

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA
PERMOHONAN SIVIL NO: 08(f)-39-2008(W)

ANTARA

BADAN PEGUAM MALAYSIA

... PERAYU

DAN

KERAJAAN MALAYSIA

... RESPONDEN

KORAM: ZAKI TUN AZMI, CJ
ABDUL AZIZ MOHAMAD, FCJ
GOPAL SRI RAM, JCA
MOHD GHAZALI MOHD YUSOFF, JCA
TENGGU BAHARUDIN SHAH TENGGU MAHMUD, JCA

JUDGMENT OF ZAKI TUN AZMI, CJ

1. This is an application under section 137 of the Rules of the Federal Court 1995, seeking to obtain leave to review the decision of this court in respect of the validity of appointment of a judicial commissioner pursuant to Article 123 of the Federal Constitution. This court by a majority decision given on 27.12.2007 held that the appointment of Dr. Badariah bte. Sahamid as a judicial commissioner was valid. The decision was by a majority of three to two. The majority decision was delivered by Nik Hashim, Azmel and Hashim FCJJ. The minority judgment was by Abdul Hamid Mohamad CJ and Zulkefli Ahmad Makinudin FCJ.
2. We have dismissed the application on 3.9.2008 and I now give my reasons.

3. As a brief background, Dr. Badariah was appointed a judicial commissioner of the High Court of Malaya with effect from 1.3.2007. She was a professor and a lecturer at the Law Faculty of the University of Malaya prior to her appointment. As to her academic qualification, no one disagreed that Dr. Badariah is a highly qualified lady. She received a first class honours degree in law from University of Malaya on 17.6.1978. The following year, she was conferred a Masters in Law by the University of London and subsequently in 2001 she obtained a doctorate from the University of Malaya. While being a lecturer at the university, Dr. Badariah sought and was admitted as an advocate and solicitor of the High Court of Malaya on 26.9.1987. She had therefore been enrolled as an advocate and solicitor of the High Court of Malaya for about 20 years. She however had never applied for a practising certificate. In other words, she had never been a practising advocate and solicitor.
4. About 4 months after Dr. Badariah was appointed a judicial commissioner, the applicant filed an originating summons in the High Court seeking a declaration that the appointment of Dr. Badariah as a judicial commissioner of the High Court of Malaya was null and void on the ground that the said appointment contravenes Article 122AB read with Article 123 of the Federal Constitution. At the request of the defendant, the matter was referred to the Federal Court pursuant to section 84 of the Courts of Judicature Act 1964.
5. The notice of motion sought the following orders pursuant to rule 137 of the Rules of the Federal Court 1995 and / or under inherent jurisdiction of the powers of this court that:

- a. The majority judgments of this court pronounced on 27.12.2007 be set aside and that the special case be re-heard by this court.
 - b. In the alternative, the judgment of Azmel bin Haji Ma'amor FCJ be set aside and that the special case be re-heard by this court.
 - c. Such further or other relief that this court deems fit to grant in the circumstances.
6. At the beginning of the hearing, there was a suggestion that this application also involves the question of jurisdiction i.e. whether this court has the jurisdiction to grant the orders sought by the applicant. Pn. Azizah for the respondent conceded that this court has that jurisdiction. Therefore the question of whether the court has the jurisdiction to review under rule 137 is not in issue. Furthermore, since the question of jurisdiction was never raised by either party and therefore was not argued, in my opinion, it is not proper for this court to delve into that issue. The only question is that whether on the facts of this case, leave should be granted.
7. In his submission before us, Mr. Lazar based his application for review on three broad grounds.
- a. The majority decision given on 27.12.2007 was in error and has resulted in a serious misinterpretation of the Federal Constitution that may affect future appointments of this nature to the Bench.
 - b. The empanelment of the panel hearing the special case on 22.10.2007 was unfair.
 - c. There was a clear element of bias in the judgment of Azmel Haji Ma'amor FCJ.

