Malayan Law Journal Reports/2011/Volume 6/Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim - [2011] 6 MLJ 490 - 13 September 2011

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[2011] **6 MLJ 490**

Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim

FEDERAL COURT (PUTRAJAYA)
ZULKEFLI, RAUS SHARIF AND ABDULL HAMID EMBONG FCJJ
CIVIL APPEAL NOS 01(i)-1 OF 2011(W), 01(i)-2 OF 2011(W) AND 01(i)-3 OF 2011(W)
13 September 2011

Administrative Law -- Judicial review -- Application for -- Application to review decision of Commission of Enquiry set up by government under s 2 of the commission of enquiry Act 1950 -- Whether findings of commission amenable to judicial review -- Whether Commission was decision making body -- Whether commission made legal decision -- Whether Commission's report consisting of findings and recommendations binding on respondents -- Whether respondents' legal rights directly affected by findings -- Whether findings and recommendations of Commission came within ambit of O 53 of the Rules of the High Court 1980

On 19 September 2007, a video clip recording containing a controversial material relating to the judiciary surfaced on the internet. It depicted images of a person engaged in a telephone conversation relating to the appointment of judges. The government thus set up a Commission pursuant to s 2 of the Commission of Enquiry Act 1950 ('Act 119') to, inter alia, enquire and ascertain the authenticity of the video clip, to identify the parties involved and to ascertain the truth or otherwise of the content of the conversation in the video clip. The Commission was also supposed to determine whether any act of misbehaviour had been committed by person(s) mentioned in the video clip and to recommend any appropriate course of action to be taken against them. The respondents were among those summoned to give evidence before the Commission. The Commission later submitted its report which was made available to the public. The respondents claimed that they are aggrieved by the findings of the Commission. They therefore applied for leave for an order of certiorari to quash those findings of the Commission which implicated them. They claimed that the findings of the Commission were tainted due to bias and prejudice and those findings were contrary to the principle of law. The attorney general objected to the applications on the ground, inter alia, that what the respondents sought to quash was not a decision within the ambit of O 53 r 2(4) of the Rules of the High Court 1980 ('RHC') but was the collective findings of the Commission. It was contended that the respondents could not be construed as persons 'adversely affected' by the Commission's findings. The

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High Court judge upheld the objection by the attorney general and dismissed all the applications with costs. The respondents' appeal to the Court of Appeal against that decision was allowed. Hence this appeal. The issue which arose for determination was whether the findings of the Commission of Enquiry pursuant to s 3 of Act 119 is reviewable under O 53 of the RHC.

Held, allowing the appeal with no order as to costs here and courts below:

(1) A person who is adversely affected by the decision of a public authority can apply for a judicial

review of that decision. At the leave stage, the threshold for the granting of such leave is very low. Leave is normally granted if the application is neither frivolous nor vexatious and it justifies further argument on a substantive motion. The question is, do the issues raised by the respondents justify further argument on a substantive motion (see para 20).

(2) It is trite law that the purpose of an order for certiorari is to quash the legal effect of a decision. Under the scheme of O 53 of the RHC, only a person adversely affected by the decision of a public authority shall be entitled to apply for judicial review. In the present case, the Commission was a public authority but was not a decision making body. The Commission did not make legal decision. The Commission's report consisted of findings and recommendations of the Commission on the terms of reference entrusted upon them. Being mere findings and recommendations, it did not bind the respondents, not even the government. Such findings were not reviewable as the respondents' legal rights were not directly affected by the findings or that the benefit they have been permitted to enjoy had not been deprived of. Clearly, the Commission's findings had not affected their legal rights and it therefore was not amenable to judicial review. Thus, the findings and recommendations of the Commission did not come within the ambit of O 53 of the RHC (see para 26-27 & 29).

(3) There is a strong policy consideration that it is against public interest to allow the findings of the Commission to be challenged in courts. The findings of any Commission established under Act 119 shall not be subjected to judicial review. If the proceedings of the Commission are allowed to be challenged either at the outset or during its continuance by prohibition or at its conclusion by certiorari, its purpose will come to naught. It will make the setting up of the Commission a meaningless exercise, and also a waste of public fund. Hence, it would be against public policy to subject the findings and recommendations of the Commission to judicial review (see para 41).

(4) The question posed was answered in the negative. The findings of the Commission of Enquiry under s 3 of Act 119 is not reviewable under O 53 of the RHC (see para 45).

