Review of *TR Sandah*: No Respite in Sight for Threats to Native Land Rights

by Thulasy Suppiah

About the Author

Thulasy Suppiah is a Senior Associate with the Dispute Resolution & Arbitration practice of Messrs Koh Dipendra Jeremiah Law. Her portfolio of work encompasses civil and construction litigation and advisory work. She may be contacted at thulasy@kdj-law.com.

On 11 Sept 2019, the Federal Court issued its decision(s) concerning three review applications filed pursuant to rule 137 of the Rules of the Federal Court 1995, collectively and broadly referred to as *TR Sandah ak Tabau v Director of Forest Sarawak & Ors* ("TR Sandah Reviews"). In the 30-page majority judgment, delivered by Azahar Mohamed, CJM (Alizatul Khair Osman Khairuddin, FCJ; Mohd Zawawi Salleh, FCJ; Idrus Harun, FCJ; in agreement), the Court explained its decision to dismiss the TR Sandah Reviews on the ground that there must be finality to litigation and that it did not find any injustice had been caused to the Applicants.

The dissenting judgment delivered by David Wong Dak Wah, CJSS ("dissenting judgment") expounds in detail why the TR Sandah Reviews should have been allowed *in toto* and goes on to emphatically state that the legitimacy of the Judiciary as the guardian of the rule of law and public confidence in its ability to mete out justice will be compromised if the Federal Court chooses not to exercise its right to review decisions merely on the principle that there should be finality in litigation.

The Federal Court's decision in the TR Sandah Reviews is the final nail in the coffin as the remaining applicants have been left with no further legal recourse in our legal system.

Overview of the High Court, Court of Appeal and Federal Court Appeals (at 1st instance) leading up to the TR Sandah Reviews

The TR Sandah Reviews comprised three review applications which stemmed from three separate originating suits filed in the Kuching High Court in Sarawak.

(1) *TR Sandah ak Tabau & 7 Ors v Director of Forest Sarawak & Anor* ("Review 27/2015");

(2) *Siew ak Libau v State Government of Sarawak & Anor* ("Review 3/2019"); and

(3) *Siew ak Libau v Rosebay Enterprise Sdn Bhd* ("Review 4/2019").

All three High Court suits were tried by the same High Court judge, Justice Yew Jen Kie. The following table describes briefly the facts of the High Court suits and the appeals at the Court of Appeal and Federal Court right before the TR Sandah Reviews were filed.

High Court	
Review 27/2015	• Applicants filed a suit seeking a declaration that they enjoyed native customary rights ("NCR") and usurfructuary rights over certain forest lands on the basis that they had established the native customs of *pulau galau* and *pemakai menoa*. • Justice Yew allowed the claim.
Reviews 3/2019 & 4/2019	• Applicants filed a suit claiming that they possessed NCR and usurfructuary rights over certain forest lands and that the lease granted by the State of Sarawak to Rosebay Enterprise was in breach of their NCR. • Justice Yew allowed both claims.
Court of Appeal	
Review 27/2015	• The Respondents appealed the High Court decision. • Court of Appeal coram comprising Hishamudin Yunus, Abdul Wahab Patail and Balia Yusof, JJCA unanimously upheld the High Court decision and dismissed the appeal.
Reviews 3/2019 & 4/2019	• The Respondents appealed the High Court decisions. • Court of Appeal coram comprising Abdul Wahab Patail, Clement Skinner and Hamid Sultan Abu Backer, JJCA unanimously upheld the High Court decisions and dismissed the appeals.
Federal Court *("2016 Federal Court Judgment")*	
The Respondents for Review 27/2015, and Reviews 3/2019 and 4/2019 collectively applied for leave to appeal and were granted leave for all three appeals to be heard jointly before the Federal Court since the questions of law arising therefrom were substantially the same.	• The Federal Court appeal was initially heard by a panel of five: Md Raus Sharif, PCA; Abdul Hamid Embong, FCJ; Ahmad Maarop, FCJ; Zainun Ali, FCJ; and Abu Samah Nordin, FCJ. • However, by the date of delivery of the decision and grounds, Justice Hamid Embong retired, leaving a panel of four judges. • On 20 Dec 2016, the Federal Court appeal was allowed, ostensibly, by a majority 3:1 resulting in the setting aside of the High Court and Court of Appeal decisions. The majority judgment was delivered by Justice Raus with Justice Ahmad Maarop in agreement. • The dissenting judgment in favour of the Applicants was delivered by Justice Zainun Ali. • Justice Abu Samah, whilst delivering a separate judgment, decided to allow the Respondents's appeals. However, the judge "declined" to answer the three questions of law to be determined as part of the Federal Court appeal. • Justice David Wong (in his dissenting judgment) would posit that Abu Samah, FCJ's central decision emphatically concurred with that of Justice Zainun Ali's and not that of Justice Raus's[1]. Further, Justice Abu Samah had, arguably, embarked on a fact-finding process[2] and in doing so, interfered with the lower courts' factual findings. Thus, what remains arguable is whether Justice Abu Samah's supporting judgment could effectively be deemed to be in support of Justice Raus's judgment.

