GADING (Online) Journal for Social Sciences, Universiti Teknologi MARA Cawangan Pahang
Vol 25(01), July 2022

THE RELATIONSHIP BETWEEN DOCTRINE OF ULTRA VIRES & R RAMA CHANDRAN IN THE MALAYSIAN AND ENGLISH ADMINISTRATIVE LAWS

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Abstract

In the Malaysian administrative law, any person who aggrieves with the administrative decision is entitled to a judicial review to determine whether the administration fails to adhere to express or implied rules related to its establishment, i.e. *ultra vires* decision. The primary legal test for *ultra vires* decision for English and Malaysian administrative laws derives from the Wednesbury unreasonableness. Its jurisdiction further expands in the Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935 ("GCHQ"), recognising another three categories of *ultra vires* decision, namely illegality, procedural impropriety and proportionality. Meanwhile, the Malaysian Court has also accepted the common law doctrine of legitimate expectation as part of a legal test in administrative law. Nevertheless, since R Rama Chandran v Industrial Court of Malaysia [1997] 1 MLJ 145 case ("R Rama Chandran"), the jurisdiction of judicial review in the Malaysian Court is further enlarged from subjective test to objective test, which allows the Court to examine the merit of the administrative decision and further engage in judicial activism. This article examines the relationship between the Wednesbury unreasonableness, GCHQ legal test, proportionality, legitimate expectation, and their relevance to the current Malaysian administrative law. This study is based on the doctrinal legal research method, and the outcome will ascertain applicable legal tests. The findings of this study would contribute to the body of knowledge in administrative law.

Keywords: administrative law, judicial review, ultra vires, Wednesbury unreasonable, proportionality, legitimate expectation.

Introduction

Ultra vires decision in the administrative law refers to an administrative action that fails to adhere to express or implied rules related to its establishment and can be subjected to judicial intervention known as judicial review. Generally, an *ultra vires* decision divides into two; substantive *ultra vires*; a decision by the administration beyond the scope of its authority and procedural *ultra vires*; the administration fails to adhere to the procedural rule in making the decision. In Malaysia, the High Court can intervene and provide common law & equitable remedies such as certiorari, prohibition, mandamus, quo warranto, injunction, and declaration against *ultra vires* decision. However, to prove certain administrative conduct is tantamount to an *ultra vires* decision is much more complex as the determination of the *ultra vires* decision is not a straightforward assessment (**Craig, 1998**). It relies on the Court's discretion to determine whether an administrative decision is to be construed as an *ultra vires* decision. Furthermore, the application for judicial review depends on balancing the right to seek check

and balance for good administration and protecting against unnecessary action that is wasteful expenditure on the public fund and preventing an irresponsible flood of litigation (Wong & Hong, 2016). This statement is based on a doctrine known as the presumption of regularity or, in Latin *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium,* which means the administrative decision presumes to be in good faith unless it is proven otherwise. Consequently, the right to file a judicial review is not axiomatic. Therefore, the procedural rules in the Order 53 of the Rules of Court 2012 impose two stages of processes; (1) an application to obtain leave *ex parte* so that the Court can filter false or frivolous action, and (2) a hearing application, *inter partes* proceeding between the applicant and administration to determine the whole merit of the case. At the same time, several English common law legal tests such as Wednesbury unreasonableness, legal test in Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935 or known as GCHQ legal test ("GCHQ"), proportionality, substantive fairness & legitimate expectation had been widely used by Malaysian Courts in dealing with the complexity of *ultra vires* decision.

In the past, the Malaysian Court was quite reluctant to examine the merit of the administrative decision as in the subjective test, the Court's primary duty is to interpret the law and settle the dispute only (Yaqin & Kamal, 2004). The traditional approach was revolutionised by the Federal Court decision in R Rama Chandran v Industrial Court of Malaysia [1997] 1 MLJ 145 ("R Rama Chandran"), recognising the Court's role as one of the branches of the government to safeguard the public's interest against unfettered power given to the members of the administration. In the R Rama Chandran, the court adopts an objective test, which allows the court to look at the substance/merit of the decision, i.e. grounds and facts in existence that justify the administrative decision. Consequently, the court departs from the traditional role under the separation of power into engaging in judicial activism (Raus, 2017).

