Case Note

NATURAL JUSTICE: A CASE FOR UNIFORM RIGOUR

Ho Paul v Singapore Medical Council
[2008] 2 SLR 780

Kay Swee Pin v Singapore Island Country Club
[2008] 2 SLR 802

This note considers if there is a discernible framework in which courts resolve alleged claims of breaches of natural justice. On the one hand, once it has been ascertained that the rules of natural justice apply, the court will look at all the circumstances of the case to determine if there has been any unfairness. On the other hand, it has been suggested that even assuming the rules of natural justice apply, there can be varying degrees of rigour in which they are enforced, a sliding scale of sorts.

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I. Introduction

1 Natural justice is often described as a concept that is "highly flexible" and dependent on the facts of each case.[1] Indeed, what constitutes a fair hearing presided by an impartial tribunal – said to be the "irreducible core" of natural justice[2] – does not lend itself to an endeavour of preconceiving all the factual permutations. However, the authors of this note would suggest that on the jurisprudence presented,

1 See *Halsbury's Laws of Singapore*, vol 1 (Butterworths Asia, 1999) at p 48; Woolf, Jowell & Le Sueur, *De Smith, Woolf & Jowell's Judicial Review of Administrative Action* (London: Sweet & Maxwell, 5th Ed, 1995) at p 431; Aronson & Dyer, *Judicial Review of Administrative Action* (Sydney: LBC, 2nd Ed, 2000) at p 395; and *Kok Seng Chong v Bukit Turf Club* [1993] 2 SLR 388 at [48] ; and Wade & Forsyth, *Administrative Law* (New York: Oxford University Press, 9th Ed, 2004) at p 496.

2 *Re Shankar Alan* [2007] 1 SLR 85 at [42].

the methodology or analytical framework in which courts resolve alleged breaches of natural justice might be said to be broken down into two parts (let us call this our suggested approach): (a) first, the threshold question of whether the rules of natural justice should even apply to a given situation must be satisfied. In that connection, the House of Lords decision in *Ridge v Baldwin* has identified four categorical situations, which are based on the type of rights that are at stake;[3] (b) the court would next consider the entire factual matrix of the case and determine if any well-established tenets of fairness (*ie*, first principles) have been breached (*eg*, the rule against pre-judgment of guilt). Where necessary, the court refers to more specific categorical precedents (*eg*, whether there is a right to cross-examination). That said, there exists a somewhat countervailing view that the rules of natural justice should be applied with more rigour in certain contexts, and less so in others. This notion seems self-contradictory, and (as shall be demonstrated) is superfluous in view of the threshold question *Ridge v Baldwin* presents. This note, therefore, considers two recent cases whereby the foregoing contrasting viewpoints are examined.

2 The first, *Ho Paul v Singapore Medical Council* ("*Ho Paul*"),[4] involved issues of expanding the role of a tribunal when a doctor facing disciplinary sanctions did not avail himself of counsel. The second, *Kay Swee Pin v Singapore Island Country Club* ("*Kay Swee Pin*"),[5] involved reviewing the suspension of a member from a premier country club, of which the impartiality of the disciplinary process therein was alleged to be tainted by club politics. In both cases, much was at stake: the livelihood of a professional, and the suspension of an expensively-acquired membership. The applicability of the rules of natural justice in either instance was thus not in issue. But when these two cases are examined in juxtaposition, we are left to ask if they have posited reconcilable approaches in resolving questions of natural justice. Specifically, *Kay Swee Pin* endorses the (by no means unprecedented) view that natural justice can be enforced more (or less) rigorously in certain situations. On the other hand, *Ho Paul*, while a decision of considerable brevity, is seemingly more compatible with the suggested approach.

3 [1964] AC 40 at 65–72 *per* Lord Reid. The categories are where there is a: (a) master-servant relationship; (b) deprivation of property rights and privileges; (c) deprivation of membership of a body; and (d) disciplinary proceeding. On the last category, see also *Chiam See Tong v Singapore Democratic Party* [1994] 1 SLR 278; *Joseph Clement v Singapore Airlines Ltd* [2002] 4 SLR 794. It should be said that *Ridge v Baldwin* was an important decision in many other respects that are beyond the scope of this note.

