

**DALAM MAHKAMAH PERSEKUTUAN MALAYSIA
(BIDANGKUASA RAYUAN)**

CIVIL REFERENCE NO. 06-1-2007(W)

ANTARA

BADAN PEGUAM MALAYSIA - PLAINTIF

DAN

KERAJAAN MALAYSIA - DEFENDAN

**KORAM: DATO' ABDUL HAMID MOHAMAD, CJ
DATO' BENTARA ISTANA NIK HASHIM NIK AB. RAHMAN, FCJ
DATO' HASHIM DATO' HJ. YUSUFF, FCJ
DATO' AZMEL HJ. MAAMOR, FCJ
DATO' ZULKEFLI AHMAD MAKINUDIN, FCJ**

JUDGMENT OF ABDUL HAMID MOHAMAD CJ

By an Originating Summons dated 27 July 2007, the Bar Council ("Plaintiff") prayed for "a declaration that the appointment of Dr. Badariah bte Sahamid as a Judicial Commissioner of the High Court of Malaya is null and void and of no effect on the ground that the said appointment is in contravention of Article 122AB

read together with Article 123 of the Federal Constitution."

On 27 August 2007, i.e. one day before the matter was scheduled to be mentioned before the learned Judge of the High Court, the Government of Malaysia ("Defendant") filed a Summons in Chambers for questions of law relating to the appointment be referred to this court pursuant to section 84 of the Courts of Judicature Act 1964. On 18 September 2007, after hearing the parties, the learned Judge allowed the Defendant's application and referred the constitutional issues to this court for its determination. The issues are as follows:

- "i. Whether the words "advocates of those courts" appearing in Article 123 of the Federal Constitution requires an Advocate to have been in practice for a period of ten years preceding his/her appointment as a Judicial Commissioner under Article 122AB of the Federal Constitution?
- ii. If the answer to Question I is in the negative, is the appointment of Y.A. Dr. Badariah Sahamid as a Judicial

Commissioner of the High Court of Malaya with effect from 1 Mac 2007 valid?

iii.If the answer to Question I is in the affirmative, is the appointment of Y.A. Dr. Badariah Sahamid as a Judicial Commissioner of the High Court of Malaya with effect from 1 Mac 2007 null and void?"

We heard the arguments on 22 October 2007 and reserved our judgments. This is my judgment.

The facts are not in dispute. Dr. Badariah Sahamid graduated with a first class honours degree in law from the University of Malaya on 17 June 1978. That qualification renders her to be a "qualified person" within the meaning of the Legal Profession Act 1976. In 1979, she was conferred with a Masters in Law by the London School of Economics and Political Science (LSE), the University of London. Having completed her pupillage and having satisfied the requirements of the Act, on 26 September 1987, she was admitted as an advocate and solicitor of the High Court of Malaya. However, she never applied for nor obtained a practising certificate that would enable her to practise as an advocate and solicitor. Instead, she

served as a lecturer at the Faculty of Law of the University of Malaya from 14 January 1980. On 10 April 1992 she became an Associate Professor and on 31 December 2006 a Professor, until her appointment as a Judicial Commissioner of the High Court of Malaya. No doubt she has a very impressive academic credential. However, the issue before this court is one of law, simply put, whether she is, in law, qualified for the said appointment. That calls, in particular, for the interpretation of Articles 122AB, 122B and 123. Article 122AB, in substance, provides that the Yang di-Pertuan Agong may "appoint to be judicial commissioner any person qualified for appointment as a judge of the High Courts;"

Article 122B provides for the appointment of judges of Federal Court, the Court of Appeal and the High Courts.

Regarding the qualification of a person to be appointed as a judge of the High Courts, Article 123 provides:

"123. A person is qualified for appointment under Article 122B as a judge of the Federal Court, as a judge of the Court of Appeal or as a judge of any of the High Courts if -

(a) he is a citizen; and

(b) for the ten years preceding his appointment he has been an advocate of those courts or any of them or a member of the judicial and legal service of the Federation or of the legal service of a State, or sometimes one of sometimes another."

Prior to 16 September 1963 that Article read as follows:

"123. A person is qualified for appointment as a judge of the Supreme Court if -

(a) he is a citizen; and

(b) has been an advocate of the Supreme Court or a member of the judicial and legal service of the Federation for a period of not less than ten years, or has been the one for part and the other for the remainder of that period."

