Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(F)-14 OF 2008

ARIFIN ZAKARIA CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK) AND JAMES FOONG FCJ

10 MARCH 2010

Administrative Law — Judicial review — Application for — Mode of commencement — Whether by writ or originating summons — Circumstances when procedure under O 53 Rules of the High Court 1980 mandatory — Whether use of wrong mode and procedure abuse of court's process — Whether action liable to be struck off if wrong mode and procedure used — Rules of the High Court 1980 O 53

Administrative Law — Judicial review — Application for — Nature and purpose of judicial review — Circumstances when judicial review suitable — Appropriate mode for commencement of application — Rules of the High Court 1980 O 53

Civil Procedure — Judicial review — Application for — Mode of commencement — Appropriate mode for commencement of application — Whether use of wrong mode and procedure abuse of court's process — Whether action liable to be struck off if wrong mode and procedure used — Rules of the High Court 1980 O 53

Civil Procedure — Mode of commencement — Action against public authority — Circumstances when judicial review under O 53 of the Rules of the High Court 1980 suitable — Circumstances when writ or originating summons suitable — Rules of the High Court 1980 O 53

The appellant — a government officer — absented himself from work from 28 March 2001 following a dispute with his superiors. On 7 February 2003, the appellant's solicitors were informed that the appellant had been dismissed from service vide gazette notification dated 25 October 2001. On 15 January 2004, the appellant filed a writ of summons and statement of claim against the respondents seeking, inter alia, a declaration that his dismissal was null and void, and damages for wrongful dismissal. The respondents successfully struck out the appellant's action in the High Court. His appeal to the Court of Appeal was also dismissed. The appellant obtained leave to appeal to the

Federal Court on two questions, viz: (i) whether pursuant to the amended O 53 of the Rules of the High Court 1980 ('RHC'), an application to challenge the decision of a public authority could only be instituted by way of judicial review under O 53 of the RHC; and (ii) whether challenging the decision of a public authority by way of writ and statement of claim, instead of through an application for judicial review under O 53 of the RHC, constituted an abuse of the process of court. The appellant's main contention was that the procedure under O 53 of the RHC was not a mandatory procedure — a person aggrieved with the decision of a public body could therefore seek relief by way of writ or originating summons.

Held, dismissing the appeal with costs:

(1) Judicial review provides a means by which judicial control of administrative action is exercised. In Malaysia, supervisory jurisdiction by the High Court over administrative or public bodies is found in O 53 of the RHC (see paras 6–7); *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 referred.

(2) The stringent conditions imposed by O 53 of the RHC are intended to protect those entrusted with the enforcement of public duties against groundless harassment and to reduce delays in resolving applications in the interest of good administration. In the instant case, the appellant was clearly handicapped, inter alia, through limitation of time, in applying for judicial review under O 53 r 3(6) (see paras 15–16); *O'Reilly v Mackman* [1982] 3 All ER 1124 followed.

(3) Not every decision made by an authoritative body is suitable for judicial review. There must be sufficient public law elements in the decision made. In the instant case, there were clearly elements of public law present. The appellant was a public officer subject to the Public Officers (Conduct and Discipline) Regulations 1993 ('the Regulations'). He had been dismissed under a statutory law — the Regulations — by a body which had acted within the scope of such statutory power. Although the decision to dismiss the appellant involved the dismissal of an employee by an employer, just like a master dismissing his servant — which constituted a private law matter — the fact that there were statutory conditions and restrictions imposed by the Regulations on the conduct and dismissal of the appellant underpinned the public law element in the instant case. The instant case was thus suitable for judicial review (see paras 21, 36 & 61); *R v East Berkshire Health Authority, ex-parte Walsh* [1985] 1 QB 152 and *Wendal Swann v Attorney General of the Turks and Caicos Islands* [2009] UKPC 22 distinguished.

(4) Order 53 of the RHC sets out a specific procedure for an aggrieved party seeking relief against a public authority concerning an infringed right protected under public law. When such an explicit procedure is

created, then as a general rule all applications for such relief must adhere to the procedure prescribed under O 53 of the RHC, failing which the applications would be liable to be struck off for abuse of the process of court. However, there are exceptions, such as where the action is a claim against the public authority for negligence and where the action involves a matter affecting the legal status of an applicant (see para 60); *O'Reilly v Mackman* [1982] 3 All ER 1124 followed; *YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener)* [2009] 4 MLJ 24 (FC) followed; *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389 (FC) followed.

(5) A challenge on the use of appropriate procedure is very much fact based. It is necessary for a judge when deciding on such a matter to first ascertain whether there is a public law element in the dispute. If the claim is based solely on substantive principles of public law then the appropriate process should be by way of O 53 of the RHC. If it is a mixture of public and private law, then the court must ascertain which of the two is predominant. If the claim has substantial public law elements, then the procedure under O 53 of the RHC must be adopted. Otherwise it may be set aside on the ground that it abuses the court's process. If the matter is under private law, though concerning a public authority it would be inappropriate to commence the action under O 53 of the RHC. The courts should be cautious in allowing a matter that should be commenced by way of O 53 of the RHC, to proceed in another manner (see para 61).

(6) In the instant case, the appellant's claim was based solely on public law. There was no trace of private law involvement. Neither did the circumstances justify an exception to the general rule. Thus, the appellant's writ was rightly struck off as an abuse of the court's process (see para 63).

[Bahasa Malaysia summary

Perayu — seorang pegawai kerajaan — tidak hadir bekerja dari 28 Mac 2001 berikutan pertelingkahan dengan pegawai atasannya. Pada 7 Februari 2003, peguamcara perayu telah diberitahu bahawa perayu telah dipecat daripada perkhidmatan dengan merujuk kepada pemberitahuan warta bertarikh 25 Oktober 2001. Pada 15 Januari 2004, perayu telah memfailkan writ saman dan penyataan tuntutan terhadap responden-responden memohon, antara lain, deklarasi bahawa pemecatannya adalah terbatal dan tidak sah, dan ganti rugi kerana pemecatan salah. Responden-responden telah berjaya membatalkan tindakan perayu di Mahkamah Tinggi. Rayuannya ke Mahkamah Rayuan juga telah ditolak. Perayu telah memperoleh kebenaran untuk merayu ke Mahkamah Persekutuan atas dua persoalan, iaitu: (i) sama ada menurut pindaan kepada A 53 Kaedah-Kaedah Mahkamah Tinggi 1980

('KMT'), permohonan untuk mencabar keputusan pihak berkuasa awam hanya boleh dimulakan melalui semakan kehakiman di bawah A 53 KMT; dan (ii) sama ada dengan mencabar keputusan pihak berkuasa awam melalui writ dan penyataan tuntutan, dan bukan melalui permohonan untuk semakan kehakiman di bawah A 53 KMT, membentuk penyalahgunaan proses mahkamah. Hujahan utama perayu adalah bahawa prosedur di bawah A 53 KMT bukan prosedur mandatori — seseorang yang terkilan dengan keputusan pihak berkuasa awam boleh dengan itu memohon relief melalui writ atau saman pemula.

Diputuskan, menolak rayuan dengan kos:

(1) Semakan kehakiman memperuntukkan cara yang mana kawalan kehakiman ke atas tindakan pentadbiran dilaksanakan. Di Malaysia, bidang kuasa penyeliaan oleh Mahkamah Tinggi ke atas badan-badan pentadbiran atau awam didapati dalam A 53 KMT (lihat perenggan 6–7); *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 dirujuk.

