

From Common Law Principles to Judicial Activism: The Duty to Provide Reasoned Decisions in Administrative Law in Malaysia

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Abstract: Historically, the court has a supervisory role in ensuring the public administration exercises good governance. Therefore, the court has given the authority to determine the legality of the administration's decision through a mechanism known as a judicial review. One contentious issue in dealing with ultra vires decisions is whether the authority has to give a reasoned decision, i.e. the requirement to communicate the justification of its decision. The main crux of this duty is to ensure that the decision is not made arbitrarily. Under common law, the duty is subject to exceptional circumstances. Meanwhile, in Malaysian law, several cases demonstrate the imposition of a duty to make reasoned decisions primarily influenced by judicial activism propounded in the R Rama Chandran case rather than principles in the common law. Therefore, this study aims to analyse Malaysian and English administrative laws concerning the duty to make reasoned decisions and how they influence respective governments.

Keywords: Administrative law, Good governance, Judicial review, Public administration, The duty to give a reasoned decision

Introduction

In democratic countries, judicial review is an essential component under the doctrine of separation of powers, allowing the judiciary to intervene in any transgression of law committed by the executive government and its agencies against the public. A judicial review refers to a civil action that allows the public to challenge the validity of the authority's decision that exercises public duty or function (Ketua Pengarah HDN v Alcatel-Lucent [2017] 1 MLJ 563) ("Alcatel-Lucent"). It enables the public to redress the abuse of power while at the same time promoting the expectation of the public towards independence of the judiciary; that is, the court will not subjugate other branches' interests in the government just because they are approving the appointment of judges. For example, while Article 122B of the Federal Constitution confers the appointment of the superior courts' judges based on the Prime Minister's advice, the courts do not hesitate to decide, even if it is against the government's interest. Case in point, in *Berthelsen v DG of Immigration*, it was held that the decision to revoke the employment pass of a staff correspondent of the international newspaper who made articles which is critical to Malaysian officials was declared to be ultra vires due to the government's failure to comply with procedural rules (Rodan, 2004).

The process of judicial review in Malaysia

The jurisdiction of judicial review in the Malaysian legal system lies in several written laws starting from Article 121 (1) of the Federal Constitution. In *Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah* [2021] 2 MLJ 822, the Federal Court held that jurisdiction and power of the High Court under Article 121 (1) based on two sources; (a) federal law when the Parliament enacted

Act of Parliament or did not repeal any existing law and (b) law recognised by Federal Constitution which includes the unwritten law of common law. Therefore, the rules about judicial review are based on any written law conferred by the Parliament and common law. For instance, remedies for the judicial review has set out in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and Chapter VIII of Part 2 of Specific Relief Act 1950, which includes certiorari, prohibition, mandamus and quo warranto and injunction and declaration.

Order 53 of the Rules of Court 2012 is the main procedural rule governing the judicial review proceeding. The procedural rules in the Rules of Court 2012 impose two stages of processes; (1) a leave *ex parte* application for filtering false or frivolous action, and (2) an *inter partes* proceeding between the applicant and public administration/respondent for the whole merit of the case. In the leave application, there are several criteria imposed by the Rules of Court 2012, such as (a) the application for leave must be made within the time framework set out in Order 53 rule 3 (6), (b) the application must include a statement and affidavit which contain name and description of the applicant, relief and grounds for the application and facts that relevant to the proceeding, (c) the respondent is an entity who exercises a public duty or function, and (d) the applicant had been adversely affected by the respondent's decision, action or omission.

