IN THE COURT OF APPEAL OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO: W-02(IM)-2530-11/2013

BETWEEN

NATIONAL UNION OF BANK EMPLOYEES ... APPELLANT

AND

1. DIRECTOR GENERAL OF TRADE UNIONS ... RESPONDENTS
2. KESATUAN PEKERJA-PEKERJA BUKAN EKSEKUTIF MAYBANK BERHAD

[In the matter of Application for Judicial Review No: R1-25-3011
In the High Court of Malaya in Kuala Lumpur]

In the matter of a decision of the Director General of Trade Unions dated 3rd January 2011 pursuant to Section 12(1) of the Trade Unions Act 1959 registering Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Berhad as a Trade Union

And

In the matter of Order 53 of the Rules of the High Court 1980

"SALINAN DIAKUI SAH

NORPIPAH BT. IBRAHIM
Setiausaha Kepada
YA Datuk Dr. Haji Hamid Sultan bin Abu Backer
Hakim Mahkamah Rayuan Malaysia
Putrajaya

Between

NATIONAL UNION OF BANK EMPLOYEES ... Plaintiffs

And

1. **DIRECTOR GENERAL OF TRADE UNIONS**
2. **KESATUAN PEKERJA-PEKERJA BUKAN EKSEKUTIF MAYBANK BERHAD** ... Defendants

CORUM:
Abdul Wahab bin Patail, JCA
Linton Albert, JCA
Hamid Sultan Bin Abu Backer, JCA

Hamid Sultan Bin Abu Backer, JCA (Delivering Judgment of The Court)

GROUNDS OF JUDGMENT

[1] The appellant's (a national based union) appeal against the decision of the learned High Court Judge who refused an application for judicial review in respect of a decision of the 1st respondent in allowing the 2nd respondent to be registered as in-house 'establishment' union pursuant to section 12 of the Trade Union Act 1959 (TUA 1959) came up for hearing on 02-07-2014 and upon hearing the submission we reserved judgment. My learned brothers Abdul Wahab bin Patail JCA and Linton Albert JCA have read the judgment and approved the same. This is our judgment.

Brief Facts

[2] The learned counsel for the 2nd respondent has set out the facts. It will save much judicial time by repeating the same. The brief facts *inter alia* read as follows:

(a) the applicant is a trade union registered pursuant to Section 12 of the TUA 1959, representing non-executive employees in the entire banking industry, including Malayan Banking Berhad (Maybank) since 1958. The applicant has been concluding collective agreements with the Malaysian Commercial Employees Association which bind *inter alia*, Maybank and its non-executive employees.

(b) pursuant to the decision, the 2nd respondent was registered as a trade union to represent Maybank non-executive employees on 3-01-2011.

(c) by letter dated 28.1.2011, the applicant filed an appeal pursuant to section 71A of the TUA 1959 with the 1st respondent to cancel the registration of the 2nd respondent.

(d) on 8.2.2011, without a response or decision on the appeal, the applicant filed the JR application herein to challenge and quash the decision for *inter alia* the following reasons:

(i) The 1st respondent failed to afford the applicant an opportunity to be heard before proceeding to register the 2nd respondent as a trade union; and

(ii) The 1st respondent failed to take into account the scope of the 2nd respondent's membership which overlapped and/or is identical with the scope of membership of the applicant and that the applicant's members who are employed with Maybank are

enjoying the terms and benefits of the 16th Collective Agreement entered into between the applicant and Malaysian Commercial Employees Association.

[3] The learned counsel for the 2nd respondent says:

(a) pursuant to section 12(2) of the TUA 1959, there is no impediment in law to the co-existence of an in-house union and a national union representing the same category of employees;

(b) in point of fact, there existed another in-house union within Maybank representing its executive officers who were, at the material time, a category of employees falling under the umbrella of representation of the Association of Bank Officers, Peninsular Malaysia, a national trade union for executive officers in the banking industry; and

(c) it is in the best interest of the non-executive employees of Maybank that the 2nd respondent be registered in furtherance of its employees' right of association guaranteed by the Federal Constitution and their legitimate right to elect to be represented by a union of their choice.

(d) The 2nd respondent after close of submission had also brought to our attention, the Court of Appeal's decision in *Persatuan Pegawai-Pegawai Bank Semenanjung Malaysia v Ketua Pengarah Kesatuan Sekerja Malaysia & Ors* [2014] 5 CLJ 566 (which relied on Robin's case and Nordin's case), and submitted as follows:

"Mahkamah Rayuan telah menyatakan bahawa Seksyen 12(1) tidak mewajibkan Ketua Pengarah Kesatuan Sekerja untuk memberi hak pendengaran kepada kesatuan sekerja pada tahap nasional di dalam kes itu sebelum mendaftarkan suatu kesatuan sekerja dalaman syarikat disitu."

We will deal with this issue in greater detail below.

[4] It is of interest to note that the learned counsel for the 2nd respondent says as follows:

"What is noteworthy is that the hearing of the JR application, counsel for the applicant conceded and did not dispute that the applicant was cloaked with the authority pursuant to section 12(2) of the TUA to register an in-house 'establishment' union notwithstanding the existence of a 'national-based' union representing the same set of employees."