A Brief History of the Cases of TR Sandah and Siew ak Libau

The claims filed by TR Sandah and Siew ak Libau and others involved lands that ought rightly be protected since they should fall under NCR protection but which had been licensed and leased out by the State Government of Sarawak and/or its various apparatuses to private timber/plantation companies (such as Rosebay Enterprise Sdn Bhd).

The common and central issue in the TR Sandah and Siew ak Libau cases was simply whether the Iban customs of *pulau galau* (Communal Forest Reserves) and *pemakai menoa* (Territorial Domain) ought to be clothed with NCR under Sarawak law. The Center for Orang Asli Concerns ("COAC") has helpfully defined the key terms for context, as follows[3]:

(1) *Pemakai menoa* is an Iban term that refers to "a territorial domain of a long-house community where customary rights to land resource are created by pioneering ancestors"; and

(2) Within a *pemakai menoa* there are various categories of land use zones, including for example the *temuda* lands which are settled and cultivated areas, and *pulau galau* which are communal forest reserves and the rivers that the Ibans use for hunting, fishing and for the gathering and foraging of forest products.

Taken together, the *pemakai menoa* and *pulau galau* areas need to be protected to enable the Dayak/Iban peoples to continue to forage the forests for their livelihood, as they have done for many generations.[4]

The Kuching High Court and Court of Appeal had rightly recognised that the Dayak/Iban peoples can apply for their *pemakai menoa* and *pulau galau* areas to be protected by NCR. The practical effect of these decisions was that the Applicants (namely TR Sandah and Siew ak Libau and others) were the rightful owners of the *pemakai menoa/pulau galau* areas and that the State apparatuses' and/or any private companies' encroachments onto said lands were unlawful.

However, the 2016 Federal Court judgment in effect delivered a ruling that only temuda lands are recognised under NCR and therefore, the Dayaks/Ibans cannot apply for NCR protection for their *pemakai menoa* and *pulau galau* areas. The practical effect of this decision is that the Dayak/Iban peoples must continue to fight to enforce their right to use *pemakai menoa/pulau galau* areas as NCR lands.

The TR Sandah Reviews

Following the decision in the 2016 Federal Court Judgment, the Applicants filed an application for the Federal Court to review and set aside its decision under rule 137 of the Rules of Federal Court 1995 *vide* the TR Sandah Reviews, seeking that the 2016 judgment be set aside and/or in the alternative, for a rehearing of the three appeals as allowed under section 78(2) of the Courts of Judicature Act 1964 ("CJA").