Clearly the changes were made as a result of the formation of Malaysia.

It is Article 123(b), in particular, that calls for interpretation in this case.

First, I would approach it by looking at the provision of the Constitution itself to discover the meaning intended.

Under Article 123(b) there are two categories of persons who are qualified to be appointed as a judge:

- (1) a person who has been an advocate and solicitor for ten years preceding his appointment.
- (2) A person who has been a member of the legal and judicial service of the Federation or of the legal service of a State or sometimes one and sometimes another or ten years preceding the appointment.

The Constitution specifically mentions "an advocate" and "a member of the legal and judicial service". Compare, for example, with the position in Singapore and India. In Singapore, Article 96 provides:-

"96. A person is qualified for appointment as a Judge of the Supreme Court if he has for an aggregate period of not less than 10 years been a qualified person within the meaning of section 2 of the Legal Profession Act (Cap. 161) or a member of the Singapore Legal Service, or both."

In other words, in Singapore there are three categories of persons who qualify to be appointed as a Judge:

- (1) A qualified person within the meaning of section 2 of the Legal Profession Act (Cap. 161).
- (2) A member of the Singapore Legal Service.
- (3) A person who has been both (1) and (2).

Category (2) in Singapore is similar to category (2) in Malaysia: both refer to a member of the legal and judicial service.

But category (1) in the two countries differ. In Malaysia, the key words are "an advocate". No

interpretation is given as to who is "an advocate". There is no reference to the Legal Profession Act 1967 or its predecessor at the time the Constitution was promulgated. On the other hand, in Singapore, the term used is "qualified person within the meaning of section 2 of the Legal Profession Act (Cap. 161)." In other words, specific reference is made to the meaning of "qualified person" provided in the Act. So, in Singapore, to know whether a person is qualified to be appointed as a Judge, one only has to look at the provision of the Legal Profession Act. Section 2 of the Singapore Legal Profession Act provides:

"qualified person" means any person who -

(a) before 1st May 1993 -

- (i) has passed the final examination for the degree of Bachelor of Laws in the University of Malaya in Singapore, the University of Singapore or the National University of Singapore;
- (ii) was and still is a barrister-at-law of England or of Northern Ireland or a member of the Faculty of Advocates in Scotland;

(iii) was and still is a solicitor in England or Northern Ireland or a writer to the Signet, law agent or solicitor in Scotland; and

(iv) was and still is in possession of such other degree or qualification as may have been declared by the Minister under section 7 in force immediately before 1st January 1994 and has obtained a certificate from the Board under that section;

(b) on or after 1st May 1993 possesses such qualifications and satisfies such requirements as the Minister may prescribe under subsection (2); or

(c) is approved by the Board as a qualified person under section 7;"

So, just to take one example, before 1st May 1993, in Singapore, a person who has passed the final examination for the degree of Bachelor of Laws in one of the universities mentioned is qualified to be

appointed as a judge. He does not have to be admitted to the bar or to practice.

In India, Article 124(3) of the Indian Constitution provides:

"(3) A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and -

(a) has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or

(b) has been for at least ten years an advocate of a High Court or of two or more such courts in succession; or

(c) is, in the opinion of the President, a distinguished jurist."

Note that under (c) "a distinguished jurist" is qualified to be appointed a judge.

Coming back to the position in Malaysia, we have noted the two categories: an advocate and a member of the judicial and legal service. No mention is made of

any other category, be it a "distinguished jurist", a law graduate per se, or a law graduate who may be working as a lecturer, professor, banker, a government servant, a politician or who whatever.

Let us now see if there is something in common between "an advocate" and "a member of the judicial and legal service" from which we can extract the intent of the Constitution. A member of the judicial and legal service can only mean a person who is employed as and works as a member of the judicial and legal service. He does the work, the judicial or legal work. There is no such thing as a "non-working" member of the judicial and legal service. He has to work as a judicial and legal officer for at least ten years before he qualifies to be appointed a judge. That is for him to gain the necessary experience to do the work of a judge when appointed.

In my view, the other limb of Article 123(b), i.e. "an advocate" should be seen from the same perspective. An "advocate" must be a person who works as an advocate. He too must have the experience working as an advocate before he qualifies to be appointed a judge. It is only logical that the two limbs must be seen from the same perspective.

