JUDICIAL REVIEW APPROACHES ON THE RIGHT TO ORAL HEARING IN DISCIPLINARY PROCEEDINGS AGAINST PUBLIC SERVANTS: A MALAYSIAN PERSPECTIVE

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Abstract - Notwithstanding the established principle set by the Privy Council in Najar Singh's case [1976] 1 MLJ 203 and reaffirmed by the Federal Court in Utra Badi's case [2001] 2 CLJ 525, the administrative decisions in disciplinary proceeding continue to be reviewed by the Malaysian Courts on the failure of discipline authority to grant oral hearing to the affected public servants. This article will highlight the development of the case law on the issue of the right to oral hearing. In addition to that, it will examine the approaches of the court in determining the right to oral hearing in disciplinary proceedings against public servants; and whether the administrative decisions of the disciplinary authorities should be subject to judicial review or not. This article forwarded a submission that the approaches of the courts on this issue are liberal and restricted in nature. In furtherance of that, it submits that the liberal approach should be adopted in judicial review of the right to oral hearing in disciplinary proceedings against public servants in Malaysia.

Keywords - Disciplinary Proceeding, Public Servant, Right to oral hearing, Natural Justice, Judicial Review

I. INTRODUCTION

Disciplinary proceeding is an administrative action executed by the in-house authority in each department of the public service agencies. Meanwhile, the right to oral hearing in disciplinary proceedings is an issue related to the right to be heard in the execution of the doctrine of natural justice, which is derived originally from the common law[1] concept. The application of oral hearing in the disciplinary proceeding gives a better safeguard to the affected public servants in the disciplinary proceedings and also helps the government in reaching the right decisions since it may affect the credibility of the public administration at large.

Currently Malaysia has 1.6 million public servants[2], which consist of four main sectors of administration, education, health and security. Malaysian Public Service [3] also includes State Public Services that historically exist prior to Merdeka Day in every Federated and Unfederated Malay States. [4] On the reason of financial liability of the Federal Government, the data also includes the employees of the statutory bodies and local authorities though these employees are not clearly defined as member of public service in the Federal Constitution.

II. OBJECTIVES

This article will have the following objectives:

a) To highlight the development of the case law on the right to oral hearing in disciplinary proceedings;
b) Toexamine the approaches of the Malaysian Courts in judicial review of the right to oral hearing in disciplinary proceedings.

III. CONSTITUTIONAL PROTECTION TO PUBLIC SERVANTS

Article 135(2) of the Federal Constitution[5] adopts the common law concept of natural justice. It gives the right to a reasonable opportunity to be heard to a member of public service in case of dismissal or demotion. In this regard, Raja Azlan Shah in Ketua Pengarah Kastam vs. Ho Kwan Seng[6] had decided that: The rule of natural justice that no man may be condemned unheard applies to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled "judicial", "quasi judicial", or 'administrative' or whether or not the enabling statute makes provision for a hearing.
All members of public services under the Constitution, except provided otherwise are subject to Public

[1]By virtue of section 3 of the Civil Law Act 1956, the court must apply the common law of England subject to local circumstances of the States of Malaysia permits and to any written law in force.
[2]Suhaila Shahrul Anuar, Jumlah penjawat awam munasabah, *Berita Harian Online*, 19 April 2017.
[3] Article 132(1) Federal Constitution mentions that - For the purposes of this Constitution, the public services are— (a) the armed forces; (b) the judicial and legal service; (c) the general public service of the Federation; (d) the police force; (e) (Repealed); (f) the joint public services mentioned in Article 133; (g) the public service of each State; and (h) the education service. *Federal Constitution*, 2010, The Commisioner of Law Revision, Malaysia, pp. 123-124.
[4]Nik Ahmad Kamal Nik Mahmood, 2003, Perkhidmatan Awam, In. Ahmad Ibrahim, Faiza Thamby Chik, Ramlah Muhammad, Asiah Daud & Ismail Hassan (Eds.), *Perkembangan Undang-Undang Perlembagaan Persekutuan*, pp. 231-273, Dewan Bahasa dan Pustaka, Kuala Lumpur, p. 232.
[5]Article 132(2) of the Federal Constitution states "no member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard":*Federal Constitution*, 2010, pp. 124.
[6] [1977] 2 MLJ 152

Officer(Conduct and Discipline)Regulations 1993. Regulation 34(1) adopts the constitutional protection of reasonable opportunity of being heard in case of dismissal and reduction in rank.[7] Nonetheless, such 'reasonable opportunity of being heard' is limited to a written representation only[8] and by the discretion of the disciplinary authority may be extended to the oral hearing before the Investigation Committee.

