YONG TECK LEE v. HARRIS MOHD SALLEH & ANOR
COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD, JCA; MOHD SAARI YUSOFF, JCA; K C VOHRAH, JCA
CIVIL APPEAL NO: S-04-75-2001
6 JUNE 2002
[2002] 3 CLJ 422

***CIVIL PROCEDURE**: Appeal - Appeal from decision of Election Judge to Court of Appeal - Whether Court of Appeal has jurisdiction to hear appeal - Whether s. 36 Election Offences Act 1954 excludes jurisdiction thereof - Whether decision of an Election Judge is a decision of a High Court appealable within art. 121(1B)(a) Federal Constitution - Whether art. 121(1B)(a) is subject to federal laws - Courts of Judicature Act 1964, ss. 50, 67, 68 - Federal Constitution, arts. 4(1), 118, 128(3)*

***CONSTITUTIONAL LAW**: Courts - Appeals - Decision of Election Judge - Whether appealable - Whether Court of Appeal has jurisdiction to hear appeal within art. 121(1B)(a) Federal Constitution - Whether s. 36 Election Offences Act 1954 excludes jurisdiction thereof - Whether art. 121(1B)(a) is subject to federal laws - Whether absence of a provision similar to art. 128(3) of Constitution in respect of Court of Appeal renders all appeals from High Court to Court of Appeal appealable - Whether decision of Election Judge is a decision of a High Court appealable within art. 121(1B)(a)*

***STATUTORY INTERPRETATION**: Constitution - Interpretation of - Article 121(1B)(a) - Jurisdiction of Court of Appeal to hear appeal from decision of Election Judge - Whether within art. 121(1B)(a) of Constitution - Whether jurisdiction to hear appeal barred by s. 36 Election Offences Act 1954 - Whether conflict between art. 121(1B)(a) and s. 36 - Whether absence of a provision similar to art. 128(3) of Constitution in respect of Court of Appeal renders all appeals from High Court to Court of Appeal appealable - Whether s. 36 rendered null and void by art. 4(1) of Constitution*

The appellant won the general election State Assembly for the Likas constituency in Sabah. The election, however, was declared null and void by the Election Judge based on two election petitions presented by the respondents. The appellant appealed to this court and the parties were directed to address on the preliminary issue, *ie*, whether the decision of the Election Judge was appealable.

The matters that arose for determination were: (1) whether the decision of the Election Judge was a decision of the High Court and therefore appealable within art. 121(1B)(a) of the Federal Constitution ('the Constitution'); (2) whether the Court of Appeal's jurisdiction to hear appeals was not abrogated, limited or restricted as it did not have a provision similar to art. 128(3) of the same which provided the Federal Court's jurisdiction to hear appeals subject to federal law; and (3) whether s. 36 of the Election Offences Act 1954 ('Act 1954') which purported to exclude the jurisdiction of the Court of Appeal to hear an appeal from a final order of an Election Judge was inconsistent with art. 121(1B)(a) of the Constitution thereby

rendering it null and void by art. 4(1) of the same.

Held:

Per Abdul Hamid Mohamad (Mohd Saari Yusoff concurring) JJCA

[1] It is settled law that the decision of an Election Judge is not a decision of a tribunal inferior to the High Court for the purpose of judicial review. But that does not make a decision of an Election Judge a decision of the High Court in the ordinary sense. It must be noted that the only reference made to the High Court in art. 118 of the Constitution is with regard to the place where an election petition is to be presented. A place for presentation has to be named as there is no establishment as an Election Court. That is provided as a matter of convenience. (pp 437 g-h & 438 a-b)

[2] The fact that the petition is filed in a High Court does not empower a judge of the High Court to try the petition as in other cases filed therein. He has to be nominated by the Chief Judge for that purpose. In practice, only a few judges of the High Court are nominated after every general election to try the petitions and, quite often, the resident High Court judge is not the one nominated for such purpose. (p 438 c)

[3] Section 2 of Act 1954 makes a clear distinction between an Election Judge and a High Court judge. Apart from that, the term "Election Judge" is used throughout Act 1954 but when the Act refers to a High Court judge, the words used are "any judge of the High Court". A clear example is sub-s. 4 of s. 33 of Act 1954. It followed, therefore, that a decision of an Election Judge is not a decision of a High Court or a judge thereof. On this ground alone, the appeal could be dismissed. (pp 438 d-i)

[4] There is not one judgment in this country that states that the decision of an Election Judge is appealable to a higher court. On the other hand, ever since elections were held, the appellate courts were of the view that such decisions were not appealable. Even the decision of an Election Judge in an interlocutory matter has been held not to be appealable. (p 439 a-b)

[5] The question whether the absence of a provision similar to art. 128(3) of the Constitution in respect of the Court of Appeal meant that all decisions of the High Court were appealable to the Court of Appeal depended on whether ss. 50, 67 and 68 of the Courts of Judicature Act 1964 ('CJA') were valid. That in turn depended on whether art. 121(1B) of the Constitution should be read restrictively or whether it should be read together with those sections. (p 444 e-f)

[5a] The amendments to ss. 50, 67 and 68 CJA by Act A886 came into force on the same day the Court of Appeal was created by Act A885. So clearly, these provisions of the CJA and art. 121(1B) of the Constitution were intended to be read together. The intention of Parliament could not be any clearer than that. (pp 444 g-h & 445 a)

[6] The CJA which is a federal law regulates the requirement to obtain leave to the Court of Appeal and not the Constitution. That does not mean that when leave is refused, a constitutional right in the exercise of a federal law has been refused which proves to show that the provision of the Constitution should be read together with the provisions of the CJA. To hold otherwise, leads to a conclusion that ss. 50, 67 and 68 CJA are void and unconstitutional, and that all decisions of the High Court are appealable to the Court of Appeal. Article 121(1B) of the Constitution, even in the absence of a similar provision to art. 128(3) of the same, being a general provision, cannot be read in such a restrictive way. (pp 445 h-i & 446 a)

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu telah menang dalam pilihanraya Dewan Undangan Negeri bagi kawasan pilihanraya Likas di Sabah. Pilihanraya tersebut, walaubagaimanapun, telah diisytiharkan batal dan tak sah oleh Hakim Pilihanraya berdasarkan dua petisyen pilihanraya yang dikemukakan oleh responden-responden. Perayu telah merayu kepada mahkamah ini dan pihak-pihak tersebut telah diarahkan supaya memperkatakan mengenai isu awal, iaitu sama ada keputusan Hakim Pilihanraya tersebut boleh dirayui.

