DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)

RAYUAN SIVIL NO. R3-25-25-2009

Dalam perkara Fasal-fasal XVI(2), XVI(6) dan XVI(7) undang-undang Tubuh Kerajaan Negeri Perak

Dan

Dalam perkara permohonan di bawah Aturan 53 Kaedah-Kaedah Mahkamah Tinggi 1980

Dan

Dalam perkara remedi-remedi dan relif-relif di bawah seksyen 25(2) dan perenggan 1 Jadual kepada Akta Mahkamah Kehakiman 1984

Dan

Dalam perkara remedi-remedi dan relif-relif di bawah seksyen-sekseyn 41, 44, 50, 51 dan 52 Akta Spesifik Relif 1950

Dan

Dalam perkara Artikel 8 Perlembagaan Persekutuan

Dan

Dalam perkara permohonan untuk antara lainnya deklarasi, writ bersifat "quo warranto", injunksi dan gantirugi

Dan

Dalam perkara pertikaian undang-undang di antara Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin dan Dato' Dr Zambry bin Abd. Kadir berhubung dengan jawatan Menteri Besar Perak Darul Ridzuan

ANTARA

DATO' SERI IR. HJ. MOHAMMAD NIZAR BIN JAMALUDDIN ... PEMOHON

DAN

DATO' DR. ZAMBRY BIN ABD. KADIR ... RESPONDEN

GROUNDS OF DECISION

Last week, a few days after this action was filed and the file assigned to me under the court's rotation system, I fixed this case for mention to inform the parties that I was considering recusing myself from hearing the case by reason of my previous involvement as counsel for Parti Islam Se Malaysia (PAS) and Parti Keadilan Rakyat (PKR) on a number of matters. This involvement included acting as leading counsel in a number of recent election petition cases for PAS, prior to my appointment as judicial commissioner. For completeness, I also informed the parties that I had previously acted as well for a Barisan Nasional candidate in an election petition case in Sarawak.

I must stress one immediate point by way of introduction - the file was assigned to me not by choice or upon my request, but as a normal incidence of case assignment in the Appellate and Special Powers Division of the High Court at Kuala Lumpur. It is common knowledge that the facts of this case involve a challenge by the applicant, Dato' Seri Ir Hj Mohamad Nizar, on the validity of the appointment of the respondent, Dato' Dr. Zambri bin Abdul Kadir, as the Menteri Besar of Perak under the State Constitution of Perak. Purely by way of factual narrative, without in any way prejudging the constitutional issues, the applicant was the lawfully appointed Menteri Besar until the defections of three Pakatan Rakyat state assemblymen and the return to the Barisan Nasional (BN) fold of another state assemblyman who had earlier "crossed over" to the Pakatan Rakyat (PR), thus tilting the balance of representation in the Dewan Negeri (the State Legislative Assembly). The applicant is, as widely known, a PAS member elected as State Assemblyman on a PAS ticket, and subsequently appointed as Menteri Besar to head the Pakatan Rakyat Government in Perak until the defections and the unfolding of associated events which led to the appointment of the respondent as Menteri Besar by His Royal Highness the Sultan of Perak.

Since I had been actively involved as an adviser and counsel for PAS and PKR, and had been a member of PAS with party positions at branch, division and state levels, and in fact had contested in the 2004 General Elections for a state constituency as a PAS candidate, I thought it would be in the interest of transparency and justice for me to declare my interest to the parties in this suit so as to avoid any appearance of bias on my part, and to consider recusing myself on the principle that justice must not only be done but must manifestly be seen to be done.

When the case was called up for mention last week, I made this position plain, and invited the parties to submit on this the following Monday. I also indicated I would be willing to hear the case if all parties had no objection to my sitting as judicial commissioner. Even then, Dato' Ahmad Kamal who appeared as the State Legal Adviser and indicated he was representing the respondent, informed me his client's instructions were to seek my recusal. So, it was made clear there could not, and would not, be unanimity on this point. Puan See Mee Chuan, Senior Federal Counsel, was then invited by me to advise this court on the stand of the Attorney-General's Chambers on the issue the following Monday.

For clarity, avoidance of doubt and unnecessary speculation, I wish to state that I am no longer a party member of any political party, having tendered my resignation from PAS before accepting the position of judicial commissioner. Equally clear is the fact that presently I do not hold any party position at any level.

My involvement in the political process, whether directly or indirectly, predated any personal contemplation or thought to join the ranks of the judiciary. It was an exercise of a legitimate political choice as a citizen, which properly speaking should not have an immediate bearing on my impartiality as a judicial commissioner to hear this case, since all judges and judicial commissioners are duty bound to discharge their function justly and impartially, and to uphold the constitution. This is in keeping with the general principle that there should be "a strong presumption of judicial impartiality": **Che Minah Remeli** v **Pengarah Tanah, Pejabat Tanah Besut, Terengganu & Ors** [2008] 3 CLJ 653 .

Nevertheless, the foundational principle that justice must not only be done but must manifestly be seen to be done has to be placed on the other side of the equation. That was why I decided to indicate to the parties my predisposition to recuse myself in the circumstances, depending on views they wished to express. May I say on this point that I am thankful to Tuan Haji Sulaiman , counsel for the applicant, for highlighting a passage in "Judges on Trial" by Shimon Shetreet on the applicable practice on matters of disqualification in England. I quote:

> "When the circumstances of the case in the judge's opinion do not justify his disqualification, he will always disclose the matter giving rise to the difficulties and require counsel to take instructions from the solicitors and their client to see whether they have any objection to his trying the case...However, where the interest is more than minimal or when his association with a party, witness or counsel might give rise to the appearance of impropriety, of unfairness or bias, he will disqualify himself and not leave the matter dependent upon whether or not the parties will raise objections." (at page 305)

I believe the course of conduct I took falls quite closely with this recommended practice. It was not an outcome or a reaction against adverse comments on blogsites or certain sections of the mainstream media. It will be a sorry day for the judiciary if a judge's conduct has to be conditioned by these extraneous factors, since they will fetter the independence of the judiciary unduly.