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Pada 19 September 2007, satu rakaman video klip mengandungi perkara kontroversi berhubung kehakiman muncul di internet. Klip tersebut memaparkan imej seorang lelaki yang terlibat di dalam satu perbualan telefon berhubung perlantikan hakim-hakim. Kerajaan dengan itu menubuhkan Suruhanjaya menurut s 2 Akta Suruhanjaya Penyiasatan 1950 ('Akta 119') bagi, antara lainnya, menyelidik dan memastikan kesahihan video klip tersebut, untuk mengenalpasti pihak-pihak yang terlibat dan memastikan kebenaran kandungan perbualan di dalam video klip tersebut atau sebaliknya. Suruhanjaya juga sepatutnya menentukan sama ada terdapat sebarang salahlaku dilakukan oleh orang yang disebut di dalam video klip tersebut dan mencadangkan tindakan yang seharusnya diambil terhadap mereka. Responden-responden adalah di antara mereka yang dipanggil untuk memberikan keterangan di hadapan Suruhanjaya. Suruhanjaya kemudiannya mengemukakan laporan mereka kepada masyarakat umum. Responden-responden mendakwa bahawa mereka terkilan dengan dapatan-dapatan Suruhanjaya. Oleh itu, mereka memohon kebenaran untuk satu perintah certiorari untuk membatalkan dapatan-dapatan Suruhanjaya yang mengaitkan mereka. Mereka mendakwa bahawa dapatan-dapatan Suruhanjaya tersebut tercemar dengan sikap berat sebelah dan prejudis dan dapatan-dapatan tersebut bercanggah dengan prinsip undang-undang. Peguam negara membantah permohonan-permohonan tersebut atas alasan bahawa apa yang dituntut oleh responden-responden untuk dibatalkan bukanlah keputusan yang terangkum di bawah A 53 k 2(4) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') tetapi dapatan-dapatan kolektif Suruhanjaya. Peguam negara menghujah bahawa responden-responden tidak boleh ditafsirkan sebagai seseorang yang dimudaratkan oleh dapatan-dapatan Suruhanjaya. Hakim Mahkamah Tinggi menyokong bantahan Peguam Negara dan menolak semua permohonan dengan kos. Rayuan responden-responden kepada Mahkamah Rayuan dibenarkan. Oleh itu rayuan ini dibuat. Isu yang timbul untuk ditentukan ialah sama ada dapatan-dapatan Suruhanjaya Penyiasatan menurut s 3 Akta 119 boleh disemak semula di bawah A 53 KMT.

Diputuskan, membenarkan rayuan tanpa perintah untuk kos di makamah ini dan makamah-makamah rendah:

(1) Seseorang yang terjejas oleh keputusan pihak berkuasa boleh memohon untuk semakan kehakiman keputusan tersebut. Pada peringkat mendapatkan kebenaran, kemungkinan untuk kebenaran tersebut diberikan adalah tipis. Kebenaran biasanya diberikan sekiranya permohonan tersebut bukanlah remeh atau menyusahkan dan permohonan itu menjustifikasikan hujahan lanjut atas usul penting.

6 MLJ 490 at 493

Persoalannya ialah, adakah isu-isu yang ditimbulkan oleh responden-responden menjustifikasikan hujahan lanjut atas usul penting (lihat perenggan 20).

(2) Undang-undang yang terpakai berkenaan tujuan perintah certiorari ialah bagi membatalkan keputusan tersebut di sisi undang-undang. Di bawah A 53 KMT, hanya orang yang terjejas dengan keputusan pihak berkuasa berhak untuk memohon semakan kehakiman. Di dalam kes ini, Suruhanjaya merupakan pihak berkuasa tetapi bukannya badan yang membuat keputusan. Suruhanjaya tidak membuat keputusan undang-undang. Laporan Suruhanjaya terdiri daripada dapatan-dapatan dan cadangan-cadangan Suruhanjaya mengikut garis-garis panduan yang diberikan kepada mereka. Dapatan-dapatan dan cadangan-cadangan tersebut tidak mengikat responden-responden atau kerajaan. Dapatan tersebut tidak boleh disemak semula memandangkan hak sah mereka tidak dijejaskan secara langsung oleh dapatan-dapatan atau mereka tidak dihalang daripada menikmati manfaat tersebut. Jelas bahawa dapatan Suruhanjaya tidak menjejaskan hak sah mereka dan oleh itu tidak tertakluk kepada semakan kehakiman. Oleh itu, dapatan-dapatan dan cadangan-cadangan Suruhanjaya tidak terangkum di bawah A 53 KMT (lihat perenggan 26-27 & 29).