Perkara-perkara yang berbangkit untuk penentuan adalah: (1) sama ada keputusan Hakim Pilihanraya adalah keputusan Mahkamah Tinggi dan oleh itu boleh dirayu di dalam lingkungan per. 121(1B)(a) Perlembagaan Persekutuan ('Perlembagaan tersebut'); (2) sama ada bidangkuasa Mahkamah Rayuan untuk mendengar rayuan-rayuan tidak dibatalkan, dihadkan atau disekat kerana ianya tidak mempunyai peruntukan yang sama dengan per. 128(3) Perlembagaan tersebut yang memperuntukkan bidangkuasa Mahkamah Persekutuan untuk mendengar rayuan-rayuan tertakluk kepada undang-undang persekutuan; dan (3) sama ada s. 36 Akta Kesalahan-Kesalahan Pilihanraya 1954 ('Akta 1954') yang bertujuan untuk mengecualikan bidangkuasa Mahkamah Rayuan untuk mendengar sesuatu rayuan daripada perintah muktamad seorang Hakim Pilihanraya adalah tidak konsisten dengan per. 121(1B)(a) Perlembagaan tersebut seterusnya menjadikannya batal dan tak sah oleh per. 4(1) Perlembagaan tersebut.

Diputuskan:

Oleh Abdul Hamid Mohamad (Mohd Saari Yusoff bersetuju) HHMR

[1] Ianya adalah merupakan undang-undang yang tetap bahawa keputusan seorang Hakim Pilihanraya bukannya keputusan sebuah tribunal yang lebih rendah dari Mahkamah Tinggi bagi tujuan kajian semula kehakiman. Tetapi itu tidak menjadikan keputusan seorang Hakim Pilihanraya keputusan Mahkamah Tinggi menurut perkara yang biasa. Adalah harus diperhatikan bahawa hanya rujukan yang dibuat kepada Mahkamah Tinggi di dalam per. 118 Perlembagaan tersebut adalah berhubung dengan tempat di mana sesuatu petisyen pilihanraya harus dikemukakan. Sesuatu tempat untuk mengemukakan petisyen haruslah dinamakan kerana tidak terdapat tempat yang dikenali sebagai Mahkamah Pilihanraya. Ianya diperuntukkan semata-mata untuk kemudahan.

[2] Hakikat bahawa petisyen tersebut telah difailkan dalam Mahkamah Tinggi

tidak memberikan kuasa kepada seseorang hakim Mahkamah Tinggi tersebut untuk membicara petisyen tersebut sepertimana dalam kes-kes lain yang difailkan di dalamnya. Beliau haruslah dipilih oleh Ketua Hakim bagi tujuan itu. Mengikut amalan, hanya sebilangan kecil hakim Mahkamah Tinggi telah dipilih selepas setiap satu pilihanraya umum untuk membicarakan petisyen-petisyen dan selalunya, residen hakim Mahkamah Tinggi bukannya yang terpilih untuk tujuan tersebut.

[3] Seksyen 2 Akta 1954 membuat perbezaan yang jelas antara Hakim Pilihanraya dan hakim Mahkamah Tinggi. Selain daripada itu, ungkapan "Election Judge" diguna pada keseluruhan Akta 1954 tetapi apabila Akta tersebut merujuk kepada hakim Mahkamah Tinggi, perkataan-perkataan yang digunakan adalah "any judge of the High Court". Contoh yang jelas adalah sub-s. 4 dari s. 33 Akta 1954 tersebut. Diikuti, oleh itu, bahawa keputusan Hakim Pilihanraya bukannya keputusan Mahkamah Tinggi atau hakimnya. Atas alasan ini sahaja, rayuan tersebut boleh ditolak.

[4] Tidak terdapat satu penghakiman pun di dalam negara ini yang menyatakan bahawa keputusan Hakim Pilihanraya boleh dirayui di mahkamah yang lebih tinggi. Sebaliknya, sejak pilihanraya diadakan, mahkamah-mahkamah rayuan berpendapat bahawa keputusan yang sedemikian tidak boleh dirayu. Keputusan seorang Hakim Pilihanraya sekalipun dalam perkara interlokutori telah diputuskan sebagai tidak boleh dirayui.

[5] Persoalan sama ada ketiadaan peruntukan yang sama dengan per. 128(3) Perlembagaan tersebut berhubung Mahkamah Rayuan bermakna bahawa kesemua keputusan Mahkamah Tinggi boleh dirayu kepada Mahkamah Rayuan bergantung pada sama ada ss. 50, 67 dan 68 Akta Mahkamah-Mahkamah Kehakiman 1964 ('AMK') adalah sah. Itu sebaliknya bergantung pada per. 121(1B) Perlembagaan tersebut seharusnya dibaca secara terhad atau sama ada ianya harus dibaca bersama-sama dengan seksyen-seksyen itu.

[5a] Pindaan-pindaan kepada ss. 50, 67 dan 68 AMK oleh Akta A886 mula berkuatkuasa pada hari yang sama Mahkamah Rayuan diwujudkan oleh Akta A885. Oleh itu sungguh jelas, peruntukan-peruntukan AMK dan per. 121(1B) Perlembagaan tersebut bertujuan untuk dibaca bersama-sama. Niat Parlimen tidak lebih jelas daripada itu.