4 [2008] 2 SLR 780.

5 [2008] 2 SLR 802. This entire saga was also widely reported in the local press, from January to June 2008 in *The Straits Times*.

II. Ho Paul

3 Dr Ho had been found guilty of professional misconduct by the Singapore Medical Council and he was censured, fined $1,000 and suspended for three months.[6] He chose to appear in person before the Council's Disciplinary Committee ("DC") and conducted his own defence. One of the questions raised on appeal was whether natural justice was breached because: (a) Dr Ho had declined to cross-examine the Council's key witness ("Dr Tan") but the DC failed to warn Dr Ho of the "legal implications" of this; and (b) the DC had failed to ensure that Dr Ho appreciated the importance of making a mitigation plea.[7] The court's reply, encapsulated in [13] of its judgment, reflected a consideration of both first principles and the surrounding facts of the case:

> Additional duties are not foisted on a tribunal merely because the individual is unrepresented – advising a person who has been charged of his litigation strategies and options is the duty of an advocate and solicitor, not the adjudicator. This is quite apart from the general premise that tribunals are masters of their own procedures. Where breaches of the rules of natural justice are alleged, the key question lies in asking whether the individual concerned was given the opportunity to present his case and whether he suffered any prejudice as a result of any unfairness in the conduct of the proceedings … Dr Ho had been given the opportunity to present his case and cross-examine the witnesses, and had also been invited to make a mitigation plea. There was simply no basis to suggest that fairness had been compromised.

4 In effect, Dr Ho had argued that he was entitled to a higher standard of natural justice because he was not legally represented. Let us attempt to expound on the court's reasoning as to why it rejected this argument.

A. The legal implications of failing to cross-examine

5 To be sure, the issue is not whether doctors have a right to legal representation before the DC. Notwithstanding s 43(3) of the Medical Registration Act[8] ("[t]he registered medical practitioner *may* appear in person or be represented by counsel"), there is sufficient case law to suggest that Dr Ho was entitled to argue that he had a right to counsel.[9] Yet, the question as to whether the DC's failure to warn him of the "legal implications" of not cross-examining Dr Tan amounted to a procedural

6 [2008] 2 SLR 780 at [1].
7 [2008] 2 SLR 780 at [12].
8 (Cap 174, 2004 Rev Ed)
9 *Eg*, *R v Board of Visitors of HM Prison* [1988] 1 AC 379; *Kok Seng Chong v Bukit Turf Club* [1993] 2 SLR 388 at [56].

irregularity is very much linked to the underlying principles of the right to counsel. As has been written: "often a party cannot effectively exercise his right to cross-examination unless he is represented by a lawyer"[10] – the corollary then, is that extending the right of cross-examination to an unrepresented party may not suffice. Lord Denning's remarks in *Pett v Greyhound Racing Association Ltd* are equally apposite:

> It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: "You can ask any questions you like"; whereupon the man immediately starts to make a speech.[11]

6 Likewise, it was stated in *Bushell v Secretary of State for the Environment* that "there is a massive body of accepted decisions establishing that natural justice requires that a party be given an opportunity of challenging by cross-examination witnesses called by other parties on relevant issues".[12] It therefore stands to reason that a proper hearing includes a fair opportunity for the individual to correct anything prejudicial to his view, especially if the opposing party has had the opportunity of cross-examination.[13] Conversely, from a more pragmatic standpoint, it can be said that the true question in every case is whether the absence of cross-examination renders the decision unfair in all the circumstances.[14] This might explain in part why the court in *Ho Paul* emphasised that they detected no prejudice suffered by the appellant. Of course, one notices that first, Dr Ho chose, entirely of his own volition, not to avail himself of legal representation. Secondly, the DC did give Dr Ho the opportunity to present his case and cross-examine the witnesses. A legal assessor – "an advocate and solicitor of not less than 10 years standing" – would also have been present during the inquiry,[15] and he would have helped ensure a fair hearing. It is noteworthy that *per* s 43(4) (see also s 43(1)) of the Medical Registration Act, the DC was not bound by any written laws relating to evidence. This supports the notion that tribunals, regardless of form, are always masters of their own procedure, and they possess the discretion

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10 Woolf, Jowell and & Le Sueur, *De Smith, Woolf & Jowell's Judicial Review of Administrative Action* (London: Sweet & Maxwell, 5th Ed, 1995) at p 456.