The two categories of persons are required to have been so for ten years preceding their appointments. Why is such a requirement provided for? The obvious answer is for them to obtain experience from the work that they do as an advocate or a member of the judicial and legal service. I cannot think of any other reason for it.

That being so, then, the term "advocate" must necessarily mean a person who works as an advocate or who practices law.

It is interesting to note that Article 123(b) uses the word "advocate" instead of "advocate and solicitor". Section 2 of the Advocates and Solicitors Ordinance 1948, the law in force when the Constitution was drafted and promulgated contained a definition of "advocate and solicitor" and "solicitor" as follows:

" "advocate and solicitor" means an advocate and solicitor admitted and enrolled under this Ordinance, or prior to the commencement of this Ordinance under any written law of the Federated Malay States or of either the Settlements or of the State of Johore."

" "Solicitor" means a practitioner when performing those of his professional activities normally performed by a solicitor but not by a member of the Bar in England."

We see that, even though the term "advocate and solicitor" is used in the Ordinance, the drafters of the Constitution chose the word "advocate" when drafting the Constitution. True that the Ordinance did not define the word "advocate" even though the word "solicitor" was defined. Both are terms peculiar to the English legal profession. An advocate conducts cases in court. A solicitor does not.

Bearing in mind the background of the members of the Reid Commission that drafted the Constitution, it could well be that they were influenced by the position in England where, until very recently, only advocates were appointed as judges, not solicitors, even though in the then Malaya and until now we have a joint profession.

Besides, at the time when the Constitution was drafted, there was not even a law school in the then Malaya, or even when Malaysia was formed, not to speak of professors of law. There were certainly some people with a law degree in the civil service or in the private sector. But, the drafters of the Constitution only

chose those advocates or members of the legal and judicial service as persons qualified to be appointed Judges. They were the "practising lawyers".

Lest I am misunderstood, I am not saying that the Constitution should be interpreted under the circumstance or in accordance with the law at the time it was drafted. If the Malaysian Constitution contains a provision similar to the Singapore Constitution i.e. "a qualified person within the meaning of section 2 of the Legal Profession Act (Cap.161)", then whatever the meaning that is given to that term at any particular point of time the Constitution is to be interpreted, should be the meaning prevailing that should adopted. But, no definition of the term "advocate" is given in the Constitution, no provision is made that reference should be made to a provision in another law. By looking at the provision of the Constitution itself, in my view, the more reasonable meaning that should be given to the word "advocate" is a practising advocate.

I shall now consider other laws where the term "advocate" is used in order to see if they are of assistance. Even in so doing, the meaning given in those laws need not necessarily be the meaning assigned to the word by the Constitution. That is because, words must be read in their contexts. As has been

mentioned earlier under Section 2 of the Ordinance, "advocate and solicitor" was defined as "an advocate and solicitor admitted and enrolled under this Ordinance". Even that definition is subject to the words "unless there is something repugnant in the subject or context." So, it is quite neutral.

Under Part I of the Interpretation Acts 1948 and 1967, in section 3, "advocate" is defined as follows:

" "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;" (emphasis added).

Who is "entitled to practise as an advocate and solicitor under the law in force in any part of Malaysia"? Under the Legal Profession Act 1976, "no person shall practise as an advocate and solicitor or do any act as an advocate and solicitor unless his name is on the Roll and he has a valid practising certificate authorizing him to do the act" - section 36(1). So, he must have a practising certificate before he can practise as an advocate and solicitor. Otherwise, he is an "unauthorized person" - section 36(1). He commits an offence if he acts as an advocate and solicitor - section 37. So, if we go by the Legal

Profession Act 1967 "a person entitled to practise" must necessarily mean a person whose name is on the Roll and has a valid practising certificate.

Under the Sarawak Advocates Ordinance (Cap. 110) only an advocate who has "a certificate to practise" is "entitled to practise in Sarawak" for a particular year - section 9. The position is the same in Sabah - see section 9 of the Advocates Ordinance (Sabah Cap. 2).

Section 30(1) of the Legal Profession Act 1976, inter alia, provides:

"30.(1) No advocate and solicitor shall apply for a practising certificate -

- (a)
- (b)
- (c) If he is gainfully employed by another person, firm or body in a capacity other than as an advocate and solicitor."