[5] The learned counsel for the 2nd respondent had also summarized the grounds for rejecting the judicial review application. And it *inter alia* reads as follows:

(a) the word 'establishment' that is present in section 12(2) of the TUA 1959 enables the legitimization of in-house unions in spite of the existence of national unions;

(b) section 12(2) of the TUA 1959 gives the 1st respondent wide discretion to either allow or disallow the registration of an

union as it uses the word 'may' as opposed to 'shall'. The TUA 1959 does not require any consultation before the 1st respondent can exercise his power to register;

(c) the registration of the 2nd respondent does not prejudice the applicant in any manner whatsoever. This is because although registered, the 2nd respondent still has to get recognition by Maybank by proving it represents the majority members of the non-executive employees of Maybank (that the applicant says to represent), before it can negotiate any collective agreement) on their behalf.

(d) If there indeed is an overlap in terms of membership between the applicant and 2nd respondent, section 15(3) of the TUA 1959 expressly provides the 1st respondent the power to exercise his discretion and may cancel the registration of the union with the least number of members or order the union with the least number of members to remove from its membership register those members employed in that establishment, trade and industry. Therefore, the issue of overlapping representation is a non-starter.

[6] The learned Senior Federal Counsel acting for the 1st respondent in urging the court to dismiss the appeal anchors a procedural complaint as follows:

(b) The 2nd respondent was registered as a trade union on 3.1.2011 to represent employees in Maybank;

(c) The applicant subsequently filed an appeal to the Minister of Human Resources vide a letter dated 28.1.2011 pursuant to section 71A of the TUA 1959 against the 1st respondent to cancel the registration of the 2nd respondent.

(d) Despite the fact that the Minister has yet to decide on the appeal, the applicant on 11.2.2011 proceeded to file a judicial review to challenge the decision of the 1st respondent.

[7] What is interesting to note is that both the respondents, though anchoring the procedural complaint, did not provide much assistance in the submission whether judicial review application is maintainable.

[8] The appellant has raised 18 grounds in the Memorandum of Appeal and *inter alia* it reads as follows:

> "*1. The learned Judge had erred in fact and in law when she failed to consider relevant provisions of the law in particular provisions of the Trade Unions Act, 1,959 and binding precedent in dismissing the Appellant's ("the Applicant's") Application for Judicial Review in the High court.*
>
> *2. The learned Judge had erred in fact and in law when she wrongly identified the "Substantive Issue" in the case as "Whether the Minister had failed to take into consideration relevant matters and therefore had erred in registering the 2nd Respondent" when the Minister did not make any decision here but rather it was the Director-General of Trade Unions who had done so.*

3. *The learned Judge had erred in fact and in law when she held that the purpose of the amendment to section 12(2), Trade Unions Act, 1959 in 1989 was to encourage the flourishing of in-house trade unions (despite the existence of national unions) without considering the overall effect and intention of section 12(2), Trade Unions Act, 1959.*

4. *The learned Judge had erred in fact and in law when she failed to consider that the 1st Respondent had failed to undertake any investigation or exercise that would enable the 1st Respondent to consider whether that the provisions of section 12(2), Trade Unions Act 1959 had been satisfied and complied with to enable the 2nd Respondent to be registered.*

5. *The learned Judge had erred in fact and in law when she failed to appreciate that the 1st Respondent's exercise of discretion to register the 2nd Respondent or any union must be exercised after due consideration of all relevant facts and circumstances affecting the affected workers and the interest of the workers concerned and there was no such consideration at all or that there was insufficient consideration of the relevant matters here by the 1st Respondent.*

6. *The learned Judge had erred in fact and in law when she failed to consider that relevant precedents have interpreted section 12(2), Trade Unions Act, 1959 to rnean that the 1st Respondent was obliged to consult with the Applicant being an existing trade union that had represented the same class and category of employees for more than 50 years.*

7. *The learned Judge had erred in fact and in law when she made a finding that there was no overlap in the scope of membership of the Applicant with the 2nd Respondent on the basis that the Applicant was a*

national union whilst the 2nd Respondent was an in-house union notwithstanding the category of workmen are exactly the same.

8. *The learned Judge had erred in fact and in law when she made a finding that the 2nd Respondent as an in-house union would be able to present the employees concerned more effectively as compared with the Applicant being a national union without there being material to make such a finding.*

9. *The learned Judge had erred in fact and in law when she made a finding that the 2nd Respondent as an in-house union would be able to represent the employees concerned more effectively as compared with the Applicant being a national union without consideration of all relevant facts including that the 2nd Respondent would comprise of only employees of Maybank Berhad and would be susceptible to succumb to management control and pressure of their employer, Maybank Berhad.*

10. *The learned Judge had erred in fact and in law when she failed to consider that the issue of registration of the 2nd Respondent ought not in any way be influenced by the process of recognition of the 2nd Respondent by their employer, Maybank Berhad.*

11. *The learned Judge had erred in fact and in law when she wrongly held the issues of "overlapping of membership" and "industrial disharmony" are irrelevant matters in considering the registration of the 2nd Respondent as a trade union.*