Literature review

a) The application of the legal tests for *ultra vires* decision in English administrative law

The principle of unreasonableness in administrative law derives from the English Court of Appeal case of Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680 ("Wednesbury unreasonableness"). Lord Greene MR proposed a threefold test to determine an *ultra vires* decision in the Wednesbury unreasonableness. First, the administration fails to take the fact or law that it ought to consider in line with its authority. Second, the administration accepts consideration that it ought not to have taken into account in line with its authority. Lastly, the administrative decision is absurd, wrong, unreasonable, unjustified or arbitrary as no reasonable administration could have done with its jurisdiction. For instance, discretion exercises with *mala fide* or dishonest intention are *prima facie* that the decision is unreasonable. However, Lord Greene MR reserves its opinion on whether the test proposed in Wednesbury unreasonableness can illustrate under a single head.

Thirty-seven years later, the House of Lords in the GCHQ case revisits the Wednesbury unreasonableness legal test concerning whether the Ministerial exercise of the monarch's prerogatives can be reviewed before the Court. The crux of the GCHQ case is based on three concepts; first, every discretionary power conferred to the administration is not absolute, even if the statutory provision gives absolute discretion. Second, public interest can override private individuals' legitimate expectations, such as on national security grounds. Lastly, one of the judges, Lord Diplock, had further expanded court jurisdiction in the Wednesbury unreasonableness. He states that three categories of decisions of administrative action can be subjected to control by the Court; illegality which the decision is tainted by error of law, which

means the administration wrongly applied the law while exercising its function; irrationality, which derives from Wednesbury unreasonableness and procedural impropriety where the decision-making authority fails to observe procedural rules under the laws. Lord Diplock further proposes the possibility of recognising the doctrine of proportionality, a well established legal test in European law. This doctrine allows the Court to assess the merit of the decision and determine whether such a decision that may infringe the complainant's fundamental liberty is acceptable. However, his Lordship refrains himself from using the doctrine of proportionality as the proposed tests in the GCHQ case are sufficient.

While the GCHQ case partially recognises the application of the doctrine of legitimate expectation, this doctrine was successfully invoked in R v Devon County Council [1995] 1 All ER 73. In that case, the Court classifies the doctrine of legitimate expectation into two; substantive legitimate expectation, also known as substantive fairness/unfairness, and procedural legitimate expectation. The right in the substantive legitimate expectation arises in two situations. First, when an unambiguous promise or undertaking is reasonable for a person to rely upon, the administration has been estopped from stating otherwise. Second, when his interest is being protected by procedural fairness. Meanwhile, the procedural legitimate expectation consists of two aspects; the duty to act fairly and the consequence of the administration's specific promise or practice to follow a certain particular procedure. Meanwhile, one English case that successfully invokes the doctrine of substantive fairness is R v Ex parte Coughlan [2000] 3 All ER 850. In this case, an applicant, a tetraplegic victim of a road accident, stays at the Mardon House health care facility. The health authority has promised that Mardon House would be the applicant's home for life. However, the health authority decides to close the Mardon House without providing a solution to the applicant and the rest of the patients. The Court held that the respondent committed a breach of substantive legitimate expectation, which amounts to abuse of power.

Regarding the doctrine of proportionality, the English courts are initially quite reluctant to accept the doctrine of proportionality as one of the legal tests for *ultra vires* decisions. For instance, in Brind v Secretary of State for the Home Department [1991] 1 All ER 720, the Court refuses to accept the doctrine of proportionality in English administration law. Judges, in this case, had distinguished opinions about the incorporation of the doctrine of proportionality into English administrative law. Nevertheless, the current position inclines to accept the doctrine of proportionality, especially after accepting the European Convention on Human Rights 1950 as part of national law in the Human Rights Act 1998. For instance, in R (Unison) v Lord Chancellor [2017] 4 All ER 903 concerning the introduction of the payment of fees for claims in an employment tribunal and appeals to the Employment Appeal Tribunal by the Lord Chancellor of the Employment Tribunals and the Employment Appeal. The Supreme Court held that the Lord Chancellor could not impose the fee arbitrarily, and it should be set at a level that could reasonably be afforded. The Court further accepts that the imposition of the exorbitant fee has effectively reduced the number of claims. In this case, the Lord Chancellor fails to balance the legitimate aim sought to be achieved between the decision to reduce the taxpayer's burden and whether the fee payable is realistically for any applicant to afford it. As a result, it has effectively imposed limitations on exercising the right of access to justice under common law & European Union rights.

b) The application of the legal tests for *ultra vires* decision in Malaysian administrative law

