

Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors

Decision of the Federal Court (delivered by Tengku Maimun binti Tuan Mat)

Key issues

Does the legal immunity statutorily provided for the appellant extend to criminal proceedings?

The Federal Court found that the legal immunity provided for under section 8A(1) and Part II of the Second Schedule of the International Organisations (Privileges and Immunities) Act 1992 (“**Act 485**”) extend to criminal proceedings. In interpreting the phrase ‘*from other legal processes*’, the Federal Court based the interpretation on the presumption that Parliament does not intend to breach international laws.

Looking at the entire purpose of the granting of immunity, the Federal Court found that the purpose of immunity is to respect the sovereign independence and territorial integrity of the sending State. Applying it to the case herein, the immunity if granted would be to protect and preserve the inviolability of the AIAC, its documents and archives. Whether or not the proceeding is civil or criminal would not change the purpose of immunity being granted.

The Federal Court held that this reading is very much in line with section 8A(1) of Act 485 which provides further guidelines that courts should consider when granting immunity. The applicant must show that the claim for immunity is for an act which was not done for personal gain but for the benefit of the entity he is a part of. In light of this, the Federal Court found the appellant’s actions to be one devoid of any personal gain and thus granted him immunity from the criminal proceedings against him.

Can the Attorney General (“AG”) or PP’s discretion under Article 145(3) of the Federal Constitution (“FC”) be amenable to judicial review?

The Federal Court held that only in appropriate and exceptional cases should the discretion of the AG or PP pursuant to Article 145(3) of the Federal Constitution be amenable to judicial review. For instance, in situations where the law has been misunderstood or misapplied. The Federal Court found this to be so and thus the appellant should be given an opportunity to have such discretion reviewed by way of judicial review.

In coming to the above findings, the Federal Court relied on the *dictas* in the case of *Karpal Singh* and *Zainuddin* which in brief, held that the AG's and PP's exercised discretion are reviewable if found to be in bad faith. Further guided by the case of *Ramalingam Ravinthran v Attorney General* [2012] 2 SLR 49, the Federal Court held that the Attorney General or PP's discretion under Article 145(3) of the FC is subject to a higher threshold of scrutiny and is thus reviewable.

The Federal Court laid out the two-step threshold which parties must satisfy at the leave stage of any application for judicial review. Firstly, the applicant bears the burden of proof to show that he has a legal basis (i.e. illegality, procedural impropriety, irrationality and mala fides) to challenge the AG's and PP's decision. Secondly, the litigant must show that judicial review is the only method of redress available for the litigant.

In the present case, the Federal Court held that the appellant satisfied the two-step test by identifying the illegality and adducing compelling prima facie evidence to sustain that allegation. Upon finding that the AG's or PP's powers are amenable to judicial review, the courts are fully empowered to issue the corresponding appropriate remedy provided for in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and inherent in its supervisory jurisdiction to meet the justice of the case.

Decision

This case was dismissed with no order as to costs as it concerned public interest.

Facts

The appellant is the former director of the Asian International Arbitration Centre ('AIAC') who authored a treatise titled '*Law, Practice and Procedure of Arbitration*' (2nd edition, LexisNexis, 2016). The 2nd respondent, the PP, charged the appellant for criminal breach of trust under section 409 of the Penal Code. These offences were allegedly committed by the appellant in his capacity as 'the Director of AIAC' having dominion over the AIAC funds and using them to purchase copies of his own book for AIAC.

The appellant responded that the books were purchased for the promotional and marketing of AIAC. In order to invoke his legal immunity, the appellant filed an application for judicial review to seek, among others, declaratory and prohibitory reliefs to give effect to his legal immunity and to stop all or any criminal proceedings against him.