During the leave stage, the applicant is not required to demonstrate the case's merit. The applicant needs to establish an arguable case that justifies the court to investigate further on substantive grounds. Therefore, the court devises several grounds to establish what constitutes an arguable case. For example, (1) on the issue of justiciability, the court cannot adjudicate the matter as it is within administrative decision-making. In *Peguam Negara Malaysia v Chin Chee Kow* [2019] 3 MLJ 443, the Federal Court had listed down several non-justiciable issues, such as the jurisdiction of the Federal Government in governing international affairs, including concluding international agreements, security of sovereign, pardon in criminal law and Parliament's dissolution and appointment of members of Cabinet. At the same time, (2) the court does not have jurisdiction if the decision made by a public administration is not amenable to judicial review, as the purpose of judicial review is solely to remedy cases that have substantial public law elements. If the case predominately involves private law issues, it must be commenced in the originating process mechanism like Writ of Summons or Originating summons. In relation, the court has the discretion to dismiss the leave application if there is a possibility that (3) there is an alternative remedy that is more convenient for the applicant to take rather than the judicial review process or (4) the case is frivolous or vexatious which does not stand a chance the relief to be granted even the court allows the leave application. Once the leave is allowed, the court will set a date for an *inter parte* hearing to determine the case's full merit, i.e., whether the respondent's decision is *ultra vires*. At this stage, the court will have to decide whether the decision made by the respondent is indeed unlawful, and the burden of proof lies on the applicant to convince the court it entitles to the relief sought. The issue of whether the decision made by the respondent is *ultra vires* is generally a mixed question of law and fact. The court needs to satisfy that the decision falls into either four grounds:

- a) Unconstitutional: there are three situations, (a) the primary legislation is *ultra vires* to the Federal Constitution (*Semenyih Jaya Sdn Bhd v Pentadbir Tanah Hulu Langat*, [2017] 3 MLJ 561), (b) subsidiary legislation is *ultra vires* to the Federal Constitution (*Majlis Perbandaran Seberang Perai v Muziadi Mukhtar*, [2020] 1 MLJ 141), and (c) decision by the administration is *ultra vires* to the Federal Constitution (*Indira Gandhi v Pengarah Jabatan Agama Islam Perak*, [2018] 1 MLJ 545). The essence of this jurisdiction is based on Article 4 (1) of the Federal Constitution, which makes the Constitution the supreme law of this Federation and any law that inconsistency with the Constitution shall be invalid;
- b) Subsidiary legislation is inconsistent with the Act of Parliament: there are two situations; the power given in the subsidiary legislation is beyond what is allowed by (a) the parent act (*Ang Ming Lee v Menteri Kesejahteraan Bandar* [2020] 1 MLJ 281) or (b) other acts of Parliament (*Sia Cheng Soon v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753);
- c) Exceed express or implied power or duty: The public administration decision must be based on express or implied power and duty. Therefore, the public administration must not exceed

its power (Minister of Labour v National Union of Journalists [1991] 1 MLJ 24) or neglect its duty (Malayan Banking v Association of Bank Officers [1988] 3 MLJ 204) in exercising its discretion. Duty refers to the requirement that the public administration must follow, while power means the basis for making decisions. The power or duty of public administration can be found in five sources; Federal Constitution, primary legislation, subsidiary legislation, common law and Court decisions; or

- d) Act of Parliament conflicts with other Act of Parliament: There is also unusual circumstances in which the administration relies on the Act of Parliament may be inconsistent with other Act of Parliament. If that happens, two doctrines will be applicable (a) *generalia specialibus non derogant*; the provisions of the special law will prevail over the provisions of the general law (Perwaja Steel v Majlis Daerah Kemaman [1994] 3 MLJ 15 & Tie Dee Kheng v Unit Keselamatan dan Penguatkuasaan Negeri, [2020] 11 MLJ 199) & (b) doctrine of harmonious construction which the court will attempt to reconcile provisions that seem in conflict to other & interpret them in such a way that effect is given to both provisions as much as possible (Majlis Perbandaran Seberang Perai v Muziadi Mukhtar, 2020).

One of the contentious issues in judicial review proceedings is whether the public administration is required to make a reasoned decision; that is, the duty to provide and communicate a reason for its decision to the applicant. Under common law, the duty is subject to exceptional circumstances. Meanwhile, in Malaysian administrative law, several cases demonstrate a flexible approach to the imposition of a duty to make reasoned decisions, an aberration from the common law position. This article will further explain the discussion between English and Malaysian positions.