(2) Syarat-syarat ketat yang dikenakan oleh A 53 KMT bertujuan untuk melindungi mereka yang diamanahkan dengan penguatkuasaan tanggungjawab awam terhadap gangguan yang tidak berasas dan untuk mengurangkan kelewatan dalam menyelesaikan permohonan-permohonan demi kelancaran pentadbiran. Dalam kes ini, perayu jelas terhalang, antara lain, disebabkan had masa, untuk memohon semakan kehakiman di bawah A 53 k 3(6) (lihat perenggan 15–16); *O'Reilly v Mackman* [1982] 3 All ER 1124 diikut.

(3) Bukan semua keputusan yang dibuat oleh badan yang autoritatif sesuai untuk semakan kehakiman. Elemen-elemen undang-undang awam hendaklah mencukupi dalam keputusan yang dibuat. Dalam kes ini, jelas terdapat elemen-elemen undang-undang awam. Perayu merupakan pegawai awam yang tertakluk kepada Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 ('Peraturan tersebut'). Dia telah dipecat di bawah undang-undang statutori — Peraturan tersebut — oleh sebuah badan yang bertindak dalam bidang kuasa statutori sedemikian. Meskipun keputusan untuk memecat perayu melibatkan pemecatan pekerja oleh majikan, seperti majikan dan pekerja — yang menjadi perkara undang-undang persendirian — fakta bahawa terdapat syarat-syarat dan sekatan-sekatan statutori yang dikenakan oleh Peraturan tersebut tentang perlakuan dan pemecatan perayu menguatkan elemen undang-undang awam dalam kes ini. Kes ini dengan itu sesuai untuk semakan kehakiman (lihat perenggan 21, 36 & 61); *R v East Berkshire Health Authority, ex-parte Walsh* [1985] 1 QB 152 dan *Wendal Swann v Attorney General of the Turks and Caicos Islands* [2009] UKPC 22 dibeza.

A (4) Aturan 53 KMT menetapkan prosedur spesifik untuk pihak terkilan yang memohon relief terhadap pihak berkuasa awam berkaitan pelanggaran hak yang dilindungi di bawah undang-undang awam. Apabila prosedur eksplisit sebegini diwujudkan, maka sebagai rukun am semua permohonan untuk relief sebegini hendaklah mematuhi
B prosedur yang ditetapkan di bawah A 53 KMT, dan jika gagal permohonan-permohonan itu hendaklah dibatalkan kerana penyalahgunaan proses mahkamah. Walau bagaimanapun, terdapat pengecualian, seperti di mana tindakan itu adalah tuntutan terhadap pihak berkuasa awam untuk kecuaian dan di mana tindakan itu
C melibatkan perkara yang menjejaskan status sah pemohon (lihat perenggan 60); *O'Reilly v Mackman* [1982] 3 All ER 1124; *YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener)* [2009] 4 MLJ 24 (MP) dan
D *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389 (MP) diikut.

(5) Cabaran terhadap penggunaan prosedur yang sesuai lebih berasaskan fakta. Adalah perlu untuk seorang hakim apabila membuat keputusan tentang perkara sebegini terlebih dahulu menentukan sama ada terdapat
E elemen undang-undang awam yang dipertikaikan. Jika tuntutan itu semata-mata berasaskan prinsip-prinsip undang-undang awam yang substantif maka proses yang sesuai adalah melalui A 53 KMT. Jika ia gabungan undang-undang awam dan persendirian, maka mahkamah
F hendaklah mengenalpasti mana antara dua itu lebih utama. Jika tuntutan itu mempunyai elemen-elemen undang-undang persendirian yang substantif, maka prosedur di bawah A 53 KMT hendaklah digunapakai. Jika tidak ia boleh diketepikan atas alasan bahawa ia menyalahgunakan proses mahkamah. Jika perkara itu di bawah
G undang-undang persendirian, meskipun berkaitan pihak berkuasa awam, tidaklah sesuai untuk memulakan tindakan di bawah A 53 KMT. Mahkamah hendaklah berhati-hati untuk membenarkan perkara yang sepatutnya dimulakan melalui A 53 KMT, untuk dimulakan dengan cara lain (lihat perenggan 61).

H (6) Dalam kes ini, tuntutan perayu adalah semata-mata berasaskan undang-undang awam. Tiada kesan penglibatan undang-undang persendirian. Mahupun keadaan menjustifikasikan pengecualian kepada rukun am. Oleh itu, writ perayu dengan sewajarnya telah dibatalkan kerana penyalahgunaan proses mahkamah (lihat perenggan
I 63).]

Notes

For cases on application for a judicial review, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 191–197.

For cases on judicial review generally, see 2 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4324–4328.

For cases on mode of commencement generally, see 2 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4783–4825.

Cases referred to

Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals [2003] 1 MLJ 567; [2003] 1 CLJ 585, CA (refd)

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, HL (refd)

Dato' Seri Anwar bin Ibrahim v Perdana Menteri Malaysia & Anor [2007] 4 MLJ 422; [2007] 3 CLJ 377, CA (refd)

Ghozi Abu Bakar v Majlis Angkatan Tentera & Anor [2006] 4 CLJ 291, HC (refd)

Kenniah a/l Sinnasamy v Ketua Polis Seberang Perai & 2 Ors (unreported), HC (refd)

Kuching Waterfront Development Sdn Bhd (formerly known as Toiaz Sdn Bhd) v Superintendent of Lands and Surveys, Kuching Division & 3 Ors (unreported), HC (refd)

Maisi bin Gating v Kerajaan Malaysia (unreported), HC (refd)

Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors [2006] 2 MLJ 389; [2006] 2 CLJ 1, FC (folld)

McLaren v The Home Office (1990) ITLR 338 (refd)

O'Reilly v Mackman [1982] 3 All ER 1124, HL (folld)

R v East Berkshire Health Authority, ex parte Walsh [1985] 1 QB 152, CA (distd)

R v Secretary of State for the Home Department, ex parte Benwell [1985] 1 QB 554, HC (refd)

Robert Cheah Foong Chiew v Lembaga Jurutera Malaysia [2009] 1 MLJ 676; [2009] 1 CLJ 193, CA (refd)

Roy v Kensington and Chelsea and Westminster Family Practitioner Committee [1992] 1 All ER 705, HL (refd)

Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2002] 2 MLJ 413; [2002] 3 CLJ 697, CA (refd)

Teh Guan Teik v Inspector General of Police & Anor [1998] 3 MLJ 137, FC (refd)

Trustees of the Dennis Rye Pension Fund and another v Sheffield City Council [1997] 4 All ER 747, CA (refd)

Wendal Swann v Attorney General of the Turks and Caicos Islands [2009] UKPC 22, PC (distd)

YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener) [2009] 4 MLJ 24; [2009] 4 CLJ 253, FC (folld)

Legislation referred to

Courts of Judicature Act 1964 Schedule para 1
Federal Constitution arts 63, 132(2)
Legal Profession Act 1976 s 46A
National Health Service Act 1977 [UK]
Public Officers (Conduct and Discipline) Regulations 1993 regs 3, 26, 26(7)
Rules of the High Court 1980 O 15 r 16, O 18 r 19(1), (1)(b), (d), O 53, O 53 rr 1, 1(1), 2(1), (2), (3), 3(1), (2), (3), (4), (6), 5(1)
Specific Relief Act 1967 s 41

Appeal from: Civil Appeal No J-01–11 of 2007 (Court of Appeal, Putrajaya)

Karpal Singh (Ramkarpal Singh, Subramaniam Nair and Ebrina bt Zubir with him) (Karpal Singh & Co) for the appellant.
Azizah Nawawi (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

James Foong FCJ:

INTRODUCTION

[1] This appeal concerns the use the appropriate procedure for use in judicial review.