[6] AMK yang mana adalah undang-undang persekutuan menyelaraskan syarat-syarat untuk mendapatkan kebenaran merayu ke Mahkamah Rayuan dan bukannya Perlembagaan tersebut. Itu tidak bermakna bahawa apabila kebenaran ditolak, suatu hak berperlembagaan dalam melaksanakan undang-undang persekutuan telah ditolak. Ini membuktikan bahawa peruntukan Perlembagaan tersebut haruslah dibaca bersama dengan peruntukan-peruntukan AMK. Untuk memutuskan sebaliknya, membawa kepada kesimpulan bahawa ss. 50, 67 dan 68 AMK adalah batal dan tidak berperlembagaan, dan bahawa kesemua keputusan Mahkamah Tinggi boleh dirayu kepada Mahkamah Rayuan. Perkara 121(1B) Perlembagaan tersebut, meskipun tiada peruntukan yang sama seperti per. 128(3) Perlembagaan tersebut, yang merupakan peruntukan umum, tidak boleh dibaca dengan cara

terhad sedemikian.

[Rayuan ditolak oleh satu majoriti.]

For the appellant - Gavan Griffith QC (Alex Decena, PK Lim & John Sikayun, Lawrence Chong); M/s Luping & Co

For the respondents - Ansari Abdullah (Rezuan Borhan); M/s Ansari & Co

Reported by Usha Thiagarajah

Case(s) referred to:

*AJ Arzu v. AE Arthurs & Anor [1965] 1 WLR 675 (**refd**)*

*Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 (**refd**)*

*Dason Gaban v. Zulkifli Majun & Other Cases [1982] 1 MLJ 31 (**refd**)*

*Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Ahir Syed Darus [1981] 1 MLJ 29 (**refd**)*

*Devan Nair v. Yong Kuan Teik [1967] 1 LNS 37, [1967] 1 MLJ 261 (**refd**)*

*DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor [2000] 2 CLJ 57 (**refd**)*

*Ignatius Stephen Malanjun v. Election Judge Sabah & Anor (Civil Appeal No: 03-42-89) (unreported) (**refd**)*

*Lam Kong Co Ltd v. Thong Guan Co Ptd Ltd [2000] 3 CLJ 769 (**refd**)*

*Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645 (**refd**)*

*Merdeka University Bhd v. Government of Malaysia [1981] CLJ 175; [1981] CLJ (Rep) 191 (**refd**)*

*Raymond v. Honey [1983] 1 AC 1 (**refd**)*

*Re Perting Timor Election (No 2) [1962] 1 LNS 162, [1962] 28 MLJ 333 (**refd**)*

*Selvanathan Savarimuthu v. Suruhanjaya Pilihanraya Malaysia (Civil Application No: W-08-417-1998) (unreported) (**refd**)*

*Sennayake v. Navaratne [1954] AC 640 (**refd**)*

Tengku Razaleigh Tengku Mohd Hamzah v. Election Judge for Election Petition No. 33-6-1995 & Ors [1996] 1 CLJ 366 ***(refd)***

Tunku Abdullah v. Ali Amberan ,[1970] 1 LNS 162,[1971] 1 MLJ 25 ***(refd)***

Wee Choo Keong v. Lee Chong Meng & Anor [1996] 3 CLJ 508 ***(refd)***

Wee Choo Keong v. Lee Chong Meng & Anor [1998] 1 CLJ 705 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 20, 24, 50, 67(1), 68(1)(a) , (b), (c), (d), (2), (3)

Courts Ordinance 1948 , s. 37(c), (d)

Election Offences Act 1954, ss. 2, 11(c) , (d), 32, 33(4), 34(1), 35, 36, 42(2)

Federal Constitution, arts. 4(1), 118, 121(1) , (1B)(a), (b), (2)(a), (b), (c), 128(1) , (3), 130, 160(1)

Interpretation Acts 1948 & 1967, s. 17A

Rules of the High Court 1980, O. 9

JUDGMENT

Abdul Hamid Mohamad JCA:

This appeal arises from two election petitions, ie, Election Petition No. 5 of 1999 and Election Petition No. 11 of 1999. Both petitions concern the general election for the State Assembly for the constituency of Likas, known as "N13". The present appellant was the second respondent in Election Petition No. K5 of 1999 and third respondent in Election Petition No. K11 of 1999. The present respondent was the petitioner in both petitions. They were both candidates in the said election which was won by the appellant.

In the court below, both the petitions were consolidated.

Election Petition No. 5 of 1999 concerns the erection of four billboards alleged to have contained false statements about the respondent and alleged to have been made and/or put by the appellant. The election judge found that the appellant had committed an offence under s. 11(c) and (d) and s. 32 of the Election Offences Act 1954.

Election Petition No. 11 of 1999 was based on three main grounds:

> (1)that the Election Rolls 1998 which was used in the said election was illegal as (it was alleged) it contained names of non-citizens and persons who had been convicted for possession of fake identity cards;

> (2)that there were corrupt practices on the part of the appellant;
>
> (3)that there was conspiracy between the Federal Government and Barisan Nasional (the party to which the appellant represented in the said election).

The learned judge found in favour of the respondent on the first ground and held that the 1990 Electoral Roll for the said constituency "was illegal".

Regarding the second ground, the learned judge found that the respondent "had failed to prove beyond reasonable doubt the offence of bribery or corrupt practices."

Regarding the third ground, the learned judge found that there was no evidence of the alleged conspiracy.

In conclusion the learned judge declared that the 1998 Electoral Roll for Likas Constituency (N13) was illegal and that the said election was null and void.

The appellant appealed to this court.

