

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA

(BIDANG KUASA RAYUAN)

PERMOHONAN SIVIL NO: 08(f)-39-2008(W)

Antara

BADAN PEGUAM MALAYSIA ... **PEMOHON**

Dan

KERAJAAN MALAYSIA ... **RESPONDEN**

[Dalam perkara Rujukan Sivil No. 06-1-2007(W)
Dalam Mahkamah Persekutuan Malaysia

Antara

Badan Peguam Malaysia ... Pemohon/Plaintif

Dan

Kerajaan Malaysia ... Responden/
Defendan]

Coram: Zaki Tun Azmi, CJ
Abdul Aziz Mohamad, FCJ
Gopal Sri Ram, JCA
Mohd Ghazali Yusoff, JCA
Tengku Baharudin Shah, JCA

GROUND OF JUDGMENT
of
Abdul Aziz Mohamad, FCJ

1. By Article 122AB of the Federal Constitution, the qualification for appointment as a judicial commissioner is the same as that for appointment as a judge of a High Court. By Article 123, a person is

qualified for appointment as a judge of a High Court if he is a citizen and if “for the ten years preceding his appointment he has been” one of two things, the one being an “advocate” of the Federal Court, the Court of Appeal or the High Courts or any of those courts.

2. Dr. Badariah binti Sahamid was appointed judicial commissioner on 1 March 2007. For the ten years preceding her appointment she was an “advocate and solicitor” of the High Court in Malaya, having been admitted as such on 26 September 1987 under section 10 of the Legal Profession Act 1976. But she did not have a practising certificate and was not, in those ten years, practising as an advocate and solicitor. She was teaching law at the University of Malaya.

3. The Malaysian Bar, being of the view that the word “advocate” in Article 123, paragraph (b), means a practising advocate, sought from the High Court a declaration that the appointment of Dr. Badariah as judicial commissioner was null and void as contravening Article 123. The matter came before this court from the High Court as a Special Case by way of a reference of a constitutional question under section 84 of the Courts of Judicature Act 1964 at the instance of the defendant Government. The question was, to put it simply, whether the word “advocate” in Article 123 means a person who actually practises as an advocate. On the answer to that question depended the validity or otherwise of Dr. Badariah’s appointment.

4. On 27 December 2007 this court (Abdul Hamid Mohamad, CJ, Nik Hashim Ab. Rahman, Hashim Yusoff, Azmel Maamor, Zulkefli Makinudin, FCJJ) decided in effect that the word “advocate” in Article 123 does not necessarily mean a practising advocate and that therefore the appointment of Dr. Badariah was valid. It was a majority decision, Abdul Hamid Mohamad CJ and Zulkefli Makinudin FCJ dissenting.

5. The motion before us, which we unanimously dismissed on 3 September 2008, without hearing the respondent Government, was brought by the Malaysian Bar on 21 March 2008 pursuant to rule 137 of the Rules of the Federal Court 1995. It sought a review of this court’s majority judgment of 27 December 2007 with the aim of having the Special Case reheard by another panel of this court. The Bar were of the view that the majority judgment was erroneous.

6. In *Chan Yock Cher v Chan Teong Peng* [2005] 4 CLJ 29, this court held that rule 137 is a reaffirmation of this court’s inherent powers, in the words of the rule, “to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court”, to the extent even of reviewing its own decision. According to the rule, the inherent powers reflected in it are to be exercised only for the purpose of preventing an injustice or an abuse of the process of the court. According to the motion before us, it was in order to prevent an injustice that the Bar sought a review of the judgment of this Court of 27 December 2007.

7. Were it not for the potential risk posed by the motion, that decision of this court, being that of the apex court, would be final as regards the position of Dr. Badariah and she could therefore rest assured that her position was no longer assailable. Abdul Hamid Mohamad CJ said in his judgment that academically she was definitely one of the most qualified persons to be appointed judicial commissioner, if not the most qualified. And Azmel Maamor FCJ in his judgment said that her qualification in the law was impeccable and that the Bar's counsel admitted that the Bar had no complaints about her qualification in the law. For it to be said that the majority decision of this court which confirmed that her appointment was valid would be an injustice, it must be shown that someone would suffer an injustice – would feel the pangs of injustice – by her appointment, but, in view of what had been acknowledged about her qualification, I was unable to see who would suffer an injustice by her appointment. So I put the question to learned counsel for the Bar.