[2] The facts of this case are as follows: The appellant was a government officer attached to the Ministry of Cultural, Arts and Tourism since 16 September 1993. He had a dispute with his superior and refused to turn up for work since 28 March 2001. On 25 January 2003, his solicitors wrote to the respondents enquiring about his employment status. They were informed on 7 February 2003 that the appellant was dismissed from the government service since 25 October 2001 vide a gazette notification number 11898 dated the same day. About a year later, on 15 January 2004, the appellant filed a writ of summons and statement of claim against the respondents seeking the following reliefs:

(a) a declaration that his dismissal by the respondent is void and of no effect and that he is still a government officer in the said Ministry;

(b) an inquiry be conducted into his salary and entitlement which he ought to receive as a government servant;

(c) damages for wrongful dismissal;

(d) interest and costs.

[3] Responding to this, the respondents filed an application under O 18 r 19(1)(b) or (d) of the Rules of the High Court 1980 ('RHC') to strike out the appellant's writ and statement of claim on the ground that it is an abuse of the process of the court by commencing a writ action rather than an application for judicial review under O 53 of the RHC. A B

[4] The High Court allowed the respondent's application to strike out the appellant's writ and statement of claim. Dissatisfied with this decision, the appellant lodged an appeal to the Court of Appeal and lost. He then sought leave to appeal from this court. Leave was granted based on two questions of law for determination: C

Question 1

Whether pursuant to the amendment to O 53 of the RHC vide gazette notification PU (A) 342/2000 with effect from 22 September 2000, any application to challenge the decision of a public authority, can only be commenced by way of a judicial review under O 53 of the RHC. D

Question 2

Whether it is an abuse of the process of the court to commence the proceedings by way of a writ and a statement of claim to challenge the decision of a public authority instead of filing an application for judicial review under O 53 of the RHC thereby evading the clear requirement of O 53 of the RHC. E

[5] The underlying thrust of the appellant's argument is that O 53 of the RHC is not a mandatory procedure for a party who disagrees with the decision of a public body to seek relief by way of a writ or an originating summons rather than be confined to an application for judicial review under O 53 of the RHC. According to the appellant there should be greater flexibility in approach. F G

[6] To fully appreciate this contention, let us begin by disclosing that under common law, it is accepted that the High Court has a supervisory jurisdiction over proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties. This process exercised by the High Court is commonly referred to as 'judicial review'. In brief, judicial review provides a means by which judicial control of administrative action is exercised — see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at p 408. H I

A [7] In Malaysia, the exercise of the supervisory jurisdiction by the High Court over such bodies is found in O 53 of the RHC under the heading: 'APPLICATION FOR JUDICIAL REVIEW'. And r 1 of O 53 of the RHC reads:

B > This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purpose therein specified.

C **[8]** Paragraph 1 of the Schedule to the Courts of Judicature Act 1964 reads:

> Prerogative writs
>
> Power to issue to any person or authority directions, order or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and
D certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them or for any purpose.

[9] However O 53 r 2(1) of the RHC excludes 'an order for habeas corpus'
E but under r 2(2) 'An application for judicial review may seek any of the said reliefs, including a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter'.

F **[10]** But a relief by way of a declaration is also provided for under O 15 r 16 of the RHC which says:

> No action or other proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make
G binding declarations of right whether or not consequential relief is or could be claimed.

[11] It was due to this provision (O 15 r 16 of the RHC) that before the current O 53 of the RHC was amended on 22 September 2000 there was a
H series of cases concerning the appropriate procedure to be used when seeking a declaratory judgment against a decision of a public authority: by way of a writ action or under the procedure set out in O 53 of the RHC (as it then existed).

I **[12]** The heading of the pre-amended O 53 of the RHC reads: 'APPLICATION FOR ORDER OF MANDAMUS, PROHIBITION, CERTIORARI, ETC' and under r 1(1) it says that 'No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule'. The Federal Court

in *Teh Guan Teik v Inspector General of Police & Anor* [1998] 3 MLJ 137 decided that a claim for a declaratory relief by way of a writ action against the decision of a public authority is permitted despite concurrent remedies set out in the then O 53 of the RHC.

[13] Now with the inclusion of a relief for a declaration in the current amended O 53 of the RHC, the issue previously raised has taken a different angle and dimension. In addition to a relief for a declaration, the current O 53 r 2(3) of the RHC also allows the court to 'make any orders, including an order of injunction or monetary compensation: Provided always that the power to grant injunction shall be exercised in accordance with the provisions of section 29 of the Government Proceedings Act 1948 and section 54 of the Specific Relief Act 1950'.

[14] And under O 53 r 5(1) of the RHC, the award of damages to an applicant in such application is allowed.

[15] Then one may enquire as to why the appellant, like many others (in the various cases soon to be cited) insist on commencing their action by writ or originating summons rather than by way of a application for judicial review under O 53 of the RHC? Generally, this is due to the stringent conditions or rules imposed by O 53 of the RHC such as:

(a) Under O 53 r 3(6):

> An application for judicial review shall be made promptly and in any event within 40 days from the date when the grounds for the application first arose or when the decision is first communicated to the applicant provided that the Court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

(b) Under O 53 r 3(1):

> No application under this Order shall be made unless leave therefore has been granted in accordance with this rule.

(c) Under O 53 r 3(2):

> An application for leave must be made ex parte to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(d) Under O 53 r 3(3) of the RHC:

> The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits.

(e) Under O 53 r 3(4):

> The Judge may, in granting leave, impose such terms as to costs and as to the giving of security as he thinks fit.

[16] One may ask what is the purpose of these conditions? The basic objective is to protect those entrusted with the enforcement of public duties 'against groundless, unmeritorious or tardy harassment that were accorded to statutory tribunals or decision making public authorities by O 53, and which might have resulted in the summary, and would in any event have resulted in the speedy disposition of the application, is among the matters fit to be taken into consideration by the judge in deciding whether to exercise his discretion by refusing to grant a declaration ...' as described in the celebrated case of *O'Reilly v Mackman* [1982] 3 All ER 1124 at p 1133. Further, there is also the need to reduce the delay in resolving such application in the interest of good administration. As Lord Diplock in *O'Reilly v Mackman* reiterated, 'The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision'.

[17] Set against the conditions laid down above against the facts of this instant case, one will notice that the appellant is handicapped by limitation of time (among other things) in bringing an application under O 53 r 3(6) of the RHC for judicial review.

[18] Be that as it may, the principal issue that needs to be decided is whether the appellant can still commence such action by writ or originating summons despite a specific procedure set out in O 53 of the RHC and if our answer is in the negative, inevitably the appellant's writ will be struck of for abusing the process of the court.

[19] In *O'Reilly v Mackman* the House of Lords in England answered this question in the following fashion. Lord Diplock delivering the opinion of the court first set out the development of the law on judicial review and then highlighted the advantages and disadvantages of O 53 which is in pari materia to our current O 53 of the RHC. He then continued:

> Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained on an application for judicial review, as can also remedies for infringement of rights under private law if such infringements should be involved, it would in my view as a general rule be contrary to public policy, and an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of O 53 for the protection of such authorities.
>
> My Lords, I have described this as a general rule, for, though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the validity of the decision arise as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis: a process that Your Lordship will be continuing in the next case in which judgment is to be delivered today (see *Cocks v Thanet DC* [1982] 3 All ER 1135).