Reasoned Decision: Position in the Common Law

It is trite law for public administration is not required to give a reasoned decision unless the statute requires it, like Section 10 of the Tribunals and Inquiries Act 1992. The reason lies in the fundamental principle of English constitutional law, Parliamentary sovereignty, that is, 'Parliament has the right to make or unmake any law whatsoever; and further, no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament' (Lester, 1984). This proposition has been emphasised since the 19th – 21st century by decisions in King v Bishop of London (1811) 104 ER 433, Allcroft v Lord Bishop of London [1891] AC 666, Minister of National Revenue v Wrights' Canadian Ropes [1947] AC 109, Rey v Government of Switzerland [1999] 1 AC 54 and further, confirmed in literature like Burnett (1983), Antoine (1992) & Boughey (2021).

Nevertheless, the common law cases provide several exceptional circumstances, and the leading principle is based on the House of Lords' decision in Padfield v Minister of Agriculture [1968] AC 997. In this case, several milk producers referred a complaint to the Minister of Agriculture, Fisheries and Food as the milk marketing scheme introduced by the Milk Marketing Board is economically disadvantaged to them. The Agricultural Marketing Act 1958, the subject matter of this case, empowered the Minister to establish a committee of investigation for any complaint made to the Minister regarding the operation of any scheme. The Minister refused to refer the matter to the Committee on two grounds the complaint was not suitable for such investigation, and the Minister had unfettered discretion to determine whether to refer the complaint before the Committee of investigation. The court held that while there is no general duty imposed by the Agricultural Marketing Act 1958 for the Minister to provide his reasoned decision, his decision can be scrutinised before the court if his decision is unlawful, i.e. against the statute's object. The decision in Padfield provides two footholds. First, there is a duty to give reasoned decisions if the public administration's decision is unlawful, i.e. departs from its statutory duty. The duty can be derived from an express provision or the statute's object. Second, an unreasoned decision will create an adverse inference against the Minister if the complaint is within the law's limit. In Padfield's case, by reading Sections 19 (3) and (6) of the Agricultural Marketing Act 1958 and the purpose of the Agricultural Marketing Act 1958, this statute was enacted as a safeguard to protect the interest of producers as they were compelled to sell their commodities in a way to which they objected. Therefore, if the statute allows

the aggrieved person to complain, the Minister is responsible for investigating the scheme if it is contrary to the interests of any persons affected and is not in the public interest.

Nonetheless, the English Court was slow to develop Padfield's case as a landmark principle for the duty to give reasoned decisions. It had been curtailed by decisions like *Breen v Amalgamated Engineering Union* [1971] 2 QB 175 ("*Breen v Amalgamated*") and *Lonrho v Secretary of State* [1989] 1 WLR 525. Even decisions aftermath Padfield like *GEC v Price Commission* [1975] ICR 1 & *Ex p Huddleston* [1986] 2 All ER 941, which emphasise the relationship between a good administration and the requirement to give a reason, does not become a ratio decidendi judgment among the English Court. Because there is a presumption under common law, the administrative decision is in good faith unless proven otherwise. Therefore, an unreasoned decision per se cannot be regarded as unlawful unless proved otherwise (Robertshaw, 1998). The applicant had an utmost burden to prove the decision was unlawful since the administration controls the relevant information when it exercises its discretion for that decision. The English Court cautiously recognises the duty in exceptional circumstances, and this can be explained for several grounds:

- a) Fairness: fairness is the fundamental principle in recognising the duty to give a reasoned decision in English administrative law (Craig, 1994). Several cases, like *Ex p Doody* [1994] 1 AC 531 and *R v Dover District Council* [2017] UKSC 79, highlighted the relationship between the concept of fairness and the duty to give a reasoned decision by the highest court. In *Ex p Doody*, the principle of fairness concerning the duty to give a reasoned decision may be summarised as follows. First, there is a presumption that the administration acted reasonably in exercising discretion. Therefore, the burden of proof lies on the applicant to prove the existence of unfairness done by the administration.