8. The answer given by learned counsel for the Bar had to do with this court's decision in *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97. It was about the appointment of a Chairman of the Industrial Court under section 23A(1) of the Industrial Relations Act 1967, which lays down the requirement of having been, for the seven years preceding appointment, "an advocate and solicitor within the meaning of the Legal Profession Act 1976". This court construed it to mean an advocate and solicitor who has been in practice. Learned counsel for the Bar's answer was that, so long as the decision of this

court in Dr. Badariah's case stands, it would create a situation whereby to be appointed a Chairman of the Industrial Court a person would have to be in practice for the required number of years whereas to be appointed a judge of a High Court or a judicial commissioner, an advocate need not be in practice for the required number of years, and the injustice would lie in such a situation. I was unable to agree that such a situation amounts to an injustice that would merit the exercise of this court's powers under rule 137. It was mainly for that reason that I decided that the motion ought to be dismissed. It simply did not qualify under rule 137.

9. Although that was how the Bar founded their claim of injustice, it was not the approach of the Bar that if this court agreed with the claim, then it should follow, without more ado, that the judgment of this court of 27 December 2007 should be set aside and the Special Case be reheard by another panel. The Bar also took upon themselves the burden of showing either one of two things to justify their plea that the judgment be set aside.

10. The Bar sought to show, firstly, that there was unfairness in the selection of the panel for the Special Case. In their affidavit and written submission they argued that since the appointment of Dr. Badariah had involved consultation with the Chief Justice by the Prime Minister, it would have been preferable that the empanelling be done by the President of the Court of Appeal under section 9 of the Courts of Judicature Act 1964, although the Bar accepted that the Chief Justice

was not, by reason of his involvement in the appointment of Dr. Badariah, disqualified from empanelling the court. To persuade us of unfairness in the selection of the panel, the Bar added the fact that Nik Hashim FCJ was the judge who wrote the judgment of the Court of Appeal in the *Rajasegaran* case that I have mentioned, which had ruled that the words “advocate and solicitor” in section 23A(1) of the Industrial Relations Act 1967 do not necessarily mean an advocate and solicitor in active practice, and the fact that none of the judges of this court who disagreed with the Court of Appeal was chosen to be in the panel for the Special Case of Dr. Badariah.

11. In his oral submission, however, the Bar’s counsel seemed in the end to reduce the scope of the matter of alleged unfairness in the selection of the panel and to focus only on the selection of Nik Hashim FCJ, so that I formed the understanding that the aim of the Bar now was to cast doubt on the validity of his judgment in the Special Case, thereby rendering the remaining judgments a tie and meriting a rehearing of the Special Case. I was unable to see how Nik Hashim FCJ’s judgment could be vitiated since the Bar in their affidavit accepted that the fact that he had formed the view that he did on a matter of law in the *Rajasegaran* case did not disqualify him from sitting in the panel for the Special Case.

12. I ought to mention that in their affidavit the Bar did, in relation to the selection of Nik Hashim FCJ, contend that the selection of the panel was unfair. I quote their paragraph 14:

“The fact that Y.A. Dato’ Bentara Istana Nik Hashim Nik Ab. Rahman, FCJ had formed a view in the Rajasegaran case on a matter of law did not, in law, disqualify him from sitting in that panel. However, the fact that none of the judges who sat in the Rajasegaran case in the Federal Court who had formed an opinion contrary to that held by Y.A. Dato’ Bentara Istana Nik Hashim Nik Ab. Rahman, FCJ were selected, clearly illustrates the unfairness in the selection of the 22.10.2007 Special Case panel.”

13. The thinking of the Bar seemed to be that while the selection of Nik Hashim FCJ could not be questioned, nevertheless since he had in the Court of Appeal formed an opinion in the *Rajasegaran* case which was disapproved by this court, then for a fair selection of the panel of this court for the Special Case one or more of the judges in the panel for the *Rajasegaran* case should also have been selected to the panel for the Special Case. In my judgment, if that had been done, the selection of the panel might also been seen to be unfair as designed to ensure that the Special Case was decided along the same lines as the *Rajasegaran* case was decided.