When this appeal came before us, we directed the learned counsel for both parties to address us on one point first, and that is whether a decision of an election judge in an election petition is appealable to this court. After hearing the arguments of the learned counsel for both sides, we reserved our judgment as a constitutional issue of great importance and wide implications has been raised. This judgment is in respect of that issue only.

The argument of the learned Queen's Counsel for the appellant may be summarised thus:

Article 121(1B)(a) vests the jurisdiction in the Court of Appeal to determine appeals from decisions of a High Court or a judge thereof, regardless of whatever the position was as to the jurisdiction of the Federal Court (or Supreme Court) prior to the creation of the Court of Appeal. By virtue of Article 121(1B)(b), this "primary jurisdiction" may be enlarged by federal law but not abrogated, limited or restricted. Any law that attempts to do so is void for inconsistency under art. 4(1) of the Constitution. Jurisdiction under ss. 32, 33 and 36 of the Election Offences Act 1954 is vested exclusively in the High Court by art. 118 of the Constitution and those same sections. To the extent that s. 36 of the Election Offences Act 1954 purports to exclude the jurisdiction of the Court of Appeal to hear an appeal from a final order of an election judge, it is void and of no effect by operation of art. 4(1) it being inconsistent with art. 121(1B)(a) of the Constitution. The decisions of the courts prior to 24 June 1994, the date of the creation of the Court of Appeal, are not in point as they do not concern art. 121(1B).

For easy reference the relevant provisions of the Constitution are reproduced:

Article 4(1)

> 4(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

Article 118

> 118 No election to the House of Representatives or to the Legislative Assembly of a State shall be called into question except by an election petition presented to the High Court having jurisdiction where the election was held.

Both these provisions were not touched by the Constitution (Amendment) Act 1994 (Act A 885) that *inter alia* created the Court of Appeal with effect from 24 June 1994.

Article 121(1B):

> (1B) There shall be a court, which shall be known as the Mahkamah Rayuan (Court of Appeal) and shall have its principal registry in Kuala Lumpur, and the Court of Appeal shall have the following jurisdiction, that is to say:
>
> > (a)jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the Court and appealable under federal law to a judge of the Court); and
> >
> > (b)such other jurisdiction as may be conferred by or under federal law.

This clause was inserted by Act A885 and came into force on 24 June 1994. Prior to that date appeals from the High Court went straight to the Supreme Court, which was renamed "Federal Court" by the same amendment Act.

Article 121(2):

> (2) There shall be a court which shall be known as the Mahkamah Persekutuan (Federal Court) and shall have its principal registry in Kuala Lumpur, and the Federal Court shall have the following jurisdiction, that is to say:
>
> > (a)jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof;
> >
> > (b)such original or consultative jurisdiction as is specified in articles 128 and 130; and
> >
> > (c)such other jurisdiction as may be conferred by or under federal law.

Prior to 24 June 1994 (when amendment A885 came into force) cl. (2)(a) read as follows:

> (2) There shall be a court which shall be known as the Mahkamah Agung (Supreme Court) and shall have its principal registry in Kuala Lumpur, and the Federal Court shall have the following jurisdiction, that is to say:
>
> > (a)exclusive jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High

> Court given by a registrar or other officer of the court and appealable under federal law to a judge of the Court.)

The relevant provisions of the Election Offences Act 1954 are ss. 32, 33 and 36. Section 32 empowers the election judge to declare the election of a candidate at an election void on any of the grounds provided thereto.

Section 33(1) provides:

> 33(1) Every election petition shall be tried by the Chief Judge or by a Judge of any High Court nominated by the Chief Judge for the purpose:
>
> > Provided that the Chief Judge shall not nominate a Judge of a High Court of which he is not Chief Judge without consulting the Chief Judge of that High Court.

This section was amended by the Courts of Judicature (Amendment) Act 1994 (Act A886) that came into force as Act A885. The only amendment made was that the word "justice" wherever found was substituted with the word "judge". These are consequential amendments resulting from Act A885.

It should also be noted that, in respect of interlocutory matters in connection with an election petition subsection (4) provides:

> (4) Unless otherwise ordered by the Chief Judge, all interlocutory matters in connection with an election petition may be dealt with and decided by any Judge of the High Court whose decision shall be final.

Section 36, in brief, requires the election judge, at the conclusion of the trial to determine, *inter alia*, whether the election was void and rectify such determination. Upon such certificate being given such determination shall be final.

Before going any further, something should be said about the principles of the interpretation of constitutions.

The Supreme Court, the highest court in this country before it was renamed the "Federal Court", in a five-judge panel, has reiterated the principles in *Dewan Undangan Negeri Kelantan & Anor v. Nordin bin Salleh & Anor* [1992] 2 CLJ 1125; ([1992] 1 CLJ (Rep) 72). Abdul Hamid Omar LP has this to say at p. 1130 (pp. 78-79) of the report:

> Secondly, as the Judicial Committee of the Privy Council held in *Minister of Home Affairs v. Fisher* at p. 329, a constitution should be construed with less rigidity and more generosity than other statutes and as *sui juris*, calling for principles of interpretation of its own, suitable to its character but not forgetting that respect must be paid to the language which has been used.
>
> In this context, it is also worth recalling what Barwick CJ said when speaking for the High Court of Australia, in *Attorney General of the Commonwealth, ex relatione McKinley v. Commonwealth of Australia* at p. 17:

> the only true guide and the only course which can produce stability in constitutional law is to read the language of the constitution itself, no doubt generously and not pedantically, but as a whole and to find its meaning by legal reasoning.

> In our approach to this appeal we have accordingly kept in the forefront of our minds the principles aforesaid.