11 [1969] 1 QB 125 at 132.

12 [1981] AC 75 at 116.

13 Woolf, Jowell and & Le Sueur, *De Smith, Woolf & Jowell's Judicial Review of Administrative Action* (London: Sweet & Maxwell, 5th Ed, 1995) at p 512; Craig, *Administrative Law* (London: Sweet & Maxwell, 5th Ed, 2003) at p 434.

14 *Bushell v Secretary of State for the Environment* [1981] AC 75 at 108; Woolf, Jowell and & Le Sueur, *De Smith, Woolf & Jowell's Judicial Review of Administrative Action* (London: Sweet & Maxwell, 5th Ed, 1995) at pp 455–456.

15 See s 61 of the Medical Registration Act (Cap 174, 2004 Rev Ed).

as to whether certain privileges should be extended.[16] It is not being suggested, however, that s 43(4) reflects a legislative intent to circumscribe a fair hearing; rather, the argument that the DC had a duty to warn Dr Ho is also, at bottom, predicated on the presupposition that Dr Ho had an *absolute* right to cross-examination. Such a presupposition does not comport with the preponderance of local and English authorities.[17] By most accepted accounts, there is tremendous value in cross-examination (it being a cornerstone of litigation),[18] but it is one thing to say that Dr Ho was deprived of his right to cross-examination, and an even bolder thing to say that he should have been warned of the legal consequences of not proceeding with cross-examination.

7 Then there is the imperative question of the roles and functions of a tribunal, which is probably the logically prior question. For these purposes, a useful analogy – and an example of the universal applicability of first principles – is found in *Rajeevan Edakalavan v PP*.[19] There, the accused had appeared in person before the Magistrate and entered a plea of guilt. However, he then petitioned for criminal revision, arguing that as the Magistrate had not informed him of the defences available to him, his plea was equivocal. The court refuted this argument in the strongest terms at [22]:[20]

> It is not the duty of the judge to inform the accused of the defences or other options that may be open to him and advantageous to his case. That is the duty of the counsel … The onus does not shift to the judge (or the prosecution, for that matter) simply because the accused is unrepresented. That will be placing too onerous a burden on the judge. Furthermore, the judge will be performing two completely incompatible and irreconcilable roles – one as the adjudicator, the other as the de facto defence counsel. [emphasis added]

8 It would seem that the principles espoused above can be easily imported into the administrative law context. It is important to remember that cross-examination is a tool in the adversarial process, and a tool *of the advocate*. Failing to utilise it likely results in a strategic disadvantage, but to assert it results invariably in "legal implications" unfavourable to the individual stretches the argument. It would have

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16 See Woolf, Jowell and & Le Sueur, *De Smith, Woolf & Jowell's Judicial Review of Administrative Action* (London: Sweet & Maxwell, 5th Ed, 1995) at pp 454–455.

17 Woolf, Jowell and & Le Sueur, *De Smith, Woolf & Jowell's Judicial Review of Administrative Action* (London: Sweet & Maxwell, 5th Ed, 1995); *Kok Seng Chong v Bukit Turf Club* [1993] 2 SLR 388 at [56].

18 *Eg*, *Mechanical & General Inventions Co v Austin* (1935) AC 346 at 359; *cf*, Aronson & Dyer, *Judicial Review of Administrative Action* (Sydney: LBC, 2nd Ed, 2000) at p 438.

19 [1998] 1 SLR 815.

20 See also *Soong Hee Sin v PP* [2001] 2 SLR 253 at [8].

been unreasonable and improper for the DC to have adopted both the role of counsel and adjudicator as this would have resulted in both a conflict of interest and a conflation of roles.

