." It is only this part of the Privy Council's decision that was cited by the learned High Court Judge in our instant appeal, without acknowledging the earlier remarks and those that followed; and that can be quite erroneous as we shall soon see, for the Privy Council did not stop with those remarks. Instead, the Privy Council went on to say, and this was actually cited by our Federal Court in ***Majlis Perbandaran Pulau Pinang*** at page 64:

> "But it is well established that there are exceptions where the giving of reasons will be required as a matter of fairness and openness. These may occur through the particular circumstances of a particular case. Or, as was recognized in *R v Higher Education Funding Council; ex p Institute of Dental Surgery* [1994] 1 WLR 242 at p 263, there may be classes of cases where the duty to give reasons may exist in all cases of the class. Those classes may be defined by factors relating to the particular character or quality of the decision, as where they appear aberrant, or to factors relating to the particular character or particular Jurisdiction of the decision-making body, as where it is concerned with matters of special importance, such as personal liberty. There is certainly a strong argument for the view that what were once seen as

> exceptions to a rule may now be becoming examples of the norm, and the cases where reasons are not required may be taking on the appearance of exceptions. But the general rule has not been departed from and their Lordships do not consider that the present case provides an appropriate opportunity to explore the possibility of such a departure. They are conscious of the possible re-appraisal of the whole position which the passing of the Human Rights Act 1998 may bring about. The provisions of art 6(1) of the Convention on Human Rights, which are now about to become directly accessible in national courts, will require closer attention to be paid to the duty to give reasons, at least in relation to those cases where a person's civil rights and obligations are being determined. But it is in the context of the application of that Act that any wide-reaching review of the position at common law should take place."
>
> [emphasis added]

[44] As can be seen, the Privy Council had expressed considerable opinion on this issue of duty to give reasons, examining it not just from the perspective of express or implied duty but whether the subordinate body or tribunal has the power to give reasons for its decision; and the argument for giving reasons under common law. In its analysis, the Privy Council weighed the competing arguments for requiring reasons to be given, acknowledging that this will depend "*on the particular circumstances of a particular case*", that there may "*classes of cases where the duty to give reasons may exist in all cases of the class.*" In addition to those considerations, the Privy Council agreed that there "*is certainly a strong argument for the view that what were once seen as exceptions to a rule may now be becoming examples of the norm, and the cases where reasons are not required may be taking on the appearance of exceptions*."

[45] All these remarks and principles were endorsed by the Federal Court in ***Majlis Perbandaran Pulau Pinang***, and not just what was set out by the learned Judge. At page 64 of its judgment, the Federal Court went on to say:

> We endorse the principles enunciated by the Privy Council in Dr Stefan and say that in the exceptional circumstances of this case and having regard to the trend towards increased openness in matters of Government and administration, as a matter of fairness, reasons should have been given by the Council as to why it was imposing the disputed condition and thus resiling from the original approval of planning permission which was free from any pricing condition. In so holding, we should like to place special stress on the Council's earlier statement, when responding to a plea by members of the Society regarding pricing, that pricing was an internal matter and did not concern it. To put it mildly, the circumstances here were such as to cry out for an explanation from the Council as to its departure from its earlier stance, yet none was vouchsafed to the Society until after proceedings had been commenced in Court. That belated explanation, as we have already indicated, left much to be desired. [emphasis added]

[46] Without diminishing its importance and contributions to many respects in the law on judicial review and the law of bias, the Federal Court's decision in ***Majlis Perbandaran Pulau Pinang*** concerns the local authority's imposition of conditions to its approval of the respondent's application for planning permission. The facts are not really important for our present purpose, but the Federal Court's views on the principles on the duty to give reasons are. Generally, the principles that can be deduced from the Federal Court's decision on this issue may be summed up as follows:

1. the duty to give reasons depends on whether there is an express duty to do so;
2. where there is no express duty, the Court should consider whether there is an implied obligation to state reasons;
3. if there is no express or implied obligation, is there a power to give reasons?
4. at common law, although there is no universal duty to give reasons, the trend is to give reasons;
5. this trend is consistent with current development towards an increased openness on matters of government and administration;
6. the giving of reasons is a matter of fairness;
7. this trend proceeds on a case by case basis.