(3) Terdapat pertimbangan polisi yang kukuh bahawa dengan membenarkan dapatan-dapatan Suruhanjaya dicabar di mahkamah-mahkamah, maka ia akan bertentangan dengan kepentingan awam. Dapatan-dapatan mana-mana Suruhanjaya yang ditubuhkan di bawah Akta 119 tidak tertakluk kepada semakan kehakiman. Sekiranya prosiding-prosiding Suruhanjaya dibenarkan untuk dicabar sama ada pada peringkat permulaan atau semasa ia dijalankan dengan halangan atau pada peringkat kesimpulan dengan certiorari, tujuan Suruhanjaya tersebut ditubuhkan menjadi tidak bererti. Ini menjadikan penubuhan Suruhanjaya sebagai satu tindakan tidak bermakna dan menghabiskan wang rakyat. Oleh itu, mengenakan semakan kehakiman ke atas dapatan-dapatan dan cadangan-cadangan Suruhanjaya adalah bertentangan dengan polisi awam (lihat perenggan 41).

(4) Persoalan yang diutarakan dijawab secara negatif. Dapatan-dapatan Suruhanjaya Penyiasatan di bawah s 3 Akta 119 tidak boleh disemak semula di bawah A 53 KMT (lihat perenggan 45).

Notes:

For cases on application for, see 1(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 254-279.

Cases referred to

Application by Ong Eng Guan for an Order of Prohibition in Re Appointment of SHD Elias, In Re [1959] 1 MLJ 92 (refd)

6 MLJ 490 at 494

Association of Bank Officers, Peninsular Malaysia v Malaysian Commercial Bank Association [1990] 3 MLJ 228, SC (refd)

Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor [1998] 1 MLJ 224, HC (refd)

Chua Ho Ann, Re [1963] MLJ 193 (refd)

Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935, HL (refd)

JP Berthelsen v Director General of Immigration, Malaysia & Ors [1987] 1 MLJ 134, SC (refd)

Mohamed Nordin bin Johan v Attorney-General Malaysia [1983] 1 MLJ 68, FC (refd)

R v Collins; Ex parte Actu Solo Enterprises Pty Ltd (1976) 8 ALR 691, HC

Erebus Royal Commission; Air New Zealand Ltd v Mahon (No 2), Re [1981] 1 NZLR 618, CA (refd)

Tun Dato Haji Mohamed Salleh bin Abas v Tan Sri Dato Abdul Hamid bin Omar & Ors [1988] 3 MLJ 149; [1988] 1 CLJ (Rep) 294, SC (refd)

Legislation referred to

Commission of Enquiry Act 1950 ss 2, 3

Consumer Protection Act 1999

Courts of Judicature Act 1964 s 96, Schedule, Para 1

Housing Development (Control and Licensing) Act 1966

Industrial Relations Act 1967

Inquiry Commissions Ordinance (CAP 52)

Rules of the High Court 1980 O 53, O 53 r 2(4), O 53 rr 3, r (3)1

Singapore Citizenship Ordinance 1957 [SG] s 22

Appeal from: Civil Appeal No W-01--1 of 2009 (Court of Appeal Putrajaya)

Azizah Hj Nawawi (Senior Federal Counsel, Attorney General's Chambers) for the appellant.

Bastion Pius Vendargon (Mahinder Singh Dulku, Muzaffirah Ahmad Fairuz and Fifi Natasya Jamaluddin with him) (Firah & Partners) for the first respondent.

VK Lingam (VK Lingam & Co) for the second respondent.

B Lobo (Hazman Ahmad with him) (Omar Ismail Hazman & Co) for the third respondent.

Raus Sharif FCJ (delivering judgment of the court):

INTRODUCTION

[1] There are three separate appeals before us filed by the attorney general. The appeals were against the decisions of the Court of Appeal dated 28 August 2010. The Court of Appeal, which heard the three appeals together, had by a majority decision allowed the respondents' appeal against the decision of the High Court in refusing respondents' application for leave for judicial review.

6 MLJ 490 at 495

[2] At the High Court the respondents with two others had (by separate applications) sought for leave to apply for an order of certiorari to quash the relevant parts of the report of the Royal Commission of Enquiry ('the Commission') set up pursuant to s 2 of the Commission of Enquiry Act 1950 ('Act 119'). All the five applications were made under O 53 r 3 of the Rules of the High Court 1980 ('the RHC').

[3] On 7 February 2011, this court pursuant to s 96 of the Courts of Judicature Act 1964 ('the CJA') granted the attorney general's application for leave to appeal against the decision of the Court of Appeal on a single question, namely:

Whether the findings of the Commission of Enquiry pursuant to s 3 of the Commission of Enquiry Act 1950 is reviewable under O 53 of the Rules of the High Court 1980.