B. Appreciating the importance of making a mitigation plea

9 While not many will quarrel with the notion that mitigation (which is not an absolute right)[21] can positively affect the outcome of a case,[22] the aforementioned principles on the role of an adjudicator apply just as well to the second alleged breach of natural justice. It cannot be the duty of an adjudicator to inform an individual of options that will assist that individual's case, even if it is for the purpose of asking for a lighter sentence. Indeed, the court in *Ng Ai Tiong v PP*, which dealt with the *even more fundamental question* of whether the court should have invited the accused to make such a plea, stated:

> What the applicant was seeking to suggest in asking this question was effectively that, before passing a sentence a court is duty bound to invite the convicted person to present his mitigating plea. *Such a contention must be strenuously rejected. In any case being heard before the court, it is the defence counsel who has a duty to defend the accused, his client. The court has no duty to defend the accused* and neither is it obliged to assist the accused in presenting his case.[23] [emphasis added]

10 *A fortiori*, how can the argument that a DC is expected to ensure the individual appreciates the importance of making such a plea be sustained? The correctness of the outcome of *Ho Paul*, in relation to natural justice, is further supported by three key facts: (a) the DC *did* invite Dr Ho to make a mitigation plea;[24] (b) the court sieved the relevant evidence and concluded that no prejudice or unfairness was suffered by Dr Ho (coupled with the finding that he was allowed to present his case to the DC);[25] and (c) the DC had, prior to determining the sanctions for Dr Ho, considered his unblemished record of 26 years.[26] In bridging to the next case to be discussed, the court's *modus operandi* in *Ho Paul* seems to be that it had considered the existing scope of natural justice by focusing on either established first principles (*eg*, the disparate functions of adjudicator and counsel) or established categories of natural justice (*eg*, the situations in which a right to cross-examination arises, and why). This was coupled with a close scrutiny of

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21 See Woolf, Jowell & Le Sueur, *De Smith, Woolf & Jowell's Judicial Review of Administrative Action* (London: Sweet & Maxwell, 5th Ed, 1995) at p 456.

22 *Eg*, *PP v Lee Meng Soon* [2007] 4 SLR 240 at [30].

23 [2000] 2 SLR 358 at [16].

24 *Ho Paul* [2008] 2 SLR 780 at [13].

25 *Ho Paul* [2008] 2 SLR 780.

26 *Ho Paul* [2008] 2 SLR 780 at [6]. While it is unfair to hypothesise what Dr Ho would have pleaded in mitigation, it is plain that the DC did take on board a fact that would have been crucial had mitigation been pleaded.

the entire factual matrix, wherein the court was reinforced in its view that Dr Ho had been given a fair hearing. In other words, *Ho Paul* can be justified on both the legal reasoning and facts. Indeed, although Dr Ho was in a precarious situation (facing suspension and not legally represented), there was no express or implied allusion to rules of natural justice needing to be enforced more or less rigorously. However, *Kay Swee Pin* proffers a different perspective.

III. Kay Swee Pin

11 As will soon be evident, the facts of this case ought to be narrated in some detail. The appellant ("Kay") became a member of the respondent club ("SICC") in 1992 after paying a fee of $190,000. In her application form, she declared one Ng as her spouse. She was not asked to produce her marriage certificate, and neither was she told what constituted a "spouse". As it were, Kay and Ng had been living together since 1982 and married in January that year by way of a customary marriage in Johor; they even had an 18-year-old daughter. The complication, however, was that between 1977 and December 1982, Kay was married to someone else ("Koh"); *ie*, when the customary marriage took place, Kay's first marriage had not yet to been dissolved.

12 In August 2005 – 13 years after she had joined SICC–Kay decided to stand for elections as Captain of the Lady Golfers' Sub-Committee. Simultaneously, there were rumours concerning whether Ng was truly her husband, and since SICC was in the midst of updating its members' bio-data, it asked Kay for a copy of her marriage certificate. It was furnished the next month, but the certificate showed that she had married Ng only on *24 August 2005* in Las Vegas. Lee, the husband of Kay's rival in the elections, e-mailed SICC's general manager in September 2005, urging SICC to investigate Kay's marital status. On election day, the general manager informed Kay that Lee had made a complaint against her, and warned her against running in the elections. Kay went ahead and lost.