Gan Ching Chuan (2007)[9] in discussing the issues of disciplinary procedure and its related application with the rule of natural justice and right to oral hearing argued the right to a fair hearing is the sign quo non of modern administrative process that finds expression in some modern Constitutions as part of fundamental right. Article 135(2) has constitutionalized the rule of natural justice that is developed from the common law. Where as V Ananta Raman (1993) in his article[10] supported the suggestion that the application of the audi alteram partem to be replaced by 'duty to act fairly' as a new common law concept in Malaysia.

A leading authority in Administrative Law in the Commonwealth is a book written by MP.Jain (1997).[11] There is a specific chapter on the Natural Justice and the related issue and cases on the right to oral hearing is discussed in a specific chapter of Principles Natural Justice. Natural justice according to him has no precise definition of its content. It has to be applied to the proceedings of a wide spectrum of decision- making bodies and inquiries like disciplinary proceedings against government servants.[12]

IV. DEVELOPMENT OF THE CASE LAW

Acceptance of the court on the expense of the right to be heard varies in numerous cases and depends on the fact of each proceeding. The arising issue is whether the right to be heard to public servants in disciplinary proceeding is limited to a written representation or may be extended to the right to oral hearing? In Najar Singh v Government of Malaysia,[13] the appeal to the Privy Council was on the ground that appellant was not afforded a reasonable opportunity of being heard orally. Privy Council held that Regulation 27 of Chapter D[14] is not to be interpreted as imposing an obligation to hear an officer orally. This principle was also upheld by the Supreme Court in Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor[15] and followed by the Federal Court in Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi Perumal.[16]

Despite the principles of the foregoing cases, the Court of Appeal in Ann Seng Wan v. Suruhanjaya Polis Diraja Malaysia & Anor,[17] in interpreting the relevant provision on the right to be heard i.e O.26 of the General Order 1980[18] inter alia ruled out that since there was no evidence to contradict the appellant's exculpatory statement, it would be justifiable to hold an oral hearing.

Meanwhile, in Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor,[19] Zulkefli Makinuddin FCJ when allowing the appeal gave inter alia the following judgement;

When there is a request by the public officer for an oral hearing after he had denied all the charges and appeared to have exculpated himself by furnishing credible evidence in his representation letter, by virtue of O.26 (5) of the General Orders 1980, the officer should be accorded an oral hearing to satisfy the requirement of Article 135(2) of the Federal Constitution. It would become all the more necessary for the oral hearing or enquiry to be held if there was no evidence to contradict the public officer's exculpatory statement (Ann Seng Wan v. Suruhanjaya Polis Diraja Malaysia & Anor; refd) (Mat Ghafar Baba v. Ketua Polis Negara & Anor, refd).

Further, the learned judge while delivering the majority judgment, held that the principle in the case Utra Badi and Vickneswary[20] that states 'the right to heard given by Article 135(2) of the Federal Constitution does not require that the person concerned be given an oral hearing' applies not in all cases and there are exceptions to this general rule.

The position became more exacerbated after Yusuf Sudin's case when the same Federal Court in Kerajaan

[7]Regulation 34 (1)provides that an officer shall not be dismissed or reduced in rank unless he has been informed in writing of the grounds on which it is proposed to take action against him and been afforded a reasonable opportunity of being heard.

[8] Regulation 37(2)(b)

[9]Gan, Ching Chuan, 2007, *Disciplinary Proceedings Against Public Officers in Malaysia*, Lexis Nexis, Singapore.

[10]V Ananta Raman, Natural Justice- The Malaysian Experience [1993] 3 MLJ i

[11]MP Jain, *Administrative Law of Malaysia and Singapore*, Third Edition, 1997, Malayan Law Journal, Kuala Lumpur

[12] ibid at p 289

[13] [1976] 1 MLJ 203 at p 205

[14] Regulation 27, Chapter D states: In all disciplinary proceedings under this Part no officer shall be dismissed or reduced in rank unless he has been informed in writing of the grounds on that it is proposed to take action against him and has been afforded a reasonable opportunity of being heard.

[15][1994] 2 CLJ 333. It was held inter alia that the word 'hearing' does not mean oral hearing and the right to be heard does not entail an obligation to hold an inquiry. The main consideration is that the person concerned should have a full opportunity of stating his case before being dismissed.

[16][2001] 2 CLJ 525. It was held in this case that the right to heard given bt art 135(2) of the Constitution does not require that the person concerned be given an oral hearing and it could not be argued that the failure to give the an oral hearing was a denial of justice.

[17] [2002] 1 CLJ 493

[18] Order 26 General Order 1980 states the procedures of disciplinary proceeding.