[4] We heard the three appeals together on 14 June 2011 and it was agreed by all parties that the decision in Appeal No 01(i)-2 of 2011(W) will bind Appeal No 01(i)-1 of 2011(W) and Appeal No 01(i)-3 of 2011(W). The respondent in Appeal No 01(i)-2 of 2011(W) is Dato' Kanalingam a/l Vellupillai, an advocate and solicitor and better known as Dato' VK Lingam. The respondent in Appeal No 01(i)-1 of 2011(W) is Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim, a former Chief Justice. The respondent in Appeal No 01(i)-3 of 2011(W) is Tun Hj Mohd Eusoff bin Chin, also a former Chief Justice.

[5] For the purpose of arguments in these appeals, all the parties agreed that they would be referring to the appeal records of the respondent in Appeal No 01(i)-2 of 2011(W).

BACKGROUND FACTS

[6] The relevant facts and events leading to these appeals are these. On 19 September 2007, a video clip recording containing a controversial material relating to the judiciary surfaced on the internet. It depicted images of a person engaged in a telephone conversation relating to the appointment of judges.

[7] The exposure was indeed explosive. The government on 25 September 2007, as an immediate response, set up an independent panel comprising of three members, namely Tan Sri Dato' Seri Haidar bin Mohamed Noor, Dato' Mahadev Shankar and Tan Sri Dato' Lee Lam Thye, to investigate into the authenticity of the video clip recording. On 6 November 2007, the independent panel submitted its report to the government recommending that a Commission be set up.

6 MLJ 490 at 496

[8] The government agreed with the recommendation and took steps to advice His Majesty the Yang di-Pertuan Agong for the establishment of a Commission. On 17 November 2007, the government announced the setting up of the Commission.

[9] On 12 December 2007, pursuant to s 2 of the Act 119, the Commission was constituted. The members of the Commission appointed were Tan Sri Dato' Seri Haidar bin Mohamed Noor, Tan Sri Datuk Amar Steve Shim Lip Kiong, Dato' Mahadev Shankar, Puan Sri Zaitun Zawiyah bt Puteh and Professor Dato' Dr Khoo Kay Kim. Tan Sri Dato' Seri Haidar bin Mohamed Noor was appointed as the chairman of the Commission. Dato' Abdullah Sani bin Ab Hamid was appointed Secretary to the Commission.

[10] Pursuant to s 3 of the Act 119, the Commission was specified with the subject of enquiry with the following terms of reference:

(a) to enquire and ascertain the authenticity of the video clip;
(b) to enquire and identify the speaker, the person he was speaking to in the video clip and the persons mentioned in the conversation;
(c) to enquire and ascertain the truth or otherwise of the content of the conversation in the video clip;
(d) to determine whether any act of misbehaviour has been committed by person or persons identified or mentioned in the video clip; and
(e) to recommend any appropriate course of action to be taken against the person or persons identified or mentioned in the video clip, should such person or persons be found to have committed any misbehaviour.

[11] The Commission commenced its enquiry by way of a public hearing on 14 January 2008 and concluded its hearing on 15 February 2008. The respondents were among those summoned to give evidence before the Commission.

[12] On 9 May 2008, the Commission submitted its report to the Yang di-Pertuan Agong. The Commission's Report was transmitted to the government who decided to make it available to the public as 20 May 2008.

[13] The respondents claimed that they are aggrieved by the findings of the Commission. They filed their applications for leave for an order of certiorari to quash those findings of the Commission which implicate them. They alleged the findings of the Commission are tainted due to bias and prejudice and those findings were contrary to the principle of law.

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[14] The High Court (on application and agreement of the parties concerned) heard the five applications together. At the hearing of the applications, the senior federal counsel, Datin Azizah Nawawi ('the SFC') who appeared on behalf of the attorney general, objected to the applications on the ground, inter alia, that what the respondents and two others sought to quash was not a decision within the ambit of O 53 r 2(4) of the RHC, but the collective findings of the Commission. She contended that the respondents could not be construed as persons 'adversely affected' by the Commission's findings.

[15] The respondents argued otherwise. They contended that the findings of the Commission are decisions within the ambit of O 53 r 2(4) and had adversely affected them. Alternatively they argued that para 1 of the Schedule to the CJA gave the court wide powers to issue an order of certiorari for any purpose and therefore O 53 r 2(4) of the RHC which purport to limit such right to a 'decision' of public authority was ultra vires. It was also argued the threshold for the granting of leave under O 53 r 3(1) is a low threshold and they should be given their day in court to argue the substantive motion.

[16] The High Court judge upheld the objection by the attorney general and dismissed all the applications with costs. The judgment of the High Court can be found in [2010] 2 CLJ 720. The respondents (separately) appealed against the decision of the High Court judge to the Court of Appeal.