[47] Aside from finding that there were exceptional circumstances, the Federal Court in ***Majlis Perbandaran Pulau Pinang*** held that for the reasons set out above, the appellant must give reasons for its decision. In the Federal Court's words, "*To put it mildly, the circumstances here were such as to cry out for an explanation from the Council*…" Therefore, contrary to the learned Judge's conclusion that ***Majlis Perbandaran Pulau Pinang*** is authority for the proposition that the law does not at present recognize a general duty to give reasons, following on from this decision of the Federal Court, there is in fact such a duty whether it is due to presence of exceptional circumstances, or due to *"the particular circumstances of a particular case*", or as a result of the

"*classes of cases where the duty to give reasons may exist in all cases of the class.*"

[48] That was the decision of the Federal Court in ***Majlis Perbandaran Pulau Pinang*** which remains good law till this day. Now, more recently is the decision of the Court of Appeal in ***Pembinaan Batu Jaya Sdn Bhd v Pengarah Tanah dan Galian Selangor & Anor*** [2016] 5 MLRA 503, a decision available at the time of the hearing of the application before the High Court, yet not referred to.

[49] The appellant in that case sought to review the State Authority's decision in relation to alienation of land. After land had been alienated to the appellant on 26.7.1995, the appellant had submitted an application for conversion of use of part of the land from "Industrial" to "Shop Office and Commercial Complex." This was allowed on 5.8.1996. On 29.4.2005, the State Authority reduced the size of the land that was approved. Between that date and November 2011, there was much correspondence between the parties over the size of the land that was alienated and the status of conversion of land use. On 27.6.2012, the State Authority revoked its decision to alienate any land to the appellant. The appellant's appeal proved unsuccessful. The appellant's application for judicial review was also dismissed.

[50] At the Court of Appeal, one of the contentions was that the decision revoking the initial approval to alienate land to the appellant was bad as it was unreasonable in the *Wednesbury* sense in that no reasons were proffered by the respondent as to why the alienation was revoked in the circumstances obtaining in the case. After dealing with the issue of prerogative power, that the decision to alienate land under

sections 40, 42 and 76 of the National Land Code 1956 is justiciable and not immune from judicial scrutiny, Abang Iskandar JCA went on to deal with the issue of duty to give reasons. This is what his Lordship said after citing ***Pengarah Tanah dan Galian v Sri Lempah Enterprise*** [1979] 1 MLJ 135 where the very idea of unfettered discretion to grant or reject an application under section 124 of the National Land Code or to impose conditions or other requirements is seen as "a contradiction in terms":

> [45] …the principle as stipulated in the ***Sri Lempah Enterprise*** case [supra] is applicable in cases involving exercise of discretion, absolute or otherwise. High authorities have shown such phrase to be a gross anomaly that cannot pretend to even co-exist. [See for instance: ***Pyx Granite Co Ltd v Ministry of Housing and Local Government*** [1958] 1 All ER 625]. In exercise of a public power, there is no escaping the obligation on the part of the decision-maker to act reasonably in the peculiar circumstances of the case that appears before him. One of the fundamental features in modern administrative law jurisprudence has been the growing need for the public decision-maker to give reasons for his decision. It may be inconvenient to do so. But it is an indivisible component in all decision-making processes. We find that every decision, both good and bad, is driven to such conclusion by a reason. Learned Justice Zainun Ali JCA [as she then was] in the case of ***Datuk Justin Jinggut v Pendaftar Pertubuhan*** [2012] 3 MLJ 212 had said this:
>
> > "Thus if no reason is given by the respondent, it is open for this Court to conclude that he had no good reason in as much as it is open for us to conclude that the respondent had not exercised his discretion in accordance with the law."

[51] His Lordship found further support for this approach in yet another Federal Court decision, that is, ***Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan*** [2002] 4 CLJ 105. Although in the peculiar facts in ***Sugumar*** , the Federal Court found that the Director of Immigration Sabah did not have to give reasons as he was not the decision-maker, he merely carried out the directions of the appellant. Consequently, there was no duty imposed on the DG of Immigration to give reasons for the adverse decision that had aggrieved Sugumar.