12. *The learned Judge had erred in fact and in law when she failed to consider and appreciate that the 1st Respondent had failed to take all necessary steps, investigation and action section 12(2), Trade Unions Act, 1959 had been satisfied before registering the 2nd Respondent.*

13. *The learned Judge had erred in fact and in law when she failed to consider and appreciate that) even if the amendment to section 12(2), Trade Unions Act, 1959 allowed the 1st Respondent to register an in-house union when a national union had already existed (which is not admitted), the 1st Respondent had not undertaken any exercise of investigation to satisfy herself that it would be in the best interest of the employees concerned to register the 2nd Respondent despite the existence of the Applicant.*

14. *The learned Judge had erred in fact and in law when she placed great reliance on speech of the Deputy Minister of Labour in the Hansard when the amendment to section 12Q), Trade Unions Act, 1959 was debated in Parliament although the words in section 12(2) are clear and unambiguous and required no reference to speeches in parliament when the amendments were debated or the Hansard for construction of the same.*

15. *The learned Judge had erred in fact and in law when she referred to and relied on section 15, Trade Unions Act, 1959 to hold that the 1st Respondent can go ahead and register the 2nd Respondent as a trade union without considering that section 15, Trade Unions Act, 1959 calls for consideration of different and distinct considerations from that the 1st Respondent must consider pursuant to section 12(2), Trade Unions Act, 1959.*

16. *The learned Judge had erred in fact and in law when she failed to consider and appreciate that the overall scheme and intent of section 12(2), Trade Unions Act, 1959 was to avoid multiplicity of trade unions representing the same category of workers, which is what happened when the 1st Respondent registered the 2nd Respondent as a trade union.*

17. The learned Judge had erred in fact and in law when she failed to consider and appreciate that a registered trade union is a special entity that is subject to numerous statutory controls and that at the same time enjoys numerous powers, rights and privileges exclusive to registered trade unions. Accordingly, the registration of a trade union can and must only be carried out after careful and due consideration of all relevant factors and not done or exercised capriciously as was done here by the 1st Respondent.

18. The learned Judge had erred in fact and in law when she failed to appreciate and consider that the "(Keppa Case" submitted by the 2nd Respondent in fact and in law supports the Applicant in furthering the argument that where there already exist a union then great care and consideration must be exercised in registering another union representing the same class or category of workers.

[9] The learned Senior Federal Counsel had relied on some provisions of the Federal Constitution without authorities for the proposition. And the submission *inter alia* reads as follows:

(i) The court must not permit restrictions upon the rights of the citizens to form a union as conferred by Article 10(1)(c) of the Federal Constitution beyond what is provided under Article 10(2)(c) of the Federal Constitution and the word 'establishment' that is present in section 12(2) of Act 262 enables the legitimatization of in-house unions;

(ii) Section 12(2) of Act 262 gives discretion to 1st respondent to either allow or to disallow the registration of an union as it uses the word 'may' as opposed to 'shall'; and

(iii) The registration of 2nd respondent does not in any event mean that they can directly negotiate with the employer. They have to file claim for recognition in order to do so.

[10] We have read the appeal records and the submissions of the parties in detail. We are grateful to the comprehensive submissions of the learned counsel as well as the learned Senior Federal Counsel. After much consideration to the submission of the respondents, we take the view that the appeal must be allowed. Our reasons *inter alia* are as follows:

(i) What is essential to note is that registration under the TUA 1959 itself does not permit the 2nd respondent to represent the employees without obtaining 'recognition' under section 9 of the Industrial Relation Act 1967 (IRA). Both of these Acts in a way must be seen to be social legislation to promote, preserve and protect the employees as well as the employers' right to create what we often term as 'Industrial Harmony' for successful 'Nation Building'. Industrial Jurisprudence does not just depend on the cold letters of the law per se or procedural requirement to decide on issues affecting the employer or employee unless the law as well as case laws are clear on the issues.

(ii) Objections under TUA 1959 are crucial for the appellant. IRA is *inter alia* is related to the employer who must be satisfied of the employees' support of the new union for purpose of recognition. If there is no support registration may be cancelled under s.15 of TUA 1959.

(iii) TUA 1959 and IRA must not be read in isolation. The reasons have been summarized in 'Janab's Series to Law, Practice And Legal Remedies' (2005), Vol. 11 at pages 773 and 775 and for purpose of convenience we set it out in full and it *inter alia* reads as follows:

"The Industrial Court unlike the Superior Courts does not have inherent jurisdiction. It decisions are referred to as awards. The courts power is specifically provided by the Act. Under the Act the court is required to act according to equity, good conscience and substantial merits of the case without regard to technicalities and legal form. It is seen as a forum of compulsory arbitration under the Act even though there are provisions for voluntary arbitration when there is a trade dispute and the disputants jointly request the Minister to refer their dispute to the court.