[20] The ratio of this case is: if the claim for infringement is based solely on substantive principles of public law then relief must be by way of an application for judicial review under O 53 of the RHC. If it was commenced by writ or by originating summons then this would be considered an abuse of the court's process and should be struck out under O 18 r 19(1) of the RHC. But if the matter is under private law though concerning a public authority, O 53 of the RHC is not a suitable. But the distinction and the boundaries between public law and private law are difficult to ascertain in practice though in principle it is clear. Further, what would happen if a matter is a mixture of public law and private law? In our instant appeal, there is also the argument that O 15 r 16 of the RHC to be read with s 41 of the Specific Relief Act 1967, which allows a claimant seeking declaratory relief to commence his claim by writ or originating summons.

[21] In view of this, let us begin by first asking ourselves a preliminary question: is the appellant's complaint or grievance amenable for judicial review (before even considering whether the procedure adopted by him is appropriate). If his complaint is not amenable for judicial review then he can commence his action by writ or originating summons; there is no issue on the process. So first we have to determine the parameter of matters amenable for judicial review. It is widely accepted that not every decision made by an authoritative body is suitable for judicial review. To qualify there must be sufficient public law element in the decision made. For this, it is necessary to examine both the source of the power and the nature of the decision made; whether the decision was made under a statutory power (see para 61

Halsbury's Laws of England (4th Ed, 2001 Reissue) Vol 1(1). To illustrate this, we will refer to a number of authorities involving dismissal from service by an authority.

[22] In *R v East Berkshire Health Authority, ex parte Walsh* [1985] 1 QB 152, the applicant was a senior nursing officer employed by the respondent under a contract of service. He was dismissed by the respondent's district head nursing officer for misconduct. He applied for judicial review under O 53 for an order of certiorari to quash the dismissal. The respondent raised a preliminary issue on whether the appellant is entitled to apply for judicial review since it is a private law matter involving the dismissal of a servant by a master. This would not fall within the scope of judicial review which is only confined to matters concerning public law. The High Court dismissed the preliminary objection based primarily on this ground:

> The public may have no interest in the relationship between the servant and master in an 'ordinary' case, but where the servant holds office in a great public service, the public is properly concerned to see that the authority employing him acts towards him lawfully and fairly. It is not a pure question of contract. The public is concerned that the nurses who serve the public should be treated lawfully and fairly by the public authority employing them...

[23] This decision was overturned in the Court of Appeal where Sir John Donaldson MR, delivering one of the three judgments of the court declared:

> ... Employment by a public authority does not per se inject any element of public law. Nor does the fact that the employee is a 'higher grade' or is an 'officer'. This only makes it more likely that there will be special statutory restrictions upon dismissal, or other underpinning of his employment: see per Lord Reid in *Malloch v Aberdeen Corporation* at p 1582. It will be this underpinning and not the seniority which injects the element of public law. Still less can I find any warrant for equating public law with the interest of the public. If the public through Parliament gives effect to that interest by means of statutory provisions, that is quite different, but the interest of the public per se is not sufficient.
>
> The ordinary employer is free to act in breach of his contracts of employment and if he does so his employee will acquire certain private law rights and remedies in damages for wrongful dismissal, compensation for unfair dismissal, an order for reinstatement or re-engagement and so on. Parliament can underpin the position of public authority employees by directly restricting the freedom of the public authority to dismiss thus giving the employee 'public law' rights and at least making him a potential candidate for administrative law remedies. Alternatively it can require the authority to contract with its employees on specified terms with a view to the employee acquiring 'private law' rights under the terms of the contract of employment. If the authority fails or refuses to thus create 'private law' rights for the employee, the employee will have 'public law' rights to compel compliance, the remedy being mandamus requiring the authority so to contract or a declaration that the employee has those rights. If, however, the authority gives the employee

the required contractual protection, a breach of contract is not a matter of 'public law' and gives rise to no administrative law remedies.

[24] So based largely on the fact that the respondent was given the right to enter into a contract of employment with the applicant, which includes the right of dismissal, the Court of Appeal found no public law element in the applicant's complaint to entitle him to the administrative remedies sought in the judicial review.

[25] But if there is a special statutory provision bearing directly upon the right of a public authority to dismiss the plaintiff then this injects the element of public law to attract the remedies under administrative law. This is elaborated by Sir John Donaldson MR in the same case (*R v Berks Authority, ex parte Walsh*) where he said:

> In all three cases there was a special statutory provision bearing directly upon the right of a public authority to dismiss the plaintiff. In *Vine v National Dock Labour Board* [1957] AC 488 the employment was under the statutory dock labour scheme and the issue concerned the statutory power to dismiss given by that scheme. In *Ridge v Baldwin* [1964] AC 40 the power of dismissal was conferred by statute: s 191(4) of the Municipal Corporations Act 1882 (45 & 46 Vict c50). In *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578 again it was statutory: s 3 of the Public Schools (Scotland) Teachers Act 1882 (45 & 46 Vict c18). As Lord Wilberforce said, at pp 1595–1596, it is the existence of these statutory provisions which injects the element of public law necessary in this context to attract the remedies of administrative law ...

[26] Soon after the Court of Appeal decision in *R v East Berkshire Health Authority, ex parte Walsh* the High Court in another case *R v Secretary of State for the Home Department, ex parte Benwell* [1985] 1 QB 554, decided a public servant who was dismissed by the authority was amenable for judicial review under O 53. But here the distinction is the performance of the respondent's duty imposed in part by statute. To fully appreciate this distinction, we append below the facts.

[27] The complainant was a prison officer. He was charged for disobeying orders contrary to certain paragraphs of the Code of Discipline for Prison Officers. The officer, who held the disciplinary inquiry recommended that the applicant be severely reprimanded. The department did not accept this recommendation and instead gave the applicant notice of their intention to dismiss him. The applicant then appealed and eventually the Secretary of State decided that the applicant should be dismissed. The applicant applied for judicial review and for an order of certiorari to quash the decision of the State Secretary.

[28] And this is what the High Court found:

> In this case, however, it is my opinion that in making a disciplinary award of dismissal, the Home Office (to use a comprehensive term to include the department and the Secretary of State so distinguished by the respondent itself in this case) was performing the duties imposed upon it as part of the statutory terms under which it exercises its power. I conclude therefore that this court in the exercise of its supervisory jurisdiction can come to the aid of the applicant in this case and I am glad that it can.

[29] This principle was subsequently reiterated by Lord Wolf in *McLaren v The Home Office* (1990) ITLR 338 where he declared:

> There can however be situations where an employee of a public body can seek judicial review and obtain a remedy which would not be available to an employee in the private sector. This will arise where there exists some disciplinary or other body established under the prerogative or by statute to which the employer or the employee is entitled or required to refer dispute affecting their relationship.

[30] But in a more recent case of *Wendal Swann v Attorney General of the Turks and Caicos Islands* [2009] UKPC 22, handed down only on 21 May 2009, by the judicial committee of the Privy Council, a complaint for non-payment of arrears by public servant was deemed to be a private law matter and therefore not amenable for judicial review. To ascertain whether this was a move to change established principles we scrutinised the facts which are:

[31] The appellant was appointed chairman of the Public Service Commission of the Turks and Caicos Islands (PSC) by the Governor. His remuneration was $90,000 a year. In November 2006, at a meeting of the Cabinet, presided over by the Governor, it was decided to reduce the remuneration of the PSC chairman to $30,000. This was communicated to the appellant. Dissatisfied, the appellant filed an application for judicial review. The High Court refused leave on the ground that the appellant's claim is essentially for damages caused by an alleged breach of agreement concerning his salary. This could be enforceable by a writ action rather than by way of a judicial review. Unhappy over this, the appellant appealed to the Court of Appeal which affirmed the decision of the High Court. This caused the matter to be referred to the Privy Council.