13 On 10 October 2005, SICC's General Committee ("GC") met to discuss Kay's marital status. There, some members opined that Kay had declared Ng as her spouse *so that he could use SICC's facilities*.[27] Along the way, SICC searched the Registry of Marriages and discovered that Kay was married to Koh at the material time (*ie*, 1982). On 18 November, Kay received a notification to appear before the Disciplinary Committee ("DC"). She was charged with, *inter alia*, *falsely declaring* Ng as her spouse.[28] Before the DC hearing, Kay provided a

27 *Kay Swee Pin* [2008] 2 SLR 802 at [16].
28 *Kay Swee Pin* [2008] 2 SLR 802 at [18].

couple of written responses, explaining the circumstances surrounding the marriage certificate. The DC hearing took place on 11 February 2006 in the absence of Kay as proceedings had already been postponed several times,[29] but her written responses were considered together with the oral evidence of Lee and SICC's administrative manager. Before adjourning, the DC established that the *issue was whether Kay was divorced* when she joined SICC. On 16 February, the GC requested Kay to furnish documents *vis-à-vis* the dissolution of her marriage to Koh, but she refused.

14 When the DC reconvened, Kay gave her defence: if SICC had asked her for a marriage certificate in 1992, she and Ng would just have registered their marriage there and then. Further, she could not recall much about her divorce and did not have the relevant documents. In that connection, the Court of Appeal pointed out that this defence was predicated on her understanding that she was charged with making a false declaration so as to enable Ng to use SICC's facilities, and that the declaration was false *because* she had produced a marriage certificate dated 24 August 2005.[30] In any event, while the DC was unable to confirm if the customary marriage was recognised by Singapore law, it ascertained that *Kay was already divorced* when she applied to join SICC and recommended the charge to be withdrawn.[31] The DC's recommendations were somehow leaked to Lee, and before the GC convened to discuss them, Lee sent an elaborate e-mail to the President of SICC explaining why Kay's marriage to Ng was void under the Women's Charter. The President forwarded the e-mail to the GC members.

15 The GC met in April 2006. However, the Chairman of the DC cum member of the GC (who had disqualified himself from Kay's DC hearings) wrongly informed the GC *the DC was satisfied that the marriage between Kay and Ng was valid*.[32] The GC thus disagreed with the DC's recommendations. It requested that the DC redeliberate, on the basis that Kay was not Ng's spouse because her first marriage had not been dissolved before she married Ng. The GC also advised the DC to *consider any relevant mitigating factors* in their deliberations, which the Court of Appeal noted as the GC pre-judging Kay's guilt.[33] Kay was

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29 The DC assured Kay that they would not conclude its hearing without giving her a right to be heard first: *Kay Swee Pin v Singapore Island Country Club* [2007] SGHC 166 at [14].

30 *Kay Swee Pin* [2008] 2 SLR 802 at [27].

31 Kay had submitted a letter from Malaysian solicitors opining that her marriage to Ng was deemed registered under Malaysian law, as well as four statutory declarations confirming the customary marriage had taken place: *Kay Swee Pin* [2007] SGHC 166 at [16].

32 *Kay Swee Pin* [2008] 2 SLR 802 at [30].

33 *Kay Swee Pin* [2008] 2 SLR 802 at [34].

not asked to attend the redeliberation, but while the DC reiterated its view to the GC that Kay had no intention to cheat SICC and recommended she pay green fees for the times Ng had played golf at SICC, it nevertheless submitted in its second set of recommendations a list of "mitigating factors". The GC – in a session dominated by the Vice-President's strong criticisms of the DC – considered the second report, and imposed an additional one-year suspension of Kay's membership.