[17] On 28 August 2010, the Court of Appeal, by a majority decision, allowed the respondents' appeals. The respondents, in effect were granted leave to commence a judicial review proceeding to quash the findings of the Commission. The judgment of the Court of Appeal can be found in [2011] 4 AMR 324.

[18] We heard the appeals on 14 June 2011 and adjourned the matter for our decision. We now give our decision and the reasons for the same.

DECISION

[19] The single issue that calls for determination is whether the findings of the Commission is reviewable under O 53 of the RHC. Thus, before dealing further with the matter it would be convenient to reproduce the relevant provisions of O 53:

> 2(1) An application for any of the reliefs specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 (other than an application for an order of habeas corpus) shall be in Form 111A.
>
> *6 MLJ 490 at 498*
>
> (4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.
>
> 3(1) No application under this Order shall be made unless leave therefore has been granted in accordance with this rule.
>
> (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.
>
> (3) 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.

[20] It is clear from the above that a person who is adversely affected by the decision of a public authority can make an application for a judicial review of that decision. But the person must first obtain leave before his substantive motion can be heard. At the leave stage without the need to go into depth of the abundance

of authorities, suffice for us to state that the threshold for the granting of such leave is very low. Leave is normally granted if the application is neither frivolous nor vexatious and it justifies further argument on a substantive motion (see *Association of Bank Officers, Peninsular Malaysia v Malaysian Commercial Bank Association* [1990] 3 MLJ 228, *Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor* [1998] 1 MLJ 224, *Mohamed Nordin bin Johan v Attorney-General Malaysia* [1983] 1 MLJ 68 and *JP Berthelsen v Director General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134).

[21] The question is, do the issues raised by the respondents justify further argument on a substantive motion. The SFC submitted that the answer should be in the negative. She gave two reasons. Firstly, the Commission was merely making findings and not decision and thus not reviewable under O 53 r 2(4) of the RHC. Secondly, it is against public policy to allow the findings of the Commission to be challenged in our courts.

ARE FINDINGS OF THE COMMISSION 'DECISIONS'?

[22] The Commission in their report to the Yang di-Pertuan Agong, presented its executive summary which reads:

> Having considered all the materials before us, that is the testimonies of 21 witnesses, 116 exhibits and 17 statutory declarations including that submissions we are please to summarised our Findings on the Five Terms of Reference herein as follows:
>
> (1) To enquire and ascertain the authenticity of the video clip.
>
> The Commissioners find that the video clip, Ex C7 is authentic.
>
> *6 MLJ 490 at 499*
>
> (2) To enquire and identify the speaker, the person he was speaking to in the video clip and the persons mentioned in the conversation.
>
> The Commissioners find:
> (a) that the person on the phone is Dato' V.K. Lingam;
> (b) that the person to whom he was speaking on the phone is Tun Ahmad Fairuz bin Dato' Sheikh Abdul Halim;
> (c) that the Chinese mentioned in the conversation had ended is Mr Loh Mui Fah; and
> (d) that other person mentioned in the conversation will be identified in the body of the report.
>
> (3) To enquire and ascertain the truth or otherwise of the content of the conversation in the video clip.
>
> The Commissioners find the content of the conversation in the video clip is true in substance and in material particulars.
>
> (4) To determine whether any act of misbehavior has been committed by person or persons identified or mentioned in the video clip.
>
> The Commissioners find sufficient evidence of misbehavior on the part of certain individuals or personalities identified or mentioned in the video clip. In this connection, we refer to the body of the report.
>
> (5) To recommend any appropriate cause of action to be taken against the person or persons identified or mentioned in the video clip, should such person or persons be found to have committed any misbehaviour.
>
> The Commissioners find sufficient cause to invoke the Sedition Act 1948, the Legal Profession Act 1976, the Official Secrets Act 1972 and the Penal Code against the various individuals mentioned in the video clip which we have elaborated in the Report. We do not discount the possibility of other laws being contravened. We leave it to the Attorney General, Malaysia and the Malaysian Bar Council to take the appropriate actions against the personalities implicated. Additionally, we are proposing to the Government for the necessary reforms including the establishment of a Judicial Appointments Commission.

[23] Dato' VK Lingam submitted that the findings of the Commission as contained in the report submitted to the Yang di-Pertuan Agong which was published and made available to the public are clearly 'decisions' under O 53 r 2(4) of the RHC. He argued that the words 'to enquire and ascertain', 'to enquire and identify', 'to determine' and 'to recommend' in the five terms of reference denote that the Commission is required to

make decisions. According to him, under the five terms of reference the Commission had a choice to decide one way or the other. For example, they were entitled to decide that the video clip was authentic or not authentic. They could decide that the contents of the video clip were true or they were not true. They also had a choice to decide that there was misbehavior or no misbehavior on the other

6 MLJ 490 at 500

individuals named. Therefore, the Commission had a choice and they settled on one choice based on their assessment of the evidence and that amount to a decision. Further Dato' VK Lingam submitted that the words 'find', 'conclusion' and 'we hold' used by the Commission in their findings to the five terms of reference, also denote that the Commission was making 'decisions'.