[32] The Privy Council (without citing any authority) came to this conclusion:

> The appellant's complaint is that he was wrongly deprived of his remuneration of $90,000 a year for a period of three months (or thereabouts), during which he was only paid at the rate of $30,000 a year. In order to found a legal claim on that

complaint, the applicant would have to establish that he had an enforceable right to be remunerated at the rate of $90,000 a year as chairman of PSC. A

In the Board's view, the only basis for advancing such a right, in the light of the evidence and the arguments which have been presented, arises out of conversations which, according to the appellant, he had with the Governor and the Chief Secretary, in which they 'invited' him 'to continue in the office of chairman on (a full time) basis' and 'on the basis that the base salary was to be ... $90,000 ... per annum', and that he 'decided to accept the challenge, including taking up residence in Grand Turk', which he duly did (quoting from paras 10–13 of the appellant's first affidavit, sworn on 26 January 2007). B

Accordingly, the appellant's complaint amounts to a straightforward private law claim for around $15,000, being the difference over a period of three months between (a) $90,000 a year, the rate of remuneration to which he claims to have been entitled, and (b) $30,000 a year, the rate at which he was actually paid. The basis of this entitlement is a conversation, or a series of conversations, described in paras 10–13 of his affidavit, cited in para 11 of this judgment. His claim is thus almost certainly in contract (although it is conceivable that it could be founded on estoppel), and whether it is made out will turn on oral evidence. C D

In those circumstances, it seems clear that the appellant should not have sought to bring his claim by way of judicial review, and should have issued a writ. That is primarily because his claim is, on analysis, a classic private law claim based on breach of contract (or, conceivably, estoppel) ... E

[33] The finding of the Privy Council is based on the fact that this claim is for breach of contract rather than per se against the decision of the authority. Being a private law matter which has little or no public law element, it is more appropriate that the action by the appellant should commence by writ rather than the process set out in O 53. F

[34] From the persuasive authorities above, we observed that for the appellant to be amenable for judicial review there must be the presence of an element of public law necessary to attract remedies of administrative law. We detected the presence of this in our instant case both from the source as well from the nature of the decision itself. The appellant was an officer within reg 3 of the Public Officers (Conduct and Discipline) Regulations 1993 (Amended) 2002 ('the Regulations'). 'Officer' under this regulation 'means a member of the public service of the Federation'. This Regulation is a statutory enactment made in pursuant to cl (2) of art 132 of the Federal Constitution and it applies to an officer throughout the period of his service. He was absent from work without leave or without prior permission or without reasonable cause for seven consecutive working days and cannot be traced. So under reg 26 of the Regulations: G H I

(1) Where an officer is absent from duty without leave or without prior permission or without reasonable cause for seven consecutive working days

A and cannot be traced, his Head of Department shall cause a letter to be delivered personally or sent by A.R. registered post to the officer at his last-know address, directing the officer to immediately report for duty.

(2) If, after the letter is delivered —

B (a) the officer reports for duty; or

(b) the officer fails to report for duty or no news is heard from him, his Head of Department shall submit a report to the appropriate Disciplinary Authority and the Disciplinary Authority shall institute disciplinary action against the officer.

C (3) If the letter cannot be delivered in person to the officer by reason of the fact that he is no longer residing at his last-known address or if the A.R. registered letter is returned undelivered, the Head of Department shall report the matter to the Disciplinary Authority having jurisdiction to impose a punishment of dismissal or reduction in rank upon the officer.

D (4) The appropriate Disciplinary Authority shall, upon receiving the report referred to in subregulation (3) take steps to publish a notice in at least one daily newspaper published in the national language and having a national circulation as determined by the Disciplinary Authority —

E (a) of the fact that the officer has been absent from duty and cannot be traced; and

(b) requiring the officer to report for duty within seven days from the date of such publication.

(5) (not applicable here)

F (6) If the officer fails to report for duty within seven days from the date of the publication of the notice referred to in subregulation (4), the officer shall be deemed to have been dismissed from the service with effect from the date he was absent from duty.

G **[35]** When all the above were complied with no response forthcoming from the appellant, the public authority gazetted the appellant's dismissal under sub-reg (7) of the Regulations which reads:

H The dismissal of an officer by virtue of subregulation (6) shall be notified in the *Gazette*.

[36] Thus, the decision to dismiss the appellant was made under a statutory law by a body who acted within the scope of such statutory power. Though I this decision involves the dismissal of an employee by an employer, much like a master dismissing his servant, which is a private law matter, the fact that there are statutory conditions and restrictions imposed by the Regulations on the conduct and dismissal of the appellant underpins the public law element in this case. This is not a case of a public authority being delegated with

authority to hire and fire much like what has occurred in *R v East Berkshire Health Authority, ex parte Walsh* and *Wendal Swann v Attorney General of the Turks and Caicos Islands*. Here, a special statutory provision bearing directly upon the right of a public authority to dismiss the appellant. This injects the element of public law necessary in this context to attract the remedies of administrative law making this case amenable for judicial review.

[37] We shall now move to the next issue concerning the use of the correct procedure in a case where an aggrieved person can direct and pursue his complaint against a public authority for a decision made by them affecting him. *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 All ER 705 is one of a series of cases of this nature. Here, the respondent, a general medical practitioner, who practiced in the area administered by the appellant, was on the list of doctors undertaking to provide general medical services under the National Health Service Act 1977. His remuneration was governed by certain regulations where he would get certain basic allowance. He brought an action against the appellant for, inter alia, a declaration that the appellant was in breach of contract in abating his basic practice allowance. The appellant applied to strike out his claim on the ground that it is an abuse of court's process since the appropriate procedure to challenge such decision is by way of judicial review and not by an action commenced by writ. The High Court allowed the appellant's application and struck off the respondent's claim. But on appeal, the Court of Appeal permitted the respondent's claim to stand. Dissatisfied, the appellant appealed to the House of Lords. The appeal was dismissed.

[38] Lord Bridge in this case said:

> The decisions of this House in *O'Reilly v Mackman* [1982] 3 All ER 1124; [1983] 2 AC 237 and *Cocks v Thanet DC* [1982] 3 All ER 1135; [1983] 2 AC 286 have been the subject of much academic criticism. Although I appreciate the cogency of some of the arguments advanced in support of that criticism, I have not been persuaded that the essential principle embodied in the decisions requires to be significantly modified, let alone overturned. But, if it is important, as I believe, to maintain the principle, it is certainly no less important that its application should be confined within proper limits. It is appropriate that an issue which depends exclusively on the existence of a purely public law right should be determined in judicial review proceedings and not otherwise. But where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him. I think this proposition necessarily follows from the decisions of this House in *Davy v Spelthorne BC* [1983] 3 All ER 278; [1984] AC 262 and *Wandsworth London EC v Winder* [1984] 3 All ER 976;

A [1985] AC 461. In the latter case Robert Goff LJ in the Court of Appeal, commencing on a passage from the speech of Lord Fraser of Tullybelton in the former case, said ([1984] 3 All ER 83 at p 96; [1985] AC 461 at p 480):

> I read this passage in Lord Eraser's speech as expressing the opinion that the
B principle in *O'Reilly v Mackman* should not be extended to require a litigant to proceed by way of judicial review in circumstances where his claim for damages for negligence might in consequence be adversely affected. I can for my part see no reason why the same consideration should not apply in respect of any private law right which a litigant seeks to invoke, whether by way of action or by way
C of defence. For my part, I find it difficult to conceive of a case where a citizen's invocation of the ordinary procedure of the courts in order to enforce his private law rights, or his reliance on his private law rights by way of defence in an action brought against him, could, as such, amount to an abuse of the process of the court.

