

**IN THE FEDERAL COURT OF MALAYSIA AT PUTRAJAYA
(CIVIL REFERENCE NO. 06-1-2007 (W))**

BETWEEN

BADAN PEGUAM MALAYSIA ... PLAINTIFF

AND

KERAJAAN MALAYSIA ... DEFENDANT

**Reference from High Court Kuala Lumpur
(Saman Pemula No. R2-24-63-2007)**

CORAM

**ABDUL HAMID BIN HAJI MOHAMAD, CJ
NIK HASHIM BIN NIK AB. RAHMAN, FCJ
HASHIM BIN DATO' HAJI YUSOFF, FCJ
AZMEL BIN HAJI MAAMOR, FCJ
ZULKEFLI BIN AHMAD MAKINUDIN, FCJ**

27 DECEMBER 2007

Judgment of Nik Hashim Nik Ab. Rahman, FCJ

1. This reference of constitutional question under section 84 of the Courts of Judicature Act 1964 relates to the question whether the appointment of Dr. Badariah binti Sahamid as a Judicial Commissioner (JC) of the High Court of Malaya with effect from 1 March 2007 is valid.
2. I have read through the draft judgments of the learned Chief Justice and my learned brothers Hashim Yusoff, Azmel Maamor and Zulkefli Ahmad Makinudin, FCJJ and I find their Lordships' judgments well reasoned and comprehensive.
3. This is my judgment, albeit a short one.
4. A broad and liberal interpretation should be given to the phrase "advocate of those courts" under Article 123 of the Federal Constitution (the FC). This call is in accord with a well-established principle that a constitution should be construed with less rigidity and more generosity than other

statutes (**Minister of Home Affairs v Fisher (1980) AC 319 at p329; Dewan Undangan Negeri Kelantan v Nordin bin Salleh (1992) 1 MLJ 697; Kamariah bte Ali dan Lain-lain lwn. Kerajaan Negeri Kelantan dan Satu Lagi (2005) 1 MLJ 197**).

5. Barwick CJ when delivering the decision of the High Court of Australia in **Attorney General of the Commonwealth, ex relatione McKinley v Commonwealth of Australia (1975) 135 CLR 1** said at p 17 :

“the only true guide and the only course which can produce stability in constitutional law is to read the language of the constitution itself, no doubt generously and not pedantically, but as a whole and to find its meaning by legal reasoning”.

See also **Dato’ Menteri Othman bin Baginda & Anor v Dato’ Ombi Syed Alwi bin Syed Idrus (1981) 1 MLJ 29** per Raja Azlan Shah Ag. LP (as His Royal Highness then was).

6. Therefore, taking the above approach to the case before us, the interpretation as requiring only an advocate and solicitor who has been in practice (in possession of a practising certificate) preceding the appointment before he could be qualified as a JC or a Judge of the High Court, would amount to reading words which are not in Article 123 of the FC, and surely this is a wrong thing to do for the term “advocate” in the FC appears to have the same meaning as “advocate” and “advocate and solicitor” under section 66 of the Interpretation Acts 1948 and 1967 (Act 388) (Part 11) to mean an advocate and solicitor of the High Court, and under section 3 of the Legal Profession Act 1976 (Act 166) the phrase “advocate and solicitor” 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. So, in the present case, although Dr. Badariah has no practising certificate under Act 166, she is an advocate and solicitor as she had been admitted and enrolled as one and there is nothing in section 3 to say that to

be an advocate and solicitor one must have a practising certificate (see **Samantha Murthi v Attorney-General, Malaysia & Ors (1982) 2 MLJ 126**). Thus, an “advocate of those courts” under Article 123 of the FC does not necessarily need to be a practising advocate and solicitor.

7. In this regard, I, with respect, agree with the learned Attorney General that the Bar Council’s interpretation of Article 123 of the FC as requiring an advocate and solicitor who must have been in practice (in possession of a practising certificate) preceding the appointment was too rigid. A generous interpretation is called for in this case as Dr. Badariah could be considered as practising in a wider sense as she was teaching law to her students in the University of Malaya before her appointment as a JC. Therefore, in my view, the main criterion for the appointment as a JC or a Judge of the High Court is that the candidate must had been called to the Bar and admitted and enrolled as an advocate and solicitor for 10 years and it does not matter if the

candidate, like Dr. Badariah here, did not possess a practising certificate preceding the appointment. That is the minimum qualification, besides being a citizen, required of the members of the Bar for the appointment. Of course with that qualification, it is up to the powers that be to appoint a suitable candidate for the appointment.

8. The Federal Court case of **All Malayan Estates Staff Union v Rajasegaran & Ors (2006) 4 CLJ 195** is inapplicable to and readily distinguishable from, the present case. Unlike the present case, which involves the construction of a provision in the FC, the Federal Court in **Rajasegaran** considered and construed the words “advocate and solicitor” in the context of the Industrial Relations Act 1967 an ordinary Act of Parliament according to ordinary rules of statutory interpretation.

9. And for those reasons, I uphold the appointment of Dr. Badariah as a JC valid as she was an advocate and solicitor of the High Court of Malaya for more than 10 years, a PhD,

Law holder and also a professor at the University of Malaya before the appointment. Accordingly, my answers to questions (i) and (ii) are in the negative and affirmative respectively, while question (iii) is deemed unnecessary in view of my answer to question (i).

27 December 2007

(Dato' Bentara Istana Dato' Nik Hashim bin Nik Ab. Rahman)
Judge
Federal Court
Malaysia

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