[24] Dato' VK Lingam submitted further that the findings of the Commission are in fact 'decisions' and the findings and/or decisions that he had committed criminal misbehavior is a grave attack on his reputation and his reputation has been gravely tarnished and injured. Therefore, he argued that he is a person who is adversely affected by the 'decisions' of the Commission within the meaning of O 53 r 2(4) of the RHC. Accordingly, he argued that the majority decision of the Court of Appeal was right in allowing his application for leave for judicial review.

[25] Dato' Bastian Pius Vendargon and Mr Lobo representing Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim and Tun Hj Mohd Eusoff bin Chin respectively, also argued along the same line as that of Dato' VK Lingam. They are also saying that the findings of the Commission are in fact decisions within the meaning of O 53 r 2(4) of the RHC and their clients were adversely affected by the decisions. They also argued that their clients should be given their day in court to submit on the substantive motion.

[26] It is trite law that the purpose of an order for certiorari is to quash the legal effect of a decision. In England, in the case of *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935 the House of Lords held that for a decision to be susceptible to the court's reviewing powers, there must first be a decision by a decision maker or a refusal by him to make a decision, and, that decision must affect the aggrieved party by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy.

[27] We adopt the same view. Under the scheme of O 53 of the RHC, only a person adversely affected by the decision of a public authority shall be entitled to make the application for judicial review. In the present case, there is no dispute that the Commission is a public authority. But we are of the view that the Commission is not a decision making body. A closer look at the Commission's report will reveal that the Commission does not make legal decision. The report consists of findings and recommendations of the Commission on the five terms of reference entrusted upon them to do. Being mere findings and recommendations, it do not bind the respondents, not even the government.

[28] No doubt in the present case the Commission had made strong findings

6 MLJ 490 at 501

that there are 'sufficient cause to invoke the Sedition Act 1972 and the Penal Code against various individuals mentioned in the video clip' which implicate the respondents, but such findings remain mere findings. Such findings are not reviewable as the respondents' legal rights are not directly affected by the findings or that the benefit they have been permitted to enjoy had not been deprived of.

[29] Thus, in Dato' VK Lingam's case here, despite the Commission's findings that he had committed criminal misbehaviour, his status as an advocate and solicitor is intact. The fact that he is appearing before us is a clear testimony that his legal rights has not been adversely affected. Similarly, for Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim and Tun Hj Mohd Yusoff bin Chin, it is not shown to us that they have been deprived of the benefit which they had been permitted to enjoy before. Clearly, the Commission's findings had not affected their legal rights and it therefore not amenable to judicial review.

[30] A similar stand was taken in Australia In *R v Collins; Ex parte Actu Solo Enterprises Pty Ltd* (1976) 8 ALR 691, the High Court held that the report of a Royal Commission appointed to inquire into the production of refining and marketing and pricing in Australia of petroleum products are not amenable to judicial review.

[31] In that case, the applicant sought an order nisi for certiorari to quash the report of the Commission on the grounds (1) that the conclusion were incorrect and there was no evidence before the Commission from which they could reasonably have been reached; (2) that the contents of the Appendix IV of the Commission's report were incorrect and the applicant was afforded no opportunity of learning of such contents, or of contesting their accuracy, before the report was published; and (3) that the Commission departed from its terms of reference.

[32] Stephen J after examining the nature of the reporting function of the Royal Commission concluded at p 695:

> The instant Royal Commission is just such a mere commission of inquiry and report, its compulsive powers it derives from Commonwealth statute law, and they are not under challenge. The reported conclusions of the Commission no doubt serve to inform the mind of government and may in consequence, to a greater or lesser extent, be instrumental in shaping the course of future legislative or executive initiatives, but they neither directly determine, or of their own force affect, rights nor does the reporting of particular conclusions satisfy some condition precedent to the exercise of power which will in turn affect rights or otherwise give rise to legal consequences.