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[39] Lord Lowry delivering the other opinion of the House expressed:

> The 'broad approach' was that the rule in *O'Reilly v Mackman* did not apply
E generally against bringing actions to vindicate private rights in all circumstances in which those actions involved a challenge to a public law act or decision, but that it merely required the aggrieved person to proceed by judicial review only when private law rights were not at stake. The 'narrow approach' assumed that the rule applied generally to all proceedings in which public law acts or decisions were
F challenged, subject to some exceptions when private law rights were involved. There was no need in *O'Reilly v Mackman* to choose between these approaches, but it seems clear that Lord Diplock considered himself to be stating a general rule with exceptions. For my part, I much prefer the broad approach, which is both traditionally orthodox and consistent with the Pyx Granite principle, as applied in
G *Davy v Spelthorne BC* [1983] 3 All ER 278 at pp 283–284; [1984] AC 262 at p 274 and in *Wandsworth London BC v Winder* [1984] 3 All ER 976 at p 981; [1985] AC 461 at p 510. It would also, if adopted, have the practical merit of getting rid of a procedural minefield. I shall, however, be content for the purpose of this appeal to adopt the narrow approach, which avoids the need to discuss the
H proper scope of the rule, a point which has not been argued before Your Lordships and has hitherto been seriously discussed only by the academic writers.

[40] In Malaysia, there are a number of authorities on this point. Starting
I with the High Court, we have the case of *Ghozi Abu Bakar v Majlis Angkatan Tentera & Anor* [2006] 4 CLJ 291 where the plaintiff, a member of the Royal Malaysian Navy, sued by way of writ for a declaration that he was wrongly decommissioned and retired. In her judgment, Noor Azian Shaari JC (as she then was) said:

Since the plaintiff is seeking a remedy on an allegation that a public authority that is entitled to protection under the law has exceeded or infringed the law, the plaintiff must proceed by way of a judicial review and not by way of an ordinary action ie, in the case the plaintiff has chosen by way of writ and statement of claim for an injunction or otherwise.

By filing the writ and statement of claim and not by way of O 53 of the RHC it appears that the plaintiff is trying to circumvent the leave requirement of O 53 of the RHC.

[41] This was followed by *Maisi bin Gating v Kerajaan Malaysia* (an unreported decision) where the plaintiff, a member of the Royal Malaysian Police, sought by way of a writ action to declare that the defendant's decision to dismiss him was unlawful. Tee Ah Sing J dismissed the plaintiffs claim on the ground that it is an abuse of process. The proper mode should be by way of judicial review under O 53 of the RHC since the plaintiff was challenging the decision made by the defendants pursuant to a Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993.

[42] Another High Court decision against the use of a writ to commence such action rather than by way of O 53 of the RHC is *Kenniah a/l Sinnasamy v Ketua Polis Seberang Perai & 2 Ors* (unreported). The plaintiff's claim for a declaration by way of a writ that he was unlawfully dismissed from the police force was struck out on the ground that it was an abuse of the process of the court.

[43] At the Court of Appeal, we have the case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2002] 2 MLJ 413; [2002] 3 CLJ 697 where Gopal Sri Ram JCA (as he then was) delivering the judgment of the court said:

These arguments of counsel on either side bring into sharp focus the divide between private and public law remedies. In England, where the judicial review provisions are in some respects similar to ours while differing materially in other respects, cases have gone in both directions. Thus, in *Re Tillmire Common, Heslington* [1982] 2 All ER 615 at pp 621–622 Dillon J (as he then was) following the judgment of Goulding J in *Heywood v Hull Prison Board of Visitors* [1980] 3 All ER 594, pointed to the ill-advisedness of invoking the general provision governing declaratory relief in O 15 r 16 in cases of public law. The English courts, at that stage, were very concerned that a litigant instead of taking on the heavier burden imposed by O 53 may attempt to by-pass that rule of court by taking advantage of the less onerous and more generous private law provision in O 15 r 16. Even a cursory reading of the judgments in cases I have just referred to as well as the speech of Lord Diplock in *O'Reilly v Mackman* [1982] 3 All ER 1124 make this concern clear.

I have thus far mentioned cases going the one way. There are several cases going in the opposite direction. I need only mention one of these. It is a decision of critical importance to English practitioners. But it also provides us much needed

guidance when construing our own O 53 which is comparatively new. The case I refer to is *Trustees of the Dennis Rye Pension Fund and another v Sheffield City Council* [1997] 4 All ER 747. The principal judgment was delivered by Lord Woolf MR, now Lord Chief Justice, the acknowledged authority on modern civil procedure and administrative law in the Commonwealth. There are two passages in his judgment that merit reproduction. The first appears at p 754 where he said:

> ... What I would suggest is necessary is to begin by going back to first principles and remind oneself of the guidance which Lord Diplock gave in *O' Reilly v Mackman*. This guidance involves recognising: (a) that remedies for protecting both private and public rights can be given in both private law proceedings and on application for judicial review; (b) that judicial review provides, in the interest of the public, protection for public bodies which are not available on private law proceedings (namely the requirement of leave and the protection against delay).

The second passage appears at p 755. It reads:

> ... If It is not clear whether judicial review or an ordinary action is the correct procedure it will be safer to make an application for judicial review than commence an ordinary action since there then should be no question of being treated as abusing the process of the court by avoiding the protection provided by judicial review. In the majority of the cases it should not be necessary for purely procedural reasons to become involved in arid arguments as to whether the issues are correctly treated as involving public or private law or both. (For reasons of substantive law it may be necessary to consider this issue). If judicial review is used when it should not, the court can protect its resources either by directing that the application should continue as if begun by writ or by directing it should he heard by a judge who is not nominated to hear cases in the Crown Office List. It is difficult to see how a respondent can be prejudiced by the adoption of this course and little risk that anything more damaging could happen than a refusal of leave.
>
> Acting on this guide, it is my view that in the present case the appellant was entirely correct in invoking the provision of O 53.

[44] Before we depart from this case to discuss others we would like first to disclose the facts in *Sivarasa Rasiah v Badan Peguam Malaysia* to some observations on the judgment of the Court of Appeal.

[45] In this case (*Sivarasa Rasiah v Badan Peguam Malaysia*) the applicant, an advocate and solicitor, was disqualified from being a member of the Bar Council by virtue of s 46A of the Legal Profession Act 1976 due to his appointment as vice-president of a political party. Dissatisfied with this statutory disqualification, he applied for leave for judicial review under O 53 of the RHC. The High Court dismissed his application for leave. This was overturned by the Court of Appeal.

[46] Our first observation concerns the comment by the Court of Appeal on the appropriate procedure to be used in judicial review. This was obiter dictum. That was not the issue before the court for deliberation. The question before the Court of Appeal was whether leave should be granted in an application made under O 53 of the RHC. Secondly, our O 53 of the RHC, though in many respect is in pari materia to the English provision of O 53 referred to by Lord Woolf in *Trustees of the Dennis Rye Pension Fund and another v Sheffield City Council* [1997] 4 All ER 747, does not contain provision to allow the court to direct an application made under O 53 of the RHC be converted into a writ action if the latter is found to be a more suitable process.