MISINTERPRETATION

8. I will look into the facts of this case to determine whether the order sought should be granted or not. In other words, whether the applicant has crossed the threshold or not. I am aware that I should not touch on the substantial issues at this stage.
9. The stand taken by the Federal Court in regard to invocation of Rule 137 of the Rules of the Federal Court 1995 has been briefly and succinctly put by Abdul Hamid Mohamad CJ in *Asean Security Papermills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd*¹:

“In an application for a review by this court of its own decision, the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstance in which a review may be made. Only if it does, that the court reviews its own earlier judgment. Under no circumstances should the court position itself as if it were hearing an appeal and decide the case as such. In other words, it is not for the court to consider whether this court had or had not made a correct decision on the facts. That is a matter of opinion. Even on the issue of law, it is not for this court to determine whether this court had earlier, in the same case, interpreted or applied the law correctly or not. That too is a matter of opinion. An occasion that I can think of where this court may review its own judgment in the same case on question of law is where the court had applied a statutory provision that has been repealed. I do not think that review power should be exercised even where the earlier panel had followed certain judgments and not the others or had overlooked the others. Not even where the earlier panel had disagreed with the court’s earlier judgments. If a party is

¹ [2008] 6 CLJ 1

dissatisfied with a judgment of this court that does not follow the court's own earlier judgments, the matter may be taken up in another appeal in a similar case. That is what is usually called "revisiting". Certainly, it should not be taken up in the same case by way of review. That had been the practice of this court all these years and it should remain so. Otherwise, there will be no end to litigation. A review may lead to another review and a further review. This court has so many time warned against such attempts. ...” (Emphasis mine)

10. The test of whether application for review under rule 137 should be allowed or not is quite well found in so many cases. I therefore do not need to restate the position again.

11. Let us now analyse individually the grounds raised by the applicant. The applicant contends that the majority decision given on 27.12.2007 was in error and according to counsel that has resulted in a serious misinterpretation of the Federal Constitution that may affect future appointments of this nature to the Bench. Counsel for the applicant sought review, according to him, to prevent injustice. But what is justice? I have attempted to discuss it in *Asean Security Papermills*. Is it injustice because the applicant does not agree with the decision of the court? If I understand him correctly, his contention is that there was injustice because according to him, there is a conflict in the decision in this case and the case of *All Malayan Estate Staff Union v. Rajasegaran & Ors*. That was a decision declaring that a person who has been called to the Bar but had not practised is not qualified to be an Industrial Court judge. It was based on the interpretation of section 23A(1) of Industrial Relations Act 1967 (Act 177).

12. Before the application can succeed, he must be able to show on the face of the record that there was injustice. That error must be obvious on the face of the record. It should be able to be seen just by reading the record that there was an error which obviously was an injustice. In *Asean Security Papermills* case, I have listed out the circumstances where discretion under Rule 137 can be exercised². If one were to go through all these cases, injustice could be clearly seen even before going into the merits of each case. It cannot apply where a decision of this court is only questioned, whether in law or on the facts of the case. This principle is well spelt out in the case cited below.

13. In *Chan Yock Cher v Chan Teong Peng*³, Abdul Hamid Mohamad FCJ (as he then was) said this:

“... It has been seen that the applicant questions the findings of this court both in law and on facts. These are matters of opinion. Just because we may disagree (we do not say whether we agree or disagree with such findings) with the earlier panel of this court, that is not a ground that warrants us to review the decision. Similarly, regarding the interpretation and application of some provisions of the Companies Act 1965, even if we disagree with the earlier panel (again we do not say whether we agree or disagree) that does not warrant us to set aside the judgment and the order of the earlier panel of this court and re-hear and review the appeal. Otherwise, as has been said, there would be no end to a proceeding.”

14. In *Chu Tak Fai v. PP*⁴, Nik Hashim FCJ defines injustice as:

² *Supra* at page 15

³ [2005] 4 CLJ 29 at page 45

"... (i) a lack of fairness or justice or; (ii) an unjust act. Whether an act is unjust or not is a question of law, and in this case, it must depend on the determination of whether the failure of the chemist to specify the weight of the samples he used in the analysis of the drug in question is unjust so as to cause an injustice to the applicant or an abuse of process of the Court which needs to be rectified."

15. In *Dato' Seri Anwar bin Ibrahim v. PP*⁵, this court also said:

"The Federal Court would exercise its power of review for the purpose of rectifying a mistake which had crept in by misprision in embodying the judgments, or had been introduced through inadvertence in the details of the judgment."

16. Before us, counsel for the applicant could only say that the Federal Court had misinterpreted the Articles 123 and 122AB of the Federal Constitution. He based his argument on the grounds that in *Rajasegaran's case*, the Federal Court had ruled contrary to the manner it had done in respect of this case. He argued that the contradiction in interpretation has resulted in an illogical situation. According to him, while a person is qualified to become a judicial commissioner, the same person is not qualified to become a judge of the Industrial Court. It is quite obvious that the jurisdiction conferred upon the judge of the Industrial Court is much less than that conferred on a judicial commissioner. To him this is injustice.

