

**DALAM MAHKAMAH PERSEKUTUAN MALAYSIA  
(BIDANG KUASA RUJUKAN)  
RUJUKAN SIVIL NO: 06-1-2007**

ANTARA

BADAN PEGUAM MALAYSIA

... PLAINTIF

DAN

KERAJAAN MALAYSIA

... DEFENDAN

[Dalam Mahkamah Tinggi Kuala Lumpur (Rayuan Kuasa-kuasa  
Khas) Saman Pemula No. R2-24-63-2007]

Coram: Abdul Hamid bin Haji Mohamad, CJ  
Nik Hashim bin Nik Ab. Rahman, FCJ  
Hashim bin Dato' Hj. Yusoff, FCJ  
Azmel bin Haji Ma'amor, FCJ  
Zulkefli bin Ahmad Makinudin, FCJ

**JUDGMENT OF ZULKEFLI BIN AHMAD MAKINUDIN FCJ**

I have read the judgment in draft of my learned brother Abdul Hamid Mohamad, CJ and I agree with the views expressed and the decision reached by his lordship on the questions referred for the determination of this Court on the interpretation of Article 123 of the Federal Constitution. I would like to state my views in support of the judgment of his lordship on some of the issues raised by the parties as follows:

The relevant background facts of the case and the three questions of constitutional issues referred to us for determination are as set out by his lordship Abdul Hamid Mohamad, CJ in his judgment.

It is to be noted the word “*advocate*” in Article 123 is not defined in the Federal Constitution, but the meaning can be found in sections 3 and 66 of the Interpretation Acts 1948 and 1967 [“The Interpretation Act”]. Section 3 of the Interpretation Act states that an “*advocate*” means a person entitled to practise as an advocate or as an advocate and solicitor under the law in force in any part of Malaysia. Section 66 of the Interpretation Act states that an “advocate” means an advocate and solicitor of the High Court and this provision only applies for the interpretation of any written law prior to its repeal with effect from 18.5.1967 [**see section 65 Interpretation Act**]. Section 3 of the Legal Profession Act, 1976 [“LPA 1976”] states that “advocate and solicitor” where the context requires means an advocate and solicitor of the High Court admitted and

enrolled under this Act or under any written law prior to the coming into operation of this Act.

The Honourable Attorney General for the defendant submitted before us that since the statutory definition in section 3 of the Interpretation Act uses the word “*means*” in defining the words “*advocate*”, it would thus limit the meaning of the word to what is set out in the definition. Therefore, the definition of “*advocate*” in section 3 of the Interpretation Act must be limited to a person duly entitled to practise as an advocate or as an advocate and solicitor under the law in force in any part of Malaysia.

It was argued for the defendant that under the LPA 1976 there are three specific circumstances where a person

is entitled to practise as an advocate or as an advocate and solicitor, namely:

- (i) a qualified person duly admitted as an advocate and solicitor under section 10 of the LPA 1976;
- (ii) a qualified person admitted to practise as an advocate and solicitor under section 18 of the LPA 1976; and
- (iii) a person duly admitted as an advocate and solicitor under section 28B of the LPA 1976, by virtue of a “*Special Admission Certificate*” issued by the Attorney General under section 28A.

It was further argued for the defendant since Dr. Badariah bte. Sahamid had been admitted as an advocate and solicitor in 1987 under section 10 of the LPA 1976,

then she is eligible to practise as an advocate and solicitor under the LPA 1976. The defendant took the stand that the words “*advocate of those courts*” in Article 123 of the Federal Constitution must mean a person who has been admitted as an advocate and solicitor and has been enrolled as an advocate and solicitor of the High Court of Malaya, no matter whether he or she is in actual practise or not.

With respect, I could not agree with the submission of the Honourable Attorney General that Dr. Badariah bte. Sahamid has met the requirement of being “*advocate of those courts*” within the meaning of Article 123 of the Federal Constitution and that she need not be in actual practice to qualify for appointment as a Judicial Commissioner of the High Court. I am of the view the

crucial words under Article 123 of the Federal Constitution that need to be considered are as follows:

*“..... for the ten years preceding his appointment  
he has been an advocate of those courts.....”*

I am of the view to be an advocate of those courts, a person has to be in actual or active practice, besides having first been admitted and enrolled under the provision of the LPA 1976 as an advocate and solicitor. It further follows that to enable to practise, an advocate and solicitor has to apply for and be issued with a practising certificate. [**See sections 29(1) and 30(1) of the LPA 1976**]. Section 35(1) of the LPA 1976 provides that subject to the exceptions in Article 35(2), only advocates and solicitors have the exclusive right to appear and plead in all Courts of Justice

in Malaysia. A person who is admitted as an advocate and solicitor but does not possess a valid practicing certificate is termed as “*an unauthorized person*”. [**See section 36(1) of the LPA 1976**].