6 MLJ 490 at 502

[33] Further at p 699, Stephen J concluded:

> Whatever may be the tenor of the Commission's report, it will not legally affect the rights of the applicant; with or without such a report, and even, no doubt, in direct opposition to any recommendations in it, the Minister might, in his absolute discretion, take action affecting the applicant's crude oil entitlements, or might decide to take no action at all. Accordingly, the nature of the Commission's report neither directly affects nor in any way subjects to a new hazard the rights of the applicant; the hazard of ministerial intervention has always been present and it is only the degree of likelihood of that intervention occurring in a sense adverse to the applicant's interests which is increased by the actual nature of the Commission's recommendation. That cannot, in my view suffice to justify curial intervention, by means of certiorari, in the case of a Royal Commission whose sole function is to inquire and report to the executive the result of its inquiries, whose mode of conducting its inquiry is entirely unfettered, either by statute or by executive direction, and whose report neither directly affects rights nor is a condition precedent to the affecting of them.

[34] We wish to point out that the Royal Commission in *R v Collins* in its report had also made a strong finding against the applicant stating that the applicant 'deliberately deceived the Minister for Minerals, thereby inducing him to raise no objection to the transaction'. But the Australian High Court held that such findings have no legal effect or binding force on the applicant and thus not amenable to judicial review.

[35] A similar stand was also taken in Singapore. Buttrose J in *Re Chua Ho Ann* [1963] MLJ 193 held that the order of prohibition does not lie against the Committee of Inquiry established under s 22 of the Singapore Citizenship Ordinance 1957. At p 194, Buttrose J said:

> The committee is a fact finding committee. Its function is to inquire into and investigate the facts and convey information thereon to the Minister. It is not required to make recommendations. It makes no decision on the result of its findings which have no legal or binding force, affect no rights and impose neither liabilities nor obligations.
>
> The Minister in only required to have regard to the committee's report in making his order but having done so it is open to him to refrain from acting on any advice tendered in it. It is to the minister and the minister alone that the decision to deprive a person of his citizenship is entrusted. The committee of inquiry is merely conducting a factual investigation on behalf of the Minister in an advisory capacity.

[36] Back home, we have the case of *Tun Dato Haji Mohamed Salleh bin Abas v Tan Sri Dato Abdul Hamid bin Omar & Ors* [1988] 3 MLJ 149; [1988] 1 CLJ (Rep) 294, where Hashim Yeop Sani SCJ (as he then was) at p 297 said:

6 MLJ 490 at 503

> The function of the tribunal appointed under art 125(3) of the Constitution is to enquire and investigate on the representation and then report to the Yang di-Pertuan Agong with any recommendation it may make. The tribunal is a body which investigates and does not decide. It is performing a constitutional function. The tribunal should not therefore be restrained from performing its constitutional function.

[37] It can be seen from the above cases that the findings of a Commission of Inquiry with no legal authority to determine the question affecting the right of the subject, are not amenable to judicial review. As such we are unable to subscribe to the arguments by Dato' VK Lingam that the Commission established under Act 119 is just like any other inferior tribunals such as tribunals established under the Industrial Relations Act 1967, Consumer Protection Act 1999 and Housing Development (Control and Licensing) Act 1966, where their decisions are always subjected to judicial review.

[38] We wish to point out that the decisions of those tribunals are amenable to judicial review because the decisions made are legal decisions. For instance, the Industrial Court established under the Industrial Relation Act 1967, in a constructive dismissal's case, has to make decision whether an employee is constructively dismissed by the employer or otherwise. If the Industrial Court decides in favour of the employee, the employer will be the aggrieved person following the decision of the Industrial Court. This is because the consequences of the order would be either the employer has to reinstate the employee or pay the employee compensation in lieu of reinstatement. In that way, the Industrial Court makes a legal and binding decision.

[39] Nevertheless that does not happen in our case. The Commission merely investigates and does not decide. Its findings and recommendations are not binding on anybody, not even the government. Thus, we hold that the findings and recommendations of the Commission do not come within the ambit of O 53 of the RHC. In this respect, we agree with the minority decision of the Court of Appeal in upholding the decision of the learned High Court judge that there was no inconsistency between O 53 r 2(4) of the RHC and para 1 of the Schedule to the CJA. The word 'decision' in O 53 r 2(4) do not run foul of para 1 of the Schedule to the CJA and thus not ultra vires.

[40] In light of the above, we are not able to agree with the majority decision of the Court of Appeal that the determination of whether the findings and recommendations of the Commission constitute 'decisions' within the ambit of O 53 r 2(4) should be taken up at the hearing of the substantive motion. We are of the view that there is no necessity to grant the application for leave on this ground when at the leave stage it can clearly be determined that the findings and recommendations of the Commission are not legal decisions that affect the

rights of the respondents as envisaged under O 53 r 2(4) of the RHC. On this ground alone, the appeals should be allowed.