[47] In another Court of Appeal case of *Dato' Seri Anwar bin Ibrahim v Perdana Menteri Malaysia & Anor* [2007] 4 MLJ 422; [2007] 3 CLJ 377, the former Deputy Prime Minister of Malaysia has sued the Prime Minister of Malaysia and another by way of an originating summons for a declaration that they had acted in contravention of the Federal Constitution in dismissing him as the Deputy Prime Minister and that he is still a Minister in the Malaysian Cabinet. The defendants applied to strike out the plaintiff's claim under O 18 r 19(1) of the RHC. One of the grounds advanced by the defendants was the use of an incorrect procedure, it should have by way of an application for judicial review under O 53 of the RHC rather than by originating summons. The High Court allowed this application. Dissatisfied the plaintiff appealed. His appeal was dismissed by the Court of Appeal and there Justice Heliliah JCA (as she then was) remarked:

> This suit raises public law issues as it is a decision and action taken by the Prime Minister in pursuance of the provisions of the Federal Constitution that is being impugned. As such a decision taken by the Prime Minister with regard to a Minister as a member of the administration in his public duties is one which has implications for the public as a whole and it is in consequence of this that the public law is concerned with the decision making process. The legal sources of the powers that are being impugned are in the public domain. As such to institute the proceedings by ordinary summons, though seemingly appearing to be simple in procedure, will deprive the public authority in this case the Federal Government and in the circumstances of the present case, of the protection of the law that it is entitled to by the processes available under O 53.

[48] This approached was repeated in a more recent Court of Appeal decision of *Robert Cheah Foong Chiew v Lembaga Jurutera Malaysia* [2009] 1 MLJ 676; [2009] 1 CLJ 193. In this case, the appellant was an engineer registered under the Registration of Engineers Act 1967 ('the Act'). The respondent, the Board of Engineers Malaysia, commenced disciplinary proceedings against the appellant upon complaints received on his professional performance in an engineering project. Before disciplinary

proceedings could commence, the appellant applied to the High Court for a declaration that no disciplinary action can be taken against him by virtue of certain provisions of the Act. He also applied for a prohibitive injunction to restrain the appellant from investigating him on the complaints lodged. The High Court dismissed his application and the Court of Appeal affirmed the decision of the High Court. He then applied for leave to appeal to the Federal Court but before his application was heard, he withdrew claiming that the respondent had agreed to retract the disciplinary charge against him. The respondent did not withdraw the charge. Instead they revised the original charge. Before the respondent could proceed with the disciplinary hearing, the appellant applied by way of originating summons for a declaration that the appellant's revised charge against him was ultra vires the Act and bad in law. The High Court struck out his originating summons under O 18 r 19(1) of the RHC on the ground that since the appellant's application is for judicial review it should be by way of O 53 of the RHC. His appeal to the Court of Appeal was dismissed on the following grounds:

> First, we are of the view that the High Court in deliberating the application has applied the correct principle of law as set out in *O'Reilly v Mackman* [1983] 2 AC 237 (and adopted by our courts in *Dato' Seri Anwar bin Ibrahim v Perdana Menteri Malaysia & Anor* [2007] 4 MLJ 422 at p 436; [2007] 3 CLJ 377 at p 397) which is:
>
> > It would as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of O 53 for the protection of such authorities.
>
> Secondly, we find that in substance and in fact what the appellant is requesting in his originating summons involves principally and primarily public law rights rather than private law rights.
>
> Thirdly, though we are conscious of the English House of Lords decisions in *Wandsworth London Borough Council v Winder* [1985] 1 AC 461 and *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 2 WLR 239 which says:
>
> > ... where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him.
>
> We are of the view that the prayers sought by the appellant involve principally and primarily public law rights rather than private law rights. When they overwhelmingly concern public law rights, then the correct approach should be by way of judicial review under O 53 of the RHC rather than by way of originating summons.

[49] This line of approach is the same as those adopted by the Court of Appeal in an earlier case of *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567; [2003] 1 CLJ 585 where Gopal Sri Ram JCA (as he then was) delivering judgment of the court on the claim by the plaintiffs against the defendant, a public authority, for an order issued against them by the High Court regarding their duties imposed subsequent to the collapse of a building caused partially by their negligence ruled:

> Now, assuming that there was a duty on the fourth defendant to act in a particular manner towards the property of the plaintiffs post collapse, such duty must find its expression in public and not private law. Accordingly, if there had been a failure on the part of the fourth defendant to do or not to do something as a public authority, the proper method is to proceed by way of an application for judicial review.

[50] In support of this proposition, the learned judge cited the case of *Trustee of the Denis Rye Pension Fund & Anor v Sheffield City Council*.

[51] However, this point was overruled by the Federal Court on appeal. The Federal Court (in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389 at p 410; [2006] 2 CLJ 1 at p 24) decided that though the principle set out in *O'Reilly v Markman* is acceptable as a general rule it does not apply to a claim against a public authority for negligence. Such claim can be commenced by way of writ. We reproduce the pertinent part of this judgment of the Federal Court delivered by Steve Shim CJ (Sabah and Sarawak):

> I think the brief facts in *Trustee of Dennis Rye Pension Fund* relied on by the Court of Appeal ought to be stated. There, the plaintiffs were served with a repair notice under the Housing Act (UK) requiring work to be carried out to certain houses to render them fit for human habitation. They then applied to the Sheffield City Council for improvement grants under the Local Government & Housing Act. The council approved the application but subsequently refused to pay the grants on the grounds, inter alia, that the works had not been completed to its satisfaction. The plaintiffs' commenced private law actions against the council claiming the sums due under the grants. The council contended that if the plaintiffs had any grounds of complaint (which it did not accept), the only appropriate procedure was an application for judicial review and not an ordinary action. It accordingly applied to strike out the plaintiff's claims under the RSC O 18 r 19 and the inherent jurisdiction of the court. The district judge struck out the claims; but the judge allowed the plaintiffs' appeal and dismissed the council's application. The council appealed to the Court of Appeal.
>
> The Court of Appeal presided by Lord Woolf MR held that when performing its role under the Local Government & Housing Act (UK) in relation to the making of grants, a local authority was in general performing public functions which did not give rise to private rights; but once an application for a grant had been

A approved, a duty to pay it arose on the applicant fulfilling the statutory conditions and that duty would be enforceable by an ordinary action. The court further emphasised that although, in the case before it, there was a dispute as to whether those conditions had been fulfilled, any challenge to the local authority's refusal to express satisfaction would depend on an examination of issues largely on fact — that furthermore, the remedy sought for the payment of a sum of money was not B available on an application for judicial review. The court concluded that an ordinary action was the more appropriate and convenient procedure and consequently that the plaintiff's actions were not an abuse of process. The appeal was therefore dismissed.

C It is clear that when the speeches by Lord Woolf MR and Pill LJ are read in their proper perspective, they explicitly recognise that remedies for protecting both private and public rights can be given in private law proceeding and an application for judicial review. It is pertinent to note the observations made by Lord Woolf MR in explaining the seminal decision in *O'Reilly v Mackman* [1983] 2 AC 237 when he said ...

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It is in the light of the established principles stated above that the respondents in our case maintain that the Court of Appeal has erred in holding that their only cause of action against MPAJ lay in the area of public law for post-collapse liability. The respondents have relied on ordinary tort principles for their claims of negligence. In this, they are amply supported by established authorities. They E should be entitled to file their claims against MPAJ by way of writ action.

[52] There is a more recent Federal Court case on this issue — *YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener)* [2009] 4 MLJ 24; [2009] 4 CLJ 253. F But before we proceed to deal with the issue concerning an appropriate mode to commence such action let us disclose the facts of this case.