Raja Azlan Shah, Ag LP (as he then was), in *Dato' Menteri Othman bin Baginda & Anor v. Dato' Ombi Syed Ahir bin Syed Darus* [1981] 1 MLJ 29 (FC) said, at p. 32 of the report:

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way "with less rigidity and more generosity than other acts" (see *Minister of Home affairs v. Fisher*). A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: "A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms." The principle of interpreting constitutions "with less rigidity and more generosity" was again applied by the Privy Council in *Attorney-General of St. Christopher, Nevis and Anguilla v. Reynolds*.

See also *Merdeka University Bhd. v. Government of Malaysia* [1981] CLJ 175; [1981] CLJ (Rep) 191.

Of late, the present Federal Court has adopted the "purposive approach" of interpreting the Constitution relying, in particular, on the provision of s. 17A of the Interpretation Acts 1948 and 1967 (Act 388). The judgment of Mohamed Dzaiddin FCJ (as he then was) in *Lam Kong Co. Ltd. v. Thong Guan Co. Ptd. Ltd* [2000] 3 CLJ 769 (FC) is one such example. This judgment was followed in *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn. Bhd. & Anor* [2002] 2 CLJ 57 (FC). Haidar Mohd. Noor FCJ delivering the judgment of the Federal Court, said at p. 69 of the report:

> This purposive approach has now been given statutory recognition by our Parliament enacting s. 17A in the Interpretation Acts 1948 and 1967 (Act 388) which reads:
>
> > In the interpretation of a provision of an Act, a construction that would promote the purpose of object underlying the Act (whether that purpose or object is expressly stated in the Act or

> not) shall be preferred to a construction that would not promote that purpose or object.

> Recently, the Federal Court in a majority judgment in *Lam Kong Co. Ltd. v. Thong Guan Co. Ptd Ltd* [2000] 3 CLJ 769 Mohamed Dzaiddin, FCJ, (now CJ Malaysia) took the purpose or object of the legislature as provided by s. 17A of the Interpretation Acts 1948 and 1967 (Act 388) for the construction of s. 68(1)(a) of CJA on the "filter' principle. In view of the statutory recognition we can and should adopt a purposive approach in the interpretation of "Ruler" for the purposes of arts. 181, 182 and 183."

It should be noted that in *Lam Kong Co. Ltd* the Federal Court adopted the purposive approach in considering s. 68(a) of the Courts of Judicature Act 1964, one of the sections presently under consideration. I shall adopt the same approach.

Is the decision of the Chief Judge or a judge of a High Court sitting as an "election judge" a decision of a High Court?

In this respect the learned Queen's Counsel relied on art. 118 of the Constitution and the cases of *Wee Choo Keong v. Lee Chong Meng & Anor* [1998] 1 CLJ 705, *Tengku Razaleigh bin Tengku Mohd. Hamzah v. Election Judge for Election Petition No. 33-6-1995 & Ors.* [1996] 1 CLJ 366 and *Dason Gaban v. Zulkifle bin Majun & 21 Other Cases* [1982] 1 MLJ 31.

Wee Choo Keong [1998] is a judgment of the Federal Court. The applicant was elected as a member of Parliament, but in the election petition filed subsequently, he was disqualified and unseated by the election judge. The applicant applied to the High Court for leave to apply for an order of *certiorari* to quash the decision of the election judge. He was unsuccessful in the High Court and also in the Court of Appeal. He appealed to the Federal Court. The issue was whether an election judge was amenable to an order of *certiorari.* The Federal Court held that the court in which the election judge sits to hear an election petition is not an inferior court or any statutory authority or tribunal which is amenable to an order of *certiorari*. Prerogative order cannot be issued by the High Court against an "election court" which is not an inferior court.

In arriving at that conclusion the Federal Court, through the judgment of Peh Swee Chin FCJ relied on the provision of s. 33 of the Election Offences Act 1954 and the fact that "election petitions have not been known to have been filed anywhere else except in the High Court and the title of the election petition in question reads "Dalam Mahkamah Tinggi di Kuala Lumpur.""

The learned judge also relied on art. 118 of the Federal Constitution, and *inter alia,* said:

> High Court is the designated court for an election judge to sit in.

The learned judge then referred to s. 24 of the Courts of Judicature Act 1964 and said:

> ... Article 118 of the Federal Constitution in our view, seems to provide the High Court with this additional specific jurisdiction not mentioned in the said Act.

> We are of the view that the election court is, in fact, the High Court.

The judgment of the High Court in *Tengku Razaleigh* is to the same effect.

As far as this court is concerned, it is settled law that for the purpose of judicial review the "election court" is not a tribunal inferior to the High Court, the orders of which are susceptible to judicial review. That is a very sensible view to take, because, when the Chief Judge himself sits as an "election judge", it is unimaginable that his decision will be subject to judicial review by a High Court judge. Similarly, when a High Court judge is nominated by the Chief Judge to try an election petition, he sits as a judge not as a chairman or member of a tribunal. Therefore it is perfectly correct to treat the decision of an election judge not as a decision of a tribunal inferior to the High Court for the purpose of judicial review.

But that does not make a decision of an election judge a decision of the High Court in the ordinary sense. It must be noted that the only reference made to the High Court in art. 118 is with regard to the place where an election petition is to be presented. Surely, a place for the presentation of an election petition has to be named as there is no such establishment as an election court and as it is either the Chief Judge or a judge of a High Court who may be nominated to try the petition. That is provided as a matter of convenience.

Furthermore, the fact that the petition is filed in a High Court does not empower a judge of that High Court to try the petition as in other cases filed therein. He has to be nominated by the Chief Judge for that purpose. In practice, only a few judges of the High Court are nominated after every general election to try the petitions and, quite often, the resident High Court judge is not the one nominated for such purpose.

Further, it must be noted that the Election Offences Act 1954 makes a clear distinction between an election judge and a High Court judge. Section 2 provides an interpretation of an "election judge":

> "election judge" means the Chief Judge or any judge nominated by the Chief Judge under section 33;

The term "election judge" is used throughout the Act see, for example, ss. 28, 29, 32, 33, 36, and 37.