This provision has been interpreted by the Court of Appeal in Syed Mubarak bin Syed Ahmad v Majlis Peguam Negara (sic) (2000) 4 MLJ 167. The court held that the words "gainfully employed" include a person who practises as an accountant in his own accountancy firm and not only a person "employed by another person,

firm or body." As a result he was not qualified to apply for a practising certificate.

In the present case, had Dr. Badariah wanted to apply for a practising certificate, she would not even be able to raise a similar argument as in Syed Mubarak bin Syed Ahmad (supra) as she was employed by the university. In other words, she would not qualify to obtain a practising certificate even if she wanted to practise during the period she was employed by the university.

We shall now look at the judgment of this Court in All Malayan Estates Staff Union v Rajasegaran & Ors. (2006) 6 MLJ 97. In that case, the respondent was admitted and enrolled as an advocate and solicitor of the High Court on 15 December 1995. He commenced legal practise on 1 April 1996 and ceased to do so on 23 January 2001. He was appointed as a Chairman of the Industrial Court on 15 January 2004. So, even though he had been admitted and enrolled as an advocate and solicitor for eight years and one month at the date of his appointment, he was in practise for only four years nine months and 22 days at that time. Section 23A(1) of the Industrial Relations Act 1967 provides:

"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 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 question was whether he was qualified to be appointed as a Chairman of the Industrial Court.

This Court held that the appointment of the respondent was invalid. Augustine Paul, FCJ, delivering the judgment of this court, inter alia, said at page 110 of the report:

"Thus, the purpose of the seven-year period in relation to a member of the judicial and legal service can be used to determine the purpose of the same period in the case of an advocate and solicitor. There can be no dispute that the reference to a member of the judicial and legal service is a reference to a person who has been employed as a legal officer. The

seven-year period in relation to such an officer is therefore a reference to his working experience in that capacity for the prescribed number of years. Similarly, the need for a person to have been an advocate and solicitor for seven years preceding his appointment is obviously a reference to his practice or experience as such. The rationale underlying the equation of the seven year requirement for an advocate and solicitor with a member of the judicial and legal service would promote and not frustrate the intention of Parliament."

This supports my view expressed earlier.

Further, at page 112, the learned Judge said:

"A person who is entitled to practise as an advocate and solicitor under the Legal Profession Act 1976 is one with a practising certificate. Accordingly, the term 'advocate and solicitor' in s 23A(1) must be construed as a reference to an advocate and solicitor who has been in practice under the Legal Profession Act 1976. This interpretation does not do any violence to the language

employed in s 23A(1) and is consistent with the object of the section as discussed earlier. It must thus be preferred in accordance with the requirement of s 17A. The answer to the question posed for our determination would therefore be in the negative."

Note that section 23(1) uses the words "an advocate and solicitor within the meaning of the Legal Profession Act 1976" while Article 123 uses the words "an advocate of those courts". In section 3 of the Legal Profession Act 1976 "advocate and solicitor" and "solicitor" are defined as follows:

" "advocate and solicitor", 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;" (emphasis added).

So, even though section 23(1) of the Industrial Relations Act 1967 specifically refers to the definition of "advocate and solicitor" in the Legal Profession Act 1967 and the definition in the latter Act only speaks about "admitted and enrolled" and not "practise", this Court had interpreted the words

"advocate and solicitor", in the context used in section 23(1) of the Industrial Relations Act 1967 to mean a practising advocate and solicitor.

On the other hand, article 123 of the Constitution makes no reference to the definition of "advocate and solicitor" in the Legal Profession Act 1967. So, in my view, there is a stronger reason to hold that the word "advocate" as used in Article 123 of the Constitution, means a practising advocate. In other words, compared to All Malayan Estates Staff Union v. Rajasegaran & Ors (supra) there is a stronger ground for the word "advocate" to be given the meaning of a practising advocate in the instant case.