14. Alternatively, the Bar sought to show that Azmel FCJ was biased against the Bar, so that his judgment ought to be set aside, leaving a tie judgment of this court, thus necessitating a rehearing of the Special Case.

15. Reading Azmel FCJ’s judgment as a whole, it seemed to me that there were three facets to it. He first of all agreed with the views of Hashim Yusoff FCJ that as a matter of interpretation of a word in a

constitution, the word “advocate” in Article 123 does not necessarily mean a practising advocate. He supported those views with a consideration of principles of constitutional interpretation and of the difference that he saw between the interpretation of the terms “advocate and solicitor” and “advocate” in two decisions of this court, namely , those in *Samantha Murthi v Attorney-General Malaysia & Ors* [1982] 2 MLJ 126 and in *Rajasegaran*, of which he preferred to follow *Samantha Murthi*. That was the interpretive part of the judgment, and the essential part. But as an adjunct or a corollary to it, he went on to consider the undesirability of interpreting Article 123 so as to ensure the appointment of persons with “really appropriate and proper” qualifications, in that it would open to question the validity of past appointments of certain other judges, whose appointments the appointing authorities considered satisfied Article 123 and nobody objected to. The case of Dr. Visu Sinnadurai, who had left the judiciary, was particularly dwelt on. Azmel Maamor FCJ was perfectly entitled as a judge to hold the views that he did in those two facets of his judgment, be they sound or otherwise. The Bar’s allegation of bias was directed at the third facet of the judgment which related to or arose from the second facet and which appeared to amount to an expression of displeasure at the Bar for having brought proceedings to invalidate Dr. Badariah’s appointment, whereas they had not objected to the appointment of Dr. Visu Sinnadurai. Azmel Maamor FCJ said that it was “certainly most unconscionable on the part of the Bar to practice a double standard”.

16. In his oral submission, learned counsel for the Bar fastened upon something that Azmel Maamor FCJ said. The learned judge was referring to the fact that Dr. Visu Sinnadurai was not practicing law but was gainfully employed by the University of Malaya and as the Commissioner for Law Revision during the ten years preceding his appointment and saying that because he was gainfully employed he could not, in view of section 30(1) of the Legal Profession Act 1976, have been issued with a practising certificate to enable him to practice. What learned counsel for the Bar fastened upon was the further statement that if the Bar Council had issued a practising certificate to Dr. Visu, it would have been fraudulent. But I thought that was neither here nor there because what was said was about something that did not happen. As no practising certificate was issued to Dr. Visu Sinnadurai, Azmel Maamor J could not have actually thought that the Bar Council had practised fraud.

17. I was of the view that Azmel Maamor FCJ's exasperation arose as a result of his views in the first two facets to his judgment and that it was not the case that those views were influenced by his exasperation. The first facet of the judgment, where the essential matter of interpretation of Article 123 was considered, was the essential part of the judgment and that alone would have been sufficient for a decision against the Bar on the Special Case. I entertained no doubt the Azmel Maamor FCJ would have arrived at his decision on the essential question in any event and that the decision was not influenced by any bias against the Bar.

18. The Bar therefore failed to show what they sought to show to justify their plea that the judgment of this court of 27 December 2007 be set aside. That was my secondary reason for dismissing their motion.

19. Gopal Sri Ram, Mohd Ghazali Yusoff and Tengku Baharudin Shah JJCA have in their grounds of judgment taken the opportunity to consider rule 137. They have set out the circumstances in which it may be resorted to. They conclude, contrary to previous decisions of this court, that this court has no inherent jurisdiction to review its own decisions except on very limited grounds. This was not a subject that came up for decision on the motion before us or that had been debated in the hearing before us. I therefore do not feel myself called upon to lend my voice to it.

Dated: 17 November 2008

DATO' ABDUL AZIZ BIN MOHAMAD

Judge

Federal Court of Malaysia

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