[52] What is interesting is how Abang Iskandar JCA approached this thorny issue of no express duty under the NLC for the appellant to give or assign any reason for deciding in the way it deems fit. To this, this is what his Lordship said:

> "But, we could not find any statute which contains express provisions that affirmatively prohibit a public officer, as a decision-maker, in the discharge of his public duty, from assigning any reason for his decision. Indeed, it would be most strange, if there as one such statute. We say so because it would defeat the essence of good governance and that it would not promote accountability and owning up to responsibility in decision-making. As such, the silence in a statute requiring that a reason or reasons be given by the decision-maker ought not to be taken to mean there was therefore no duty to give reasons. The silence in the statute, on the duty to give reason for a decision, ought not to be made a cloak or a blanket under which the decision-maker could conveniently find refuge so that the rationale for his decision remains shrouded in mystery, privy only to himself, but not to the public at large, on whose behalf, he is entrusted to discharge that duty. That scenario would indeed be a contradiction in terms."

[53] The Court of Appeal in ***Pembinaan Batu Jaya Sdn Bhd*** similarly examined the Federal Court's decision in ***Majlis Perbandaran Pulau Pinang*** on the issue of duty to give reasons before concluding that the question to ask is whether in the circumstances of the case, there arose a duty on the part of the decision-maker to give reasons. In other words, it is not just a matter of trend but a recognition of accountability, that it stands to reason that good governance demands the giving of reasons for the particular decision made; more so, where there is an avenue of appeal against that decision. The justification for not giving reasons is now more a case of an exception rather than the general rule, as warned by the Federal Court in ***Majlis Perbandaran Pulau Pinang*** citing Michael Beloff QC and also the concerns of the Privy Council and the House of Lords.

[54] Although the learned Judge was correct in citing ***Minister of Human Resources v National Union of Hotel, Bar and Restaurant Workers, Semananjung Malaysia*** [1997] 3 MLJ 377, as authority for the proposition that "*the absence of reasons could not of itself prove and support of the suggested irrationality of the decision*", a proposition that emanated from the House of Lords' decision in ***Lonrho plc v Secretary of State for Trade and Industry*** [1989] 2 All ER 609 and which was adopted by the Court of Appeal, there was in fact more that House of Lords had said in this regard. It is perhaps helpful to set out what exactly Lord Keith of Kinkel had said in ***Lonrho plc***:

> "The absence of reasons for a decision where there is no legal duty to give them cannot of itself provide any support for the suggested irrationality of the decision. <u>The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a</u>

different decision, the decision-maker who has given no reasons cannot complain if the Court draws the inference that he has no rational reason for his decision." [emphasis added]

[55] Once again, it is observed that his Lordship has failed to take into regard the full text and context of what Lord Keith had said. Lord Keith had expressed the view that if no reasons are given, "*The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker who has given no reasons cannot complain if the Court draws the inference that he has no rational reason for his decision."* It is therefore open to Court to infer that the decision maker such as the respondent has no "*rational reason for his decision" where the facts and circumstances "point overwhelmingly in favour of a different decision*."

[56] Coming back to our present appeal, what the High Court ought to have done is to consider whether there were exceptional or particular circumstances or whether the appellant or the subject matter under consideration belong to a class of cases where the duty to give reasons may in fact exist. The learned Judge did not do that. Instead, what the learned Judge did was to find that the respondent had considered the application and all the reasons given by the appellant in support of his application, and had rejected it. Such a decision, in the learned Judge's view, "*without reasons given in support of the Applicant's application does not constitute 'Wednesbury unreasonableness*'".

[57] In considering whether there were exceptional or particular circumstances where the duty to give reasons may in fact exist, the learned Judge ought to have taken into account the fact that this was an application for optional retirement under section 12(1) of the Statutory and Local Authorities Pensions Act 1980. That Act has to be read together with the appropriate service circulars issued by the Public Services Department and which have been adopted for application by statutory bodies such as the respondent. In this case, that would be Surat Pekeliling Perkhidmatan Bil. 4 Tahun 2003 [SPP Bil. 4/2003] which has revoked the earlier Surat Pekeliling Perkhidmatan Bil. 1 Tahun 1991 [SPP Bil. 1/1991], as explained by the respondent.

[58] Paragraph 15 of SPP Bil. 4/2003 deals with optional retirement under section 12 and it reads as follows:

> **15. Persaraan Pilihan Di Bawah Seksyen 12 Akta 227 / 239**
>
> Anggota berpencen yang telah berumur 40 tahun boleh memohon persaraan pilihan. Tempoh perkhidmatan yang boleh dimasukira tidak kurang daripada 10 tahun adalah diperlukan bagi membolehkan faedah persaraan diberi kepada anggota tersebut. Ganjaran perkhidmatan layak dibayar pada tarikh persaraan manakala pencen hanya akan dibayar pada umur layak menerimanya mengikut undang-undang pencen. Fadeah persaraan yang layak diberi ialah saperti di **Jadual 26** dengan mengemukakan borang dan dokumen saperti di **Jadual 27**.