On the other hand, when the Act refers to a High Court judge, the words used are "any judge of the High Court". A clear example is sub-s. (4) of s. 33 of the Act:

> (4) Unless otherwise ordered by the Chief Judge, all interlocutory matters in connection with an election petition may be dealt with and decided by **any judge of the High Court** whose decision shall be final. (emphasis added).

The distinction was pointed out by Suffian LP in *Dason Gaban v. Zulkifli bin Majun and 21 Other Cases* [1982] 1 MLJ 31 (FC) when he said:

> Here however while it is true that Seah J was a Judge of the High Court, he made the order appealed from not in exercise of the ordinary jurisdiction of a High Court Judge but of the special jurisdiction of an Election Judge, having been specially so nominated by the Chief Justice under section 33 of the

Election Offences Act.

There is therefore clearly a distinction between a High Court judge and an election judge.

On these grounds, in my judgment, a decision of an election judge is not a decision of a High Court or a judge thereof. On this ground alone the appeal could be dismissed.

Assuming that I am wrong, I shall now consider the other arguments. First, I shall look at the decided cases, so far. I have not been able to find even one judgment of any court in this country that says that a decision of an election judge is appealable to a higher court. On the other hand, I find that ever since elections were held in this country, all the appellate courts, be it the former Court of Appeal, the former Federal Court, the Privy Council, the Supreme Court and the present Court of Appeal are all of the same view that such decisions are not appealable.

I shall take the cases in chronological order.

Re Perting Timor Election (No. 2) [1962] 28 MLJ 333 is a judgment of the former Court of Appeal. In that case an election judge made an interim order in Election Petition No. 6 of 1961. The election, it is to be noted, is an election to the Town Council of Bentong in Pahang. The respondent filed a notice of appeal against the said order. The matter for consideration by the court was the motion by the petitioner that the notice of appeal should be struck out on the ground that no appeal should be brought by virtue of s. 37(c) and (d) of the Courts Ordinance 1948.

Hill Ag. CJ sitting with Good JA and Suffian J (as he then was), delivering the judgment of the court, said at p. 333:

> The matter only presents difficulty because the order against which the appeal is lodged is an interim or interlocutory order made by the Election Judge in preliminary stages of the hearing of the Election Petition. The learned Judge had not determined the issues set out in section 36 of the Election Offences Ordinance 1954 (No. 9 of 1954) and had not certified his determination. If he had, such determination would be final according to this section and no appeal would lie for section 36 states *inter alia* "upon such certificate being given, such determination shall be final."

At p. 334 of the report, the learned Acting Chief Justice said:

> What then is the position with regard to appeals from interim or interlocutory orders made by an Election Judge? The right of appeal is not an inherent right, but one that must be expressly granted or conferred. Neither in the Constitution nor in the Courts Ordinance, nor in the Election Offences Ordinance is this right conferred and in any view there is therefore no such right of appeal.

It should be noted that the judgment was delivered on 18 July 1962. At that time the words "whose decision shall be final" were not yet part of sub-s. (4) of the said s. 33. Those words were only added by the Election Offences (Amendment) Act 1986 (Act A640) that came into force on 2 May 1986. Yet, even without those words the former Court of Appeal held that

even a decision in an interlocutory matter by "any judge of the High Court" was not appealable to the then Court of Appeal.

Devan Nair v. Yong Kuan Teik [1967] 1 MLJ 261 is a decision of the Privy Council. For the present purpose, it is sufficient to say that the board held at p. 263 that:

> There was no appeal to Their Lordship's Board for it has been settled by a long time of decision of their Lordships starting with *Theberge v. Laudrey* ([1876] 2 App. Cas 102, PC) in 1876 and ending with *Arzu v. Arthurs* ([1965] 1 WLR 675 PC)... in 1961 that their Lordships will not entertain appeals from the determination of an election judge.

And, again:

> Looking at sections 33 and 36 (of the Election Offences Ordinance 1954), while it is clear that section 36 enacts that final orders are not subject to appeal, there were no such limiting words in section 33(4).

The issue whether a decision in an interlocutory matter is appealable arose again in *Dason Gaban v. Zulkifli bin Majun & Ors* [1982] 1 MLJ 315 (FC). Suffian LP distinguished the facts in *Devan Nair* 's case in considering the observation of the Privy Council and invited Parliament to "consider the ambiguity in the law disclosed in these appeals, decide as a matter of policy whether or not interlocutory orders made in an election petition should be appealable and legislate accordingly."

Clearly, it was that invitation that led the Parliament to amend sub-s. (4) of s. 33 by adding the words "whose decision shall be final" in 1986.

Be that as it may, we are concerned with a final order of an election judge.

Tunku Abdullah v. Ali Amberan [1971] 1 MLJ 25 is again a judgment of the Federal Court, consisting of Azmi LP, Suffian and Gill FJJ (as they then were). In that case the appellant sought to appeal from the decision of the election judge against the finding that he was guilty of corrupt practice and against the award of costs against him. The Federal Court held that the final order of an election judge was unappealable and therefore the Federal Court had no jurisdiction to entertain the appeal. *Devan Nair v. Yong Kuan Teik* [1967] 1 MLJ 261, *A.J. Arzu v. A.E. Arthurs & Anor* [1965] 1 WLR 675, *Sennayake v. Navaratne* [1954] AC 640 and *Re Perting Timor Election (No 2)* [1962] 28 MLJ 333 were followed.