The TR Sandah Reviews were premised on three grounds — the first two of which are related to coram failure:

(1) That at the heart of it, Justice Abu Samah's supporting judgment was in fact consistent with the dissenting judgment delivered by Justice Zainun Ali which would effectively render the 2016 Federal Court Judgment evenly divided and hence, in breach of section 78(1) of the CJA referred to hereafter as the "First Ground";

(2) That the 2016 Federal Court panel did not include at least one judge with "Bornean judicial experience" which contravened the provisions (to be read together) in paragraph 26(4) of the Report of the Inter-Governmental Committee 1962 ("IGC") and Article VIII of the Malaysia Agreement 1963, thus causing an injustice to the Applicants who are the indigenous peoples of Sarawak — a Borneo state — referred to hereafter as the "Second Ground"; and

(3) Finally, that the majority judgment had expounded an opinion that is wrong in law — referred to hereafter as the "Third Ground".

The Majority Judgment

The 30-page judgment would deal with all three grounds posed for determination under the review application but not without emphasising the panel's general reluctance to review the 2016 Federal Court Judgment for the reason that its powers under rule 137 were intended *"to be exercised sparingly, and only in circumstances which can be described as 'exceptional'"* and that *"finality of proceedings is of fundamental importance to the certainty of administration of law"*[5]. However, this emphasis on achieving and upholding finality of litigation, unfortunately, also suggests that the panel has accorded primacy to achieving finality in litigation proceedings over ensuring the prevention of injustice caused to litigants (especially litigants whose legal rights under existing laws are weaker or more vulnerable).

The pith of the majority judgment, particularly as it pertains to the First, Second and Third Grounds, can be summarised as follows:

(1) That notwithstanding Justice Abu Samah's failure to answer the three questions of law posed for determination in the 2016 Federal Court appeals, *"his supporting judgment had agreed with the conclusion arrived at by Raus Sharif PCA who delivered the majority judgment of the Court"*[6]. Justice Abu Samah's judgment was viewed as one that was consistent with Justice Raus's even if the reasoning and substance of his judgment may not have been so. On that note, the majority judgment reasoned that the 2016 Federal Court Judgment was delivered pursuant to section 78(1) of the CJA;

(2) The Federal Court in its majority judgment stated that it found no cogent reason to depart or deviate from its earlier decision in *Keruntum Sdn Bhd v Director of Forests & Ors* [2018] 4 CLJ 145 (*"Keruntum Case"*) where it was found that the *"recommendation in para 26(4)* [of the IGC] *was never implemented by an express provision in the Federal Constitution nor by any legislative, executive or other action by the Government of the Federation of Malaya, North Borneo (Sabah) and Sarawak"* and that *"Article VIII of the Malaysia Agreement did not mandate the Judiciary to take action to implement the said recommendation and the recommendation in para. 26(4) of the IGC report cannot be enforced by the courts"*[7]. In other words, there was no basis for requiring that the judicial panel hearing the 2016 Federal Court appeals ought to have included a judge with sufficient Bornean judicial experience; and finally,

(3) The Court took the position that it was not for the review panel to resolve whether the earlier panel in the same case, interpreted or applied the law correctly or not for the reason that it is a matter of opinion. It was emphatically pointed out that *"the majority of the Federal Court was entitled to come to its decision even when such decision may be questioned, whether in law or on facts"*[8] (sic). This could not, therefore, form a legitimate basis for seeking review of an earlier decision.

Justice Wong's Dissenting Judgment

Justice Wong allowed the TR Sandah Reviews *in toto* and further recommended that the matters be properly reheard so that the correctness of the majority judgment could be ventilated[9]. For clarity's sake, it is to be repeated that the central issue for determination in the 2016 Federal Court appeals was whether the Dayak/Iban customs of *pulau galau* and *pemakai menoa* ought to be clothed with NCR under Sarawak Law.