[59] Under paragraph 15 of SPP Bil. 4/2003, the only conditions that the appellant must meet before he may apply for the respondent's

consent to retire at an age earlier than his compulsory age of retirement is that he must have attained 40 years of age and has 10 years of service. There is no dispute that both conditions are met here. Consequently, given that-

i. both section 12(1) of the Statutory and Local Authorities Pensions Act 1980 and SPP Bil. 4/2003 only require that an applicant fulfil the two conditions of age and minimum years of service before an application for early retirement may be made;

ii. the appellant has met both conditions;

iii. the appellant has explained his reasons for seeking that early retirement which is for personal, financial and family reasons; and

iv, the application is supported by his immediate department;

it was incumbent on the respondent to tell the appellant why, despite meeting the conditions and in the circumstances as set out, his application was still not approved.

[60] We are of the view that where the statutory authority makes available to its employees the option to retire early, it is only reasonable if not of perfectly logical sense that any rejection of any application to exercise that option must be explained; more so when it is made after the basic and only requirements have unquestionably been met. The very nature and circumstances of the application, that is, to opt to retire early from the service of the respondent, mandates a reading into section 12(1) an implied duty to provide reason for any withholding of consent to that option. Otherwise, that option, granted under statute and reinforced by the service circular, is as good as none; or illusory. Like

the circumstances in ***Majlis Perbandaran Pulau Pinang***, the circumstances in the present appeal "*To put it mildly,… were such as to cry out for an explanation*…" from the respondent. Not only does the trend call for an increased openness in matters of government and administration, it is quite evidently a matter of fairness that the respondent should have given reasons for its decision. Thus, when the learned Judge said that he found the decision made under such circumstances, with all the reasons and grounds offered by the appellant to "*…not constitute 'Wednesbury unreasonableness*'", we are entirely perplexed as to how his Lordship could have arrived at such a conclusion. With respect, with and on the reasons and grounds offered by the appellant, and with his wife's similarly circumstanced application approved, we find that this was clearly a case where the decision reached was quite clearly unreasonable. No reasonable tribunal similarly circumstanced would have arrived at the impugned decision.

[61] The additional feature in the instant appeal is also the matter of the appeals. The appellant appealed twice; and on both occasions, the appeals were rejected. As opined in ***Majlis Perbandaran Pulau Pinang*** "*a reasoned finding can improve and strengthen the appeal process*".

[62] Hence, at the time of rejection of the application as well as the appeals, the non-provision of reasons simply on the ground that there was no duty expressed under the Act and SPP Bil. 4/2003, is certainly injurious to the respondent's case. In the absence of reasons, having regard to the particular circumstances of section 12(1) of the Act, we are prepared to say that the respondent in fact, has no valid reason for rejecting the appellant's application. On that ground alone, the application for certiorari ought to and must be granted.

[63] As pointed out earlier, no reasons were given at the time of the decision and the two appeals. We have just found that to be untenable and irrational in the *Wednesbury* sense. However, the facts show that after the first decision was made but before the appeals were lodged, the appellant was in fact told, upon his enquiring, that his application was rejected because of the Civil Suit. The respondent has since disclaimed that reason; that the reason was an unofficial one; and, it is also incorrect because the wrong circular had been relied on.

[64] We find that explanation completely devoid of merit. The writer of the email dated 24.6.2015 is Azri Hohad. He is the Deputy Registrar of the respondent. Nowhere in his email is there any reservation as to the contents of the email sent to the appellant, that the views were completely the writer's own opinion. We agree with the appellant that the Deputy Registrar has ostensible authority to speak on the respondent's behalf. If it was indeed true that he was only offering his personal opinion, an affidavit to that effect ought to have been filed by Azri Hohad. There was none. Consequently, the disclaimer by the respondent is quite clearly a claw-back and an afterthought.