Trade Union Act 1959

The Act must be read with the Trade Union Act 1959, TUA 1959 covers the affairs of trade unions of both employers and employees. Trade Unions are associations formed within any particular trade or occupation or industry. The object of trade union, whether in-house or national is to regulate the relationship between employer and employees and in particular, to protect the right of its members. They negotiate collective bargaining to conclude collective agreement between employers and employees. They represent employees in Industrial Court in their trade dispute with their employers. As the Act deals with principle of Trade Unionism, Recognition, Collective Bargaining and resolving trade disputes, the TUA 1959 must be considered in all material aspects when dealing with the related issues."

(iv) What is necessary to observe in the above citation is that any decision maker in arriving at a decision relating to employers or employees is duty bound to ensure 'Industrial Harmony' is maintained by the application of rule of law and the Federal Constitution. In defining Industrial Harmony, the Report of National Commission on Labour (India) says:

"'Industrial peace' and industrial harmony' may have the same meaning; but we are inclined to think that the concept of industrial peace is somewhat negative and restrictive. It emphasizes absence of strife and struggle. The concept of industrial harmony is positive and comprehensive and it postulates the existence of understanding cooperation and a sense of partnership between the employers and the employees. That is why we prefer to describe our approach as one in quest of industrial harmony." [See O.P. Malhotra (1998)].

[11] Support for the above propositions is found in a number of cases, to name a few are as follows:

(a) In *J.K. Cotton Spinning & Weaving Mills Co. Ltd. v Labour Appellate Tribunal* [1963] II LLJ 436 (444) (S.C.), Gajendra-gadkar J had this to say:

"The ultimate object of industrial adjudication is to help the growth and progress of national economy and it is with that ultimate object in view that industrial disputes are settled by industrial adjudication on principles of fairplay and justice."

(b) In *Western India Match Co. Ltd. v Their Workmen* [1963] II LLJ 459 (463-64)(SC), K.C. Das Gupta J took the following view:

"Nor can the tests and the principles that have been laid down be applied mechanically or by way of syllogism. A mechanical or syllogistic approach may appear to furnish the easiest way of solving a complicated problem, but the allurement of the easy way has to be resisted. For, while such ways are beset with risks of error in all branches of law, they are even more unsafe and inexpedient in industrial law, where sensitive problems of human relations have to be solved in the midst of all the complexities of modem industrial Organisation. That is why in applying the well settled tests and principles on these problems we have to bear in mind that while all tests that are possible of application should be applied, the value and importance to be attached to individual tests will vary according to the nature of the industrial activities and according to the nature of the disputes in which the problem has arisen, viz., whether it is in respect of lay off, retrenchment, production bonus, profit bonus or something else."

(c) In *Re Vinay Chandra Mishra* (1995) 2 SCC 584, P.B. Sawant J had this to say:

"The rule of law is the foundation of the democratic society. The judiciary is the guardian of the rule of law. Hence judiciary is not only the third pillar, but the central pillar of the democratic State. In a democracy like ours, where there is a written Constitution which is above all individuals and institutions and where the power of judicial review is vested in the superior courts, the judiciary has a special and additional duty to perform, viz., to oversee that all individuals and institutions including the executive and the legislature act within the

framework of not only the law but also the fundamental law of the land. This duty is apart from the function of adjudicating the disputes between the parties which is essential to peaceful and orderly development of the society."

(d) In *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 CLJ 748, Gopal Sri Ram JCA (as he then was) stated:

"*In my judgment, this approach when applied to the interpretation of welfare or of social legislation demands that such legislation must* ex necessitae rei *receive a liberal interpretation in order to achieve the object aimed at by Parliament. There is respectable authority that supports this view."*

And His Lordship relied on a number of cases. To name a few are as follows: (i) *Western India Automobile Association v The Industrial Tribunal, Bombay AIR* [1949] FC; (ii) *Workmen of Dimmakuchi Tea Estate v. Management of Dimmakuchi Tea Estate* [1958] 1 LLJ 500 111; (iii) *Workmen of Indian Standards Institution v. Management of Indian Standards Institution* [1976] 1 LLJ 33.

[12] Arbitrariness in decision making process (s.12(1)) or asserting that there is right to be arbitrary in dealing with a complaint or appeal (s.71A) and asserting no requirement to act or to act expeditiously by the public decision maker is anathema to Industrial Jurisprudence and/or Industrial Harmony, from many of the decided cases which has been cited earlier and below. It will appear that the public decision maker will have more onerous obligation in exercising their discretion reasonably, fairly and

justly as opposed to cases on general principles relating to judicial review. For example on general principles, *Lord Denning v Amalgamated Engineering Union* [1971] 2 QB 175 had this to say:

> "*The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. This is established by Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997, which is a landmark decision in modern administrative law.*"

[13] We do not think the procedural complaint attempted by the respondents on the issue of appeal to the Minister and that it has not been exhausted before seeking judicial review has any merits. Section 71A of TUA 1959 cannot be equated to substantive right to appeal as there is no provision for the Minister to decide on the appeal as of right, that too within a reasonable time frame so as not to deprive the appellant to proceed for judicial review within time frame in the event the Minister does not make a decision. In fact, it will cause great prejudice to the appellants or any person in the appellants' shoes if such construction is to be given to section 71A as the respondents' attempts to suggest. Section 71A says:

> **71A**. (1) Any person who is dissatisfied with any opinion, order, declaration, refusal, cancellation, withdrawal, direction or decision, as the case may be, given, made or effected by the Director General under any of the following provisions:

(a) subsection 2(2);
(b) section 12;
(c) paragraph 15(2)*(b)* or subsection 15(4);
(d) subsection 16(1);
(e) subsection 17(1);
(f) subsection 25A(4);
(g) paragraph 28(1)(*d*), or paragraph 29(2)(*b*);
(h) subsection 34(2);
(i) subsection 40(6) or 40(9);
(j) subsection 54(1);
(k) subsection 76A(1); or
(l) subsection 76C(1),

may, within thirty days from the rate of the opinion, order, declaration, refusal, cancellation, withdrawal, direction or decision of the Director General, appeal against the same to the Minister, in such manner as may be prescribed by regulations.

(2) An appeal under subsection (1) shall not operate as a stay of execution of the opinion, order, declaration, refusal, cancellation, withdrawal, direction or decision, as the case maybe, of the Director General unless the Minister otherwise directs, and where he so directs he may impose such terms and conditions as he deems fit.

(3) The Minister may, after considering any such appeal, give such decision thereon as he deems just and proper.

(4) A direction or decision of the Minister under this section shall be final and conclusive."

[14] Sub-section (3) makes it clear that there is no duty on the Minister to make a decision on the appeal and in consequence court will not be in a position to compel the 'Minister' to consider the appeal. Parties have not cited any case laws dealing on the construction of sub-section (3) in any detail. In our view the only recourse and the best recourse would be to seek the intervention of the court by judicial review process. Support

for the proposition is found in a number of cases and is well documented by Edgar Joseph Jr J (as he then was) in *Kesatuan Sekerja Pembinaan Barangan Galian Bukan Logam v Director General of Trade Union & ors* [1990] 3 MLJ 31, and needs no repetition. By reading of sub-section (2) it will appear on a whole that section 71A is meant to give powers to the Minister to arrest any high handedness or non compliance of statutory obligation by the 1st respondent. Section 71A does not attempt to restrict judicial review process and any legislation which attempts to oust the court's role in its entirety will stand as a nullity *ab initio* pursuant to the Federal Constitution. Judicial power under the Federal Constitution vests with the courts and it cannot be transferred to the executive by way of legislation as it will impinge on the separation of power doctrine. [See *Nik Noorhafizi bin Nik Ibrahim & ors v PP* [2014] 2 CLJ 273; *Nik Nazmi bin Nik Ahmad v PP* [2014] 4 MLJ 157].

[15] In the instant case, we are satisfied that the appellants have rightly filed an application for judicial review and should not be penalized by an obscure procedure set out in section 71A TUA 1959, and that too when such an objection has failed at an early stage and the learned High Court judge has dismissed the procedural complaint. In *Mohd Karim bin Abbas & ors v Ketua Pengarah Jabatan Hal Ehwal Kesatuan Sekerja* [2013] MLJU 99, the Court of Appeal through Hamid Sultan bin Abu Backer JCA observed:

> *"There are authorities to suggest that a decision by a public authority is not a pre-requisite for judicial control of administrative action, [see Wee Choo Keong v Ketua Pengarah Perkhidmatan Awam, Malaysia [2011] 3 CLJ 331. In Council of Civil Service Unions v Minister for Civil Service [1985] AC 374, Lord Diplock at page 408 had this to say:*

"4. Judicial review, now regulated by RSC, 0.53, provides the means by which judicial control of administrative action is exercised. The subject matter of every judicial review is a decision made by some person (or body of persons) whom I will call the "decision-maker" or else a refusal by him to make a decision."

It all depends on the facts, circumstances and in case where public interest is involved the urgency of the matter for the court to act and arrest any excesses by issuing the prerogative writs of certiorari or mandamus or prohibition, quo warranto, Habeas Corpus, etc as the case may be; and/or provide interim orders and/or directions even at leave stage provided the court is satisfied the application is not frivolous, vexatious and/or abuse of process of court.....

10.(b) Failure to make decision by public bodies within a reasonable time may be a subject matter of judicial review, as advocated in the Indian Supreme Court of Samarth Transport Company Private Limited v Regional Transport Authority, Nagpur and Others AIR 1961 SC 93."

[16] We do not think it is a correct proposition of law or construction to say that section 12(1) TUA 1959 does not require any consultation before the 1st respondent can exercise his power. Section 12 says:

"12. *(1) The Director General may, upon receiving any application under section 10, and subject to this section, register the trade union in the prescribed manner.*

(2) The Director General may refuse to register a trade union in respect of a particular establishment, trade, occupation or industry if he is satisfied that there is in existence a trade union representing the workmen in that particular establishment, trade, occupation or industry and it is not in

the interest of the workmen concerned that there be another trade union in respect thereof.