As I had said earlier, in order for an applicant to succeed, he must show that the error is patent on the face of the record. It is inherently

⁴ [2007] 1 MLJ 201 at page 212

⁵ [2004] 3 MLJ 517 at page 530

obvious that disagreement in interpretation of law cannot appear on the face of the record. After all, it is a matter of opinion. Each would have his own opinion. In most cases, as in this, it is impossible to say that the finding of law is wrong. Even if there are contradictions in interpretations, it is not a case for review. It could be, as the learned Chief Justice said, "taken up in another appeal in a similar case". Even if there are inconsistent judgments on the same issue, it can only be raised in another case with similar issues but not by reviewing this decision. It does not prevent a similar issue being raised in another case bearing similar facts. The error alleged to have been committed here is that a person who has been called to the Bar and yet did not practice should not qualify to be a judicial commissioner.

17. The affidavit filed on behalf of the applicant provided the curriculum vitae of Dr. Badariah showing her qualification. From that curriculum vitae there is no doubt that academically she is more than qualified to decide as a judge. But the question that had to be decided by the Federal Court was whether she is qualified by virtue of Article 122AB read with Article 123 of the Federal Constitution as was put by the learned Chief Justice in the decision which is now impugned. The issue before the court is one of law. The simple issue is whether she is under the Federal Constitution qualified to be a judicial commissioner.

18. What the Federal Court had done was to give an interpretation to the relevant provisions of the Federal Constitution. Suffice for me to again cite the authority of *Chan Yock Cher v. Chan Teong Peng* (*supra*) in particular the judgment of the current learned Chief Justice

who was then a Federal Court judge. In his grounds of judgment, he said (at page 35):

“From the grounds listed by the applicant, it can be seen that the applicant is questioning the correctness of the judgment in law and on facts. In other words, the applicant is questioning the judgment on merits. Questioned by the court at the beginning of his submission learned counsel for the applicant admitted that he was not challenging the validity of the constitution of the court that heard the appeal. In fact, he admitted that he was challenging the correctness of the judgment on merits. In fact, whether he admits it or not, that is our view.”

19. Later on, at page 45, he said:

“The reasons have been amply stated by this court in Adorna Properties Sdn. Bhd. (supra) with which we fully agree. The only other reason we would like to add is that to freely allow previous orders to be reviewed would lead to “panel shopping”. An unsuccessful party in an appeal may try its luck before another panel that may disagree with the view of the earlier panel. If he is successful in having the order reversed, the other party will do the same thing again. Certainly, we would not like to see this apex court becoming a circus that repeats the same show again and again.”

20. I do not see any difference in regard to arguments in *Chan Yock Cher* and this case. From the argument put by the learned counsel, I find that his contention is that the decision arrived at by the Court of Appeal was wrong in law. He gave his reasons mentioned earlier why he said the Federal Court could be also wrong in law. But to me and to quote the words of the learned Chief Justice, "*These are*

matters of opinion. Just because we may disagree (we do not say whether we agree or disagree with such findings) with the earlier panel of this court, that is not a ground that warrants us to review the decision."

21. And in the context of this case, even if we disagree with the earlier panel on the interpretation of the relevant articles of the Federal Constitution, it does not warrant us to set aside the judgment for otherwise there is no end to the proceedings.
22. In England there arose a question of whether the Court of Appeal there had the discretion to re-open an appeal which has been finally determined. The application was heard and determined by a panel of five judges in the Court of Appeal consisting of Lord Woolf CJ, Lord Phillips of Worth Matravers MR, Ward, Brooke and Chadwick LJJ.
23. That case *Taylor v. Lawrence*⁶ laid down the principle that final appeal will only be re-opened if it can be shown that there was a probability of a significant injustice which must be clearly established and that there was no effective alternative remedy to correct this injustice. It must be shown that the trial or the appeal has been critically undermined. The jurisdiction is not solely concerned with the case where the earlier process has or may have produced a wrong result. It must also be shown that there was special circumstances which resulted in the process having been corrupted. In short, the purpose is to correct the injustice. This principle laid down by Taylor v. Lawrence was later incorporated as a rule in C.P.R. 52.17 headed Reopening of Final Appeals. That rule provides that:

⁶ [2002] EWCA Civ 90

“The Court of Appeal or the High Court will not reopen a final determination of any appeal unless- (a) it is necessary to do so in order to avoid real injustice; (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and (c) there is no alternative effective remedy.”