To summarise my findings, even though the Constitution does not provide that to qualify to be appointed as a judge or a judicial commissioner, an advocate must be a practising advocate having a practising certificate, considering the two categories i.e. "an advocate" and "a member of the legal and judicial service" together, the more reasonable interpretation that should be given to the word "advocate" is a practising advocate. This is further strengthened by the requirement that an advocate or a member of the judicial and legal service must have been so for ten years. That requirement can only mean to

enable the advocate or the officer to gain experience at the bar or in the service before he is appointed. Otherwise, that requirement serves no purpose whatsoever. Unlike in Singapore where a person who has been a "qualified person" for an aggregate period of not less than ten years is qualified to be appointed a judge, in Malaysia he must have been "an advocate of those courts" for ten years preceding the appointment. The difference is clear. In Singapore, one does not have to be an advocate at all to qualify to be appointed a judge. He only has to pass the final examination for the degree of Bachelor of Laws from the universities mentioned. So, in Singapore, the requirement to practise does not arise. Unlike in Singapore too, the Constitution makes no reference to the Legal Profession Act 1967 or any other relevant law. So, the meaning to be assigned to the word "advocate" is not confined to the meaning of the same word used in the Legal Profession Act 1967. In any event, I do not find the definition of "advocate and solicitor" in the Act of any assistance. Other provisions in the Act are not of much assistance either, except that without a practising certificate, a person cannot practise as an advocate and solicitor. If he cannot practise, then, it is meaningless to apply the ten-year requirement to him. It does not serve any purpose.

The definition of the word "advocate" in section 3 of the Interpretation Act 1948 and 1967 also supports the conclusion that the word must mean an advocate having a practising certificate, otherwise he is not "entitled to practise".

The requirement that a person must be an advocate for at least ten years is meant to cover advocates and solicitors who practise law. It is not meant to include people who is "only in name" an advocate and solicitor merely by virtue of being admitted to the bar but spend their lives doing something else, whether teaching law, in business or politics. If they are intended to be included, the Constitution would and should have said so, as in Singapore or, more clearly in India which provides that a "distinguished jurist" is also qualified to be appointed a Judge.

Furthermore, this Court has only last year interpreted the provision of section 23A(1) of the Industrial Relations Act 1967 to mean a practising advocate and solicitor even though that section specifically refers to the meaning of "advocate and solicitor" in the Legal Profession Act 1967 which only speaks of an advocate and solicitor who has been admitted and enrolled as such. The definition of the word "advocate" in Article 123 of the Constitution is

not restricted to the meaning given in the Legal Profession Act 1967. I am unable to find any fault in that judgment to justify me to disagree with it. I am unable to find any justification to depart from it. On the other hand, to hold otherwise would lead to an absurd result in which, a non-practising advocate may not be appointed a Chairman of the Industrial Court but may be appointed a Judicial Commissioner, a Judge of the High Court, a Judge of the Court of Appeal, a Judge of the Federal Court or even the Chief Justice. He does not have to practise law even for a day. All he has to do is to get admitted to the Bar, then may be go into business and/or into politics and after ten years he is qualified to be a appointed even as a Chief Justice. That is the implication if this Court were to rule otherwise.

It may be that the time has come for other categories of persons e.g. academicians to be included as persons qualified to be appointed as Judges especially in such areas of law as intellectual property, conventional and Islamic finance and banking and so on. But that is a matter of policy for the Government to decide. It is not right for the court to rewrite the Constitution under the pretext of interpreting it to sneak in someone under the two

existing categories when, he or she does not really belong to either of them.

This judgment is not about the suitability of Dr. Badariah to be appointed a Judicial Commissioner. Academically, she is definitely one of the most, if not the most "qualified" person to be appointed a Judicial Commissioner. This judgment is about who is qualified to be appointed a judicial commissioner or a judge under the existing law, in particular, what is meant by "an advocate" in Article 123 of the Constitution.

For the reasons given above, in my judgment, Dr. Badariah, not having practised law at all since her admission to the Bar does not qualify to be appointed a Judicial Commissioner.

I would therefore answer Question (i) in the affirmative. My answer to Question (iii) is in the affirmative. In view of my answer to Question (i), Question (ii) becomes irrelevant.

Following the judgment of this court in All Malayan Estates Staff Union v. Rajasegaran & Ors (supra) I hold that even though the appointment of Dr. Badariah is invalid, all her judgments and orders

handed down by her as a Judicial Commissioner is not a nullity by reason of the defect in her appointment.

This reference should be allowed but as it is a matter of public interest, I would order that no order for costs be made in this or in the court below.

(DATO' ABDUL HAMID BIN HAJI MOHAMAD)

Ketua Hakim Negara
Malaysia.

Tarikh : 27 Disember 2007.

Tarikh Sidang : 22.10.2007

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