[65] In any event, we note from the papers prepared for the consideration of its board of directors at its 83rd meeting, the respondent had cited that the application was prepared under the applicable circular, namely Surat Pekeliling Perkhidmatan Bil.1 Tahun 1991 [SPP Bil.1/1991] – see exhibit AK-1 in affidavit in reply of Abdul Karim bin Abdul Aziz, the legal advisor of the respondent affirmed on 31.5.2016 – see page 59 of the respondent's Bundle of Authorities:

2.2 Permohonan ini adalah selaras dengan Surat Pekeliling Perkhidmatan Bil.1 Tahun 1991 yang telah diterima pakai oleh Universiti dalam Mesyuarat Majlis Bil. 75/1991 yang diadakan pada 25 Mei 1991. Dengan penerimaan Surat Pekeliling tersebut, staf Universiti boleh memohon untuk bersara di atas pilihan sendiri apabila telah mencapai umur 40 tahun. [emphasis added]

[66] Under SPP Bil. 1/1991, the conditions that had to be met before an application for optional retirement may be favourably considered were more stringent when compared to paragraph 15 of SPP Bil. 4/2003 (see para 58 above). One of those conditions refers to pending litigation in Court:

3. TATACARA

3.1 Ketua Jabatan hendaklah memastikan bahawa setiap permohonan persaraan pilihan sendiri dikemukakan ke Bahagian Pencen, Jabatan Perkhidmatan Awam, enam (6) bulan sebelum tarikh persaraan yang dipohon. Permohonan berkenaan hendaklah dikemukakan bersama dengan dokumen-dokumen berikut:-

(a) surat permohonan asal daripada pegawai berkenaan menyatakan sebab beliau ingin bersara dan tarikh persaraan yang dipohon;
(b) surat daripada Ketua Jabatan pegawai berkenaan menyatakan sebab-sebab beliau menyokong atau tidak menyokong permohonan berkenaan;
(c) surat pengesahan daripada Ketua Jabatan pegawai berkenaan sama ada pegawai berkenaan terlibat atau bebas daripada apa-apa tindakan tatatertib dan atau tindakan Mahkamah;

(d) …

(e) …

(f) …

(g) …

[emphasis added]

[67] The respondent has since pointed out that this circular is no longer applicable, that it had been revoked and superseded by Surat Pekeliling Perkhidmatan Bil. 4 Tahun 2003 [SPP Bil. 4/2003]. With the email from Aziz Hohad informing the appellant that the rejection was due to "existing government regulations that do not allow staff with case affiliated with any organization to be released until the case is conducted", pointing undeniably to the Civil Suit, it only goes to confirm that indeed, the board must have considered the appellant's application under a repealed circular, that is, SPP Bil. 1/1991 instead of the relevant and applicable SPP Bil. 4/2003. Since the respondent had considered the appellant's application under SPP Bil. 1/1991, a no longer valid circular, the respondent's decisions are clearly illegal and liable to be quashed under an order of certiorari. This further corroborates the appellant's contention that the rejection was for irrational and illegal reasons and was in bad faith.

[68] Finally, we deal with the reasons offered after the challenge had been mounted in Court. In the affidavits filed in response, the respondent explained that the services and experience of the appellant were still very much in demand; hence, the application for optional retirement could not be consented to.

[69] Quite aside from the fact that it is the failure to provide reasons at the time when the impugned decisions were made which is relevant, the appellant has also pointed out that his own department had actually agreed and supported his application. So, even if the respondent's present explanation is to be considered, we believe the appellant's response undermines that explanation or reason. We agree with the submissions of the appellant that the reasons now given are quite clearly irrational and unreasonable.

[70] All these matters were not considered by the learned Judge. Contrary to the findings and conclusions reached by his Lordship, the principles of procedural impropriety, illegality or irrationality in arriving at the impugned decision have been breached in the particular facts of this case. It is apparent from the affidavits and documents before the Court that the decisions reached by the respondent, in the circumstances of the application, are simply unreasonable, irrational and highly irregular. Since his Lordship has failed to consider and apply the relevant legal principles, this appeal must be allowed.

Order for mandamus

[71] We are now turn to the matter of the mandamus order in the terms sought, and just to remind ourselves those precise terms:

> (iii) Kebenaran memohon untuk suatu perintah mandamus untuk mengusulkan Mahkamah Yang Mulia ini bagi mengarahkan Responden untuk meluluskan Permohonan Pemohon.