Nevertheless, in exceptional circumstances, the duty to make a reasoned decision may arise if the person has the right to make a representation or lodge a complaint and the application has been rejected without any basis. Without communicating the reason for the decision, it will defeat the statute's object and curtails the person's liberty, allowing such procedural rules. In this case, the imprisonment sentences fixed by the Home Secretary were arbitrary. Therefore, Home Secretary should allow convicted people to make written representation and provide relevant information before imposing the length of the imprisonment. In *R v Dover District Council*, the issue, in this case, concerns the duty of the local planning authority to give a reasoned decision as its decision contraries the recommendation made by the planning officers and Area of Outstanding Natural Beauty policy. The court held that the express statutory requirement to give a reason, coupled with the principles of fairness, open justice and transparency, requires the local planning authority to disclose the reason since it departs from the statutory duty, policy and officers' recommendations.

- b) Right of appeal: the general rule is that there is a duty for a judge to give reason to the judgment if there is an appeal (*English v Emery Reimbold* [2002] EWCA Civ 605). Premise on that principle, the English Court had equated the duty to give reasoned decision if there is a right for an appeal with the statutory right for a judicial review intervention (*Oakley v South Cambridgeshire* [2017] 1 WLR 3765). There are three reasons for imposing the duty (1) the parties of the case, especially the potential appellant, will know the exact reason for the court decision and allow them to determine the next step after the conclusion of the proceeding, (2) allowing the appellate court to determine the merit of appeal since the appellate court will not know whether there is an error unless the trial court provides the reasons for the judgment and (3) to maintain public confidence to the judiciary or otherwise, an unreasoned decision will lead to a perception that the decision is arbitrary (Ho, 2000).

This analogy was successfully applied in *Stefan v General Medical Council* [1999] 1 WLR 1293. In this case, Dr Stefan had been suspended by the General Medical Council Health Committee ("*Committee*") on a health-related issue. However, the Committee had not sufficiently explained the exact reason for the suspension, citing that no express statutory duty was imposed on the Committee. The court in holding that there is a duty based on four grounds (1) there is a right to appeal the Committee's decision; therefore, a sufficient reasoned

decision will assist the court in determining the legality of the decision that has been made, (2) the judicial character of the Committee in determining the validity of allegation against Dr Stefan is similar with the court which recognises the right for hearing and provide evidence, (3) the Committee decision fundamentally curtails the right of work; therefore, a sufficient reasoned decision will be appropriate and (4) there is a proof that the suspension is not supported by conclusive evidence.

- c) Judicial character: several cases like *Ex parte Khan* [1983] QB 790 and *Ex parte Cunningham* [1992] ICR 816 equates the duty to give a reasoned decision if the statute confers the administration to exercise its discretion with a court proceeding which gives a platform for an aggrieved party to provide explanation and evidence. In *Ex parte Khan*, the applicant, a citizen of Pakistan, applied to be registered as a citizen of the United Kingdom. Still, unfortunately for him, the Secretary of State served him a deportation order on suspicion that his marriage with its citizen was to avoid immigration law. The applicant filed an appeal before Immigration Appeal Tribunal but has been dismissed. However, the Immigration Appeal Tribunal fails to explain explicitly in the findings the grounds to support the allegation that the applicant had no intention of living permanently with his wife. The court held that there is a duty to give a reasoned decision as, in this case, there is no sufficient evidence to show that the solemnisation is a marriage of convenience. The basis for this argument is illustrated in *Ex parte Cunningham*, in which the court ruled that the principles of natural justice embodied the procedural safeguards for any entity that exercises judicial function under common law. Therefore, a failure to give a reasoned decision will lead to being susceptible to a challenge, especially if it is proved that the decision has not been supported by relevant assessment. In this case, the Civil Service Appeal Board fails to justify the low compensation rate for an unfair dismissal decision against the applicant compared to other unfair dismissal reported cases.
- d) Legitimate expectation: the doctrine of legitimate expectation was first introduced in *Schmidt v Secretary of State* [1969] 2 Ch 149 concerning several foreign national students at the College of Scientology, which the British government refused to allow an extension of stay to continue their studies. In this case, the court held that a foreign national has no right or interest to stay in Britain as it is within the government's prerogative to allow any foreign national to enter the country. Therefore, the foreigner does not have a legitimate expectation of being reasonably entitled to a particular interest and refuses without reasons given and a hearing to submit a representation.