It is interesting to note that a similar argument was put forward in that case, and I quote from the judgment of Suffian FJ (as he then was):

> It is submitted that Article 118 overrides all the provisions in the Election Offences Act relating to Election Judges. Dato' Nahappan does not say that the learned judge had no jurisdiction to determine this election petition. All he says is that in view of Article 118 the learned judge must be deemed to have been sitting as an ordinary judge of the High Court, and from his judgment an appeal lies under s. 67 of the Courts of Judicature Act. Dato' Nahappan points out that Article 118 was not brought to the notice of the Federation Court of Appeal in *Re Perting Timor Election* [1962] 28 MLJ 333, 334 or to the notice

> of the Privy Council in the *Devan Nair* case [1967] 1 MLJ 261 where it was held that there is no appeal from the decision of an Election Judge;

The learned judge (as he then was) went on to say:

> I am of the opinion that this court has no jurisdiction to entertain this appeal.

And again:

> In my judgment there is no inconsistency between our Election Offences Act and Article 118 of the Constitution, for Article 118 does not guarantee the citizen the right of appealing against the decision of a High Court Judge, and it is therefore open to Parliament to provide (by law) which decisions of a High Court may be appealed against and which not. By s. 36 of the Election Offences Act, Parliament has clearly provided that the determination of a judge hearing an election petition shall be final. When Parliament enacted s. 67 of the Courts of Judicature Act it knew of the court's reluctance to accept jurisdiction in a case concerning the election of a member of the legislature and that court will not entertain an appeal such as the one under consideration. If Parliament had intended to change this law, surely it would have written s. 67 of the Courts of Judicature Act in such a way as to make it clear beyond doubt that the Federal Court has jurisdiction to hear appeals from the judgment of the High Court not only in any civil matter but also in election petitions. It did not do so and I am convinced that the reason for that is that Parliament did not intend to change the law to render the decisions of an Election Judge appealable.

It should be pointed out that the provision of art. 118 of the Federal Constitution is the same now as it was on 14 August 1970 when that case was decided by the then Federal Court. The then s. 67 was the same as the present s. 67(1) except that s. 67 was renumbered as s. 67(1) by the Courts of Judicature (Amendment) Act 1972 (Act A126) with effect from 1 November 1972, that the words "Court of Appeal" was substituted for the words "Federal Court" by Act A886 with effect from 24 June 1994 and the word "cause or" was added by Act A909 also with effect from the same date, which is not material for our purpose now.

Dasan Gaban v. Zulkifli bin Majun and 21 Other cases [1982] 1 MLJ 315 is again a judgment of the Federal Court. In that case, a number of election petitions were presented in the High Court at Kota Kinabalu Sabah. The applicants argued in 20 of the petitions that the petitions should be struck out on the grounds of failure to comply with the provisions of the Election Petition Rules 1954 and s. 34 of the Election Offences Act 1954. The learned judge rejected all the applications and refused to strike out any of the petitions. The applicants appealed to the Federal Court. The court dismissed the appeal on a preliminary objection on the ground that the court had no jurisdiction to hear the appeal.

Suffian LP, sitting with Lee Hun Hoe (CJ Borneo) and Hashim Yeop A. Sani J (as he then was), delivering the judgment of the court, said:

> We dismissed these appeals because there is no inherent right of appeal to us, such a right if any must be granted by statute, and if there is any right of appeal at all it must be under s. 67(1) of the Courts of Judicature Act. That

section provides:

> (1) The Federal Court shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to the provisions of this or any other written law regulating the terms and conditions upon which such appeals shall be brought.

Wee Choo Keong v. Lee Chong Meng & Anor [1996] 3 CLJ 508 is a judgment of this court. It is this judgment that went up to the present Federal Court which confirmed it and which has been referred to earlier. It concerns an application for an order of certiorari. However, Abdul Malek Ahmad JCA (as he then was) in his judgment at p. 56 said:

> The law is well-settled that there shall be no appeal from the decision of an election judge. Section 36 of the Election Offences Act 1954 states that the election judge shall determine at the conclusion of the trial of an election petition whether the candidate whose return or election is complained of or any other and what person, was duly returned or elected, or whether the election was void, and shall certify such determination to the election commission or to the state authority, as the case may be, and upon such certificate being given such determination shall be final.
>
> This legislative provision had been given judicial sanction as long ago as in 1962 by the Court of Appeal in *Re Perting Timor Election (No. 2)* [1962] MLJ 333 and in 1970 when the Federal Court decided in *Tunku Abdullah v. Ali Amberan* [1971] 1 MLJ 25 that the final order of an election judge is unappealable and therefore, the Federal Court had no jurisdiction to entertain the appeal. The same situation arose again in 1982 when the Federal Court held in *Dasan Gaban v. Zulkifle bin Majun & Ors* [1982] 1 MLJ 315 that there is no inherent right of appeal to the Federal Court from the decision of an election judge.

It is not necessary for me to discuss the unreported judgment of the Supreme Court in *Ignatius Stephen Malanjun v. Election Judge Sabah & Anor* (Supreme Court Civil Appeal No. 03-42-89), reproduced in the judgment of Abdul Malek Ahmad JCA (as he then was) in *Wee Choo Keong v. Lee Chong Meng* [1996] 3 CLJ 508. It is to the same effect that there is no appeal from a decision of an election judge.

Similarly this court in *Selvanathan a/l Savarimuthu v. Suruhanjaya Pilihanraya Malaysia* (Permohonan Sivil No. W-08-417-1998) dismissed an application for leave to appeal against an order of costs made by an election judge as there is no appeal from that decision.

It is thus clear that all the appellate courts in this country, be it the former Court of Appeal, the former Federal Court, the Privy Council, the Supreme Court and the present Court of Appeal, have unanimously over the years held that the decision of an election judge is not subject to appeal.

However, before us it is argued that this court should not look at decisions before 24 June 1994 as they are not relevant, because, at that time, this court has not been established yet.