[72] The appellant seeks an order mandating the respondent to grant his application. We have some reservations on issuing a mandamus order in those terms. But, first, it may perhaps be appropriate to state for the record that the parties, in particular, the respondent had made no submissions on this order, whether at the High Court or before us. Upon clarification, the appellant indicated that the order is not abandoned. Since there were no written submissions on this issue and both counsel were not prepared to address us on this point, we gave parties time to research and submit further written submissions, just on this issue of the order of mandamus.

[73] In his written submissions, learned counsel for the appellant submits that this order should follow as a matter of course in the event an order of certiorari is granted, an order for mandamus must necessarily follow. Another line of persuasion was that the appellant really had no other remedy, other than mandamus for the enforcement of his right to optionally retire from the service of the respondent. This is said to be consistent with the position taken by the Public Services Department which, in response to the appellant's complaints over the respondent's decision, had told the appellant that the matter was entirely in the respondent's hands. In any event, the application ought to have been approved since the faculty to which the appellant had served for the past 25 years, approved and supported his application.

[74] The respondent submitted otherwise; arguing that pensions is a matter of discretion, decided on a case by case basis. However, learned counsel conceded that mandamus may be issued where there is "constant disobeyance" as was considered in ***Menteri Kewangan & Anor v Wincorf Nixdorf (M) Sdn Bhd & Another Appeal*** [2016] 4 MLJ

621. In that case, the Court of Appeal opined that "*the remedy in the nature of mandamus is drastic and generally it is only invoked in extraordinary situations after the Courts have been satisfied that the applicant has exhausted all other avenues available to him (see Janab's Key to Civil Procedure (5th ed) pp 440-454)*."

[75] On this issue, we are somewhat restrained from granting the mandamus order as the conditions strictly, have not been met. The Court of Appeal succinctly set out the requirements before an order of mandamus may be granted by the Court in ***Peguam Negara Malaysia v Dr Michael Jeyakumar Devaraj*** [2012] 1 MLJ 17, 187:

> [**27**] The law governing the grant or refusal of an order of mandamus is to be gathered from three pieces of legislation. More specifically, the relevant provisions are contained in:
>
> (a) Section 44;
> (b) Para 1 of the Schedule to the Courts of Judicature Act 1964 ('the Schedule');
> (c) O 53
> (see eg Hong Leong Equipment).
>
> [**28**] Section 44 is housed in Chapter VII ('Enforcement of Public Duties') of the Specific Relief Act 1950. The relevant portion in s 44(1) reads:
>
> **Power to order public servants and others to do certain specific acts**
>
> **44**
>
> (1) A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office …
>
> Provided that –

(a) an application for such an order be made by some person whose property,…, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

(b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or Court in his or its public character, …;

(c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;

(d) the applicant has no other specific and adequate legal remedy; and

(e) the remedy given by the order applied for will be complete.

[**29**] In an application for an order of mandamus, these five conditions are cumulative. All of them must be satisfied. In ***Koon Hoi Chow***, Sharma J enunciated the following principles"

(a) An order under s 44 is in its nature an order of mandamus. It is a peremptory order of the Court commanding somebody to do that which it was his clear legal duty to do. The applicant seeking such an order must have a legal right to the performance of such duty by the person against whom the order is sought;

(b) The prerequisites essential to the issue of an order under s 44 or of a mandamus are:

(i) whether the applicant in the High Court has a clear and specific legal right to the relief sought;

(ii) whether there is a duty imposed by law on the public officer(s);

(iii) whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the public officer(s); and

(iv) whether the applicant has any remedy, other than by way of mandamus, for the enforcement of the right which has been denied to him.

(c) These are the questions, but only some of the questions, which are necessary to be answered in every application for mandamus. The applicant must show not only that he has a legal right to have the act performed but that the right is so clear and well defined as to be free from any reasonable controversy. The order cannot issue when the right is doubtful, or is a qualified one or where it depends upon an issue of fact to be determined by the public officer(s).

[76] The appellant's application for the respondent's consent under section 12(1) of the Statutory and Local Authorities Pensions Act 1980 is not merely a matter of opting to retire at a date earlier than the appellant's compulsory date of retirement. Retirement is almost wholly related to the matter of pensions, and pensions is clearly not a right conferred on the appellant – see ***Asa'ari bin Muda v Kerajaan Malaysia & Ors*** [2006] 5 MLJ 322. This is apparent from section 3(1) of the Statutory and Local Authorities Pensions Act 1980 [Act 239] which is *in pari materia* with section 3(1) of the Pensions Act 1980 [Act 227], and which reads as follows:

Pension, etc., not an absolute right

3. (1) No employee shall have an absolute right to compensation for past service or to any pension, gratuity or other benefit under this Act.