One of the early reported cases that incorporated the Wednesbury unreasonableness into the Malaysian administrative law was Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise [1979] 1 MLJ 135. In this case, the applicant, the registered landowner,

sought to sub-divide and alter the land's category. The respondent approved but is subject to several conditions; among others, the applicant had to surrender the land title, and the status of land shall change from perpetuity to a leasehold of 99 years. The Court held that the said conditions were unreasonable. No statutory power is conferred to the respondent to compel the applicant to surrender the title in exchange for such conditions. Furthermore, the respondent's condition had infringed the applicant's right to the property by changing land status to 99 years leasehold, further diminishing the value of land that the applicant is supposed to enjoy. In relation, the judge who propounds the doctrine of proportionality incorporated into Malaysian administrative law is Gopal Sri Ram JCA (as he then was) in Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan [1996] 1 MLJ 261. In this case, the Court of Appeal decided that the punishment of dismissal against the public servant is too disproportionate to his misconduct on two grounds. First, the Federal Constitution does not guarantee the public servant a hearing before his dismissal if there is a conviction. Therefore, he is not entitled to present any explanation or mitigating factors for punishment. Second, there was already a recommendation proposed by Johor Education Department, which proposes a lighter punishment. Therefore, the Court held the order of dismissal should be replaced with an order that Tan be reduced in rank as proposed by the Education Department.

The relationship between common law principles in Wednesbury unreasonableness, GCHQ legal tests, and the doctrine of proportionality is further tested by the highest court in R Rama Chandran v Industrial Court of Malaysia [1997] 1 MLJ 145 ("R Rama Chandran"). In this case, the appellant's employment is subjected to redundancy on the allegation of financial losses and economic recession. However, there is evidence that his termination is not genuine as another executive is appointed as the General Manager of Business Development, one of the appellant's functions. The said appointment is made one month after the appellant's termination. However, the Industrial Court rejected the appellant's argument, which caused the appellant to file a judicial review against the Industrial Court's award. The Federal Court held that the award by the Industrial Court was flawed as the appellant had been wrongly dismissed. In R Rama Chandran's case, there are four crucial aspects in dealing with the *ultra vires* decision. First, the ratio in R Rama Chandran recognises the test for judicial review had been dramatically changed from a subjective test to an objective test which allows the Court to examine the merit of the administrative decision and even, to a certain extent, substitute the decision made by the administration with the Court's view and provides consequential relief (Petroliam Nasional Bhd v Nik Ramli Bin Nik Hassan [2000] 2 MLJ 272).

Second, Edgar Joseph Jr FCJ explained the relationship between Wednesbury unreasonableness and GCHQ legal tests. His Lordship viewed that illegality and irrational limbs might overlap in discussing legal tests between Wednesbury unreasonableness and GCHQ legal tests. Therefore, the Court ruled that illegality concerns whether the decision made by the administration is within the parameter of law that confers its power. Therefore, illegality involves the question of law only. However, irrationality involves encroaching on the case's merit, and its determination is based on how the administration exercises its discretion, which involves a mixed question of law and facts. The findings in R Rama Chandran are similar to the position taken by Singaporean administrative law in Tan Seet Eng v AG [2016] 1 SLR 779, as the Singaporean Court of Appeal found that there is a possibility that illegality and irrational limbs may result in redundancy. In that case, the Court held that the main difference between these two limbs is that illegality examines the source and extent of the administration's power. The only relevant consideration is based on assessing the law that governs administration power. Meanwhile, irrationality deals with how the decision is made. The Court must examine whether the decision is unreasonable after considering various factors that the administration should apply to its merit.

Third, the procedural impropriety in GCHQ legal tests consists of the requirement to conclude the decision pocess, i.e. procedural rules applicable when the administration makes the decision. The concept of procedural impropriety limb was further discussed in Malaysia Airline System v Wan Sa'adi [2015] 1 MLJ 757. The Court held that procedural impropriety in GCHQ legal test involves two breaches for the Court to nullify the decision made by the administration. The first is the failure to follow procedural rules stated in the written law. The second is failure to observe the English common law of principles of natural justice. However, the concept of procedural impropriety limb may do little to assist the court as the principles of natural justice, which is the primary test for the procedural *ultra vires* decision under English and Malaysian laws, had long existed before the GCHQ legal test. Lastly, the issue of whether the decision made by the administration is fair and reasonable is within the sphere of legal tests such as legitimate expectation and proportionality. While it is also noted that the Court in R Rama Chandran (1997) recognises there is a possibility that the doctrines of legitimate expectation and proportionality are part of English administrative law, the Court fell short to determine whether these doctrines are within the domain of Malaysian administrative law.

The doctrine of legitimate expectation had long existed in Malaysian administrative law before R Rama Chandran's decision, as this principle derives from English authorities before the GCHQ case (Dahlan, 2014). Under English law, the doctrine of legitimate expectation is a legal test that allows the public to be reasonably expected to be entitled to a specific interest based on representation made by the administration (Hlophe, 1987). The basis for reliance can be found in two ways, (1) acceptance of unwritten law, which includes the principles of natural justice and (2) any representation, practice or policy made by administration members (Dahlan *et al.*, 2016). However, there is a limit in the doctrine of legitimate expectation as it cannot override the express statutory power (Pentadbir Tanah dan Daerah Petaling v Bandar Utama City, [2021] 4 MLJ 689).

