Badan Peguam Malaysia v Kerajaan Malaysia

FEDERAL COURT (PUTRAJAYA) — CIVIL REFERENCE NO 06–1 OF 2007(W)
ABDUL HAMID MOHAMAD CHIEF JUSTICE, NIK HASHIM, HASHIM YUSUFF, AZMEL AND ZULKEFLI FCJJ
27 DECEMBER 2007

Constitutional Law — Constitution — Interpretation — Whether should be construed with less rigidity and more generosity than other statutes — Whether words 'advocates of those courts' appearing in art 123 of Federal Constitution requires an advocate to have been in practice for a period of ten years preceding her appointment as a judicial commissioner under art 122AB of the Federal Constitution — Federal Constitution art 123 —

Constitutional Law — Judges — Appointment — Whether Constitution should be construed with less rigidity and more generosity than other statutes — Whether words 'advocates of those courts' appearing in art 123 of Federal Constitution requires an advocate to have been in practice for a period of ten years preceding her appointment as a judicial commissioner under art 122AB of the Federal Constitution — Federal Constitution art 123

Words & Phrases — 'advocates of those courts' — Federal Constitution art 123

By an originating summons, 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 was null and void and of no effect on the ground that the appointment was in contravention of art 122AB read together with art 123 of the Federal Constitution. On 27 August 2007, ie 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 s 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 were as follows:

(i) Whether the words 'advocates of those courts' appearing in art 123 of the Federal Constitution requires an advocate to have been in practice for a period of 10 years preceding his/her appointment as a judicial commissioner under art 122AB of the Federal Constitution?

(ii) If the answer to question (i) is in the negative, is the appointment of YA Dr Badariah Sahamid as a judicial commissioner of the High Court of Malaya with effect from 1 Mac 2007 valid?

Dr Badariah Sahamid graduated with a first class honours degree in law from the University of Malaya on 17 June 1978. That qualification renderred her to be a 'qualified person' within the meaning of the Legal Profession Act 1976. Having completed her pupilage 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, Associate Professor and later Professor at the Faculty of Law of the University of Malaya from 14 January 1980. The issue before this court was one of law, ie whether she was, in law, qualified for the appointment.

Held, by majority answering questions (i) and (ii) in the negative and affirmative respectively:

(1) (per **Hashim Yusuff FCJ**, **Azmel FCJ** concurring) When interpreting the Federal Constitution one must bear in mind the all pervading provisions of art 8(1). To read into art 123 of the Federal Constitution the words 'a practising' before the word 'advocate' is to deprive the respondent of equality before law, a fundamental liberty under the Constitution (see para 86).

(2) (per **Hashim Yusuff FCJ**, **Azmel FCJ** concurring) In the instant case the court is interpreting the Federal Constitution which is a constitutional instrument sui generis to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation. The Legal Profession Act, governing the legal profession, has provisions relating to 'advocate in active practise', advocate having a practising certificate and 'a practising advocate' eg, ss 13(1), 21(1), 36 and 38(g) and the draftsman being aware, as he must have been of such provisions would surely spell out 'practising advocate' requirements in art 123 of the Federal Constitution if he had intended such a limitation in art 123 (see paras 93–94).

(3) (per **Hashim Yusuff FCJ**, **Azmel FCJ** concurring) Moreover, it is fallacious to argue that legal experience if indeed it is a requirement of art 123, can only be obtained as a 'practising advocate'. While legal experience could commonly be gained by legal practise it is not the only or exclusive means of gaining legal experience. Section 38(g) of the Legal Profession Act specifically recognizes a full-time law lecturer acting as an advocate and solicitor in solely advisory capacity upon

instructions from a practising advocate and solicitor. What more, a person is qualified for appointment as a judge of the High Court if he has been a member of the Judicial and Legal Service for the 10 years preceding his appointment even if he were to have been posted in the Drafting Division of the Attorney General's Chambers and may not even have gone to court even once during his tenure there (see paras 95–96).

(4) (per **Hashim Yusuff FCJ**, **Azmel FCJ** concurring) Dr Badariah had wide knowledge and experience in several areas of the law and legal cases that come before the courts. This could be seen from her affidavit filed therein. Indeed as a lecturer in law she has been responsible in teaching and training numerous advocates and solicitors. There was no valid reason why a person of her standing and experience in the law should be deprived of her privilege and benefit of being appointed as a judicial commissioner. The administration of justice and the public has more to gain than lose if she was appointed as a judicial commissioner (see para 97).

(5) (per **Azmel FCJ**) This case pertained to 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 is 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 was quite obvious that the case of *Rajasegaran* 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 art 123 of the Federal Constitution. Hence for this court to be governed by the decision in *Rajasegaran* would tantamount to deciding contrary to the generally accepted principles of constitutional interpretation. The decision in *Rajasegaran*should be ignored. On the other hand the decision in *Samantha Murthi* would be a more appropriate case for this court to follow. In that case one could clearly see that the approach the court took in interpreting s 13(1) of Legal Profession Act 1976 ('the LPA') was akin to the principles of constitutional interpretation by not giving a narrower or restrictive meaning of the term 'advocate and solicitor' (see para 129); *Samantha Murthi v Attorney-General, Malaysia & Ors* [1982] 2 MLJ 126 followed; *All Malayan Estate Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 not followed.

(6) (per **Azmel FCJ**) 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. In other words, the insistance of adding the words 'practising certificate' within the meaning of art 123 of the Federal Constitution would not guarantee us getting 'proper' candidates for the appointment of a judicial commissioners (see para 131).

(7) (per **Azmel FCJ**) In the light of the precedent created through the appointment of Dr Visu Sinnadurai and the lack of objection by the Bar Council 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 (see para 137).

(8) (per **Nik Hashim FCJ**) A broad and liberal interpretation should be given to the phrase 'advocate of those courts' under art 123 of the Federal Constitution. 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 (see para 55).

(9) (per **Nik Hashim FCJ**) 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 judicial commissioner or a judge of the High Court, would amount to reading words which are not in art 123 of the Constitution, and surely it is a wrong thing to do for the term 'advocate' in the Constitution appears to have the same meaning as 'advocate' and 'advocate and solicitor' under s 66 of the Interpretation Acts 1948 and 1967 (Part II) to mean an advocate and solicitor of the High Court, and under s 3 of the Legal Profession Act 1976 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 had no practising certificate under the LPA, she was an advocate and solicitor as she had been admitted and enrolled as one and there is nothing in s 3 to say that to be an advocate and solicitor one must have a practising certificate. Thus, an 'advocate of those courts' under art 123 of the Constitution does not necessarily need to be a practising advocate and solicitor (see para 58).

(10)(per **Nik Hashim JCA**) The Bar Council's interpretation of art 123 of the Constitution 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 judicial commissioner. Therefore, the main criterion for the appointment as a judicial commissioner or a judge of the High Court is that the candidate must had been called to the Bar

A 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 (see para 59); *Samantha Murthi v Attorney-General, Malaysia & Ors* [1982] 2 MLJ 126 followed; *All Malayan Estate Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 distinguished.

(11)(per **Abdul Hamid Mohamad Chief Justice**) 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 ie '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 (see para 42).

(12)(per **Abdul Hamid Mohamad Chief Justice**) The definition of the word 'advocate' in s 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 (see paras 43–44).

(13)(per **Abdul Hamid Mohamad Chief Justice**) Furthermore, this court has only last year interpreted the provision of s 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 art 123 of the Constitution is not restricted to the meaning given in the Legal Profession Act 1967. There is no fault in that judgment to justify the court to disagree with 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 (see para 45); *All Malayan Estate Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 followed.

(14)(per **Abdul Hamid Mohamad Chief Justice** dissenting) It may be that the time has come for other categories of persons, eg 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 (see para 46).

(15)(per **Zulkefli FCJ** dissenting) The crucial words under art 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 ….' In order 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 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 paras 114–115).

(16)(per **Zulkefli FCJ** dissenting) Based on the definition of 'advocate' under s 66 of the Interpretation Act and the relevant provisions of the LPA when read together with the words 'advocate of those courts' in art 123 of the Federal Constitution would mean that an 'advocate' is someone who has been in practise. In this context the purposive approach of interpretation should be adopted to the meaning of the words 'advocate of those courts' in art 123 of the Federal Constitution. The Federal Constitution is a living document and without doing violence to the language used art 123 of the Federal Constitution should receive a fair, liberal and progressive construction so that its true objects must be promoted (see para 116).

(17)(per **Zulkefli FCJ** dissenting) The capacity that an advocate must be in active practise for the purposes of art 123 of the Federal Constitution is further fortified by reference to the words 'has been....' and the significance of the ten year period. The words 'has been' in art 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 year period would mean it is a vital requirement that before Dr Badariah'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 practising advocate. 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. It is to be noted that under the same art 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 (see para 117).

(18)(per **Zulkefli FCJ** dissenting) The interpretation favoured by the plaintiff is consistent with the fact that the 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 para 118).

(19)(per **Zulkefli FCJ** dissenting) The Federal Court in *All Malayan Estate Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 had came to the conclusion that the seven years stipulated in s 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. If a narrow construction is adopted to interpret art 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 (see para 120).

[Bahasa Malaysia summary

Melalui satu saman pemula, Majlis Peguam ('plaintif') memohon satu deklarasi bahawa pelantikan Dr Badariah bte Sahamid sebagai pesuruhjaya kehakiman Mahkamah Tinggi Malaya adalah terbatal dan tidak sah dan tidak berkuat kuasa atas alasan bahawa pelantikan itu bercanggah dengan perkara 122AB dibaca bersama dengan perkara 123 Perlembagaan Persekutuan. Pada 27 Ogos 2007, iaitu sehari sebelum perkara tersebut dijadualkan untuk sebutan di hadapan hakim bijaksana Mahkamah Tinggi, Kerajaan Malaysia ('defendan') memfailkan satu saman dalam kamar untuk persoalan-persoalan undang-undang berkaitan pelantikan itu dirujuk kepada mahkamah ini menurut s 84 Akta Mahkamah Kehakiman 1964. Pada 18 September 2007, selepas perbicaraan pihak-pihak tersebut, hakim bijaksana membenarkan permohonan defendan dan merujuk isu-isu perlembagaan ke mahkamah ini untuk diputuskan. Isu-isu tersebut adalah seperti berikut:

(i) Sama ada perkataan-perkataan 'advocates of those courts' yang terdapat dalam perkara 123 Perlembagaan Persekutuan memerlukan seorang peguambela beramal untuk tempoh 10 tahun sebelum pelantikannya sebagai pesuruhjaya kehakiman di bawah perkara 122AB Perlembagaan Persekutuan?

(ii) Jika jawapan kepada Soalan (i) adalah negatif, adakah pelantikan YA Dr Badariah Sahamid sebagai pesuruhjaya kehakiman Mahkamah Tinggi Malaya yang berkuat kuasa dari 1 Mac 2007 sah?

Dr Badariah Sahamid lulus dengan ijazah sarjan kelas pertama undang-undang dari Universiti Malaya pada 17 Jun 1978. Kelayakan tersebut menjadikannya 'qualified person' dalam maksud Akta Profesyen Undang-Undang 1976. Setelah tamat latihan guamannya dan telah memenuhi keperluan Akta tersebut, pada 26 September 1987, beliau dimasukkan sebagai peguambela dan peguamcara Mahkamah Tinggi Malaya. Namun, beliau tidak pernah memohon mahupun memperoleh sijil amalan yang membolehkan beliau beramal sebagai peguambela dan peguamcara. Sebaliknya, beliau telah berkhidmat sebagai pensyarah, Profesor Bersekutu dan kemudian Profesor di Fakulti Undang-Undang Universiti Malaya daripada 14 Januari 1980. Isu di hadapan mahkamah ini berkaitan undang-undang, iaitu sama ada beliau adalah, dari segi undang-undang, layak untuk pelantikan tersebut.

Diputuskan, dengan majoriti menjawab soalan (i) dan (ii) secara negatif dan bersetuju masing-masingnya:

(1) (oleh **Hashim Yusuff HMP**, **Azmel HMP** bersetuju) Apabila mentafsir Perlembagaan Persekutuan perlu diingat peruntukan sepenuhnya perkara 8(1). Untuk membaca perkara 123 Perlembagaan Persekutuan perkataan-perkataan 'a practising' sebelum perkataan 'advocate' akan menafikan responden kesaksamaan di sisi undang-undang, suatu kebebasan asasi di bawah Perlembagaan (lihat perenggan 86).

(2) (oleh **Hashim Yusuff HMP**, **Azmel HMP** bersetuju) Dalam kes semasa mahkamah mentafsir Perlembagaan Persekutuan yang merupakan satu alat perlembagaan sui generis yang perlu ditafsirkan menurut prinsip-prinsip yang sesuai dengan sifat tertentu dan tidak semestinya menurut rukun dan andaian tafsiran statutori yang biasa (lihat perenggan). Akta Profesyen Undang-Undang, yang mengawal profesyen perundangan, mempunyai peruntukan-peruntukan berkaitan ' advocate in active practise', peguambela yang mempunyai sijil amalan dan 'a practising advocate' contohnya ss 13(1), 21(1), 36 dan 38(g) dan penggubal sedar akan perkara tersebut, kerana beliau semestinya dalam peruntukan-peruntukan sebegini menyatakan keperluan 'practising advocate' dalam perkara 123 Perlembagaan Persekutuan jika beliau berniat untuk adanya batasan dalam perkara 123 (lihat perenggan 93–94).

(3) (oleh **Hashim Yusuff HMP**, **Azmel HMP** bersetuju) Tambahan pula, adalah satu anggapan salah untuk berhujah bahawa pengalaman undang-undang jika semestinya satu keperluan perkara 123, hanya

boleh diperoleh sebagai 'practising advocate'. Meskipun pengalaman undang-undang biasanya diperoleh melalui amalan undang-undang ia bukan satu-satunya atau sumber eksklusif memperoleh pengalaman undang-undang. Seksyen 38(g) Akta Profesyen Undang-Undang khususnya mengiktiraf pensyarah undang-undang sepenuh masa yang bertindak sebagai peguambela dan peguamcara semata-mata dalam kapasiti penasihat atas arahan daripada peguambela dan peguamcara yang beramal (lihat perenggan). Apa lagi, seseorang yang layak untuk pelantikan sebagai hakim Mahkamah Tinggi jika beliau merupakan ahli Perkhidmatan Kehakiman dan Perundangan selam 10 tahun sebelum pelantikannya jikapun beliau ditugaskan ke dalam Bahagian Penggubalan Jabatan Peguam Negara dan mungkin tidak perlu langsung semasa perkhidmatannya di sana (lihat perenggan 95–96).

(4) (oleh **Hashim Yusuff HMP**, **Azmel HMP** bersetuju) Dr Badariah mempunyai pengetahuan dan pengalaman luas dalam beberapa bidang perundangan dan kes-kes undang-undang yang dihadapkan ke mahkamah. Ini dapat dilihat daripada afidavitnya yang difailkan di sini. Sememangnya sebagai pensyarah undang-undang beliau dipertanggungjawabkan untuk mengajar dan melatih pelbagai peguamcbela dan peguamcara. Tiada alasan sah kenapa seseorang dengan pendirian dan pengalamannya dalam undang-undang patut dinafikan hak istimewa dan faedah dilantik sebagai pesuruhjaya kehakiman. Pentadbiran keadilan dan masyarakat awam akan lebih mendapat manfaat daripada rugi jika beliau dilantik sebagai pesuruhjaya kehakiman (lihat perenggan 97).

(5) (oleh Azmel HMP) Kes ini berkaitan pentafsiran peruntukan Perlembagaan Persekutuan dan bukan satu statut yang biasa. Oleh itu prinsip-prinsip berhubung pentafsiran perlembagaan hendaklah dipatuhi. Salah satu daripada prinsip-prinsipnya adalah bahawa suatu perlembagaan tidak boleh ditafsirkan terlalu teliti. Ia perlu ditafsirkan dengan kurang ketegaran dan lebih longgar daripada statut-statut lain. Adalah jelas bahawa kes *Rajasegaran* ditafsir secara teliti dengan mendalami maksudnya yang menghendaki perlunya ada sijil amalan apabila perkataan-perkataan 'practising certificate' tidak diperuntukkan dalam perkara 123 Perlembagaan Persekutuan. Justeru itu untuk mahkamah ini dikawal oleh keputusan dalam *Rajasegaran* adalah sama seperti memutuskan bertentangan dengan prinsip-prinsip pentafsiran perlembagaan yang biasa diterima. Keputusan *Rajasegaran* patut tidak dipedulikan. Sebaliknya keputusan dalam *Samantha Murthi* adalah kes yang sesuai untuk mahkamah ini ikuti. Dalam kes itu jelas dilihat bahawa pendekatan yang diambil oleh mahkamah dalam mentafsir s 13(1) Akta Profesyen Undang-Undang 1976 ('APU') adalah sama dengan prinsip-prinsip pentafsiran perlembagaan yang tidak memberikan maksud sempit atau terbatas terhadap terma 'advocate and

solicitor' (lihat perenggan 129); *Samantha Murthi v Attorney-General, Malaysia & Ors* [1982] 2 MLJ 126 diikut; *All Malayan Estate Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 tidak diikut.

(6) (oleh **Azmel HMP**) Justeru itu dengan menghendaki seseorang itu mempunyai sijil amalan bagi tujuan melayakkannya dilantik sebagai pesuruhjaya kehakiman tidak menjamin seseorang yang diberikan sijil itu 'actually' beramal undang-undang. Bahkan seseorang itu terjatuh dalam kategori 'qualified person' yang dilantik sebagai pesuruhjaya kehakiman. Dalam perkataan lain, penegasan untuk menambah perkataan-perkataan 'practising certificate' dalam maksud perkara 123 Perlembagaan Persekutuan tidak menjamin kita mendapat calon ' proper' untuk pelantikan seorang Pesuruhjaya Kehakiman (lihat perenggan 131).

(7) (oleh **Azmel HMP**) Berdasarkan duluan yang dibentuk melalui lantikan Dr Visu Sinnadurai dan kurangnya bantahan daripada Badan Peguam ia amatlah tidak adil dan semestinya tidak berpatutan di pihak Badan Peguam mengamalkan sikap berat sebelah. Layanan berbeza sebegini oleh Badan Peguam tidak patut langsung dibiarkan berlaku oleh mahkamah ini (lihat perenggan 137).

(8) (oleh **Nik Hashim HMP**) Pentafsiran meluas dan liberal patut diberikan kepada ungkapan 'advocate of those courts' di bawah perkara 123 Perlembagaan Persekutuan. Seruan ini sejajar dengan prinsip tetap bahawa suatu perlembagaan patut ditafsirkan dengan ketegaran yang kurang dan kelonggaran yang lebih daripada statut-statut lain (lihat perenggan 55).

(9) (oleh **Nik Hashim HMP**) Pentafsiran yang menghendaki hanya peguambela dan peguamcara yang beramal (memiliki sijil amalan) sebelum pelantikan itu yang mana sebelum beliau layak menjadi pesuruhjaya kehakiman atau hakim Mahkamah Tinggi, memerlukan pembacaan perkataan-perkataan yang tidak ada dalam perkara 123 Perlembagaan, dan semestinya perkara yang salah untuk berbuat sedemikian kerana terma 'advocate' dalam Perlembagaan dilihat mempunyai maksud sama dengan 'advocate' dan 'advocate and solicitor' di bawah s 66 Akta Tafsiran 1948 dan 1967 (Bahagian II) untuk bermaksud seorang peguambela dan peguamcara Mahkamah Tinggi, dan di bawah s 3 Akta Profesyen Undang-Undang 1976 ungkapan 'advocate and solicitor' bermaksud seorang peguambela dan peguamcara Mahkamah Tinggi yang dimasukkan dan didaftarkan di bawah Akta ini atau di bawah mana-mana undang-undang bertulis sebelum Akta tersebut beroperasi. Oleh itu, dalam kes semasa, meskipun Dr Badariah tiada sijil amalan di bawah APU, beliau merupakan seorang peguambela dan peguamcara kerana beliau telah dimasukkan dan didaftarkan sebagainya dan tiada apa-apa dalam s 3

yang menyatakan bahawa untuk menjadi peguambela dan peguamcara seseorang itu perlu mempunyai sijil amalan. Oleh itu, seorang 'advocate of those courts' di bawah perkara 123 Perlembagaan tidak semestinya merupakan seorang peguambela dan peguamcara yang beramal (lihat perenggan 58).

(10)(oleh **Nik Hashim HMP**) Pentafsiran Badan Peguam terhadap perkara 123 Perlembagaan yang menghendaki seorang peguambela dan peguamcara yang hendaklah beramal (memiliki sijil amalan) sebelum pelantikan terlalu tegar. Pentafsiran yang longgar perlu wujud dalam kes ini kerana Dr Badariah boleh dianggap sebagai beramal dalam erti kata yang luas kerana beliau mengajar undang-undang kepada pelajarnya di Universiti Malaya sebelum pelantikannya sebagai pesuruhjaya kehakiman. Oleh itu, kriteria utama untuk pelantikan sebagai pesuruhjaya kehakiman atau hakim Mahkamah Tinggi adalah bahawa calon tersebut hendaklah diterima masuk sebagai peguam dan dimasukkan dan didaftarkan sebagai peguambela dan peguamcara selama 10 tahun dan ia tidak penting jika calon itu, seperti Dr Badariah, tidak memilik sijil amalan sebelum pelantikan itu (lihat perenggan 59); *Samantha Murthi v Attorney-General, Malaysia & Ors* [1982] 2 MLJ 126 diikut; *All Malayan Estate Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 dibeza.

(11)(oleh **Abdul Hamid Mohamad Ketua Hakim Negara**) Meskipun Perlembagaan tidak memperuntukkan bahawa untuk melayakkan diri agar dilantik sebagai hakim atau pesuruhjaya kehakiman, seorang peguambela hendaklah seorang peguambela yang beramal dan memiliki sijil amalan, dengan mengambilkira dua kategori iaitu 'an advocate' dan 'a member of the legal and judicial service' kedua-duanya, pentafsiran yang lebih munasabah yang patut diberikan kepada perkataan 'advocate' adalah peguambela yang beramal. Ini diperkukuhkan lagi dengan keperluan bahawa seorang peguambela atau ahli perkhidmatan kehakiman dan perundangan hendaklah beramal selama 10 tahun. Keperluan itu hanya bermaksud untuk membolehkan peguambela atau pegawai itu memperoleh pengalaman undang-undang atau berkhidmat sebelum beliau dilantik. Jika tidak, keperluan itu tidak mempunyai tujuan apapun (lihat perenggan 42).

(12)(oleh **Abdul Hamid Mohamad Ketua Hakim Negara**) Definisi perkataan 'advocate' dalam s 3 Akta Tafsiran 1948 dan 1967 juga menyokong kesimpulan bahawa perkataan tersebut hendaklah bermaksud peguambela yang memiliki sijil amalan, jika tidak beliau tidak 'entitled to practise (lihat perenggan). Keperluan bahawa seseorang itu hendaklah merupakan seorang peguambela selama 10 tahun bermaksud merangkumi peguambela dan peguamcara yang beramal undang-undang. Ia tidak bermaksud merangkumi mereka yang

'only in name' sebagai peguambela dan peguamcara hanya dengan diterima masuk tetapi membuat perkara lain sepanjang hidup mereka, sama ada mengajar undang-undang, dalam perniagaan atau politik. Jika mereka diniatkan untuk dimasukkan, Perlembagaan akan dan hendaklah menyatakan sedemikian, seperti di Singapore atau, lebih jelas di India yang memperuntukkan bahawa seorang 'distinguished jurist' adalah juga layak dilantik sebagai hakim (lihat perenggan 43–44).

(13)(oleh **Abdul Hamid Mohamad Ketua Hakim Negara**) Tambahan pula, mahkamah ini hanya mentafsirkan peruntukan s 23A(1) Akta Perhubungan Perusahaan 1967 untuk bermaksud peguambela dan peguamcara yang beramal meskipun seksyen tersebut secara spesifik merujuk kepada maksud 'advicate and solicitor' dalam Akta Profesyen Undang-Undang 1967 yang hanya menyebut tentang peguambela dan peguamcara yang telah diterima masuk dan didaftarkan. Definisi perkataan 'advocate' dalam perkara 123 Perlembagaan tidak terbatas kepada maksud yang diberikan dalam Akta Profesyen Undang-Undang 1967. Tiada kesilapan dalam penghakiman untuk menjustifikasikan mahkamah untuk tidak bersetuju dengannya. Namun, untuk memutuskan sebaliknya membawa kepada keputusan yang tidak masuk akal, seorang peguambela yang tidak beramal tidak boleh dilantik sebagai Pengerusi Mahkamah Perusahaan tetapi boleh dilantik sebagai pesuruhjaya kehakiman, hakim Mahkamah Tinggi, hakim Mahakmah Rayuan, hakim Mahkamah Persekutuan mahupun Ketua Hakim Negara (lihat perenggan 45); *All Malayan Estate Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 diikut.

(14)(oleh **Abdul Hamid Mohamad Ketua Hakim Negara** menentang) Mungkin akan tiba suatu masa apabila kategori-kategori individu yang lain, contohnya para akademik dimasukkan sebagai mereka yang layak dilantik sebagai hakim-hakim terutamanya dalam bidang perundangan seperti harta intelektual, perbankan dan kewangan secara konvensional dan Islam dan lain-lain. Namun ini adalah perkara polisi yang perlu diputuskan oleh Kerajaan (lihat perenggan 46).

(15)(oleh **Zulkefli HMP** menentang) Perkataan-perkataan penting di bawah perkara 123 Perlembagaan Persekutuan yang perlu dipertimbangkan adalah seperti berikut: 'for the ten years preceding his appointment he has been an advocate of those courts ….' Untuk menjadi peguambela mahkamah tersebut, seseorang itu hendaklah memang atau giat beramal, selain daripada terlebih dahulu diterima masuk dan didaftarkan di bawah peruntukan APU sebagai peguambela dan peguamcara. Seterusnya untuk membolehkan beramal, peguambela dan peguamcara hendaklah memohon untuk dan dikeluarkan satu sijil amalan (lihat perenggan 114–115).

(16)(oleh **Zulkefli HMP** menentang) Berdasarkan tafsiran 'advocate' di bawah s 66 Akta Tafsiran dan peruntukan relevan APU apabila dibaca bersama dengan perkataan-perkataan 'advocate of those courts' dalam perkara 123 Perlembagaan Persekutuan membawa maksud bahawa 'advocate' merupakan seseorang yang telah beramal. Dalam konteks ini pendekatan bermaksud pentafsiran patut digunakan untuk maksud perkataan-perkataan 'advocate of those courts' dalam perkara 123 Perlembagaan Persekutuan. Perlembagaan Persekutuan merupakan dokumen hidup dan tanpa mencabuli bahasa yang digunakan perkara 123 Perlembagaan Persekutuan hendaklah menerima pembentukan yang adil, bebas dan progresif agar tujuan sebenarnya dapat diutarakan (lihat perenggan 116).

(17)(oleh **Zulkefli HMP** menentang) Kapasiti yang mana peguambela itu perlu aktif beramal bagi tujuan perkara 123 Perlembagaan Persekutuan diperkukuhkan lagi dengan rujukan kepada perkataan-perkataan 'has been...' dan makna tempoh 10 tahun itu. Perkataan-perkataan 'has been...' dalam perkara 123 hendaklah merujuk kepada tindakan yang telah dibuat, iaitu telahpun menjadi peguambela yang beramal di mahkamah tersebut. Tempoh 10 tahun itu bermakna ia adalah keperluan penting yang mana sebelum pelantikan Dr Badariah sebagai pesuruhjaya kehakiman dibuat dalam kes semasa, beliau hendaklah menunjukkan bahawa beliau mempunyai pengalaman sekurang-kurangnya 10 tahun sebagai peguambela yang beramal. Ia juga perlu ditekankan bahawa untuk mentafsir perkataan-perkataan 'advocate of those courts' untuk bermaksud bahawa peguambela itu hanya perlu diterima masuk dan didaftarkan akan membentuk keadaan yang tidak masuk akal di mana peguambela itu tidak perlu aktif beramal. Ia ditekankan bahawa di bawah perkara 123 Perlembagaan Persekutuan yang sama bahkan ahli Perkhidmatan Kehakiman dan Perundangan Kerajaan Persekutuan perlu mempunyai pengalaman tahun yang ditetapkan untuk layak dilantik sebagai hakim atau pesuruhjaya kehakiman (lihat perenggan 117).

(18)(oleh **Zulkefli HMP** menentang) Pentafsiran yang disokong oleh plaintif adalah konsisten dengan fakta bahawa mahkamah sentiasa menganggap peguambela itu giat beramal kerana beliau tidak dibenarkan beramal di dalam profesyen lain pada masa yang sama atau diambil bekerja dalam kapasiti selain daripada sebagai peguambela dan peguamcara (lihat perenggan 118).

(19)(oleh **Zulkefli HMP** menentang) Mahkamah Persekutuan dalam *All Malayan Estate Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 tiba kepada kesimpulan bahawa tujuh tahun yang ditetapkan dalam s 23A(1) APP bermaksud bahawa seseorang itu hendaklah telah beramal untuk tempoh masa tersebut dan hendaklah dianggap sebagai

rujukan untuk peguambela dan peguamcara yang telahpun beramal di bawah APU. Pembentukan sempit yang digunakan untuk mentafsir perkara 123 Perlembagaan Persekutuan di mana peguambela tidak perlu giat beramal untuk layak dilantik sebagai hakim atau pesuruhjaya kehakiman; dan menggunakan prinsip-prinsip yang dinyatakan dalam kes *Rajasegaran* akan membawa kepada kesimpulan yang tidak masuk akal di mana seseorang yang tidak layak untuk dilantik sebagai Pengerusi Mahkamah Perusahaan [mahkamah rendah], boleh dilantik sebagai hakim atau sebagai pesuruhjaya Mahkamah Tinggi (lihat perenggan 120).]

Notes

For a case on appointment of judges generally, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2189.

For cases on interpretation of constitution, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1896–1897.

Cases referred to

All Malayan Estate Staff Union v Rajasegaran & Ors [2006] 6 MLJ 97 (not folld)

Attorney General of the Commonwealth, ex relatione McKinley v Commonwealth of Australia [1975] 135 CLR 1 (refd)

CP Agarwal v CD Parikh 1970 SC AIR 1061 (refd)

Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29 (refd)

Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697 (refd)

Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213 (refd)

Dupont Steels Ltd & Ors v Sirs & Ors [1980] 1 WLR 142 (refd)

Kamariah bte Ali dan lain-lain lwn Kerajaan Negeri Kelantan dan satu lagi [2005] 1 MLJ 197 (refd)

Malaysian Bar v Dato' Kanagalingam Velupillai [2004] 4 MLJ 153 (refd)

Merdeka University Berhad v Government of Malaysia [1981] 2 MLJ 356 (refd)]

Minister of Home Affairs v Fisher [1980] AC 319 (refd)

Samantha Murthi v Attorney-General, Malaysia & Ors [1982] 2 MLJ 126 (folld)

Syed Mubarak bin Syed Ahmad v. Majlis Peguam Negara [2000] 4 MLJ 167 (refd)

Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261 (refd)

Legislation referred to

Advocates and Solicitors Ordinance 1948 s 2
Advocates Ordinance (Sabah) (Cap 2) s 9
Constitution of the Republic of Singapore [Sing] art 96
Courts of Judicature Act 1964 s 84
Federal Constitution arts 18(1), 22AB, 122B, 123(b), 217(2)(b)
Indian Constitution art 124(3)
Industrial Relations Act 1967 ss 23A(1), 23A(1)
Interpretation Acts 1948 and 1967 ss 2, 3, 17A, 65, 66
Legal Profession Act 1976 ss 3, 10, 13(1), 18, 21(1), 28A, 28B, 29(1), 30(1), 35(1), (2), 36(1), 37, 38(g)
Legal Profession Act (Cap 161) [Sing] s 2
Sarawak Advocates Ordinance (Cap 110) s 9

Robert Lazar (Mark Lau with him) (Sivanathan) for the plaintiff.
Tan Sri Abdul Gani Patail (Dato' Kamaluddin Md Said, Azizah Nawawi dan Suzana Atan with him) (Senior Federal Counsels, Attorney General's Chambers) for the respondent.

Abdul Hamid Mohamad Chief Justice:

[1] 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 art 122AB read together with art 123 of the Federal Constitution.'

[2] On 27 August 2007, ie 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 s 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 art 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 art 122AB of the Federal Constitution?

(ii) If the answer to question (i) is in the negative, is the appointment of YA 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 YA Dr Badariah Sahamid as a judicial commissioner of the High Court of Malaya with effect from 1 Mac 2007 null and void?

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

[4] 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 pupilage 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 arts 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; …'.

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

[6] Regarding the qualification of a person to be appointed as a judge of the High Courts, art 123 provides:

> 123. A person is qualified for appointment under art 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.

[7] 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.

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

[9] It is art 123(b), in particular, that calls for interpretation in this case.

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

[11] Under art 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.

[12] 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, art 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 s 2 of the Legal Profession Act (Cap 161) or a member of the Singapore Legal Service, or both.

[13] 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 s 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).

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

[15] 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 s 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;

[16] So, just to take one example, before 1 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.

[17] In India, art 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.

[18] Note that under (c) 'a distinguished jurist' is qualified to be appointed a judge.

[19] 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.

[20] 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.

[21] In my view, the other limb of art 123(b), ie '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.

[22] 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.

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

[24] It is interesting to note that art 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.

[25] 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.

[26] 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.

[27] 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'.

[28] 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 ie 'a qualified person within the meaning of s 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.

[29] 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 s 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.

[30] Under Part I of the Interpretation Acts 1948 and 1967, in s 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.)

[31] 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' — s 36(1). So, he must have a practising certificate before he can practise as an advocate and solicitor. Otherwise, he is an 'unauthorized person' — s 36(1). He commits an offence if he acts as an advocate and solicitor — s 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.

[32] 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 – s 9. The position is the same in Sabah — see s 9 of the Advocates Ordinance (Sabah Cap. 2).

[33] 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."

[34] This provision has been interpreted by the Court of Appeal in *Syed Mubarak bin Syed Ahmad v. Majlis Peguam Negara* [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.

[35] 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* 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.

[36] 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 s 21(1)(a) and as Chairman under s 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.

[37] The question was whether he was qualified to be appointed as a Chairman of the Industrial Court.

[38] This court held that the appointment of the respondent was invalid. Augustine Paul, FCJ, delivering the judgment of this court, inter alia, said at p 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

A 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.

B Further, at p 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 C 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.

D

[39] Note that s 23(1) uses the words 'an advocate and solicitor within the meaning of the Legal Profession Act 1976' while art 123 uses the words 'an advocate of those courts'. In s 3 of the Legal Profession Act 1976 'advocate and solicitor' and 'solicitor' are defined as follows:

E

'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.)

F

[40] So, even though s 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 G words 'advocate and solicitor', in the context used in s 23(1) of the Industrial Relations Act 1967 to mean a practising advocate and solicitor.

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

I

[42] 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 ie '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.

[43] The definition of the word 'advocate' in s 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'.

[44] 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.

[45] Furthermore, this court has only last year interpreted the provision of s 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 art 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.

[46] 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.

[47] 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 art 123 of the Constitution.

[48] 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.

[49] 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.

[50] Following the judgment of this court in *All Malayan Estates Staff Union v Rajasegaran & Ors* 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.

[51] 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.

Nik Hashim FCJ:

[52] This reference of constitutional question under s 84 of the Courts of Judicature Act 1964 relates to the question whether the appointment of Dr Badariah bte Sahamid as a judicial commissioner of the High Court of Malaya with effect from 1 March 2007 is valid.

[53] 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.

[54] This is my judgment, albeit a short one.

[55] A broad and liberal interpretation should be given to the phrase 'advocate of those courts' under art 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 p 329; *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697; *Kamariah bte Ali dan lain-lain lwn Kerajaan Negeri Kelantan dan satu lagi* [2005] 1 MLJ 197).

[56] 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".

[57] 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).

[58] 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 art 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 s 66 of the Interpretation Acts 1948 and 1967 (Act 388) (Part 11) to mean an advocate and solicitor of the High Court, and under s 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 s 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 art 123 of the FC does not necessarily need to be a practising advocate and solicitor.

[59] In this regard, I, with respect, agree with the learned Attorney General that the Bar Council's interpretation of art 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.

[60] 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.

[61] 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).

Hashim Yusuff FCJ:

[62] This is an application by summons in chambers from the High Court to refer a question by way of a special case to the Federal Court for determination pursuant to s 84 of the Courts of Judicature Act 1964.

[63] We heard the arguments on 22 October 2007 and reserved our judgments. I had the benefit of reading the judgments of my learned brothers Abdul Hamid Mohamad Chief Justice and Zulkefli Ahmad Makinudin FCJ to which, I have with respect, a different view. This is my judgment.

BACKGROUND

[64] At the High Court, the plaintiff applied 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 is of no effect on the ground that the said appointment is in contravention of art 122AB read together with art 123 of the Federal Constitution. The plaintiff also applied for any further relief which the court deemed fit to give.

[65] The defendant then applied to the High Court to refer to the Federal Court for determination pursuant to s 84 of the Courts of Judicature Act 1964 the following questions:

i) Whether the words 'advocates of those courts' appearing in art 123 of the Federal Constitution require an Advocate to have been in practise for a period of 10 years preceding his/her appointment as a judicial commissioner under art 122AB of the Federal Constitution?

ii) If the answer to question (i) is in the negative, is the appointment of YA Dr Badariah Sahamid as a judicial commissioner of the High Court of Malaya with effect from 1 March 2007 valid?

iii) If the answer to question (i) is in the affirmative, is the appointment of YA Dr Badariah Sahamid as a judicial commissioner of the High Court of Malaya with effect from 1 March 2007 null and void?

[66] The learned High Court judge then granted Order in Terms of the defendant's application. Hence this reference to this court.

ISSUE

[67] The issue to be decided by this court is as follows:

Whether an advocate and solicitor of the High Court of Malaya who has not been practising for 10 years preceding her appointment is qualified for appointment as a judicial commissioner under art 123 (read with art 122AB) of the Federal Constitution.

QUALIFICATION AND EXPERTISE OF THE RESPONDENT

[68] Dr Badariah Sahamid obtained her Bachelor of Laws degree, (First Class Hons) from the University of Malaya in 1978, Master of Laws (LLM) from the London School of Economics and Political Science (LSE) University of London, in 1979 and a Doctorate from the University of Malaya in 2001.

[69] She then became a law lecturer at the Faculty of Law, University of Malaya and eventually a Professor until her appointment as a judicial commissioner on 1 March 2007.

[70] Dr Badariah then petitioned for admission and enrolment as an advocate and solicitor. On 26 September 1987 she was admitted as an advocate and solicitor of the High Court of Malaya. On 1 March 2007 Dr Badariah was appointed as a judicial commissioner of the High Court of Malaya.

[71] The plaintiff then challenged Dr Badariah's appointment on the ground that she had not satisfied the requirements of art 123 of the Federal Constitution as she had not been in legal practise, though she was admitted as an advocate and solicitor, for more than 10 years, preceding her appointment.

[72] Mr Robert Lazaar learned counsel for the plaintiff submitted that the words 'an advocate of those courts' in art 123 of the Federal Constitution mean an advocate who is in practise as an advocate. Since the word 'advocate' is not defined in art 123, one would have to get its meaning by looking at s 66 of the Interpretation Acts 1948 & 1967 where the words 'advocate, advocate and solicitor' mean an advocate and solicitor of the High Court.

[73] It was submitted that under s 3 of the Legal Profession Act 1976, the words 'advocate and solicitor', and 'solicitor' where the context requires, mean 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.

[74] It was submitted further that the words 'he has been an advocate of those courts' in art 123, would refer to his vocation, ie, he must be in active practice as an advocate. And no person shall practise as an advocate and

solicitor... unless his name is on the Roll and he has a valid practising certificate authorising him to do the act; (see s 36(1) of the Legal Profession Act).

(Reference was also made to s 30(1) of the Legal Profession Act 1976 which states:

(1) No advocate and solicitor shall apply for a practising certificate:

(a) ...

(b) ...

(c) If he is gainfully employed by any other person, firm or body on a capacity other than as an advocate and solicitor)

[75] Since Dr Badariah has no valid practising certificate, it was submitted that she has therefore not been an advocate of those courts as mentioned in art 123 of the Federal Constitution. That being so, she is said to have failed to meet the requirement of art 123. Her appointment as a judicial commissioner should therefore be null and void.

[76] The learned Attorney General appearing on behalf of the Government/defendant argued that since the word 'practising' is not found in art 123 of the Federal Constitution; there is therefore no need for one to be a practising advocate. He referred to the case of *CP Agarwal v CD Parikh* [1970] SC AIR 1061, where the appellant filed a writ petition in the High Court of Allahabad for a quo warranto against first respondent, challenging therein his appointment as a judge of the High Court. The ground on which he challenged the appointment was that although first respondent was enrolled as an advocate more than 20 years ago, he could still not claim to be one who 'has for at least ten years been an advocate of a High Court' within the meaning of art 217(2)(b) of the Constitution, as admittedly 1st respondent was all along practising at Benaras and not in the High Court. At the preliminary hearing before W Broome and G Kumar JJ, there was a difference of opinion between the two judges.

[77] Broome J held that 'on a plain reading of the relevant clauses' the correct interpretation of the expression 'an advocate of a High Court' meant an advocate enrolled as an advocate of a High Court, irrespective of whether on such enrolment he practised in a High Court or Courts Subordinate to the High Court.

[78] G Kumar J on the other hand, accepted the contention urged on behalf of the appellant and held that the expression 'an advocate of a High Court' meant one who has practised for a required period in a High Court,

and therefore, a person who has practised only in a court or court subordinate to the High Court would not answer the qualification required under art 217(2)(b).

[79] The matter was then referred to Mathur J who agreed with Broome J. On appeal to the Supreme Court, Shelat J, delivering the judgment of the court said at p 1062, para 4 thus:

> In our opinion the language used in art 217(2)(b) is plain and incapable of bearing an interpretation other than one given by Broome J.... His lordship went on to say at para 5.
>
> If it was intended than the qualification under art 217(2)(b) should be that a person appointed to the office of a judge of a High Court should have practised in a High Court and that practising in a Court or Courts Subordinate to it would not answer the qualification, the language used in sub-clause (b) of art 217(2) would have been as follows:
>
> > A person shall not be qualified for appointment as a judge of a High Court unless he has for or at least ten years practised as an advocate in a High Court or in two or more such courts in succession.
>
> Further, Shelat J said at page 1064 para 8; 'It seems, therefore, indisputable that... the expression of 'an advocate of a High Court' used in art 217(2)(b) must mean... an advocate on the roll as such of a High Court and entitled as of right by that reason to practice in the High Court. There is nothing in any of these provisions to indicate that an advocate of a High Court can only be that advocate of a High Court who has been practising in the High Court.

[80] In the instant case the learned Attorney General argued that the wordings of art 123 of the Federal Constitution as well as s 3 of the Legal Profession Act 1976 are very clear. Therefore there is no need to give a purposive interpretation to art 123.

[81] Article 123 of the Federal Constitution reads as follows:

> A person is qualified for appointment under art 122B as a judge of the Federal Court, as a judge of the Court of Appeal or as 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 and sometimes another. (Emphasis added.)

[82] Article 122AB of the Federal Constitution reads: A

(1) For the dispatch of business of the High Court in Malaya and the High Court in Sabah and Sarawak, the Yang di-Pertuan Agong acting on the advice of the Prime Minister, after consulting the Chief Justice of the Federal Court, may by order appoint to be judicial commissioner for B such period or such purposes as may be specified in the order any person qualified for appointment as a judge of the High Court; and the person so appointed shall have power to perform such functions of a judge of the High Court as appear to him to require to be performed; and anything done by him when acting in accordance with his C appointment shall have the same validity and effect as if done by a judge of that Court, and in respect thereof he shall have the same powers and enjoy the same immunities as if he had been a judge of that Court.

PRINCIPLES OF CONSTITUTIONAL INTERPRETATION D

[83] At the outset I am mindful that the issue involves the interpretation of not an ordinary statute but the Federal Constitution, the supreme law of Malaysia. E

[84] As early as 1981 in *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356, Abdoolcader J (as he then was) stated the principles of constitutional interpretation thus (at pp 360–361):

F It will be necessary in connection with my discussion in this regard to deal with and construe certain provisions of the Federal Constitution and I should perhaps before doing so advert somewhat briefly and generally to the principles of constitutional interpretation which apply. The Privy Council held in *Minister of Home Affairs v Fisher* [1973] 3 All ER 21 (at p 329) that a Constitution should be considered with less rigidity and more generosity than other statutes (also G *Attorney-General of St Christopher, Navis and Anguilla v Reynolds* [1979] 3 All ER 129, p 136 (at p 655) and as sui generis, calling for principles of its own, suitable to its character but added that respect must be paid to the language which has been used, and in *Teh Cheng Poh v Public Prosecutor* [1979] said (at [1979] 1 MLJ 50) that in applying constitutional law the court must look behind the label to the substance. Barwick CJ, said in the High Court of Australia in *McKinlay v The Commonwealth of Australia* [1975] 135 CLP 1 (at p 17): H

> 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 I reasoning.

It is said in *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 LNS 92 that the Constitution is not to be construed in any narrow or pedantic sense (*James v Commonwealth of Australia* [1936] AC 578 (at p 614)) but this does

not mean that a court is at liberty to stretch or pervert the language of the Constitution in the interests of any legal or constitutional theory, or even, I would add, for the purpose of supplying omissions or of correcting supposed errors. The High Court of Australia in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* [1920] 28 CLR 129 eschewed so called 'political criteria' in the interpretation of the Australian Constitution and so lessened considerably the range of circumstances where it might called upon to intervene more directly in political processes.

[85] In *Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213, the Court of Appeal referred to the relevant authorities on constitutional interpretation. Gopal Sri Ram JCA expressed as follows (at pp 218–219):

> ... The proper approach to the interpretation of our Federal Constitution is now too well settled to be the subject of argument or doubt. It is to be found in the joint dissent of Lord Nicholls of Birkenhead and Lord Hope of Craig Head in the Privy Council case of *Prince Pinder v The Queen* [2002] UKPC 46.
>
> > It should never be forgotten that courts are the guardians of constitutional rights. A vitally important function of 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. Provisos derogating from the scope of guaranteed rights are to be read restrictively. In the ordinary course they are to be given 'strict and narrow', rather than broad, constructions': see *The State v Petrus* [1985] LRC (Const) 699, p 720d–f, per Aguda JA in the Court of Appeal of Botswana, applied by their Lordships' Board in *R v. Hughess* [2002] 2 AC 259, p 277 part 35.
>
> More than 20 years earlier, in *Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, Raja Azlan Shah LP (as His Royal Highness then was) expressed the same view:
>
> > In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters or ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way — 'with less rigidity and more generosity than other Acts' (see *Minister of Home Affairs v Fisher)* [1973] 3 All ER 21. A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition and rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and

> to be guided by the principle of giving full recognition and effect of those fundamental rights and freedoms.' The principle of interpreting constitutions 'with less rigidity and more generosity' was again applied by the Privy Council in *Attorney-General of St Christopher, Navis and Anguilla v Reynolds* [1979] 3 All ER 129, p 136.
>
> It is in the light of this kind of ambulatory approach that we must construe our Constitution:
>
> The long and short of it is that our Constitution — especially those articles in it that confer on our citizens the most cherished of human rights — must on no account be given a literal meaning. It should not be read as a last will and testament. If we do that then that is what it will become.
>
> The other aspect to interpreting our Constitution is this. When interpreting the other parts of the Constitution, the court must bear in mind all the providing provision of art 8(1). That article guarantees fairness of all forms of State action. See, *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261....

[86] It is my respectful view that when interpreting our Federal Constitution one must bear in mind the all pervading provisions of art 8(1) (see *Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia*)' To read into art 123 of the Federal Constitution the words 'a practising' before the word 'advocate' is to deprive the respondent of equality before law, a fundamental liberty under our Constitution. Article 8(1) does not declare that all persons must be treated alike but that persons in like circumstances must be treated alike. In *Public Prosecutor v Khong Teng Khen & Anor* [1976] 1 LNS 100; [1976] 2 MLJ 166, p 170, Suffian LP said for the Federal Court: 'The principle underlying art 8 is that a law must operate alike on all persons under the circumstances, not that it must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons... for the purpose of legislation'... the law may classify persons... the law may classify offences into different categories...;... fiscal law may divide a town into different areas... All that art 8 guarantees is that a person in the same class should be treated the same as another person in the same class...

DEFINITION OF 'ADVOCATE AND SOLICITOR'

[87] Section 3 of the Legal Profession Act 1976 (Act 166) defines an advocate & Solicitor as follows:

> In this Act unless the context otherwise requires:
>
> '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.

The words 'advocate and solicitor' within the meaning of the Legal Profession Act 1976 had been considered in at least two cases in the Malaysian courts.

[88] In *Samantha Murthi v Attorney-General, Malaysia & Ors* [1982] 2 MLJ 126 where the Federal Court was interpreting s 13(1) of Act 166 (Legal Profession Act 1976) Suffian LP in delivering the judgment of the court ruled (at pp 127–128):

> What is in dispute in this case is the meaning which we should give to the phrase 'active practice in Malaysia' in s 13(1). As earlier stated, that section provides that 'a pupil shall serve his period of pupilage with an advocate and solicitor who is or has been in active practice in Malaysia etc.' Thus there are two requirements: First, the master must be:
>
> (1) 'an advocate and solicitor' within the meaning of s 3 of the Act: and
>
> (2) He 'is or has been in active practice in Malaysia'.
>
> The learned judges in the High Court ruled that Mr Reddy is not an advocate and solicitor under s 3 because he does not hold a practising certificate issued under s 29 of the Act authorizing him to practice at the Malayan Bar.
>
> With respect we do not agree with this ruling, because there is nothing in s 3 to say that he must be in possession of such a certificate. In fact Mr Param Cumaraswamy conceded that Mr Reddy is an advocate and solicitor under s 3. Under this section an advocate and solicitor is defined as:
>
> > 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 section does not say that to be an advocate and solicitor one must have a practising certificate. In our judgment Mr Reddy is an advocate and solicitor within the Act although he has no practising certificate under the Act. As long as he has been 'admitted and enrolled' under the Act or any previous written law, he is an advocate and solicitor within the meaning of the Act. A practising certificate is not a requirement of s 3 but of s 29, which has nothing to do with the definition. The learned judges were therefore in error when they said:
>
> > He [Mr Reddy] can only be an advocate and solicitor who is in practice if he holds a practising certificate issued under s 29 of the Legal Profession Act.
>
> As regards the second requirement under s 13(1), ie, that Mr Reddy must be a person who 'is or has been in active practice in Malaysia', there is no doubt that he is and has been in active practice in Sarawak which is part of Malaysia....

[89] In the more recent case of *All Malayan Estates Staff Union v Rajasegaran & Ors* the Federal Court again had to consider the meaning of

advocate and solicitor in s 23A(1) of the Industrial Relations Act 1967 ('IRA'). The Federal Court gave leave to appeal on the following issue:

Whether an advocate and solicitor within the meaning of the Legal Profession Act 1976 who has been not been practising for the seven years preceding his appointment is qualified to be appointed as chairman of the Industrial Court under s 23A of the Industrial Relations Act 1967.

[90] The Federal Court's answer to the question posed was in the negative.

INTERPRETATION OF ARTICLE 123 OF THE FEDERAL CONSTITUTION

[91] In the above two cases the Federal Court considered the rules of construction in interpreting statutes such as the literal rule and the purposive approach under s 17A of the Interpretation Acts 1948 and 1967.

[92] I am in agreement with the principles of statutory interpretation adopted by the courts in respect of the relevant legislations in arriving at the decisions in the above two cases.

[93] In the instant case the court is interpreting the Federal Constitution which is a constitutional instrument sui generis to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation (see *Minister of Home Affairs v Fisher*, cited with approval in *Dr Mohd Nasir Hashim* and *Dato' Menteri Othman Baginda*).

[94] The Legal Profession Act, governing the legal profession, has provisions relating to 'advocate in active practise', advocate having a practising certificate and 'a practising advocate' eg, ss 13(1), 21(1), 36 and 38(g) and the draftsman being aware, as he must have been of such provisions would surely spell out 'practising advocate' requirements in art 123 of the Federal Constitution if he had intended such a limitation in art 123.

[95] Moreover, it is fallacious to argue that legal experience if indeed it is a requirement of art 123, can only be obtained as a 'practising advocate'. While legal experience can commonly be gained by legal practise it is not the only or exclusive means of gaining legal experience. Section 38(g) of the Legal Profession Act specifically recognizes a full-time law lecturer acting as an advocate and solicitor in solely advisory capacity upon instructions from a practising advocate and solicitor.

[96] What more, a person is qualified for appointment as a judge of the High Court if he has been a member of the Judicial and Legal Service for the ten years preceding his appointment even if he were to have been posted in the Drafting Division of the Attorney General's Chambers and may not even have gone to court even once during his tenure there.

[97] Dr Badariah had wide knowledge and experience in several areas of the law and legal cases that come before the courts. This can be seen from her affidavit filed therein. Indeed as a lecturer in law she has been responsible in teaching and training numerous advocates and solicitors. I can see no valid reason why a person of her standing and experience in the law should be deprived of her privilege and benefit of being appointed as a judicial commissioner. The administration of justice and the public has more to gain than lose if she was appointed as a judicial commissioner.

[98] The definition of 'advocate' in s 3 of the Interpretation Acts 1948 and 1967 (Act 388) does not appear to apply to the interpretation of the word 'advocate' in the Federal Constitution. Section 2 of Act 388 reads:

> (1) Subject to this section, Part I of this Act shall apply for the interpretation of and otherwise in relation to:
>
> (a) This Act and all Acts of Parliament enacted after 8th. May 1967;
>
> (b) All laws, whether enacted before or after the commencement of this Act, revised under the Revision of Laws Act 1968;
>
> (c) All subsidiary legislation made under this Act and under Acts of Parliament enacted after the commencement of this Act;
>
> (d) All subsidiary legislation, whether made before or after the commencement of this Act, revised under the Revision of Laws Act 1968;
>
> (e) All subsidiary legislation made after the 31st. December 1968, under the laws revised under the Revision of Laws Act 1968.
>
> (2) Part I shall not apply the interpretation of or otherwise in relation to any written law not enumerated in subsection (1).