[19][2012] 1 CLJ 448 at p 450. In this case, the appellant prayed in his letter for an oral hearing by way of an inquiry to be given to him in the event his explaination was deemed insuffient to exculpate himself from the charges against him.

[20] [2008] 6 CLJ 573 FC. The Federal Court ruled that it is clear that it is never the intention of the legislator in General Orders to give an officer under disciplinary action right to give oral evidence. p.257

Malaysia & Ors v. Tay Chai Huat [21] upheld the principle in Utrabadi's case and Vickneswary's case and laid down a principle that if the Disciplinary Authority considered that no further clarification was required, then the officer facing the disciplinary charges could not insist that a committee of inquiry be appointed since the right to be heard under Article 135 (2) did not require an oral hearing. It is interesting to note that Mohd Ghazali Yusoff (FCJ) who delivered the majority judgment in this case, gave the dissenting judgment in Yusuf bin Sudin's case.

Further, the Court of Appeal in the case of Suruhanjaya Perkhidmatan Awam v. Hjh Marina Hj Mustafa[22] refered to the case of Mat Ghaffar[23]. It was held in Mat Ghafar that:

It is settled principle that the right to be heard as enshrined in Art. 135 (2) of the Federal Constitution do not in all cases include the duty to afford an oral hearing. But as stated by Gopal Sri Ram, JCA in Raja Abdul Malek Muzaffar Shah[24]:

" Cases may arise where, in the light of peculiar facts, the failure to afford an oral hearing may result in the decision arrived at being declared a nullity or quashed. (seeR v. Immigration Appeal Tribunal [1977] 1 WLR 795)."

In the recent case, Abdul Ghani Che Mat v. Pengerusi Suruhanjaya Pasukan Polis & Ors,[25] Court of Appeal held that the audi alteram partem rule states that a decision cannot stand unless the person directly affected by it is given a fair opportunity whether he has the right to state his case as well as to know and answer the other side's case. It was held inter alia that, the right of hearing is a right to the minimum standard of procedural fairness and must not be confused with the question of whether the officer was actually guilty of the disciplinary offences. In carrying out the disciplinary procedure, natural justice requires that the disciplinary authority must employ means that justifies the end rather that the end justifying the means.

In Abdul Ghani's case, the Court of Appeal referred to Federal Court decision in Rama Chandran v. The Industrial Court of Malaysia[26]. Edgar Joseph Jr. FCJ in a landmark judgment of cardinal importance established that fairness included not only procedural fairness but substantive fairness as well. That decision marks the high level water-mark in our administrative law jurisprudence.

In the most recent case, Vijayarao a/l Sepermaniam v. Suruhanjaya Perkhidmatan Awam Malaysia, [27] the Court of Appeal held inter alia:

Where there is a request by the public officer for an oral hearing after he had denied all the charges and appeared to have exculpated himself by furnishing credible evidence, the officer should be afforded an oral hearing. An oral hearing should be granted when there is a request and when the disciplinary authority is faced with two sets of facts, documents and evidence. The circumstances of each case must be fully considered before the court could come to the conclusion whether or not the right to an oral hearing has been properly observed by the disciplinary authority.

V. PRINCIPLE OF JUDICIAL REVIEW

Any party who has suffered a grievance with the administrative decision may obtain redress through the court in addition to any statutory right of appeal. The decision of a public authority would be challenged by way of an application for judicial review which is the inherent supervisory jurisdiction of the High Court.[28] According to Khairil Azmin & Siti Aliza (2013),[29] judicial review has been described as " the power of a court to review a law or an offcial act of a government employee or agent for constitutionality or for the violation of basic principle of justice".

On the application of judicial review, Lord Scarman reminded that "Judicial review is a great weapon in the hands of the judges, but the judges must observe the constitutional limits set by our parliamentary system on their exercise of this beneficent power."[30] Thus, in judicial review, the courts are not challenging the merits of the decision but rather whether it is a decision the body is entitled to make. Concerning the application of the rule of natural justice, the court may review a decision where this has been a failure to comply with the express procedural requirements contained in an Act of Parliament or secondary legislation or when there is a procedural impropriety in the process of making decision by an administrative body.[31]

According to Wan Azlan (2006), [32] there are two matters regarding judicial review which are

[21][2012] 3 MLJ 149 at p 150.No request of oral hearing was made by the Respondent in this case.

[22][2015] 4 CLJ 312. The Court held that the right to a reasonable opportunity of being heard under art. 135(2) is not synonymous with a right to an oral hearing that should be granted according to the circumstances of the case at p 312.

