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Re Malik Imtiaz Ahmed bin Ghulam Sarwar

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HIGH COURT (KUCHING) — APPLICATION FOR AD HOC
LICENCE TO PRACTISE NO KCH-17D-3/11 OF 2019
SUPANG LIAN J
6 DECEMBER 2019

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*Legal Profession — Admission — Ad hoc — Application for grant of ad hoc
licence to practice — Test applied when considering petition — Whether
petitioner should be granted ad hoc licence to practice in High Court Sabah and
Sarawak — Sarawak Advocates Ordinance 1953 ss 4 & 10(c)*

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This was an application for the grant of ad hoc licence to permit the petitioner, a senior counsel from Peninsular Malaysia to practise in the High Court in Sabah and Sarawak at Kuching as the senior and lead counsel for Petroliam Nasional Bhd ('PETRONAS') in two cases. Those two cases were: (a) Judicial Review Application No KCH-13NCvC-8/11 of 2019 ('the judicial review application') and any related interlocutory proceedings and appeals to the Court of Appeal and Federal Court of Malaysia arising therefrom; and (b) Civil Suit No KCH-21NCvC-10/11 of 2019 ('the civil suit') and any related interlocutory proceedings and appeals to the Court of Appeal and Federal Court of Malaysia arising therefrom. The petition was made under ss 4 and 10(c) of the Sarawak Advocates Ordinance 1953 ('the Ordinance'). The respondents objected to the petitioner's application. The dispute between PETRONAS and the comptroller together with the Sarawak State Government was pertaining to the payment of state sales tax for petroleum products.

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Held, allowing application:

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(1) The court was of the opinion that it was in the interest of justice to grant the petitioner the permission sought. Those issues were of public importance upon which any determination of the same by the court in the judicial review proceedings and the civil suit would have far-reaching implications. Counsel appearing for PETRONAS must be in a position to help the court arrived at an objective view of the factual and legal aspects of the dispute. There was no denying that the petitioner had extensive experience in administrative as well as constitutional law. The petitioner had featured in many of the landmark decisions on those subjects over the past two decades (see paras 6–7 & 9–10).

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(2) The court was satisfied that the petitioner had the relevant and requisite specialised knowledge required for the judicial review application and the

civil suit. The petitioner was eminently qualified and had all the necessary expertise, skill and knowledge to act as the senior and lead counsel for PETRONAS. It would be in the interest of justice to allow the petition with global costs of RM3,000 to the Comptroller of SST Sarawak and Sarawak State Government (see paras 13 & 20).

[Bahasa Malaysia summary

Ini adalah permohonan pemberian lesen ad hoc untuk membenarkan pemohon, seorang peguam kanan dari Semenanjung Malaysia untuk praktis di Mahkamah Tinggi di Sabah dan Sarawak di Kuching sebagai peguam kanan dan peguam utama Petroliaam Nasional Bhd ('PETRONAS') untuk dua kes. Kedua kes tersebut adalah: (a) Permohonan Semakan Kehakiman No KCH-13NCvC-8/11 Tahun 2019 ('permohonan semakan kehakiman') dan apa-apa prosiding interlokutori yang berkaitan dan rayuan kepada Mahkamah Rayuan dan Mahkamah Persekutuan Malaysia yang berkaitan; dan (b) Guaman Sivil No KCH-21NCvC-10/11 Tahun 2019 ('tuntutan sivil') dan apa-apa prosiding interlokutori dan rayuan kepada Mahkamah Rayuan dan Mahkamah Persekutuan Malaysia yang berkaitan. Petisyen telah dibuat di bawah ss 4 dan 10(c) Sarawak Advocates Ordinance 1953 ('Ordinance tersebut'). Responden telah membantah permohonan pemohon. Perbicaraan di antara PETRONAS dan pengawal selia bersama dengan kerajaan negeri Sarawak adalah berkaitan dengan pembayaran cukai jualan negeri untuk produk petroleum.

Diputuskan, membenarkan permohonan:

- (1) Mahkamah berpendapat bahawa ia adalah demi kepentingan keadilan untuk membenarkan permohonan pemohon. Isu-isu tersebut adalah untuk kepentingan umum di mana setiap keputusan oleh mahkamah dalam proses semakan kehakiman dan tuntutan sivil akan membawa implikasi yang luas. Peguam yang mewakili PETRONAS harus berada dalam posisi untuk membantu mahkamah mendapatkan pandangan secara objektif mengenai aspek perbicaraan dari segi fakta dan undang-undang. Tidak dapat dinafikan bahawa pemohon memiliki pengalaman yang luas dalam undang-undang pentadbiran dan juga perlembagaan. Pemohon telah menunjukkan penglibatannya dalam banyak keputusan penting mengenai subjek tersebut selama dua dekad yang lalu (lihat perenggan 6–7 & 9–10).
- (2) Mahkamah telah berpuas hati bahawa pemohon memiliki pengetahuan khusus yang relevan dan diperlukan untuk permohonan semakan kehakiman dan tuntutan sivil. Pemohon adalah berkelayakan tinggi dan memiliki semua kepakaran, kemahiran dan pengetahuan yang diperlukan untuk bertindak sebagai peguam kanan dan peguam utama bagi PETRONAS. Adalah demi keadilan untuk membenarkan petisyen tersebut dengan kos global sebanyak RM3,000 diberikan kepada

- A Pengawal Selia SST Sarawak dan Kerajaan Negeri Sarawak (lihat perenggan 13 & 20).]