[99] The Federal Constitution was enacted in 1957. The Federal Constitution does not come within any of the categories of Acts of Parliament or written law enumerated in subsection (1). Under subsection (2), Acts not so enumerated are excluded from the application of Part 1 of Act 388. However, the definition of an 'advocate' under s 66 of the Act 388 (Part II) appears to apply to interpretive meaning of 'advocate' in the Federal

Constitution. 'Advocate' and "advocate and solicitor' under s 66 means an advocate and solicitor of the High Court. Under s 66 of Act 388 the definition therein apply to every written law as hereinafter defined, and in all public documents enacted, made or issued before or after 31 January 1948. The Federal Constitution enacted in 1957 would come within the definition of such 'written law'. 'Written law' under s 66 means 'all Acts of Parliament, Ordinances and Enactments in force in the Federation or any part thereof and all subsidiary legislation made thereunder, and includes the Federal Constitution'.

[100] Even if s 17A of Act 388 applies art 123 of the Federal Constitution read together with s 3 of the Act are clear and unambiguous in their terms.

[101] Article 123 of the Federal Constitution was enacted especially for a specific purpose, that is, to provide for the qualification of inter alia, for the appointment of a judge of the High Court. The court has to give effect to the plain meaning of the words used in the article rather than inventing ambiguities in them. The Federal Court in *Malaysian Bar v Dato' Kanagalingam Velupillai* [2004] 4 MLJ 153 agreed with the observation made by Lord Diplock in *Duport Steels Ltd & Ors v Sirs & Ors* [1980] 1 WLR 142 at p 157, wherein his Lordship said:

> Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to the plain meaning.

[102] The court cannot read into art 123 the words 'a practising' before the word 'advocate'. It cannot stretch the language of the Constitution for the purpose of supplying omissions or of correcting supposed errors (see *Merdeka University*).

[103] Article 123 of the Federal Constitution used the word 'advocate' while art 5(3) of the Federal Constitution used the words 'a legal practitioner' (that is one who is a practising advocate).

[104] The usage of different words in the Federal Constitution point to different meanings being attributed to them. Thomson CJ in *Lee Lee Cheng v. Seow Peng Kwang* [1958] 1 LNS 32; [1960] MLJ 1 at p 3 said:

> It is axiomatic that when different words are used in a statute they refer to different things...

[105] Similarly in art 123 of the Federal Constitution if Parliament had intended that only legally qualified appointees who had actually practised for

10 years to qualify for appointment as a High Court judge or judicial commissioner, the draftsman would have used the words 'a practising advocate' or 'legal practitioner' instead of the word advocate' in art 123 of the Federal Constitution. Interpreting art 123 of the Federal Constitution broadly and not a pedantic way (see *Dato' Menteri Othman Baginda*) would produce the same result reached in *Samantha Murthi* as to the meaning of the word 'advocate' where the Federal Court held that as long as a person has been 'admitted and enrolled' under the Legal Profession Act or under any previous written law then he is an advocate and solicitor within the said Act.

[106] The case of *Rajasegaran* is distinguishable on the ground that in that case the Federal Court considered and interpreted the words 'advocate and solicitor' in the context of the Industrial Relations Act, an ordinary legislation according to ordinary rules of statutory interpretation.

[107] That being the case, I hold that Dr Badariah was qualified to be appointed as a judicial commissioner as she had been an advocate of the High Court of Malaya for 10 years preceding her appointment within the meaning of art 123 of the Federal Constitution. I would therefore answer question (i) in the negative. It follows that the answer to question (ii) is in the affirmative. That being so, question (iii) therefore falls by itself.

Zulkefli FCJ:

[108] I have read the judgment in draft of my learned brother Abdul Hamid Mohamad Chief Justice 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 art 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:

[109] 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 Chief Justice in his judgment.

[110] It is to be noted the word 'advocate' in art 123 is not defined in the Federal Constitution, but the meaning can be found in ss 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 an 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 May 1967 (see s 65 Interpretation Act). Section 3 of the Legal Profession Act 1976 ('LPA') 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.

[111] The Honourable Attorney General for the defendant submitted before us that since the statutory definition in s 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 s 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.

[112] It was argued for the defendant that under the LPA 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 s 10 of the LPA;

(ii) a qualified person admitted to practise as an advocate and solicitor under s 18 of the LPA; and

(iii) a person duly admitted as an advocate and solicitor under s 28B of the LPA, by virtue of a 'Special Admission Certificate' issued by the Attorney General under s 28A.

[113] It was further argued for the defendant since Dr Badariah bte. Sahamid had been admitted as an advocate and solicitor in 1987 under s 10 of the LPA, then she is eligible to practise as an advocate and solicitor under the LPA. The defendant took the stand that the words 'advocate of those courts' in art 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.

[114] 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 art 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 art 123 of the Federal Constitution that need to be considered are as follows:

A … for the ten years preceding his appointment he has been an advocate of those courts …

[115] 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 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 ss 29(1) and 30(1) of the LPA). Section 35(1) of the LPA provides that subject to the exceptions in art 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 s 36(1) of the LPA).

[116] It is my judgment that based on the definition of 'advocate' under s 66 of the Interpretation Act and the relevant provisions of the LPA as cited above when read together with the words 'advocate of those courts' in art 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 art 123 of the Federal Constitution. Our Federal Constitution is a living document and without doing violence to the language used the said art 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 pp 479–480).

[117] I am of the view the capacity that an advocate must be in active practise for the purposes of art 123 of the Federal Constitution is further fortified by reference to the words 'has been...' and the significance of the 10 year period. I take the view that the words 'has been' in art 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 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 practising 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 art 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.

[118] 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* (6th Ed) at p 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.)

[119] 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 s 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 s 21(1) (a) and as Chairman under s 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.

[120] The Federal Court came to the conclusion that the seven years stipulated in s 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 Raiasegaran's case applies with equal, if not greater force to the present case. The only difference between art 123 of the Federal Constitution and s 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 art 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.

[121] For the reasons already stated my answer to question (i) 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 March 2007 is null and void.

Azmel FCJ:

[122] 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.

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

[124] This court has been requested to construe the provision of art 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 art 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 art 122AB of the Federal Constitution.

[125] 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 art 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.

[126] 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* [1981] 1 MLJ 29 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.

[127] 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 *Samantha Murthi v Attorney-General, Malaysia & Ors* [1982] 2 MLJ 126 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 (at p 128):

> 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.

[128] 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.

[129] 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 art 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 *Samantha Murthi* case would be a more appropriate case for this court to follow. A closer look at the decision of Suffian LP in *Samantha 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'.

[130] The Indian case of *CP Agarwal v CD Parikh* SC 1970 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.

[131] 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 is 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. It only requires monitory or administrative 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 no litigation works at all, would he then be a 'proper' person qualified to be appointed as a judicial commissioner? In other words, the insistance of adding the words 'practising certificate' within the meaning of art 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'.

[132] 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 two requirements are added then we may be able to get the 'really appropriate and proper' qualification requirements.

[133] 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 eg Yaacob Ismail J was appointed when he was employed by Petroleum Nasional Bhd immediately preceding his appointment as a judicial commissioner. Syed Ahmad Idid 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 gainly employed.

[134] 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.

[135] 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 art 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.

[136] 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 ie *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 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 art 8(1). (see *Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia*). To read into art 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.

[137] 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.

[138] In the circumstances and for the reasons as stated above I would declare that Dr Badariah bte 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 art 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.

Plaintiff's claim dismissed with costs.

Reported by Loo Lai Mee