Under common law, sources of legitimate expectation can be excerpted from two (a) the principles of natural justice and (b) any representation, practice or policy made by members of the administration (Caldwell, 1983). Concerning the duty to give a reasoned decision, one of the English cases that illustrated the duty is based on *R v Newham London Borough Council* [2002] 1 WLR 237. The fact of the case is that in the 1990s, the council had promised refugee applicants to assist them in securing a place of living within 18 months under the wrongly believed requirement under the law. Subsequently, in a different and unrelated case, the House of Lords, Britain's highest Court, held that no such duty existed to any council. However, the council continues to provide the applicants with temporary accommodation. It was held that the council is obliged to find suitable housing as applicants have legitimate expectations premised on that promise and subsequent conduct of the council. The court further states that the council should give a reason if it chooses to depart from its promise; in this case, it fails to do so.

- e) Human rights: Since the incorporation of the European Convention on Human Rights ("ECHR") into English domestic law, the Human Rights Act 1998 has been widely used for judicial review proceedings if there is a breach of fundamental liberty committed by public administration (Fordham, 2020). For instance, in *Anya v University of Oxford* [2001] EWCA Civ 405, the court held that Article 6 of ECHR requires "judicial tribunals to take into account, to the effect that adequate and intelligible reasons must be given for judicial

decisions." In this case, the Employment Tribunal had not sufficiently assessed its findings on the subject matter of the case, therefore, violating the right to a fair trial.

Reasoned Decision: Position in the Malaysian Law

Initially, the Malaysian court reluctantly recognised the duty to give a reasoned decision, as demonstrated by various appellate cases like *Minister of Labour v Chan Meng Yuen* [1992] 2 MLJ 337, *Tai Choi Yu v Malaysia* [1994] 1 MLJ 677, *Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72, *Mohd Daud Mahmud* [2009] 3 CLJ 144 & *Alcatel-Lucent* (2017). Two cases illustrated the proposition. First, in *Chan Meng Yuen*, the subject matter concerns the discretionary power given to the Minister of Labour to refer the dismissal case before the Industrial Court. In this case, the Minister refuses to refer the case and does not provide his reasoning, citing that the statute does not force him to do so. The court ruled that the court cannot compel the Minister to give a reason unless the statute expressly requires it.

Moreover, the court could not infer that the Minister's decision was illegal based on the evidence presented. Another case is *Alcatel-Lucent* (2017), which involves the issue of whether the Inland Revenue Board ("IRB") is under the duty to give a reason for imposing the withholding tax. Similar to *Chan Meng Yuen*'s case, it was held that the court could not force IRB to give a reason since there is no express duty in the statute. It was further held that the IRB acts in good faith by furnishing documents during negotiations to support the imposition of withholding tax. In both *Chan Meng Yuen* and *Alcatel-Lucent*, the courts do not overrule that there is a possibility a duty can be imposed against public administration depending on the factual matrix of the case since, in both cases, it was argued before the court that the failure to give reason implies the decision is illegal. Therefore, it is unlikely for the court to declare the existence of duty unless evidence supports the allegation. Thus, the courts' approaches are similar to the common law principle in *Padfield's* case, as the court will only compel the administration to give a reason if there is evidence of unlawfulness by the administration.

The duty to give a reasoned decision was first recognised in the High Court case of *Rohana Ariffin v Universiti Sains Malaysia* [1989] 1 MLJ 487. In that case, the applicants were lecturers found guilty of offences under *Universiti Sains Malaysia (Discipline of Staff) Rules 1979*. It was held that there was an academician's right to know the basis for a disciplinary decision that had been imposed. However, these findings were based on the minority common law decision in *Breen v Amalgamated*.