It is my judgment that based on the definition of “*advocate*” under section 66 of the Interpretation Act and the relevant provisions of the LPA 1976 as cited above when read together with the words “*advocate of those courts*” in Article 123 of the Federal Constitution would mean that an “*advocate*” is someone who has been in practise. In this context I would prefer to adopt the purposive approach of interpretation to be given to the meaning of the words “*advocate of those courts*” in Article 123 of the Federal Constitution. Our Federal Constitution is a living document and without doing violence to the

language used the said Article 123 of the Federal Constitution should receive a fair, liberal and progressive construction so that its true objects must be promoted. [See Legislation and Interpretation by Jagadish Swarup at pages 479-480].

I am of the view the capacity that an advocate must be in active practise for the purposes of Article 123 of the Federal Constitution is further fortified by reference to the words “*has been....*” and the significance of the ten (10) year period. I take the view that the words “*has been*” in Article 123 must be in reference to the act that has been done, that is having being a practising advocate at those Courts of Law. The ten (10) year period would mean it is a vital requirement that before Dr. Badariah bte. Sahamid’s appointment as a Judicial Commissioner was made in the

present case, she had to show that she has at least ten years experience as a practising advocate. This she had failed to do so. It must also be noted that to construe the words “*advocate of those courts*” to mean that an advocate need only be admitted and enrolled is to create an absurd situation in that an advocate need not be in active practise. In my view an advocate can only gain experience by being in practise. It is to be noted that under the same Article 123 of the Federal Constitution even a member of the Judicial and Legal Service of the Federation must have the requisite number of years of working experience to be eligible for appointment as a Judge or a Judicial Commissioner.

I am in agreement with the submission of Mr. Robert Lazar, learned counsel for the plaintiff that the interpretation favoured by the plaintiff is consistent with

the fact that our Courts have always considered an advocate to be in active practise because he is not allowed to practise another profession at the same time or be gainfully employed in a capacity other than as an advocate and solicitor. [**See the case of Syed Mubarak bin Syed Ahmad v. Majlis Peguam Negara (2000) 4 MLJ 167**]. I also find the interpretation that an “*advocate*” must be an advocate in active practise is consistent with the dictionary meaning of “*advocate*”. In **Black’s Law Dictionary, Sixth Edition at page 55**, an advocate is defined as “*one who assists, defends, or pleads for another. One who renders legal service and aid and pleads the cause of another. A person learned in the law and duly admitted to practise, who assists his client with advice, and pleads for him in open court.*” [Emphasis added].

Finally, I would like to refer to the case of **All Malayan Estate Staff Union v. Rajasegaran & Ors.** **(2006) 6 MLJ 97.** In **Rajasegaran's** case the Federal Court considered the provision of section 23A(1) of the Industrial Relations Act 1967 ["IRA"] which reads as follows:

***“Qualification of President and Chairman of Industrial Court***

*23A. (1) A person is qualified for appointment as President under section 21(1)(a) and as Chairman under section 23(2) if, for the seven years preceding his appointment, he has been an advocate and solicitor within the meaning of the Legal Profession Act 1976 [Act 166] or a member of the judicial and legal service of the*

*Federation or of the legal service of a State or sometimes one and sometimes another.”*

The Federal Court came to the conclusion that the seven years stipulated in section 23A(1) of the IRA means that the person must have been in practise for that period of time and must be construed as a reference to an advocate and solicitor who has been in practise under the LPA 1976. I am of the view the reasoning in **Rajasegaran**'s case applies with equal, if not greater force to the present case. The only difference between Article 123 of the Federal Constitution and section 23A(1) of the IRA is that the number of years 10 in the Federal Constitution and 7 in the IRA, and the phrase “*advocate of those courts*” in the Federal Constitution reads as “*advocate and solicitor within the meaning of the Legal Profession Act 1976*” in the

IRA. Again, in **Rajasegaran**'s case it shows that an advocate can only gain experience by being in practise. If a narrow construction is adopted to interpret Article 123 of the Federal Constitution in that an advocate need not be in active practice to be eligible for appointment as a Judge or as a Judicial Commissioner, and applying the principles enunciated in **Rajasegaran**'s case it would lead to an absurd consequence in that a person who is ineligible to be appointed as Chairman of the Industrial Court [inferior court], could be appointed as a Judge or as a Judicial Commissioner of the High Court.

For the reasons already stated my answer to Question (i) as referred to by the parties for the determination of this Court would be in the affirmative and that the appointment of Dr. Badariah bte. Sahamid as a Judicial Commissioner

of the High Court of Malaya with effect from 1.3.2007 is null and void.

(DATO' ZULKEFLI BIN AHMAD MAKINUDIN)  
Judge  
Federal Court

Dated: 27<sup>th</sup> December 2007.

**Counsel for the Plaintiff:**

Mr. Robert Lazar and Mr. Mark Lau

**Solicitors for the Plaintiff:**

Messrs. Sivananthan

**Counsel for the Defendant:**

Attorney General Tan Sri Abdul Gani Patail and Senior Federal Counsel Dato' Kamaludin Md. Said, Puan Azizah Bte. Nawawi and Puan Suzana Atan for the Jabatan Peguam Negara Malaysia.