[77] The matter of fixing the date of retirement is not one solely for the appellant or even the respondent to decide; it is decided by the Pensions

Department and the Public Services Department. Even the appellant acknowledges that as seen in his application for optional retirement.

[78] What section 12(1) in effect, confers on the appellant is a benefit or a privilege, but it is not a right. Subject to meeting the minimum conditions of age and length of service, the appellant is granted an option or a choice to seek the respondent's consent for early retirement. If pension is not a right, the benefit in section 12(1) is even less one. At best, subject to the consent of the employer, the respondent, it is a privilege to be enjoyed by the appellant as employee. The decision on whether or not to grant consent is an exercise of discretion. That exercise of discretion, in turn, is guided by sound and proper considerations of resources including human resources and in this respect we can appreciate the importance and value of expertise and experience, finance, planning, policy and much more; matters which are quite outside the ambit of judicial review and function of the Court.

[79] Yet another important factor is that section 12(1) is not drafted in mandatory terms. In ***Haji Wan Othman & Ors v Government of the Federation of Malaya*** [1965] 2 MLJ 31, Suffian J [as he then was] had occasion to examine the old Pensions Ordinance of 1951. His Lordship found the "*whole tenor of the legislation being permissive, the relevant authority being merely authorized, not compelled, by the legislature to do this and that for the retired officer.*" The same may be said of section 12(1) of the Statutory and Local Authorities Pensions Act 1980; that similarly, it is drafted in permissive and not compelling language.

[80] From the facts and circumstances, it appears that the appellant may yet again, appeal or present a fresh application under section 12(1).

For all these reasons, it would be wrong for the Court to compel the respondent, by way of an order of mandamus, to consent to the appellant's application. Similarly, in ***Menteri Kewangan & Anor v Wincorf Nixdorf (M) Sdn Bhd & Another Appeal***, the Court of Appeal took the view that "*based on the facts of the case an order for mandamus and/or prohibition at this stage is premature and the more appropriate order will be to quash the decision of the appellant which was rightly done by his Lordship. In consequence, we partly allowed the appeal for the matter to be remitted back to the appellant for the 'assessment of the remission'…*"

[81] However, we are aware from the peculiar facts and circumstances of this appeal that the respondent has taken a very hard and unreasonable line and that is evident from our deliberations of the earlier aspect of this application for judicial review and for the orders of declaration and certiorari. The decisions taken are crystal clear unreasonable if not perverse and in bad faith, irrational and most importantly, illegal. Under these conditions and for these reasons, it would be wrong for this Court to turn the appellant away from any order of mandamus at all. This is an exceptional case, and it requires a response from the Court. Having declared that the appellant has met the express conditions under section 12(1) of the Statutory and Local Authorities Pensions Act 1980 and having quashed the respondent's earlier decisions rejecting the appellant's application and appeals on *inter alia* grounds of illegality and that there are no valid reasons for refusing the appellant's application for optional retirement, we now order a mandamus be issued directing the respondent to reconsider the appellant's application in accordance with section 12(1) of the Statutory and Local Authorities Pensions Act 1980.

Conclusion

[82] The appeal is consequently allowed with costs. The decision of the High Court is set aside. In view of the reasons as set out above, the declaratory order in prayer (i) and the mandamus order in prayer (iii) of the Originating Summons are granted in the following terms:

(i) declaratory order to the effect that the appellant has fulfilled the requirements to optionally retire under the Statutory and Local Authorities Pensions Act 1980; and

(iii) order of mandamus directing the respondent to reconsider the appellant's application for optional retirement.

Prayers (ii), (iv) and (v) of the Originating Summons are further granted. Lastly, we order the respondent to bear the costs of this appeal and the costs incurred in the Court below.

Dated: 19 July 2017

Signed by
(MARY LIM THIAM SUAN)
Judge
Court of Appeal, Putrajaya
Malaysia

Counsel/Solicitors

For the appellant:

Fadhil Ihsan bin Mohd Hassan
(Salma Sakeena bt Mohamad Hassan with him)
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