24. It was said in *Re Uddin* that it is one thing to re-litigate an issue where the vehicle for doing so is the very same set of proceedings in which the issue had earlier been concluded. It is quite another to bring a fresh action to impugn an earlier judgment. To allow a final appeal to be reopened can also create injustice to the successful party. In *Taylor v. Lawrence*, this is what the Court of Appeal said:

“[54] ... The residual jurisdiction which we are satisfied is vested in a Court of Appeal to avoid real injustice in exceptional circumstances is linked to a discretion which enables the court to confine the use of that jurisdiction to the cases in which it is appropriate for it to be exercised. There is a tension between a court having a residual jurisdiction of the type to which we are here referring and the need to have finality in litigation. The ability to reopen proceedings after the ordinary appeal process has been concluded can also create injustice. There therefore needs to be a procedure which will ensure that proceedings will only be reopened when there is a real requirement for that to happen.

[55] One situation where this can occur is a situation where it is alleged, as here, that a decision is invalid because the court which made it was biased. If bias is established, there has been a breach of natural justice. The need to maintain confidence in the administration of justice makes it imperative that there should be a remedy. The need for an effective remedy in such a case may justify this court in taking

the exceptional course of reopening proceedings which it has already heard and determined. What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations...”

25. Even applying the principle that was laid in Taylor v. Lawrence, the applicant have not shown that it has satisfied the conditions laid down in that case.
26. In regard to arguments in Chan Yoke Cher and this case, from the argument put by learned counsel, I find that his contention is that the decision arrived at by the Court of Appeal was wrong in law. He gave his reasons mentioned earlier why he said the Federal Court could be wrong in law. But to me, and to quote the words of the learned Chief Justice, “These are matters of opinion. Just because we may disagree (we do not say whether we agree or disagree with such findings) with the earlier panel of this court, that is not a ground that warrants us to review the decision.”
27. And in the context of this case, even if we disagree with the earlier panel on the interpretation of the relevant Articles of the Federal Constitution, that does not warrant us to set aside the judgment for otherwise there is no end of the proceedings.
28. In the light of that the first ground lacks merit and must necessarily fail.

EMPANELMENT

29. According to Mr. Lazar, Nik Hashim FCJ should not have been empanelled to sit on the impugned appeal because he had held in Rajasegaran's case that Rajasegaran's appointment as an Industrial Court judge was valid. In other words, if Nik Hashim FCJ had decided in Rajasegaran that Rajasegaran's appointment is valid, then he is likely to also decide that Dr. Badariah's appointment is valid. I do not see any validity in this argument. Every judge has his own views on certain matters but he is always open to hear submissions otherwise. After hearing the submission, he may hold on to his views or may decide otherwise. There was no assurance that he would have decided in the same way he did in Rajasegaran's case. He would have to reconsider Dr. Badariah's case on the facts of the case.

30. In any case, the applicable laws relating to the appointment of Rajasegaran and that relating to the appointment of Dr. Badariah are different. The two provisions have to be construed separately. There was no assurance that Nik Hashim FCJ would have arrived at the same conclusion that he did in Rajasegaran's case.

BIAS

31. Applicant asked us to hold that the statements by Azmel FCJ were unwarranted, disparaging and unjustified, and also not essential or relevant in determining the case. They say this shows a real danger of bias against the applicant. This contention is made based on statements by the learned judge comparing the appointment of Dr. Badariah to the appointment of Yaakob Ismail J, Syed Ahmad Idid J

and Rohana Yusof J who were all, preceding their appointments as judicial commissioners, employed by Petroliam Nasional Berhad, Public Bank Berhad and Bank Negara respectively. Also discussed by the judge in his judgment was the appointment of Dr. Visu Sinnadurai who was a commissioner of law revision and prior to that was a professor at the Law Faculty at the University of Malaya. Although he was called to the Bar, he could not have been practicing since he was holding permanent jobs. In other words, Azmel FCJ was comparing the position of Dr. Badariah to that of Dr. Visu Sinnadurai.

32. I dare say that two wrongs cannot make one right. The fact that the appointment of Dr. Visu could have been wrongly made may be argued that it cannot make Dr. Badariah's appointment right. In my opinion however, these statements by the learned judge do not contribute towards his actual decision in holding that Dr. Badariah's appointment is valid. He had made a decision to hold Dr. Badariah's appointment valid before discussing the positions of these four judges. They do not contribute towards his *ratio decidendi*.
33. The applicant asked us to consider these statements as well as other statements in judgment that the judge was bias. In my opinion these statements by the learned judge cannot be construed as bias.
34. In the light of that, we have no alternative but to dismiss this application. We decided to make no order as to costs and any deposit made shall be refunded to the applicant.

Dated : 5 Disember 2008

ZAKI TUN AZMI
Chief Justice
Malaysia

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