[53] The first appellant was the Chief Minister of the State of Perak while G the second to seventh appellants were the State Executive Councilors. There was a complaint that the appellants had acted in contempt of the Perak State Legislative Assembly. The respondent, the Speaker of the Perak State Legislative Assembly, issued summons to the appellants directing them to appear before the Perak State Committee of Privileges ('Committee'). The H appellants appeared under protest on the ground that they do not recognise or submit to the jurisdiction of the Committee. All the appellants were found guilty as charged by the Committee and the respondent exercising his powers as the Speaker of the Perak State Assembly, suspended them from attending further sessions of the Perak State Assembly for a period of 18 and 12 months I respectively. The appellants filed originating summons in the High Court seeking, inter alia, a declaration that the respondent's decision is void on ground that it was made in contravention to the Perak State Constitution. The appellants then sought by way of motion in the Federal Court to refer certain questions of law touching on the Perak State Constitution. Though

the hearing of the originating summons had commenced in the High Court, the Federal Court proceeded to entertain the motion and pursuant to art 63 of the Federal Constitution disposed of the originating summons. At the hearing before the Federal Court and also previously in the High Court, the respondent had raised an objection that the appellants should have commenced their actions under O 53 of the RHC instead of by originating summons since the appellants were challenging the decision of the respondent made in his capacity as Speaker of the Perak State Assembly.

[54] In dealing with this, Augustine Paul FCJ after scrutinising numerous authorities both locally and abroad came to this conclusion:

> Clearly, the challenge of the applicants to their suspension from Legislative Assembly was a matter that affects their legal status within the meaning of s 41. They are therefore entitled to seek a declaration of their legal right pursuant to O 15 r 16. It cannot be argued that they ought to have proceeded under O 53 itself for declaratory relief for two reasons: Firstly, O 53 does not say it is the exclusive provision for the grant of declaratory relief as stated by Lord Diplock in *O'Reilly v Mackman* [1982] 3 All ER 1124 at p 1134 in the following words:
>
> > My Lords, O 53 does not expressly provide that procedure by application for judicial review shall be exclusive procedure available by which the remedy of a declaration or injunction may be obtained for infringement of rights that are entitled to protection under public law, nor does s 31 of the Supreme Court Act 1981. There is great variation between individual cases that fall within O 53 and the Rules of Committee and subsequently the legislature were, I think, for this reason content to rely on the express and the inherent power to the High Court, exercised on a case to case basis, to prevent abuse of its process whatever might be the form taken by that abuse. Accordingly, I do not think that your Lordship would be wise to use this as an occasion to lay down categories of cases in which it would necessarily always be an abuse to seek in an action begun by writ or originating summons a remedy against infringement of rights of the individual that are entitled to protection in public law.
>
> Secondly, when the Act was enacted O 53 was not in existence and, thus, adherence to it could not have been contemplated. Be that as it may, and in any event, in cases of this nature the most appropriate form of relief is by way of declaration...
>
> Accordingly, the objection raised by the respondent was dismissed.

[55] For a comprehensive understanding of this section of the judgment, we reproduce s 41 of the Specific Relief Act and O 15 rule 16 of the RHC.

[56] Section 41 of the Specific Relief Act:

> Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

[57] Order 15 r 16 of the RHC:

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

[58] This approach was adopted in a subsequent High Court case of *Kuching Waterfront Development Sdn Bhd (formerly known as Toiaz Sdn Bhd) v Superintendent of Lands and Surveys, Kuching Division & 3 Ors* (unreported) where David Wong J said:

> SAG however submits that Kuching Waterfront ought to have applied to the court under O 53 of the Rules of High Court 1980, to quash the condition. And since there was no such application Kuching Waterfront cannot challenge the reasonableness of the imposed condition now. This contention no doubt is based on the celebrated case of *O'Reilly v Mackman* [1982] 2 All ER 1124 where the House of Lords held that, as a general rule, litigants whose rights are affected by decisions of public authorities such litigants must challenge those decisions by way judicial review under O 53 and not by way of ordinary claim and failure to do that would amount to an abuse of the process of the court. A similar contention was made and discussed in the recent Federal Court's case No 06–04 of 2009(A) — *YAB Dato' Zambry bin Abd Kadir & 6 Others v YB Sivakumar a/l Varatharaju Naidu* where the Federal Court on the 14 April 2009 held that O 53 is not an exclusive but an alternate provision for litigants to enforce their rights affected by public authorities... I have since obtained a copy of the judgment which I have read and agree with.

[59] In view of the various decisions on this point, particularly that of *YAB Dato' Dr Zambry*, it is necessary for this court to clarify the law on this 'procedural minefield' (as Lord Lowery puts in *Roy v Kensington and Chelsea FPC*).

[60] Aside from mandamus, prohibition, quo warranto and certiorari, or any others described under the pre-amended O 53 of the RHC, an alternative

remedy for an aggrieved party seeking relief against a public authority on his infringed right to which he was entitled to protection under public law is for a declaration. The courts had for a long time recognised their power to grant a declaration under common law. But s 41 of the Specific Relief Act 1950 armed them with the statutory authority to do so. It is also commonly accepted that O 15 r 16 of the RHC also provides the High Court with such power (see Lord Diplock's judgment in *O'Reilly v Mackman* at p 1127). However, O 53 of the RHC sets out a specific procedure for an aggrieved party seeking relief, including a declaration, against a public authority on his infringed right to which he was entitled to protection under public law to follow. It is our view that when such an explicit procedure is created to cater for this purpose, then as a general rule all such application for such relief must commence according to what is set down in O 53 of the RHC otherwise it would be liable to be struck off for abusing the process of the court. This general rule enunciated in *O'Reilly v Mackman* has in fact been acknowledged by this court in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* and repeated in *YAB Dato' Dr Zambry*. However, like all general rule, there are exceptions. This again was recognised by Lord Diplock in *O'Reilly v Mackman* where he referred to 'particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law or where none of the parties objects to the adoption of the procedure by writ, or originating summons'. Then of course there is the exception for a claim against the public authority for negligence as decided in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors*. There may be others and these 'are left to be decided on a case to case basis' as spoken of by Lord Diplock in *O'Reilly v Mackman*. The circumstances in *YAB Dato' Dr Zambry* is obviously one of them where this court found that a challenge by the appellants of their suspension from attending a State Legislative Assembly is a matter that affects their legal status is an exception. For this, the aggrieved party can commence their claim by way of an originating summons rather than an application under O 53 of the RHC.

[61] We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O 53 of the RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has substantial public law element then the procedure under O 53 of the RHC must be adopted. Otherwise it may be set aside on ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O 53 of the RHC is not suitable. Aside from this, there could be other circumstances like the kind in *YAB*

Dato' Dr Zambry. Much depends on the facts of the case. But generally the court should be circumspect in allowing a matter which should be by way of O 53 of the RHC to proceed in another form. To say that it is opened to any applicant seeking judicial review to elect any mode he prefers, as implied in *Kuching Waterfront*, would, in our considered opinion, be rendering O 53 of the RHC redundant. This is certainly not the intention of the drafters of this rule who had a purpose in mind. When the purpose of this rule is in the interest of good administration then this rule must be adhered to except in the limited and exceptional circumstances discussed.

[62] With this, we have answered the first question posed to us.

[63] As to the second question, we are of the firm conviction that the appellant's claim for infringement of his rights by the respondents is based solely on public law. There is no trace of private law involvement nor do the circumstances justify it to be an exception to the general rule. For this, we agree with the courts below that the appellant's writ should be struck off as an abuse of the court's process.

CONCLUSION

[64] Accordingly, we dismiss this appeal with costs. Deposit for this appeal to the respondent towards account of costs.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon