

## Badan Peguam Malaysia v Kerajaan Malaysia 2007 [FC]

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 be 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 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.

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, FCJJJ 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 have 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).

Judgment of Zulkefli Bin Ahmad Makinudin FCJ: I have read the judgment in draft of my learned brother Abdul Hamid Mohamad, CJ and I agree with the views expressed and the decision reached by his lordship on the questions referred for the determination of this Court on the interpretation of Article 123 of the Federal Constitution. I would like to state my views in support of the judgment of his lordship on some of the issues raised by the parties as follows:

The relevant background facts of the case and the three questions of constitutional issues referred to us for determination are as set out by his lordship Abdul Hamid Mohamad, CJ in his judgment.

It is to be noted the word “advocate” in Article 123 is not defined in the Federal Constitution, but the meaning can be found in sections 3 and 66 of the Interpretation Acts 1948 and 1967 [“The Interpretation Act”]. Section 3 of the Interpretation Act states that an “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. Section 66 of the Interpretation Act states that an “advocate” means as advocate and solicitor of the High Court and this provision only applies for the interpretation of any written law prior to its repeal with effect from 18.5.1967 [see section 65 Interpretation Act]. Section 3 of the Legal Profession Act, 1976 [“LPA 1976”] states that “advocate 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.

The Honourable Attorney General for the defendant submitted before us that since the statutory definition in section 3 of the Interpretation Act uses the word “means” in defining the words “advocate”, it would thus limit the meaning of the word to what is set out in the definition. Therefore, the definition of “advocate” in section 3 of the Interpretation Act must be limited to a person duly entitled to practise as an advocate or as an advocate and solicitor under the law in force in any part of Malaysia.

It was argued for the defendant that under the LPA 1976 there are three specific circumstances where a person is entitled to practise as an advocate or as an advocate and solicitor, namely:

- (i) a qualified person duly admitted as an advocate and solicitor under section 10 of the LPA 1976;
- (ii) a qualified person admitted to practise as an advocate and solicitor under section 18 of the LPA 1976; and
- (iii) a person duly admitted as an advocate and solicitor under section 28B of the LPA 1976, by virtue of a "Special Admission Certificate" issued by the Attorney General under section 28A.

It was further argued for the defendant since Dr Badariah bte Sahamid had been admitted as an advocate and solicitor in 1987 under section 10 of the LPA 1976, then she is eligible to practise as an advocate and solicitor under the LPA 1976. The defendant took the stand that the words "advocate of those courts" in Article 123 of the Federal Constitution must mean a person who has been admitted as an advocate and solicitor and has been enrolled as an advocate and solicitor of the High Court of Malaya, no matter whether he or she is in actual practise or not.

With respect, I could not agree with the submission of the Honourable Attorney General that Dr Badariah bte Sahamid has met the requirement of being "advocate of those courts" within the meaning of Article 123 of the Federal Constitution and that she need not be in actual practice to qualify for appointment as a Judicial Commissioner of the High Court. I am of the view the crucial words under Article 123 of the Federal Constitution that need to be considered are as follows:

"..... for the ten years preceding his appointment he has been an advocate of those courts....."

I am of the view to be an advocate of those courts, a person has to be in actual or active practice, besides having first been admitted and enrolled under the provision of the LPA 1976 as an advocate and solicitor. It further follows that to enable to practise, an advocate and solicitor has to apply for and be issued with a practising certificate. [See sections 29(1) and 30(1) of the LPA 1976]. Section 35(1) of the LPA 1976 provides that subject to the exceptions in Article 35(2), only advocates and solicitors have the exclusive right to appear and plead in all Courts of Justice in Malaysia. A person who is admitted as an advocate and solicitor but does not possess a valid practicing certificate is termed as "an unauthorized person". [See section 36(1) of the LPA 1976].