(1) The First Ground

Justice Wong's analysis of Justice Abu Samah's supporting judgment in the 2016 Federal Court judgment concluded that in answering the central issue, the latter had *"emphatically concurred with Justice Zainun Ali's dissenting judgment that the Iban customs of pulau galau and pemakai menoa are part of Sarawak law"*.[10] [11]

Justice Wong did not shy away from stating that Justice Abu Samah had indeed disturbed the findings of fact made by the lower courts when the existence of the *pemakai menoa* and *pulau galau* in the disputed area was discussed and not (as he should have limited his discussion) the **existence of the custom of *pemakai menoa* and *pulau galau***[12].

Unlike his peers who agreed on the majority judgment, Justice Wong acknowledged that Justice Abu Samah's concluding judgment was at odds with his (factual and legal) reasoning for arriving at the same. Crucially, Justice Wong recognised that Justice Abu Samah's agreement, in conclusion, with Justice Raus was *"premised on a finding of fact which he was devoid of jurisdiction to make… and […] that he had agreed with the proposition put by Justice Zainun Ali on the central issue"*[13].

Thus, Justice Wong concluded based on the above, that there was indeed more of a deadlock in the 2016 Federal Court judgment as sufficient doubt had been raised by the Applicants as to whether a majority decision had in fact been rendered. Justice Wong found there was a coram failure in the 2016 Federal Court judgment constituting an infringement of section 78 of the CJA — thereby answering the First Ground in the affirmative and in favour of the Applicants.

(2) The Second Ground

Justice Wong adopted a more nuanced and holistic approach in arriving at his determination on this ground. Justice Wong appreciated that the central issue in the 2016 Federal Court appeals involved a constitutional issue affecting the livelihood of the indigenous peoples or the first peoples of the country which necessitated or merited a revisit of the principles in the *Keruntum Case*. Revisiting the *Keruntum Case* allowed His Lordship to outline the steps that would establish that section 74 of the CJA **must be read together with paragraph 26(4) of the IGC and Article VIII of the Malaysia Agreement**. After all, the latter documents were drafted specifically to preserve and protect the fundamental rights of the people of the Borneo states and predate the Federal Constitution 1972.

His Lordship's key findings could be summarised (although not necessarily limited to) as follows:

(a) That section 74 of the CJA possessed a quasi-constitutional feature and therefore one must look behind the words in the context of the Malaysia Agreement and historical documents such as the IGC Report[14];

(b) That the Judiciary had an obligation to observe the recommendations in para 26(4) of the IGC Report and to not do so would undermine the public's confidence in the Judiciary[15];

(c) Having determined the above, there is a general requirement of having a judge of Bornean judicial experience *vide* para 26(4) of the IGC Report and Article VIII of the Malaysia Agreement which ought to be read into section 74 of the CJA for appeals emanating from Sabah and Sarawak[16];

(d) The lack of a judge with Bornean judicial experience in the 2016 Federal Court appeals panel meant that section 74 of the CJA was breached and therefore there was coram failure[17]; and

(e) Since the right of the Applicants to challenge the lack of a judge with Bornean judicial experience is a constitutional one — the fact that they had only done so at the time of the stage of the TR Sandah Reviews is immaterial — it is an established principle of law that there can be no waiver of a constitutionally recognised right[18].

Appeals or review applications such as the TR Sandah Reviews emanating from Sabah and Sarawak are by no means normal — they involve the constitutional right to livelihood of a section of the nation's society, specifically, the indigenous peoples in the Borneo States who have different customs and cultures to that of the people of Peninsular Malaysia. Judges who have served in Borneo would typically be exposed to the native customs and livelihoods of its peoples in the course of their work. Justice Wong took the time to explore several unique examples in an effort to shed light on the importance of having a judge with some appreciation of the customs and values of the Bornean peoples[19]:

"In the context of Sarawak, we learn how important the rainforest is to the semi-nomadic Penan. The rainforest is the foundation of their existence. For the Penan, the rainforest is their world, life, home, forever pulsating, and awake to their sustenance, medicinal and spiritual needs. In the context of Sabah, we learn that the Bajau Laut are the Sea Gypsies where the foundation of their very existence is the ocean. The ocean is their world and life. They earn their living solely based on the ocean's resources. Their place of abode is wooden houseboats built by themselves or stilt huts atop coral reefs."