(3) The Director General shall refuse to register a trade union if—

(a) he is of the opinion that the trade union is likely to be used for unlawful purposes or for purposes contrary to or inconsistent with its objects and rules;

(b) any of the objects of the trade union is unlawful;

(c) he is not satisfied that the trade union has complied with this Act and of the regulations;

(d) he is satisfied that the objects, rules, and constitution of the trade union conflict with any of the provisions of this Act or of any regulations; or

(e) the name under which the trade union is to be registered is—

(i) identical to that of any other existing trade union, or so nearly resembles the name of such other trade union as, in the opinion of the Director General, is likely to deceive the public or the members of either trade union; or

(ii) in the opinion of the Director General, undesirable, unless the trade union alters its name to one acceptable to the Director General."

Section 12(1) cannot be read in isolation to section 12(2) or (3) or for that matter other relevant sections of the TUA 1959 or IRA as the case may be. If such an interpretation is attempted then one is descending into the arena of 'layman interpretation' of the law and it will be a recipe for 'Industrial Disharmony'.

[17] Section 12(1) is not an administrative procedure per se and cannot be exercised mechanically. Section 12 places an investigative role on the 1st respondent before coming to the conclusion whether or not to register the trade union. The 1st respondent to do so must meticulously comply with sections 12(2) as well as 12(3) though it is negatively worded. Where applicable and for this purpose 1st respondent is duty bound to give notice to all necessary and interested parties to obtain their feedback to arrive at an opinion whether or not to register. Common sense and rule of natural justice will dictate that the views of the appellants ought to have been heard before deciding to register. Failure to strictly comply with the statutory obligations set out in the section will make the decision or decision making process a nullity *ab initio* without the need even to consider the concept and parameters of judicial review. [See *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Berhad* [1998] 1 MLJ 393]. Support for the proposition is found in a number of cases to name a few are as follows:

(a) In Attorney General v Ryan [1980] AC 718, the Privy Council observed:

> "...the Minister was a person having legal authority to determine a question affecting the rights of individuals. This being so, it is a necessary implication that he is required to observe the principles of natural justice when exercising that authority; and if he fails to do so, his purported decision is a nullity."

(b) In R v Commr. Of Racial Equality, ex p Hallingdon London Borough Council [1982] AC 779, Lord Diplock stated:

> "Where an Act of Parliament confers upon an administrative body functions which involved its making affect to their detriment the rights of other persons or curtail their liberty to do as they please, there is a presumption that Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decisions."

[18] In the instant case the learned High Court judge who heard the leave application for judicial review was mindful of the duties of the 1st respondent and even at that stage had stated that failure had caused:

(i) great strife and confusion amongst the staff in Maybank;
(ii) a great strain in the relationship between the applicant and Maybank;
(iii) appellants' normal trade union activities have been affected;
(iv) the impunged registration has caused industrial disharmony.

[19] The learned judge who heard the judicial review application (proper) did not address the issues which had permitted the previous judge to grant the leave application. It would have been helpful if it has been addressed in the judgment more so when the Federal Court had ordered the stay of the registration of the 2nd respondent pending the appeal.

[20] Learned counsel for the appellant, Chevalier Ambiga Sreenevasan says that the exercise of discretion and decision making process employed by the 1st respondent is bad in law. And asserts that section 12(2) TUA 1959 was not complied with as required by a number of cases namely (i) *Persatuan Pegawai-Pegawai Bank Semenanjung Malaysia v Minister of Labour, Malaysia & ors* [1989] 1 MLJ 30; (ii)

Persatuan Pegawai-Pegawai Bank Semenanjung (ABOM) v Ketua Pengarah Kesatuan Sekerja, Malaysia & Anor [2013] 7 MLJ 265; (iii) *Association of Bank Officers, Peninsular Malaysia v Ketua Pengarah Kesatuan Sekerja, Malaysia & Anor* [2004] 7 MLJ 109.

[21] Further, the learned counsel for the appellant says the 1st respondent has failed in considering:

(i) *Whether there is an overlap between the workmen already represented by the applicant and the workmen proposed to be represented by the 2nd respondent;*

(ii) *There must be consultation with the applicant, who would be affected by the decision of the 1st respondent and who has a legitimate expectation to be heard;*

(iii) *There must also be consultation with the members concerned whom the 2nd respondent seeks to represent;*

(iv) *There must be consideration of the effect and impact of the registration of the 2nd respondent on other workmen in similar occupation in the industry as the workmen concerned whom the 2nd respondent seeks to represent.*

(v) *There must also be a consideration of the potential trouble/industrial disharmony in registering the 2nd respondent who seeks to represent the same category of workmen who are already represented by the applicant.*

[22] We find merits in the appellant's submissions as there is a gross failure on the part of the 1st respondent to satisfy the requirement of section 12 of TUA 1959 and the affidavit in opposition of the respondents only confirms the gross failure.