16 Kay sought judicial review. She argued, *inter alia*, that: (a) the GC had acted *ultra vires* by rejecting the DC's first recommendation; and (b) the GC had breached natural justice in convicting her without giving her an opportunity to be heard before them. The High Court Judge dismissed her claim, stating at [30], [36] and [39] of his judgment:

> In matters relating to disciplinary tribunals of clubs which are essentially social in nature, such as SICC, the court does not sit on appeal from their decisions. *The court's role is to ensure that the rules of natural justice have been complied with and that the disciplinary procedure set out in the club's rules have been observed …*
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> …
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> As is evident from the [SICC rules], the role of the DC is to hear evidence relating to any charge referred to it by the GC. It then submits its report containing its findings and recommendations to the GC. The recommendations need not be accepted by the GC. In its first report, the DC noted that it was unable to confirm whether Singapore law recognized the 1982 customary marriage as the plaintiff's divorce was finalised only in 1984. This legal question was dealt with by the GC which then asked the DC to deliberate on the basis that the 1982 marriage could not have been a valid one. The GC was entitled to do this as it was to be the final decision-maker in disciplinary matters of the club. It should be noted that the GC here was not directing the DC on what factual findings to make but was merely addressing the legal poser.
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> The next contention involves the plaintiff's complaint that she was not given the right to be heard by the GC before it convicted her on the charge… the plaintiff appeared to be suggesting that she should have been heard by the DC for the second time when it made its further deliberations. The sequence of events… shows that the plaintiff was indeed heard fully and fairly by the DC as provided in the disciplinary scheme in Rule 34(a). Indeed, the DC even took into account her correspondence on the matter. In its further deliberations leading to the second report, the DC did not receive further evidence necessitating a response from the plaintiff. All that transpired between the two reports was the clarification on the meaning of "spouse" by the GC and even that issue was fully canvassed already by the plaintiff … [emphasis added]

17 Kay appealed on a number of grounds, but of particular interest to us were: (a) the GC was wrong to direct the DC's decision-making; and (b) that there were breaches of natural justice because, *inter alia*, Kay was not given an opportunity to respond to Lee's e-mail, the DC failed to hear Kay at its second meeting, and the DC Chairman ought not to have participated in the deliberations of the GC.

18 The Court of Appeal agreed that the GC had failed to act fairly and Kay's appeal was allowed, but in the authors' view, the heart of the matter lies in the fact that the Court of Appeal prefaced its grounds of decision as follows:[34]

> The legal relationship between any club and its members lies in contract, and the rights of members are determined by the terms of the contract, which are found in the constitution or the rules of the club. *The traditional approach of the courts to social clubs is to leave such clubs to manage their own affairs. However, where a club expels a member, it may only do so in compliance with the rules of natural justice* …
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> Before us, counsel for SICC contended that in accordance with established principles, this court should not interfere with the decision of the [GC] to suspend the appellant from membership of the Club so long as the GC had observed the rules of natural justice. He contended that the courts had no power to determine whether the GC's decision was fair or whether the GC had come to a wrong conclusion on the facts. The GC was not sitting in judgment over matters of a trade or profession affecting an individual's economic or property rights. What was at issue here, he pointed out, was merely the temporary cessation of the enjoyment of the privileges of a social club. He contended that the GC had not breached any of the rules of natural justice …
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> *We, however, pointed out to counsel that this case did not involve simply the suspension of a member from the Club. It was pertinent that membership of the Club was transferable. Membership of SICC is highly sought after* for its social cachet as well as for the recreational, social and sports facilities (especially golf facilities) which the Club offers. Membership of SICC is regarded as a symbol of social success by many. For these reasons, membership of SICC comes at a high price …
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> *In the present case, a more rigorous application of the rules of natural justice is called for as the rules of the Club ("the Rules") confer on the GC very general and extensive disciplinary powers over the Club's members* … [emphasis added]

19 What do we make of the different outcomes that the High Court and Court of Appeal came to? Was it because the former applied

34 *Kay Swee Pin* [2008] 2 SLR 802 at [2]–[4] and [10].