Nevertheless, even since the decisions by *R Rama Chandran v Industrial Court* [1997] 1 MLJ 145 ("*R Rama Chandran*"), which changed the fundamental of Malaysian administrative law from the principle that the court will only interfere if the decision is indeed unlawful to expand the jurisdiction of judicial review by allowing the court to examine the facts surrounding the merit of a case, the court had been revolutionised to impose a duty to give a reason on the public administration without hesitation by combining the principle under the common law and *R Rama Chandran*. This statement can be evident in several cases, like as *Pembinaan Batu Jaya v Pengarah Tanah dan Galian, Selangor* [2016] 2 MLJ 495, *Mohamad Hassan Zakaria v UTM* [2017] 6 MLJ 586, *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank v Kesatuan Kebangsaan Pekerja-Pekerja Bank* [2018] 2 MLJ 590, *Nazrul Imran Mohd Nor v Civil Service Commission* [2021] 6 MLJ 750, *Uniqlo v Ketua Pengarah Kastam & Eksais* [2021] 2 MLJ 120 and in recent case in *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises* [2023] 3 MLJ 829. This position deviates from the common law position, in which the English Court is reluctant to impose the duty unless it falls under exceptional circumstances.

First, in *Pembinaan Batu Jaya*, the issue is whether the Selangor State Authority has to give a reason for the land ownership application. In this case, the Selangor state authority approves the applicant's land ownership application. Several years later, the Selangor state authority revoked the permission for ownership, arguing that they were entitled to do so since the applicant's name had yet registered in the title document. The court held that there is a duty to give a reason as it is unfair to deprive the applicant's interest as it is on the verge of completing the land process. Second is the case of *Mohamad Hassan Zakaria*. The appellant is an associate professor of the respondent's university

and decided to retire early. The respondent rejected his application despite being supported by the faculty and management committee. The applicant had successfully argued as the court held that there is an implied duty to give the reason for the rejection, given that the respondent provides an option to retire early to its employee. Therefore, depriving his right to submit the retirement application without justification is unfair.

Third is Uniqlo's case, in which the subject matter is the application for a special refund of sales tax rejected by the government. The applicant contends that the government requires to give a reason for the refusal since it complies with the refund process and is supported by an audit certificate which is unchallenged on its accuracy by the government. It was held that there is an implied duty to give reason since the statute that imposes the tax, the Goods and Services Tax Act 2014, gives any business a platform, including the applicant, to claim a special refund. Therefore, an outright rejection should be disallowed as the rejection without any basis will deprive the applicant's procedural rights guaranteed by the statute.

Lastly, in Perbadanan Pengurusan Trellises concerning whether there is a requirement for Datuk Bandar Kuala Lumpur to give a reasoned decision for its Development Order as the said Order is contraried to KL Structure Plan and the Draft KL Local Plan. The Federal Court held that there is a duty to give a written reasoned decision if the Development Order deviates from KL Structure Plan and the Draft KL Local Plan. The reason is that those plans are statutory creatures as the public approved the said Plans under Federal Territory (Planning) Act 1982. Therefore, any attempt to deviate from those plans will render the object of the said Act futile, which recognise the right of public participation.

Conclusion

Under common law, there is no general duty to the public administration to give a reason for the decision that has been refused. However, the court will only impose such a duty in exceptional circumstances if the applicant successfully invokes the common law doctrines like fairness and legitimate expectation or if there are issues such as the applicant has the right to appeal, the process of administration in making decision akin to judicial function or human right issue. However, the Malaysian Court's approach is different as it has leeway in recognising the duty, as the decision in the R Rama Chandran case allows the court to examine the factual matrix of the case in the judicial review. It can be evident by several Malaysian cases that rely upon the R Rama Chandran principle in forcing the administration to justify the decision instead of common law principles alone.

Conflict of Interests

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

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