[23][2008] 1 CLJ 773. In this case, the Court of Appeal applied the principle in *Ang Wan Seng*. It was held that it was incumbent upon the Disciplinary Authority to initialy consider the charges made against the public officer and to determine whether in the light of representation made by him an oral hearing was warranted.

[24][1995] 1 AMR 855.It was held by Court of Appeal inter alia (a) Although the settled principle is that the right to be heard does not in all cases include a duty to afford an oral hearing, in certain cases the failure or refusal to afford such a hearing could render a decision null and void.

[25][2017] 3 CLJ 399 at p 400.

[26] [1997] 1 MLJ 1

[27][2017] 4 CLJ 451 at p 452. This case is pending appeal to Federal Court.

[28]Order 53 of the Rules of Court (2012) :
(4) Any person who is adversely affected by the decision of any publicauthority shall be entitled to make the application.

[29] Khairil Azmin Mokhtar and Siti Aliza binti Alias, The Doctrine of Separation of Powers: Judicial Review as a Check and Balance Tool, Chapter One at p 7, in *Constituional law and human right in Malaysia: topical Issues and Perspectives/* Khairil Azmin Mokhtar editor, 2013, Thomson Reuters Sdn. Bhd., Selangor

[30]*Constitutional and Administrative Law in a Nutshell*, at p 74

[31]ibid at p 80

[32]Wan Azlan Ahmad & Nik Ahmad Kamal Nik Mahmod at p 33

interrelated. The first fundamental is: the decisions and determinations of public authorities are subject to judicial review if the sources of the decision-making powerare constitutional or legislative provisions. Nonetheless, if the source of power is not a written law, a review will still be applicable if the authority in question exercises functions of a public nature.

In Council of Civil Service Unions v Minister for the Civil Service[33]Lord Diplock laid down three heads of grounds on which administrative action can be controlled by the judicial review which are firstly on the ground of 'illegality,' secondly on the ground of 'irrationality' and lastly on the ground of 'procedural impropriety.' He further illustrated that by illegality the decision maker must understand the law correctly regulates his decision making power and must give effect to it. Whereas irrationality can now be referred to as 'Wednesbury unreasonableness' (see Associated Provincial Picture House Ltd v Wednesbury Corp [1948] 1KB 223).[34] It applies to a decision which is so outrageous that no sensible person who had applied his mind to the question to be decided could have arrived at it. The third ground of procedural impropriety as the failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This includes the failure of the administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of justice.

VI. APPROACHES OF THE COURTS

Based on plethora of cases which are judicially reviewed, it is humbly submitted that the approach of Malaysian courts in judicial review of disciplinary proceedings against the public servants, particularly on the right to oral hearing are liberal and restricted in nature.

6.1 Liberal or Progressive Approach

The liberal approach can be seen in the case of Yusuf Sudin where the Federal Court made the observation of procedural fairness that is closely connected to a fundamental right, for instance, the right to life (art. 5(1)) as enshrined in our Federal Constitution is of paramount importance. It has been said that 'income is the foundation or many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental right. The court in this case on the view that there should be exception to the general rule (as set in Utra Badi's case) where oral hearing should be given.

Since the appellant's reputation and livelihood, in this case, are very much at stake, thus the court's view that he ought to have been given an oral hearingas requested by him to enable him to make an effective and meaningful defense to the charges.

Long before Yusuf Sudin, Court of Appeal in Raja Abdul Malek's case the took the approach to advance the law by holding that cases may arise where, depending of its own facts, the failure to afford oral hearing may result the decision arrived at being declared a nullity or quashed although the law on oral hearing is not stated in General Order 26(4).[35] The approach in Raja Abdul Malek's case seems to be in line with the view of Prof. Jain (1997)[36] where he submitted that the scope of 'reasonable opportunity' cannot be curtailed by legislation since the concept of 'reasonable opportunity' in Article 135(2) is the root concept provided by the Constitution. It has to be defined by the courts in accordance with the principles of natural justice. He contended that it is a wrong approach by the court to confine themselves to such disciplinary regulations, not to look beyond them, and not to apply what is not provided therein. In fact, he posted a significant question whether these regulations can be supplemented with the principles of natural justice or not.

Another progressive approach was done by the Court of Appeal in Tan Tek Seng's where the court has applied its creative ingenuity in interpreting in Article 5 and 8 of the Federal Constitution. It gave a broad and liberal meaning to the word 'life' in Article 5 to include the right to livelihood. It also observed that the combined effect of Article 5 and 8 guaranteed fair procedure and also a fair and just punishment. Taking into account all the relevant factors of the case, the Court of Appeal per Gopal Sri Ram JCA, held that the dismissal was too severe a punishment to impose on the appellant and subsequently it was ordered the appellant to be reducted in rank. Gopal Sri Ram JCA referring to Article 5(1) and Article 8(1) of the Federal Constitution at 290 observed:[37]

In the light of this interpretation, the institution of disciplinary proceedings against a public officer has to observe procedural fairness and the doctrine of proportionality besides complying with the hearing requirement of Article 135(2).