PUBLIC INTEREST

[41] But there is another more important reason. We are of the view that there is a strong policy consideration that it is against public interest to allow the findings of the Commission to be challenged in our courts. This was recognized by Rose CJ many years ago in *In Re Application by Ong Eng Guan for an Order of Prohibition in Re Appointment of SHD Elias* [1959] MLJ 92. In that case, it was the application was for an order of prohibition to restrain a Commissioner appointed under the Inquiry Commissions Ordinance on the ground that he was biased. The attorney general raised a preliminary objection, inter alia, that the writ of prohibition did not lie against a Commissioner appointed under the Inquiry Commissions Ordinance. The court upheld the preliminary objection. CJ Rose in discussing the issue whether the findings of the Commission of Inquiry is amenable to judicial review held:

> In various countries of the Commonwealth during the last 30 or 40 years there must have been many Commissions of Inquiry appointed but no authority was cited to me -- and I myself have been able to find none -- which indicates that either the writ of prohibition or the writ of certiorari has been held to lie. This seems to me to be significant in that one of the more common grounds upon which certiorari is claimed is that the tribunal has exceeded its jurisdiction. Now, one of the most common criticisms directed against reports of Commissions of Inquiry in various territories has been that the Commission in its report has gone outside its terms of reference. Again and again such criticisms have been made in the appropriate Legislative Assemblies but in no case has any interested party, so far as the law reports demonstrate, had recourse to certiorari.
>
> It seems to me that a clear inference is to be drawn from this. Moreover, looking at the matter broadly from the point of view of the public interest, it seems to me that the usefulness of Commissions of Inquiry would be impaired if their proceedings were allowed to be challenged either at the outset or during their continuance by prohibition or at their

> conclusion by certiorari.
>
> The available remedies against a report which may be regarded as unsatisfactory are twofold. First, the appointing authority, in other words the government of the day, may reject all or any of the recommendations; secondly, an interested party or indeed any member of the public who is aggrieved by the report may initiate criticism in Parliament, State Council or Legislative Assembly as the case may be. In the very rare case -- and indeed I do not recollect having heard of any such -- of a Commission of Inquiry so misconducting itself as to create a scandal, no doubt the appointing authority has the power to withdraw the authority which is has itself bestowed.
>
> In my opinion, therefore, both public interest and past practice point irresistibly to the conclusion that the correct view is that neither of these two writs, certiorari or prohibition, lie in the case of a Commission of Inquiry.

6 MLJ 490 at 505

[42] Dato' VK Lingam pointed to us that there has been a case in New Zealand, which held that the findings of the Royal Commission are amenable to judicial review. He was referring to the case of *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon (No 2)* [1981] 1 NZLR 618. The New Zealand Court of Appeal stated the legal position in New Zealand as follows:

> It is established in New Zealand that in appropriate proceedings the courts may prevent a Commission of Inquiry -- whether a Royal Commission, a statutory Commission or perhaps a combination of the two -- from exceeding its powers by going outside the proper scope of its inquiry. The basis principle was clearly accepted by this Court in *Re Royal Commission on Licensing* [1945] NZLR 665. See especially the judgment of Myers CJ.

[43] With due respect, we are not persuaded to follow the legal position in New Zealand. We are of the view that the findings of any Commission established under Act 119 shall not be subjected to judicial review. Over the years, there had been a number of Commissions being set up under Act 119 but we do not remember any of their findings and recommendations had ever been allowed to be challenged by way of judicial review. We find no reason to allow this application too. If the proceedings of the Commission are allowed to be challenged either at the outset or during its continuance by prohibition or at its conclusion by certiorari, its purpose will come to naught. It will make the setting up of the Commission a meaningless exercise, and also a waste of public fund.

[44] Hence, we hold that it would be against public policy to subject the findings and recommendations of the Commission to judicial review. In the present case, the video clip circulation on the internet had sparked furious debate questioning the independence of the judiciary. The image of the judiciary is being ridiculed. Obviously, it is not in the best interest of the judiciary and the nation as a whole to allow such debate and bad perception to continue without the public knowing the truth of the matter. It was for that purpose the Commission comprising eminent persons of high standing, was setup to conduct a factual investigation on behalf of the government and to make the necessary recommendations for the betterment of the judiciary. Now the Commission had come out with its findings, it does not make any sense if such findings are allowed to be reviewed by our courts.

[45] For the above said reasons, we would answer the question posed to us in the negative. We rule that the findings of the Commission of Enquiry under s 3 of the Commission Enquiry Act 1950, is not reviewable under O 53 of the Rules of the High Court 1980.

6 MLJ 490 at 506

[46] Accordingly, the appeals are allowed. The orders of the Court of Appeal are hereby set aside.

[47] Now after hearing the parties on costs, we make no order as to costs here and the courts below.

Appeal allowed with no order as to cost here and courts below.

Reported by Kanesh Sundrum