The cut-off date is 24 June 1994, the date of the establishment of the present Court of Appeal. It is true that of all the cases mentioned above *Wee Choo Keong v. Lee Chong Meng & Anor* [1996] 3 CLJ 508 appears to be the only judgment of this court delivered after that date besides *Selvanathan a/l Savarimuthu v. Suruhanjaya Pilihanraya Malaysia* (Permohonan Sivil No. W-08-417-1998) which was also decided on the ground that there was no right of appeal.

I shall now consider the wording of art. 121(1B).

Article 121(1B) was inserted by Act A885. The same amendment Act amended the then existing art. 121(2) by changing the name of the "Mahkamah Agong (Supreme Court)" to "Mahkamah Persekutuan (Federal Court)" and secondly, by substituting a new para. (a) for the old para. (a). This is due to the creation of the Court of Appeal. A provision must be made to enable the Federal Court to hear appeals from the newly created Court of Appeal. Other than that the old provision of cl. (2) remains unchanged. For the present purpose the following words which have remained unchanged are important:

> (2) There shall be a court which shall be known as the Mahkamah Persekutuan (Federal Court)... and the Federal Court shall have the following jurisdiction, that is to say:
>
> (a)jurisdiction to determine appeals from decisions of...

Compare that with the wording of art. (1B) that creates the Court of Appeal:

> (1B) There shall be a court which shall be known as the Mahkamah Rayuan (Court of Appeal)... and the Court of Appeal shall have the following jurisdiction, that is to say:
>
> (a) jurisdiction to determine appeals from decisions of...

Note that the wording of the two clauses are exactly the same except for the name of the respective courts.

It is argued that there is no provision concerning the Court of Appeal similar to that of art. 128 concerning the Federal Court, in particular cl. (3):

> (3) The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by federal law.

That provision was inserted by Act 26/1963, s. 14, and came into force on 16 September 1963 (on the formation of Malaysia) replacing the earlier art. 128. It is argued that since there is no such provision regarding the Court of Appeal, federal laws cannot impose restrictions on the right of appeal to the Court of Appeal. In other words, all decisions of the High Court are appealable to the Court of Appeal.

The question is whether because of the absence of a provision similar to art. 128(3) in respect of the Court of Appeal means that all decisions of the High Court are appealable to the Court of Appeal. That depends on whether the provisions of arts. 50, 67 and 68 of the Courts of

Judicature Act 1964 are valid and that depends on whether the provision of art. 121(1B) should be read restrictively or whether it should be read together with those sections.

Sections 50 and 67 provide for the jurisdiction of the Court of Appeal in criminal and civil matters respectively. Section 68 goes further to provide matters which otherwise would be appealable under s. 67 are not appealable. Both ss. 50 and 67 were substituted for the old ss. 50 and 67 by Act A886 and came into force on the same day as Act A885 that, *inter alia*, created the Court of Appeal, ie, 24 June 1994. Section 68 was also amended by Act A886. Subsection (1)(a) was amended by substituting for the words "one hundred" the words "two hundred fifty" and by deleting the words "or a judge of the High Court". Subsection (2) was deleted. Subsection (3) was amended by deleting the words "or a judge of the High Court." All these amendments came into force on the same day as Act A885, ie, 24 June 1994.

So, clearly, these provisions of the Court of Judicature Act 1964 and art. 121(1B) of the Constitution are intended to be read together. The intention of Parliament cannot be clearer than that.

The words of Suffian FJ (as he then was) in *Tunku Abdullah* 's case, reproduced earlier are also relevant.

Furthermore, the observation made by Steve Shim CJ (Sabah & Sarawak) in *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd.* [2002] 1 CLJ 645 (FC) supports this view. Even though the learned Chief Judge was interpreting art. 121(2), as has been pointed out, the wording of cl. (2) and cl. (1B), in so far as they are material for the present discussion, is identical. The learned Chief Judge, at p. 660 of the report says:

> In my view, art. 121(2) Federal Constitution is a general provision relating to the jurisdiction of the Federal Court. It is an empowering provision which states that the Federal Court shall have jurisdiction to determine appeals from decisions of the Court of Appeal and the High Court. It is pertinent to note the conspicuous absence of the word "all" or "any" preceding the word "decisions" in the provision. If it was the intention of Parliament to confer jurisdiction on the Federal Court to hear appeals from all decisions of the Court of Appeal, the word "all" or "any" would have been included therein. The exclusion of those words, in my view, was clearly deliberate. It was intended that not all decisions are appealable."

Of course, having said that the learned Chief Judge went on to consider the provision of art. 128(3), which has no equivalent in respect of the Court of Appeal. However, I am only relying on his view regarding the provision of art. 121(2) which is, in substance, in *pari materia* with art. 121(1B).

In this connection, it is argued that vesting of the jurisdiction by the Constitution in the Court of Appeal to hear appeals from the High Court cannot be detracted, limited or restricted by a federal law, even though federal law may regulate it. Examples of such "regulations" are the requirement to file notice of appeal and the requirement to obtain leave in certain cases.

I have no problem with the first example. But, there is clearly a problem in respect of the requirement to obtain leave. Leave may be granted or refused. When leave is refused, following this argument, does it not mean that a constitutional right has been refused in the

exercise of a federal law? It is the federal law, ie, the Court of Judicature Act 1964 that provides for such requirements, not the Constitution. This, to my mind, shows that the provision of the Constitution should be read together with the provisions of the Courts of Judicature Act 1964. To hold otherwise would lead to a conclusion that even ss. 50, 67 and 68 of the Courts of Judicature Act 1964 are void and unconstitutional. It means that all decisions of the High Court are appeallable to the Court of Appeal. With respect, I do not think that art. 121(1B), even in the absence of a provision similar to art. 128(3), being a general provision, can be read in such a restrictive way.

On these grounds, in my judgment, the decision of an election judge in question is not appealable to this court. The appeal is therefore dismissed with costs.

My learned brother Mohd. Saari Yusoff has read this judgment in draft and has expressed his agreement with it.