It is my judgment that based on the definition of "advocate" under section 66 of the Interpretation Act and the relevant provisions of the LPA 1976 as cited above when read together with the words "advocate of those courts" in Article 123 of the Federal Constitution would mean that an "advocate" is someone who has been in practise. In this context I would prefer to adopt the purposive approach of interpretation to be given to the meaning of the words "advocate of those courts" in Article 123 of the Federal Constitution. Our Federal Constitution is a living document and without doing violence to the language used the said Article 123 of the Federal Constitution should receive a fair, liberal and progressive construction so that its true objects must be promoted. [See Legislation and Interpretation by Jagadish Swarup at pages 479-480].

I am of the view the capacity that an advocate must be in active practise for the purposes of Article 123 of the Federal Constitution is further fortified by reference to the words "has been..." and the significance of the ten (10) year period. I take the view that the words "has been" in Article 123 must be in reference to the act that has been done, that is having being a practising advocate at those Courts of Law. The ten (10) year period would mean it is a vital requirement that before Dr Badariah bte Sahamid's appointment as a Judicial Commissioner was made in the present case, she had to show that she has at least ten years experience as a practicing advocate. This she had failed to do so. It must also be noted that to construe the words "advocate of those courts" to mean that an advocate need only be admitted and enrolled is to create an absurd situation in that an advocate need not be in active practise. In my view an advocate can only gain experience by being in practise. It is to be noted that under the same Article 123 of the Federal Constitution even a member of the Judicial and Legal Service of the Federation must have the requisite number of years of working experience to be eligible for appointment as a Judge or a Judicial Commissioner.

I am in agreement with the submission of Mr Robert Lazar, learned counsel for the plaintiff that the interpretation favoured by the plaintiff is consistent with the fact that our Courts have always considered an advocate to be in active practise because he is not allowed to practise another profession at the same time or be gainfully employed in a capacity other than as an advocate and solicitor. [See the case of Syed Mubarak bin Syed Ahmad v Majlis Peguam Negara (2000) 4 MLJ 167]. I also find the interpretation that an "advocate" must be an advocate in active practise is consistent with the dictionary meaning of "advocate". In Black's Law Dictionary, Sixth Edition at page 55, an advocate is defined as "one who assists, defends, or pleads for another. One who renders legal service and aid and pleads the cause of another. A person learned in the law and duly admitted to practise, who assists his client with advice, and pleads for him in open court." [Emphasis added].

Finally, I would like to refer to the case of All Malayan Estate Staff Union v. Rajasegaran & Ors. (2006) 6 MLJ 97. In Rajasegaran's case the Federal Court considered the provision of section 23A(1) of the Industrial Relations Act 1967 ["IRA"] which reads as follows:

"Qualification of President and Chairman of Industrial Court

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 [Act 166] 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 Federal Court came to the conclusion that the seven years stipulated in section 23A(1) of the IRA means that the person must have been in practise for that period of time and must be construed as a reference to an advocate and solicitor who has been in practise under the LPA 1976. I am of the view the reasoning in Rajasegaran's case applies with equal, if not greater force to the present case. The only difference between Article 123 of the Federal Constitution and section 23A(1) of the IRA is that the number of years 10 in the Federal Constitution and 7 in the IRA, and the phrase "advocate of those courts" in the Federal Constitution reads as "advocate and solicitor within the meaning of the Legal Profession Act 1976" in the IRA. Again, in Rajasegaran's case it shows that an advocate can only gain experience by being in practise. If a narrow construction is adopted to interpret Article 123 of the Federal

Constitution in that an advocate need not be in active practice to be eligible for appointment as a Judge or as a Judicial Commissioner, and applying the principles enunciated in Rajasegaran's case it would lead to an absurd consequence in that a person who is ineligible to be appointed as Chairman of the Industrial Court [inferior court], could be appointed as a Judge or as a Judicial Commissioner of the High Court.

For the reasons already stated my answer to Question (j) as referred to by the parties for the determination of this Court would be in the affirmative and that the appointment of Dr Badariah bte Sahamid as a Judicial Commissioner of the High Court of Malaya with effect from 1.3.2007 is null and void.

Judgment of Azmel Haji Maamor, FCJ: I have the benefit of reading the judgments in draft of my four learned brothers. After having considered them I would agree with the views expressed and the decision arrived by my learned brother Hashim Yusoff FCJ. In support of his lordship's judgment I hereby state my views.

The facts of this case, which are not disputed have been well narrated by my learned brother Abdul Hamid Mohamad PCA in his judgment and I do not wish to repeat them here.

This court has been requested to construe the provision of Article 123 of the Federal Constitution which deals with the qualification of a person to be appointed as a Judicial Commissioner, specifically, whether the words "advocates of those courts" appearing in Article 123 of the Federal Constitution require 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.

At the hearing Counsel for the Plaintiff strenuously submitted that it would be a mandatory requirement that the advocate must possess a practising certificate in order to be qualified to be appointed as a Judicial Commissioner. The learned Attorney General on behalf of the Defendant, however, argued that the wordings of Article 123 of the Federal Constitution are clear and unambiguous and as such the Article must be given its literal meaning without the need to use the purposive approach in interpreting it.

At the outset I must say it is of paramount importance to bear in mind that in interpreting the provisions of a constitution being the supreme law of a country the generally accepted principles of constitutional interpretation would have to be applied. Those principles are not the same as the ones normally used in interpreting an ordinary statute or law. There have been several decided cases in respect of this subject matter. Some of those cases have been referred to by my learned brother Hashim Yusoff FCJ in his judgment. One of such cases is *Merdeka University v Government of Malaysia* [1981] 2 MLJ 356 where Eusoffe Abdoolcader J. (as he then was) had delved in detail those principles by referring to several other cases from which these principles were established. In his judgment his lordship also quoted the landmark case of *Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus* [1984] 1 CLJ (Rep) 98 where Raja Azlan Shah Ag. LP (as His Royal Highness then was) had also clearly stated the general principles in constitutional interpretation. And I do not wish to restate them here. Suffice it for me to state a few of the

principles which I consider relevant to be applied in the instant case, namely:-

- i) A constitution should be considered with less rigidity and more generosity than other statutes.
- ii) The only true guide and 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 a meaning by legal reasoning.
- iii) The constitution is not to be construed in any narrow or pedantic sense.
- iv) A vitally important function of the Court is to interpret constitutional provisions conferring rights with the fullness needed to ensure that citizens have the benefit these constitutional guarantees are intended to afford.
- v) Provisions derogating from the scope of guaranteed rights are to be read restrictively.
- vi) Judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation.
- vii) Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language.

I shall now apply the aforesaid principles of constitutional interpretation in dealing with the instant case as it involves a provision of the Federal Constitution. Firstly, the term "advocate and solicitor" or "advocate" had been decided differently by two different Federal Court cases. In the case of *M Sammantha Murthi v The Attorney-General & Ors* [1982] CLJ (Rep) 213 the panel of three renowned Federal Court judges all of whom had held the post of Lord President (Suffian, Raja Azlan Shah and Salleh Abas) in interpreting S.13(1) of the Legal Profession Act, 1976 (LPA), Suffian LP, in delivering the decision of the court, ruled:-

"The section does not say that to be an advocate and solicitor one must have a practicing certificate. In our judgment Mr Reddy is an advocate and solicitor within the Act although he has no practicing certificate under the Act. As long as he has been "admitted and enrolled" under the Act or any previous law he is an advocate and solicitor within the meaning of the Act."

The recently decided Federal Court case of *All Malayan Estate Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 ruled that for purposes of S.23A of the Industrial Relations Act 1967 (IRA) in order for an advocate and solicitor to be qualified to be appointed as a Chairman of the Industrial Court he must have a practising certificate.

So we are faced with two conflicting decisions of the Federal Court on the same issue. Which of the two should we follow. We must be reminded that we are construing the provision of the Federal Constitution and not an ordinary statute. As such the principles regarding constitutional interpretation have to be adhered to. One of such principles as I have stated above states that a constitution is not to be construed in any narrow or pedantic sense. It should be considered with less rigidity and more generosity than other statutes. It is quite obvious to me that the Rajasegaran case had been construed narrowly or rigidly by inserting into its meaning the need to have a practising certificate when the words "practising certificate" were not so provided in Article 123 of the Federal Constitution. Hence for this court to be governed by the decision in Rajasegaran case would tantamount to deciding contrary to the generally accepted principles of constitutional interpretation. In my view the decision in Rajasegaran case should be ignored. On the other hand the decision in *MS Murthi* case would be a more appropriate case for this court to follow. A closer look at the decision of Suffian LP in *MS Murthi* case one can clearly see that the approach the court took in interpreting S.13(1) of LPA was akin to the principles of constitutional interpretation by not giving a narrower or restrictive meaning of the term "advocate and solicitor".

The Indian case of C.P Agarwal v C.D Parikh (1970) S.C AIR 1061 referred to by the learned Attorney-General in his submission and also mentioned by my learned brother Hashim Yusoff FCJ in his judgment would also give support to the usage of principles of constitutional interpretation in construing constitutional provision. In interpreting a constitutional provision one cannot infer any additional word in the Article if the effect of such addition would be to create a rigidity or narrowness in the meaning of that constitutional provision. Any such addition should only serve to enlarge or broaden the meaning. Hence the word "generosity" is mentioned in one of the above said principle.

To apply the undisputed facts of this case, Dr Badariah Sahamid's legal qualification is impeccable. Even the Counsel for the Plaintiff admitted that what Majlis Peguam Malaysia complaining is not her legal qualification but merely that Dr Badariah does not have a practising certificate. In my view, getting a practising certificate after one has been admitted as an advocate and solicitor would not require further legal qualification. On payment of an annual fee one can be issued with such practising certificate. Is not this a pedantic requirement? I say so because a person may have a practising certificate but that does not guarantee that he would be actively practising law. For as long as he pays the annual fee he will continue to have his practising certificate. Hence by requiring a person to have a practising certificate in order to be qualified to be appointed as a Judicial Commissioner would not guarantee that a person issued with a certificate would "actually" practise law. Yet he comes within the category of a "qualified person" to be appointed as a Judicial Commissioner. Even assuming that he actually practises law but deals with conveyancing matters which require not litigation works at all, would he then be a "proper" person qualified to be appointed as a Judicial Commissioner? In other words, the insistence of adding the words "practising certificate" within the meaning of Article 123 of the Federal Constitution would not guarantee us getting "proper" candidates for the appointment of a Judicial Commissioners. If we really want to have "really proper" qualified persons two other meaningful requirements should be added to the said Article apart from merely having the practising certificate. They are:-

- i) "actively practising law; and
- ii) The word "immediately" before the word "preceding".

I have already explained why the need for a person having a practising certificate to be "actively practising law". In addition to that such person to be qualified for the appointment must be in active practice immediately preceding his appointment. We do not want a case of a person to have been in active practice for 10 years but then does work not related to legal practice for the next 20 years before being appointed a Judicial Commissioner, even though he may be a qualified person if the word "immediately" is not inserted before the word "preceding". If these 2 requirements are added then we may be able to get the "really appropriate and proper" qualification requirements.

But should we do that? I think the answer should be in the negative. It would mean a number of judges already appointed to the judiciary would be declared to have been invalidly appointed e.g. Yaacob Ismail J was appointed when he was employed by Petroleum Nasional Bhd immediately preceding his appointment as a Judicial Commissioner. Syed Ahmad Idid J was employed by Public Bank Bhd immediately preceding his appointment as a Judicial Commissioner. Both of them have served and left the Judiciary without any objection by anybody. Rohana Yusof J was employed by Bank Negara immediately preceding her appointment as a Judicial Commissioner. Presently she is still serving as a High Court Judge. Even though these three people were at one time members of the Judicial and Legal Service the moment they left the said service their eligibility would have also ceased. The eligibility, however, would be revived if they had been admitted as advocates and solicitors actively practising law immediately preceding their appointments. But they would not be able to actively practise

law because they could not obtain their practising certificate since they were gainfully employed.