[23] Section 12(1) is not a passport for registration of trade union as of right, without going through the investigative procedure which we have stated above. Support for the proposition is found in the case of *Persatuan Pegawai-Pegawai Bank Semenanjung (ABOM) v Ketua Pengarah Kesatuan Sekerja, Malaysia & Anor* [2013] 7 MLJ 265 where His Lordship Abang Iskandar J (as he then was) in dealing with section 12 of the TUA 1959 at page 269 had this to say:

> *"[6] Clearly therefore there is, ipso facto, a desire to avoid a multiplicity of trade unions that would cater for the same particular occupation, in this case, that would be the executive officers of the commercial banks and that the DG may not register a trade union where there already exists a trade union that represents the workmen in the particular occupation. That caveat is put in place when it is not in the interest of the workmen concerned that there be established another trade union in respect the same occupation. The words of the said section refer to the satisfaction on the part of the DG in deciding whether to register another trade union. But that satisfaction cannot be achieved without there be a prior act on the part of the DG to duly consider."*

And at page 271:

> *"While that amendment had enabled in-house unions to be established despite there already existed a national union, that power is not a carte blanche for wanton establishment of such unions. In*

exercising that power, the decision maker is circumscribed, in the sense that he must be satisfied that justice, not injustice, will be achieved in such exercise. Therefore such power will not be exercised capriciously. It is the duty of this court as a review court, to ensure that such power is exercised within reason with due regard to the relevant factors in the circumstances of a particular case."

[24] We agree with His Lordship Dato' Mohd Zawawi bin Salleh's obiter statement in *British American Tobacco (Malaysia) Bhd Employees Union v Ketua Pengarah Kesatuan Sekerja, Malaysia & ors* [2011] 7 CLJ 478, where His Lordship stated that 'the intention of Parliament was to encourage the flourishing of trade unionism when it introduced the amendment to s. 2(1) of the Act by inserting the word "establishment" in 1989. The intention was to enable the legitimizing of in-house unions in spite of the existence of national unions".

[25] It is our judgment that before deciding to register or not to register the new union the 1st respondent must take relevant consideration such as competing interest of trade union and its effect, etc. as adumbrated by us earlier. If that has been done according to law and established principles then there is nothing the appellant can complain of. In the instant case it was not done.

[26] The case of *Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2011] 2 MLJ 457* (or case of *Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v Mohd Noor Abdullah* [2004] 2 CLJ 777) will not be applicable to facts of this case for various reasons:

(i) The appellant in Robin's case commenced the action by way of originating summons which was later turned to a writ and prayers relate to declaratory relief and was not an application for judicial review.

(ii) The time for judicial review for challenging the regulation under s.12(1) in Robin's case has already passed. That effectively means the decision of the Director General in the exercise of his statutory duty cannot be challenged at all as advocated in a number of cases. The proposition stated in Robin's case that the statutory decision of the Director General cannot be challenged, cannot be construed to mean that no challenge can be made by judicial review even if made in time.

(iii) In Robin's case there was no Trade Union that will be directly affected by the registration of in house union and the appellant was only an employer.

(iv) Robin's case has nothing to do with judicial review principle and in consequence any statement in respect of judicial review or its application at the most are only obiter dicta.

(v) In Robin's case two issues for determination of the Federal Court was posed, namely: (i) whether section s.71A of Act 262 applies to the employer; (ii) whether the existence of a statutory appeal procedure/alternative remedy is a bar to judicial review or declaratory reliefs. The court on the 2nd issue held that 'in the absence of exceptional or appropriate

circumstances the answer to the second question was in the affirmative. In essence, the Federal Court did not say if there is alternative remedy it is a bar to judicial review as of right. The Federal Court by qualifying the proposition is in line with authorities we have stated earlier in relation to section 71A of the Act.

(vi) Robin's case or Nordin's case cannot stand for the proposition that section 12(1) imposes no obligation on the first respondent to hear the appellant before making a decision under s.12(1). We have repeatedly read the judgments and it is no where stated so. And no such question was posed to the Federal Court for its determination to stand as a binding authority. Further, the court in Robin's case only said at para (8):

> "In this case, pursuant to an application, the director general in allowing the second respondent to be registered as a trade union has made a 'decision' pursuant to an exercise of statutory powers."

It did not say that the decision of the Director General is not amenable to judicial review. If the court has out rightly said so that section 12(1) is purely an administrative and/or mechanical act, then section 71A would have become otiose in relation to s.12(1) and the rules of natural justice and the principles stated in Attorney General v Ryan, etc. which we have cited earlier will become inapplicable in the jurisprudence relating to judicial review.

(vii) In Robin's case the decision under section 12(1) could not have been challenged as it would have been time barred. Once it is time barred relief may not be sustainable by way of judicial review pursuant to established cases. [See *Omar Suhaimi bin Abu Hassan v Mahkamah Perusahaan Malaysia & Anor* [2014] 3 CLJ 720; *Ahmad Jefri v Pengarah Kebudayaan* [2013] 3 MLJ 145; *O'Reilly v Mackman* [1982] 3 All ER 1124 HL].