the rules of natural justice less rigorously? Or was it because it had not been brought to the full attention of certain incriminating (*vis-à-vis* SICC) facts that would have made it obvious natural justice was compromised? It is more likely the latter on a perusal of both judgments. But first and foremost, it would seem that the Court of Appeal had deemed it necessary to distinguish two cases the High Court had cited,[35] *viz*, *Lee v Showmen's Guild of Great Britain*[36] and *Haron bin Mundir v Singapore Amateur Athletic Association*.[37] In the former, Lord Justice Denning had stated at p 1181:[38]

> In the case of social clubs the rules usually empower the committee to expel a member who, in their opinion, has been guilty of conduct detrimental to the club, and this is a matter of opinion and nothing else. The courts have no wish to sit on appeal from their decisions on such a matter any more than from the decisions of a family conference … On any expulsion they will see that there is fair play … that the man has notice of the charge and a reasonable opportunity of being heard … that the committee observe the procedure laid down by the rules, but will not otherwise interfere. [emphasis added]

20 And, in the latter case, it quoted from English authorities (at [58]):

> The jurisdiction of the courts in reviewing the decisions of domestic tribunals is clearly of a limited nature. The decision of such a tribunal cannot be attacked on the ground that it is against the weight of evidence. *The function of the courts is to see that the rules of natural justice have been observed*, and that the decision has been honestly arrived at …:
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> > The court has no right to sit as a court of appeal from the decision of the members of a club duly assembled and acting according to the rules, *provided that in arriving at that decision the principles of natural justice were observed*, eg, where a member had been expelled from the club under a rule providing for the expulsion of a member guilty of conduct injurious to the character and interests of the club, that the member in question had been given proper notice of the meeting and an opportunity to attend it and be heard, and that the charges had been made against him, and the proceedings conducted, bona fide, fairly, and in the honest exercise of the powers given to the meeting by the club. These conditions having been fulfilled, the court has no right to

35 *Kay Swee Pin* [2007] SGHC 166 at [30].
36 [1952] 1 All ER 1175.
37 [1994] 1 SLR 47.
38 This passage has also been cited extensively in (at least) Canada: *eg*, *Barrie v Royal Colwood Golf Club* 2001 CarswellBC 1814 at [62]; and *Lee v Lee's Benevolent Assn of Canada* 2007 CarswellBC 1274 at [39].

> consider whether or not what was done by the meeting was right or whether or not what was decided was reasonable.
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> [emphasis added]

21 In both cases (of considerable vintage no less), the approach regarding reviewing the decisions of social clubs can be distilled as follows: (a) the court would not review the merits of the case; (b) rather, the court would first ensure that the club's decision conformed to the club's rules;[39] *and* (c) the court would ensure the principles of natural justice have been observed. Seen in that light, there was nothing wrong with the High Court relying on those two cases, unless it can be said that those two cases posited that the rules of natural justice are to be applied less rigorously in social club settings – which the authors think they did not. Moreover, since the rule that the reviewing court will not without exceptional circumstances encroach into the merits of the lower tribunal's decision remains[40] (as is also acknowledged in part in *Kay Swee Pin*, but *cf* [8] of the decision), to suggest that the enforcement of (b) can differ in rigour displaces *Ridge v Baldwin*. In fact, it renders the threshold question redundant. This is because if we apply our minds to the thought process, *Ridge v Baldwin* has *already* considered what is at stake in determining what categories of cases the rules of natural justice should apply in, *viz*, whether there is a deprivation of membership, property and economic rights, *etc*. Once *Ridge v Baldwin* applies – dispensing for the moment with the counter-argument that *Ridge v Baldwin* is no longer good law – the authors are of the view that there is no room for degree of rigour in its enforcement, as that simply militates against the concept of fairness and is not a defensible point of view to adopt. Otherwise, supposing the appellant in *Kay Swee Pin* was not a member of SICC but of a much less prestigious social club (*ie*, less is at stake), would our conclusion be, on the same factual matrix, that there was no breach of natural justice? That cannot be right, *unless* the concept that the rules of natural justice can be enforced less rigorously is accepted – and this is assuming it can be envisaged what varying degrees of rigour enforcement can entail to begin with.