(3) The Third Ground

Justice Wong dismissed the need to address this ground on the basis that a finding of coram failure on the First and Second Grounds rendered it unnecessary.

Is This the End of the Road?

Not quite. With a backlog of NCR cases facing similar issues and which were previously waiting for a favourable determination in the TR Sandah Reviews, those cases have now been revived and the Courts may still have the opportunity to revisit the legal question on the enforceability of pemakai menoa/ pulau galau as NCR lands. One such promising case appears to be that of an appeal to the Federal Court by Ramba Bungkong and five others[20].

It is imperative however, that we do not forget that whilst a decisive and resolute decision remains outstanding from our apex court in matters concerning the Sarawak natives' land rights, they would still have to battle through everyday life with their right to livelihoods inadequately protected under the law and in jeopardy of being 'stolen' away from them. There are documented instances of violent threats being made against members of the indigenous tribes who attempt to legitimately defend their land rights and against activists and community leaders who are harassed and/or face other forms of reprisals and worse, have even lost their lives in the course of fighting for legal recognition of their ownership to their lands (*vide* the case of Bill Kayong)[21].

Justice Wong's pleas to his fellows on the panel for restoring public confidence in the role of the judiciary as guardians of the rule of law and as independent but informed arbiters of justice, will hopefully serve as a clarion call to future panels of judges convened to hear appeals or reviews concerning the Sarawak peoples' constitutional right to protect their lands and livelihoods.

NOTES

[1] TR Sandah Reviews: Justice Wong's dissenting judgment at paras [30] to [31].
[2] TR Sandah Reviews: Justice Wong's dissenting judgment at paras [32] to [43].
[3] "Implications of the TR Sandah review rejection", https://www.facebook.com/notes/center-for-orang-asli-concerns-coac/implications-of-the-tr-sandah-review-rejection/2549567301753847/.
[4] "A Blow to Indigenous Rights: Comment on the TR Sandah decision", https://www.facebook.com/notes/center-for-orang-asli-concerns-coac/a-blow-to-indigenous-rights-comment-on-the-tr-sandah-decision/1335049983205591/.
[5] TR Sandah Reviews: The Majority Judgment at para [13].
[6] TR Sandah Reviews: The Majority Judgment at para [19].
[7] The *Keruntum Case* at para [20].
[8] TR Sandah Reviews: The Majority Judgment at para [17].
[9] TR Sandah Reviews: Justice Wong's dissenting judgment at para [152].
[10] TR Sandah Reviews: Justice Wong's dissenting judgment at para [31].
[11] The 2016 Federal Court Judgment: Justice Abu Samah's supporting judgment at paras [298] to [302].
[12] TR Sandah Reviews: Justice Wong's dissenting judgment at paras [33] to [40].
[13] TR Sandah Reviews: Justice Wong's dissenting judgment at para [45].
[14] TR Sandah Reviews: Justice Wong's dissenting judgment at paras [53] to [61].
[15] TR Sandah Reviews: Justice Wong's dissenting judgment at paras [101] to [114].
[16] TR Sandah Reviews: Justice Wong's dissenting judgment at para [80].
[17] TR Sandah Reviews: Justice Wong's dissenting judgment at para [138].
[18] TR Sandah Reviews: Justice Wong's dissenting judgment at paras [148] to [151].
[19] TR Sandah Reviews: Justice Wong's dissenting judgment at para [142].
[20] "NCR: TR Sandah decision to be revisited as Federal Court allows leave to appeal in Ramba case", https://dayakdaily.com/ncr-tr-sandah-decision-to-be-revisited-as-federal-court-allows-leave-to-appeal-in-ramba-case/.
[21] "International investment blamed for violence and oppression in Sarawak", https://news.mongabay.com/2017/08/international-investment-blamed-for-violence-and-oppression-in-sarawak/.