(viii) Where relief cannot be sustained by way of judicial review it may in limited circumstance be achieved by way of declaratory orders pursuant to originating summons or writ action as articulated in the case of *Racha ak Urud @ Peter Racha Urud & Ors v Ravenscourt Sdn Bhd & Ors [2014] 3 MLJ 661* by His Lordship Abdul Wahab bin Patail JCA as follows:

> *"English cases on public law remedies are confined to the doctrine of Parliamentary supremacy are not applicable per se when the relevant declaration sought raises constitutional issues under a written constitution. (see art 160(2) of the Federal Constitution). Since English cases on public law remedies are confined to the doctrine of Parliamentary supremacy, O 53 and its time frame are seen to be the procedural mechanism to challenge the decision of public authorities. Where the doctrine of Constitutional supremacy applies and the action (whether public and/or private law remedy) is related to constitutional rights, O 53 or its time frame cannot be the sole criteria. It may also be observed that Limitation Act 1953 or similar limitation provisions in contract or tort or trust, etc, deal with personal rights inter se,*

but cannot apply to a breach of constitutional rights which is a continuing breach. See Nik Noorhafizi bin Nik Ibrahim v Public Prosecutor [2013] 6 MLJ 660; [2013] 1 LNS 584; [2013] 4 AMR 854."

The case of Robin and Nordin was related to constitutional challenges based on an action other than judicial review and that distinction must be kept in mind when applying it for judicial review cases. The distinction in jurisprudence is that of apple and orange.

(ix) The facts of Nordin Hj Zakaria's case have no relevance to the facts of the present case. In Nordin's case the appellant was already a party to disciplinary proceeding and his complaint was that he was not accorded procedural fairness. In addition, Nordin's case has nothing to do with judicial review as it was a writ action and a challenge relating to clause 2 of article 135 of the Federal Constitution. And the observation of the Federal Court was that the complaint has no merit as the complainant had been given proper notice. That part of the judgment reads as follows:

"Perusing the show cause letter requiring the respondent to attend the Orderly Room Proceeding it is noted that:

(1) he had been informed of the punishable provisions of the 1970 Regulations.

(2) all the important and relevant particulars appear clearly in the charges as to leave him with no doubt as to the specific allegations he had to answer and of the possible sentence that could be meted out under reg. 2 if found guilty.

(3) he was informed of his right to be supplied with all relevant documents pertaining to the charges upon written request.

(4) he could be represented by an officer of his choice provided such an officer does not hold a rank above that of the 1st appellant."

(x) The law has not been static after Nordin's case. For example, the Federal Court in the case of *Yusof Sudin v Suruhanjaya Perkhidmatan Polis & Anor* [2012] 1 CLJ 448 had asserted that:

> *"**(1)** The term 'law' in a given legislation including a written constitution has been understood to encompass both substantive law and procedure which includes the rules of natural justice. Failure to observe procedural fairness would tantamount to a breach or aiding a breach of fundamental right.*
>
> ***(2)** It is critical for a public decision-taker to know that it is under a duty to act fairly including the observation of the rules of natural justice which comprised of two maxims, i.e, no man shall be a judge in his own cause and that no man shall be condemned unheard."*

(xi) We are not persuaded by the argument of the 2nd respondent inviting the court to give a literal interpretation of s.12(1). If literal interpretation of statute law is made the sole criteria for challenges to executive decision it will not only impinge on the jurisprudence relating to judicial review but also various provisions of the Federal Constitution. That is not permissible under the doctrine of separation of power and the court is the

supreme arbitrator of what is right and wrong. Counsel are under a duty to the court as well as the Federal Constitution not to make a submission in breach of jurisprudence relating to rule of law to entertain the concept of rule by law and lead the court to make an erroneous decision which will impinge the framework of the Federal Constitution. 'Bad' submission results in uninformed decisions. The concept of rule of law has nothing to do with literal rule in the interpretation of statute. Literal rule is one of the tools to interpretation and is subject to rule of law.

(xii) Rule of law in judicial decision making process necessarily means the court must give utmost consideration to the Federal Constitution and when interpreting a statute must not forget that (i) law under the Federal Constitution means substantive law and procedure; (ii) literal rule per se is not the only tool to interpret statutes; and other provision of the law and tools have to be taken into consideration for example section 17A Interpretation Acts 1948 and 1967; the common law construction employed for social legislation; the concept of implied provision which must be read into the Act when relating to procedural fairness which we have stated earlier, etc. A literal interpretation of a statute without the application of rule of law is an invitation to be governed by rule bylaw and that is not part of our jurisprudence relating to 'Constitutional Supremacy' or for that matter 'Parliamentary Supremacy' and the courts are under a sacrosanct oath to ensure that the country is governed by rule of law and not rule by law as the oath of office of a judge is to 'preserve,

protect and defend' the Constitution. And members of the Malaysia Bar must never make a submission even ignorantly to impinge on our Constitutional principles. [See *Nik Noorhafizi bin Nik Ibrahim v Public Prosecutor* [2013] 6 MLJ 660; *Nik Nazmi bin Nik Ahmad v Public Prosecutor* [2014] 4 MLJ 157].

[27] For reasons stated above, the appeal is allowed. The decision of the 1st respondent is quashed and the registration of the 2nd respondent is set aside with costs to the appellant here and below.

We hereby order so.

Dated: 17 September 2013

Sgd
(DATUK DR. HJ. HAMID SULTAN BIN ABU BACKER)
Judge
Court of Appeal
Malaysia.

Note: Grounds of judgment subject to correction of error and editorial adjustment etc.

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