6.2 Restricted Approach

The courts in applying restricted approach will follow the principle of judicial review assiduously. For instance in Tay Chai Huat, it was held by the Federal Court that the courts have very limited review powers over administrative determinations of public bodies and are constrained to confirm the findings in

[33] [1985] AC 374, House of Lords in Cases and Meterials on Constitutional dan Administrative Law, Michael Allen & Brian Thompson, Fifth Edition, Blackstone Press Limited, 1998 at p 593

[34] The so-called Wednesbury principles derive from the dicta of Lord Greene.

[35] Malaysian Administrative Law: Recent Case Law Development, CC Gan, *Journal of Malaysian and Comparative Law*, Volume 22 Parts 1 & 2, June and December 1995, at p 85-86

[36]MP Jain at p 279

[37] Hari Chand at p 214

disciplinary hearings. The court will only intervene in disciplinary cases where there was a fundamental procedural flaw. The court cannot exceed its role in cases of this genre as the instant appeal. The courts cannot interfere merely because it may come to different conclusions on facts on the same basis of the same evidence. Hence, the court should approach cases of this genre as the instant appeal in the following way, namely, whether there has been an error in the process or whether there was a procedural irregularity in the decision making proceedings leading to the public officer's dismissal.

The concept of proportionality which applied by the Court of Appeal in Tan Tek Seng was deemed to be overruled by the Federal Court in Ng Hock Cheng v Pengarah Am Penjara Taiping & Ors.[38] In this case, the appellant was dismissed by the disciplinary authority on the ground he had incurred heavy debts.

The decision of the Federal Court in Ng Hock Cheng case was critised by many scholars since it is regrettably destructive of the concept of proportionality. Hari Chand[39] commented that holding the employer as the best judge of the seriousness of misconduct is a dangerous theory. He raised a view that it is a proper function of the courts to check whether the punishment meted out to a person is, matching the gravity of the situation. Punishment should not be excessive or harsher than necessary. It is disappointing that the Federal Court not only refused to give any relief but also conceded unlimited discretion to the disciplinary authority in the matter of meting out punishment. The restricted view of judicial review in Ng Hock Cheng was adopted in the dissenting judgment of the learned Mohd Ghazali Yusoff FCJ in Yusuf Sudin's case where he referred to the view of Peh Swee Chin FCJ[40] that an employer, including a government, is the best person to judge the seriousness of misconduct of an employee. In brief, the courts in liberal approach will always expand the scope of the judicial review of administrative action. RRama Chandran v The Industrial Court of Malaysia and Anor[41] is a landmark case in administrative law in Malaysia where according to Edgar Joseph Jr. FCJ the decision of the Federal Court in this case "pointed the way to new horizons in the forward march of judicial review".[42] Notwithstanding the view of the liberalist, the courts in restricted approach will assiduously follow the traditional common law principle of judicial review. For instance, Mohd Ghazali FCJ in Yusuf Sudin's case reminds us that (at p 496):

In judicial review cases as here, the court is concerned with whether procedural fairness had been administered and the court has no jurisdiction to consider the merits of the case. It follows, therefore, that the court is not involved in the evaluation of evidence which transpired at the disciplinary proceeding…

The restricted approach holds the view that the courts have very limited review powers over administrative determinations of public bodies and are constrained to confirm the findings in disciplinary hearings.

CONCLUSION

The terms "reasonable opportunity of being heard" in Article 135 (2) of the Federal Constitution have continuously generated a wealth of case law[43] and in fact as research indicated within twelve years of enforcement of the Federal Constitution, Article 135 is the most litigated provision and cases on Article 135 constitute one third of all the reported cases where the courts have interpreted various provisions of the Constitution.[44]By the application of the right of oral hearing, decision of the Disciplinary Authority would not be subject to be reviewed by the court on the ground of procedural inconformity. The suggestion that the liberal approach of the court in relation to the right to oral hearing should be preferred to the restricted approach so that the rule of natural justice is truly served to the public servants in Malaysia.

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[38][1998] 1 CLJ 405

[39]Hari Chand,1998, *Contemporary Judicial Review*, in Public Law in Contemporary Malaysia, Edited by Wu Min Aun, Longman, Selangor

[40] Yusuf Sudin's case at p 503

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