Another interesting case is that of Dr Visu Sinnadurai J who was straightaway appointed as a High Court Judge while serving as Commissioner for Law Revision for a few years (less than 10 years) immediately preceding his appointment. I remember he was appointed as a Judge not long after I was appointed as a Judicial Commissioner in 1992. Prior to his appointment as the Commissioner for Law Revision he was gainfully employed as a Law Professor at the Law Faculty, University of Malaya. Could he be having a practising certificate while he was employed in the University and as a Commissioner for Law Revision? In my view it would be legally impossible for him to be issued with a practising certificate because he was all the time gainfully employed which is a restriction to obtain a practising certificate as provided under S.30(1) of the LPA. If he had been issued with a practising certificate while being gainfully employed then I must say that such issuance had been fraudulently made by the Bar Council having regard to the fact that he was all the time gainfully employed. In any case, Dr Visu Sinnadurai J had left the service.

Be that as it may the point I wish to make here is that the case of Dr Visu Sinnadurai J can be regarded as a precedent as to how the previous appointing authorities construed Article 123 of the Federal Constitution concerning qualification for the appointment of candidates to be Judges or Judicial Commissioners. It must also be remembered that the Bar Council did not raise any objection against such appointment.

It must have been the thinking of the relevant appointing authorities then that Dr Visu Sinnadurai was a person highly qualified and deserving to be appointed as a Judge to the extent that he was appointed straight as a High Court Judge without the need to undergo through the period judicial commissionership like all of us today. Undoubtedly he was a very known figure among the legal fraternity including the Bar Council. There was no objection by anybody including the Bar Council then. As such Dr Badariah's appointment should, in my view, be viewed similarly as that of Dr Visu Sinnadurai. Why in the case of Dr Badariah there is an objection by the Bar Council? Why in one case it is condoned and in the other case it was objected to? Why the inequality of treatment in respect of these two persons? On this issue I would refer to the case mentioned by my learned brother Hashim Yusoff FCJ in his judgment i.e. *Tan Tek Seng @ Tan Chee Meng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771 where the court made the following observation:-

"It is my respectful view that when interpreting our Federal Constitution one must bear in mind the all prevailing provision of Article 8(1). (see *Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia*). To read into Article 123 of the Federal Constitution the words "a practicing" before the work "advocate" is to deprive the Respondent of equality before the law; a fundamental liberty under our Constitution. Article 8(1) does not declare that all persons must be treated alike out that persons in the circumstances must be treated alike."

In the light of the precedent created through the appointment of Dr Visu Sinnadurai and the lack of objection by the Bar Council I am of the view that it would be highly unfair and certainly most unconscionable on the part of the Bar Council to practise a double standard. Such differing treatment by the Bar Council should not be condoned by this court at all.

In the circumstances and for the reasons as stated above I would declare that Dr

Badariah binti Sahamid who is an advocate and solicitor although not having her practising certificate is a qualified person to be appointed as Judicial Commissioner within the meaning of Article 123 of the Federal Constitution. She was therefore validly appointed as a Judicial Commissioner. I therefore dismiss the Plaintiff's claim with costs here and the court below.

27 December 2007

Counsel:

For the plaintiff : Robert Lazar

Mark Lau

Solicitors : Tetuan Sivananthan

For the defendant : Tan Sri Abdul Gani Patail,  
Attorney General

Dato' Kamaludin Md. Said (SFC)

Azizah Nawawi (SFC)

Suzana Atan (SFC)

Solicitors : Jabatan Peguam Negara