



**Bar Malaysia
Malaysian Bar**

www.malaysianbar.org.my

15 Leboh Pasar Besar
50050 Kuala Lumpur, Malaysia
Tel : +603-2050 2050
Fax : +603-2026 1313, 2034 2825, 2072 5818
Email : council@malaysianbar.org.my

**Circular No 157/2017
Dated 18 July 2017**

To Members of the Malaysian Bar

**Leave Application in the Federal Court of Malaysia (28 July 2017):
Malaysian Bar v Attorney General of Malaysia
& Malaysian Anti-Corruption Commission**

On 14 Mar 2016, the Malaysian Bar took an application for leave to commence judicial review proceedings to challenge the Attorney General's decision of 26 Jan 2016, purportedly made under Article 145(3) of the Federal Constitution ("Article 145(3)"), not to prosecute the Prime Minister, and to direct the Malaysian Anti-Corruption Commission ("MACC") to close its investigations into the alleged transfers of RM2.6 billion as well as funds from SRC International Sdn Bhd, both into the Prime Minister's personal bank accounts ("Attorney General's Decision").

The application was dismissed by the High Court on 11 Nov 2016, and the appeal to the Court of Appeal was dismissed on 4 Apr 2017. The Court of Appeal has not delivered its written grounds of judgment.

The Federal Court has fixed **28 July 2017 (Friday)** for the hearing of the Malaysian Bar's application for leave to appeal against the Court of Appeal's decision (*Malaysian Bar v Attorney General of Malaysia & Malaysian Anti-Corruption Commission*; Civil Application No: 08-219-05/2017).

The questions of law that the Malaysian Bar will place before the Federal Court relate primarily to the powers of the Attorney General, whether under Article 145(3) or otherwise, and the manner in which the Attorney General should deal with requests made by the MACC for mutual assistance from foreign agencies under the Mutual Assistance in Criminal Matters Act 2002 ("MACMA").

At the High Court and Court of Appeal, the Malaysian Bar's position in respect of these issues was that:

- (1) the Attorney General's Decision had prematurely and wrongfully exonerated the Prime Minister from any criminal wrongdoing;
- (2) the Attorney General's Decision was not a decision made under Article 145(3), because that provision does not empower the Attorney General to decide on the innocence or guilt of an accused person;
- (3) in any event, the Attorney General was in a position of conflict of interest and was thus disqualified from making the decision being challenged. The Attorney General had previously advised the Government on the subject matter in question, and was therefore conflicted from subsequently deciding whether to prosecute the Prime Minister in relation to the same matter;

- (4) the Attorney General had improperly directed the MACC to close its investigations (which the MACC had not yet completed) into the alleged transfer of RM2.6 billion into the Prime Minister's personal bank accounts, as the Attorney General did not have any power to do so; and
- (5) the Attorney General had wrongfully refused to consider the MACC's request for mutual assistance from foreign agencies in respect of its incomplete investigations, as he failed to adequately consider whether the request was relevant to the subject matter of the MACC's investigations.

It is noteworthy that the High Court did not decide the primary issue of whether the Attorney General's Decision was permissible under Article 145(3).

The High Court relied on a series of appellate court cases to support its decision. However, these cases do not directly deal with the exercise of the Attorney General's discretion under Article 145(3) not to institute a prosecution, which is the decision that the Attorney General made in this case. The High Court Judge was also unwilling to adopt the current position in other jurisdictions that allows for a review of this discretion of prosecuting authorities (which is the function discharged by the Attorney General).

Critically, the cases relied on by the High Court do not deal with a situation where the Attorney General exercised powers that are not conferred under Article 145(3) or any other provision of law.

The Malaysian Bar's leave application before the Federal Court therefore provides the Court with an apposite opportunity to resolve the issue of the scope of the Attorney General's powers under Article 145(3), and the Court's role when the Attorney General acts in excess of the powers granted to him.

The Attorney General's Decision is connected with various other ongoing matters, such as the criminal investigations, prosecutions and convictions in several other jurisdictions in respect of 1Malaysia Development Berhad ("1MDB") and, further, the filings by the United States Department of Justice ("DOJ") to recover assets linked with alleged misappropriated funds belonging to 1MDB.

In this respect, the Malaysian Bar's Federal Court leave application will be heard in the wake of the DOJ's recent civil proceedings to recover USD540 million in assets associated with funds allegedly misappropriated from 1MDB. The DOJ's proceedings aptly demonstrate that the investigations into this matter must continue, as the matter remains dynamic, with fresh evidence being uncovered on a regular basis. This vindicates the Malaysian Bar's position in the judicial review application, namely that the Attorney General had acted prematurely and wrongfully in exonerating the Prime Minister of criminal wrongdoing and in directing the closure of the MACC's investigations.

The Malaysian Bar's leave application in the Federal Court on **28 July 2017 (Friday)** will be argued by Tommy Thomas and Ambiga Sreenevasan.

Roger Chan Weng Keng
Secretary
Malaysian Bar