Nevertheless, the English court's approach is slightly different in applying the doctrine of legitimate expectation. While the English Court proposes the doctrine of legitimate expectation can be divided into two; substantive fairness / substantive legitimate expectation and procedural legitimate expectation, Malaysian administrative law treats the substantive legitimate expectation / substantive fairness as distinct categories of legal test in administrative law relying on Indian authorities. It is also observed that the application of substantive fairness is also different as the English law requires the reliance of a statement to constitute interest (Steward, 2007), while the Malaysian Court regarded it as the legal test as to whether the administration is allowed to make discriminatory action which supposedly been protected by fundamental liberties in the Constitution (Pillay, 2001). Nevertheless, the Malaysian legal system adopts both approaches, as in Dewith Gambut v Lawrensius Aloysius [2003] 2 MLJ 219 & Chandra Muzaffar v UM [2002] 5 MLJ 369 accepted the substantive fairness originated from English law. In Malaysia, the general principle for the Court to apply the substantive fairness premises on Article 5 (1) is that no person shall be deprived of his life and equality before the law under Article 8 (1) of the Federal Constitution. In applying the doctrine of substantive fairness, the interpretation of Articles 5(1) and 8(1) had to be interpreted broadly to cover various issues in administrative law. In Tan Tek Seng (1996), the word "life" in Article 5 (1) refers to "all those facets that are an integral part of life itself and those matters that form the quality of life". While "all persons are equal before the law" means that the administration cannot make its decision arbitrarily. Nevertheless, this doctrine is not well accepted in the Malaysian legal system as it is not part of mainstream English administrative law (Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 4 CLJ 105). So far, few cases like Nordin Bin Salleh v Dewan Undangan Negeri Kelantan [1992] 1 MLJ 343 and Sivarasa Rasiah v Badan Peguam Malaysia [2010] 3 CLJ 507 recognise the application of substantive fairness,

especially if it involves the fundamental liberty issue.

Lastly, the doctrine of proportionality has been recognised since R Rama Chandran's decision. The proportionality doctrine requires the Court to consider balancing the competing interest between the applicant and administration, in which both parties allege that their actions are based on the law (Davies, 2010). Theoretically, the purpose of the doctrine of proportionality is not for the Court to substitute the decision made by an administration member but to determine whether the decision is sustainable under the law. Therefore, the decision by the administration must not be seen as arbitrary and cannot be justified under the law. At the same time, the applicant's argument is based on the fact that he has fundamental liberty that ought to be recognised by the administration. If there is no explicit statutory enactment to deny the fundamental liberty of the applicant, the principle of legality or constitutional supremacy will be applicable; that is, the fundamental liberty under written law or common law cannot be denied in general or ambiguous words (Maria Chin Abdullah v Ketua Pengarah Imigresen [2021] 1 MLJ 750). In Malaysia, the general principle of doctrine proportionality premises on Articles 5 (1) and 8 (1) of the Federal Constitution under the limb "equal protection of the law". There is a similarity between the doctrine of proportionality and substantive fairness, as both tests derive from the exact source of law. The primary difference is that substantive fairness focuses on whether the administration can make discriminatory decisions or law. In contrast, proportionality focuses on whether the discriminatory decision or law is proportionate to its objective. However, the purpose is similar, to prevent unlawful discriminatory and arbitrary decisions. Generally, the Malaysian Court does not hesitate to use the doctrine of proportionality compared to the English Court in determining the violation of human rights. It is because the Malaysian legal system recognises several constitutional doctrines such as constitutional supremacy and the basic structure of the Constitution, which neither are available in the English constitutional law. However, it is also noted that the doctrine of the basic structure of the Constitution is still a contentious issue before the Federal Court.

Method

This research employs a doctrinal research method to examine the relationship between legal tests in English administrative law and their applications to judicial review in Malaysia. The doctrinal research method is defined as "the research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty, and predicts future developments" (Pearce *et al.*, 1987).