22 The allusions in *Kay Swee Pin* to the great socio-economic value of SICC membership and the nature and extent of the powers the GC possessed were, therefore, possibly misleading. Furthermore, on the facts presented (at least, before the Court of Appeal), it is clear the GC had stepped outside its station in the fact-finding, pre-judged Kay's guilt, ignored her defences, mischaracterised the charge levelled against her,

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39 In this connection, see also *Re GKN Bolts and Nuts Ltd Sports and Social Club* [1982] 1 WLR 774 at 776 where Megarry VC remarked that in club cases, the court usually has to adopt a "broad sword" approach in examining the club's rules *vis-à-vis* its members.

40 See, for example, *Ho Paul* [2008] 2 SLR 780 at [9].

and misunderstood (the DC Chairman's role in this respect notwithstanding) the DC's findings. The whole litany of patent procedural defects are clothed with the antithesis of a fair hearing, and did not emerge apparent only because natural justice was enforced with greater rigour or because SICC was in a position or had the extra resources to facilitate a fair hearing. The Court of Appeal had, in fact, relied no more than on well-established first principles in concluding that the appellant was justifiably aggrieved:[41]

> A duty to act fairly involves a duty to act impartially. Procedural fairness requires that the decision-maker should not be biased or prejudiced in a way that precludes a genuine and fair consideration being given to the arguments or evidence presented by the parties: *Halsbury's* at para 10.050. It is also a cardinal principle of natural justice that no man shall be condemned unheard. Compliance with the *audi alteram partem* rule requires that the party liable to be directly affected by the outcome of the disciplinary proceedings should be given notice of the allegation against him and should be given a fair opportunity to be heard. Notice includes notice of any evidence put before the tribunal. It is a breach of natural justice for evidence to be received behind the back of the party concerned: *Halsbury's* at para 10.060. It will generally be a denial of justice to fail to disclose to that party specific material relevant to the decision if he is thereby deprived of an opportunity to comment on such material. Similarly, if a tribunal, after the close of the hearing, comes into possession of further evidence, the party affected should be invited to comment upon it: see *Halsbury's* at para 10.061.

23 Indeed, the said procedural defects in *Kay Swee Pin* represented instances of breaches of natural justice simply because they would have violated any commonsensical notion and/or fundamental tenet of a fair hearing (*ie*, first principles). It is submitted that such reliance on "common sense" is not as arbitrary or unhelpful as it seems, for as was once observed astutely: "There is no precise definition of [natural justice], which relies upon what a reasonable man instinctively regards as being just and fair."[42] Combined with the surrounding facts of the case (Lee's seemingly successful politicking for his wife in particular), it became even clearer that Kay was not accorded a fair hearing.[43] In the final analysis, natural justice may (arguably) have indeterminate content, but there should be no room for the degree of enforcement.

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41 *Kay Swee Pin* [2008] 2 SLR 802 at [7]. See also [6] and [8] of the decision.

42 *Haron bin Mundir v Singapore Amateur Athletics Association* [1992] 1 SLR 18 at [28].

43 See also *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 at 114 where the House of Lords held that some of the factors that determine whether the duty to act fairly had been breached would include "the nature of the decision and the relationship of those involved on either side before the decision was taken".

IV. Concluding remarks

24 To conclude, the approach suggested here might be slightly tentative as well. Primarily, it is not clear if the four categories identified in *Ridge v Baldwin* are exhaustive, have become outdated, or even represents the local position (insofar as accepting *all* the four categories as conclusive is concerned). But that (the categories) can be remedied incrementally, provided we are willing to dispense with the rather confusing and uncertain notion that the rules of natural justice can at times be enforced with less rigour, a notion which takes us a step forward but two steps backward. Ironically, whereas Dr Ho had asked the court to apply the rules of natural justice with greater rigour and was turned down flatly, the court was happy to do so for Kay when the correctness of its decision would have stood without needing to be vindicated by a call for greater rigour.