Last Monday, on the second mention date, Dato' Kamaluddin Md Said and Puan Suzana Atan appeared for the Attorney-General's Chambers. Dato' Kamaluddin very civilly advised me on the Attorney-General Chambers' view. There is presently a public debate on whether I can be impartial when hearing the case, and to maintain the standard

of public confidence in the judiciary, it is only appropriate that I recuse myself, so it was argued. It will be in the interest of justice for me to recuse, Dato' Kamaluddin added. Counsel was careful to explain that the objections were taken not because I would in fact be biased but rather to avoid an appearance of bias in the public interest. Dato' Kamaludddin advised that the test to be applied is the "real danger of bias" test, as propounded in **Che Minah Ramelli** v **Pentadbir Tanah** (supra) and **Dato'Tan Heng Chew** v **Tan Kim Hor [2006]** 2 MLJ 293.

In response, Tuan Haji Sulaiman took a diametrically opposed position, but relying on the same principles of public interest and applying the same standard of "real danger of bias". Two other leading decisions were submitted for my consideration, namely **Majlis Perbandaran Pulau Pinang** v **Syarikat Bekerjasama-sama Serbaguna Gelugor** [1999]3 MLJ 1, and **Mohamed Ezam bin Mohd Nor & Ors** v **Ketua Polis Negara** [2001] 4 CLJ 701. Learned Senior Counsel for the applicant summarised the applicant's position thus:

1. The real danger of bias test is not satisfied.
2. I can sit, and must sit, as a matter of constitutional duty.
3. There is an imperative requirement that I preside and hear this case.
4. The presumption is that a judge will be fair and impartial.
5. Recusal will invite unwarranted comments regarding the judiciary.
6. Recusal will send a wrong message that I cannot decide objectively on a matter of controversy.
7. I can hear this case because my nexus is merely tangential, not personal or pecuniary.

Both sides have their convincing arguments. Both agree that the test to be applied is the "real danger of bias" test, to be decided objectively. How that test is to be decided objectively is a matter of some pragmatic difficulty. The cases do not point in a clear and consistent direction. The pragmatic problem is this: how is a judge in my position to decide objectively that there is a real danger or possibility of bias if I am to proceed to hear the case? In a sense, being objective means I should opt in favour of the presumption of impartiality, and a conviction that my constitutional duty and oath require me to discharge my functions impartially. There is merit in the alternative test of "reasonable suspicion or apprehension" test: would a fair-minded and informed member of the public apprehend that the judge will not be able to discharge his function impartially? However, this alternative test has been mainly disapproved by the Malaysian courts, who have preferred the real danger of bias test, as laid down in the leading English cases of **R** v **Gough** [1993], AC 646, **Re Pinochet (No 2)** [1999] 1 All ER 577 and **Locobail Ltd** v **Bayfield Properties** [2002] 1 All ER 65. And I am bound by decisions such as **Mohamed Ezzam** and **Majlis Perbandaran Pulau Pinang** which are Federal Court decisions.

Learned SFC for the Attorney-General's Chambers advised an approach of "if in doubt, recuse". That seems as an argument based on expediency, which should figure last in any order of assessment.

I am of the view that any decision to recuse in the present circumstances is best rooted in first principles of justice. I had highlighted this point on the first mention date. The primary concern must be that justice must ***manifestly*** be seen to be done. Not just be done but, I stress, manifestly so. The objective fact is my sitting has

courted controversy, whether rightly or wrongly. That counsel's conclusions can be so opposed, although applying the same principles, is an added testimony to this objective fact. This is where the valuable commentary in the authority cited by learned senior counsel for the applicant becomes highly relevant as the proper practice to be followed: "However, where the interest is more than minimal or when his association with a party, witness or counsel might give rise to the appearance of impropriety, of unfairness or bias, he will disqualify himself and not leave the matter dependent upon whether or not the parties will raise objections." : "Judges on Trial"(supra)

In the overall circumstances, I find it best I recuse myself from hearing this case. In any event, there are other judges in the Appellate and Special Powers Division who will be equally qualified to hear this case, and if my earlier suggestion to the parties that this case be referred directly to the Federal Court under Section 84 of the Courts of Judicature Act and Article 63 of the Perak State Constitution is agreed, this case will have the immediate benefit of a plurality of judges at the highest level.

Lastly, I must acknowledge my debt to learned counsels for sharing with me their learning on the subject matter of recusal, despite the tight deadline.

(MOHAMAD ARIFF BIN MD. YUSOF)
PESURUHJAYA KEHAKIMAN
MAHKAMAH TINGGI MALAYA
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Dated 25th February 2009.

COUNSELS

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1. Tuan Haji Sulaiman bin Abdullah
2. Encik Nga Hock Cheh
3. Encik Ranjit Singh
4. Encik Leong Cheok Keng
5. Encik Amer Hamzah Arshad
6. Encik Zulqarnain bin Lukman
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For the Attorney-General's:

YBhg. Dato Kamaludin bin Md. Said &

For the Barisan Nasional:

Encik Mohd Reza bin Hassan