Results and Discussion

Several critical findings exist between English and Malaysian administrative law concerning *ultra vires* decisions. First, the primary legal test for *ultra vires* decision between Malaysian and English administrative law was initially based on a decision from Wednesbury unreasonableness. Nevertheless, since the decision of R Rama Chandran (1997), the approach by the Malaysian Court is being evolved from a subjective test to an objective test. This approach is different from the English Court, which is quite reluctant to interfere with the administrative decision unless the decision itself is illegal. Thus, the Malaysian Court has broadly expanded the jurisdiction in Wednesbury unreasonableness and categories into several grounds:

Grounds for Wednesbury unreasonable	Cases
Mala fide: the administration had dishonest intentions when it made its decision	United Allied Empire v Pengarah PTG Selangor [2018] 1 MLJ 661
Taking irrelevant consideration/failure to take consideration: the administration takes several facts or law which is irrelevant or fails to consider facts or law that are relevant	Kedah Bioresources Corp v Aminudin Shuib [2018] 10 MLJ 518 & Islamic Renaissance Front Bhd v The Minister of Home Affairs [2020] 5 MLJ 399
Improper purpose: the administration has utilised its discretion to achieve a different result which makes its decision arbitrary	Cayman Developments (K) Sdn Bhd v Mohd Saad Bin Long [2000] 7 MLJ 659 & Menteri Dalam Negeri v SIS Forum (Malaysia) [2012] 6 MLJ 340
Misdirection of fact and law: When exercising its power, it misunderstands or ignores relevant facts, leading to wrongly applying the law.	Edwin Thomas v F&N Beverages Marketing Sdn Bhd [2016] 1 LNS 1645 & Teh Guat Hong v PTPTN [2017] 4 MLJ 521
Delay: the administration delays in concluding its decision	Dr Ahmad Jaafar bin Musa v Suruhanjaya Perkhidmatan Pelajaran [2018] 9 MLJ 331
Unreasoned decision: the administration fails to provide a reason for its decision	Nazrul Imran bin Mohd Nor v Civil Service Commission Malaysia [2021] 6 MLJ 750
Fettering discretion/inflexibility: the administration is being inflexible when it is exercising its discretion	Mohamad Yusof bin A Bakar v Datuk Bandar Kuala Lumpur [2019] 1 LNS 1494

Meanwhile, in dealing with the illegality limb, several Malaysian cases approve the approach taken by R Rama Chandran (1997) concerning GCHQ legal tests. First, in Kumpulan Perangsang Selangor v Zaid Bin Hj Mohd Noh [1997] 1 MLJ 789 as the Court ruled that the Industrial Court commits several errors of law such as the doctrine of estoppel should not apply to the industrial adjudication, failure to observe the rule of pleading and wrongly concludes that the allegation the post previously held by the respondent has been abolished is true despite there is no evidence to support the allegation. This case is one of the early decisions that affirm the principles of R Rama Chandran (1997). The second is in Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia [2021] 5 MLJ 209, as the Federal Court held that the decision to prosecute the appellant, the former director of the Asian International Arbitration Centre, is illegal as he holds immunity from criminal proceedings under the International Organizations (Privileges and Immunities) Act 1992.

Regarding the doctrine of proportionality, the Malaysian Court took advanced roles in applying administrative law compared to the English Court. The possible reason is that Malaysia's legal system is based on constitutional supremacy, which guarantees several fundamental liberties, while the English Court is based on Parliamentary supremacy. Therefore, the English Court is quite reluctant to interfere with human rights issues until the introduction of the Human Rights Act 1998. Therefore, abundant cases have applied the principle of proportionality ever since the R Rama Chandran decision, such as in Iszam Kamal bin Ismail v Prestij Bestari [2018] 5 MLJ 536. In this case, the appellant, an advocate and solicitor, is found guilty of the disciplinary complaint. After hearing the complaint, the disciplinary committee found the appellant guilty and recommended that the appellant be suspended for three years and fined RM10,000. The disciplinary board concurs with the disciplinary

committee's findings but elected to order the appellant to be struck off the Roll of advocate and solicitor. The Court held that punishment is disproportionate as an advocate and solicitor usually be struck out from the Roll only when a criminal element was personally attributed to the advocate and solicitor. In this case, the issue is not a case of personal dishonesty, as his clerk has deceived him into releasing monies.

Conclusion

Generally, the legal tests that English authorities have approved, such as Wednesbury unreasonableness, GHCQ legal test, legitimate expectation, and proportionality, are well-received in the Malaysian administration law. However, since R Rama Chandran (1997), the Malaysian Court has expanded the judicial review jurisdiction and applied legal tests proposed by English authorities to encroach into the merit of the administrative decision. This approach is different from the English administrative law position, as the English Court is unlikely to interfere with an administrative decision unless the issue falls on the illegality. As a result, it makes the Malaysian Court's decision to deal with *ultra vires* decisions unpredictable under the guise of judicial activism.

Conflict of Interests

It is hereby declared that the authors do not hold any conflict of interest regarding this article.

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