Cases referred to

- B *Belhaj & Anor v Straw & Others* Claim No HQ12X02603 (refd)
In the Matter of a Petition by Cyrus Das [2018] MLJU 2104; [2019] 2 CLJ 805, HC (refd)

Legislation referred to

- C Advocates Ordinance (Sabah Cap 2) ss 10(1), (2), (5)
Sarawak Oil Mining Ordinance 1958
Sarawak Advocates (Pupillage and Admission) Rules 2014
Sarawak Advocates Ordinance 1953 (Cap 110) ss 4, 10(c)
- D *Alvin Chong (Idris, Alvin Chong & Partners Advocates) for the petitioner.*
Nur Azhar (Evy Liana bt Atang with him) for the State Attorney General's Chambers.
Desmond Sahathevan (Adian Chew with him) for the Advocates Association of Sarawak.

E Supang Lian J:

- F [1] The application before me is for the grant of ad hoc licence to permit the petitioner, Mr Malik Imtiaz Ahmed bin Ghulam Sarwar, a senior counsel from Peninsular Malaysia, to practise in the High Court in Sabah and Sarawak at Kuching as the senior and lead counsel for Petroliaam Nasional Bhd ('PETRONAS') in two cases namely:

- G (a) Judicial Review Application No KCH-13NCvC-8/11 of 2019 (HC4) (the 'JR proceedings'), and any related interlocutory proceedings and appeals to the Court of Appeal and Federal Court of Malaysia arising therefrom; and
- H (b) Civil Suit No KCH-21NCvC-10/11 of 2019 (HC2) (the 'civil suit'), and any related interlocutory proceedings and appeals to the Court of Appeal and Federal Court of Malaysia arising therefrom.

- I [2] The petition is made under ss 4 and 10(c) of the Sarawak Advocates Ordinance 1953 (Chapter 110) ('the SAO 1953') and was filed by Messrs Idris, Alvin Chong & Partners Advocates, the local advocates otherwise known as the instructing solicitors. The Chambers of the State Attorney General and the Advocates' Association of Sarawak object to the application.

[3] I have noted the arguments put forward by Mr Nur Azhar and Mr Desmond Sahathevan.

DECISION

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[4] Based on the affidavit evidence placed before me, I am satisfied that the procedural requirements under the SAO 1953 and the Sarawak Advocates (Pupillage and Admission) Rules 2014 (Swk LN (F) 2) have been fulfilled in that:

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- (a) the petitioner was conferred the Bachelor of Laws (LLB) from the International Islamic University, Malaysia in 1993;
- (b) the petitioner has been admitted to practise as an advocate and solicitor of the High Court of Malaya in 1994;
- (c) the petitioner has been instructed by Messrs IACPA, who is a local advocate; and
- (d) two recent testimonials as to the good character of the petitioner have been provided.

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[5] As stated in *In the Matter of a Petition by Cyrus Das* [2018] MLJU 2104; [2019] 2 CLJ 805 at p 811, there is only one test to be applied when considering a petition under s 10(c) of the SAO 1953. It is, whether having regard to all circumstances, it is in the interest of justice to grant permission to practice.

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[6] In my considered opinion, it is in the interest of justice to grant the petitioner the permission sought. My reasons for saying so are these.

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[7] As readily discernible from the cause papers filed in court with respect to the JR proceedings and the civil suit, the dispute between PETRONAS and the comptroller together with the Sarawak State Government pertaining to the payment of state sales tax for petroleum products is not limited to ordinary questions of law. The issues involved multiple novel and complex areas of law including constitutionalism, legislative power and federalism in connection with the petroleum industry. These issues are of public importance, upon which any determination of the same by this court in the JR proceedings and the civil suit would have far-reaching implications.

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[8] This calls for not only an appreciation of the relevant legal concept, including the legislative intent underlying the enacting of the PDA, but also an understanding of the petroleum industry. Further, a full appreciation of the dispute also requires a holistic understanding of the factual aspects unique to the Malaysian petroleum industry. This is an industry which is in the public interest.

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- A [9] Given these very novel and complex matters, counsel appearing for PETRONAS must be in a position to help the court arrive at an objective view of the factual and legal aspects of the dispute. Having regard to the nature of the sales tax in issue, and the points of contention made in the statement in the JR proceedings, this would include the supply chain that leads to the ultimate points of sale, and the systems put in place by the federal government in ensuring that there would be no cascading effect where there are multiple sales in a single supply chain. These are amongst the aspects that feature in the JR proceedings and the civil suit vis the issue of overlapping or multiple taxations.
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- C [10] Based on the materials placed before me, there is no denying that the petitioner has extensive experience in administrative as well as constitutional law. He has featured as counsel in many of the landmark decisions on these subjects over the past two decades.
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- E [11] His expertise in these subjects is recognised in Sabah and Sarawak as demonstrated in him being invited by the Sabah Law Society to give a talk on the Federal Constitution at the Strategic Litigation course held in Kota Kinabalu in December 2018. The opening key note address at the course was delivered by none other than the Right Honourable the Chief Judge of Sabah and Sarawak, YAA Datuk David Wong Dak Wah. Moreover, the High Court in Kota Kinabalu had recently granted the petitioner permission to practise as the senior and lead counsel, on an ad hoc basis, in Judicial Review Application No TWU-13NCvC-1/9 of 2019 (HC), Judicial Review Application No BKI-13NCvC-12/9 of 2019, and in any subsequent or related judicial reviews, cause or matter arising out of the same facts and issues and any interlocutory proceedings and appeals, pursuant to ss 10(1), 10(2) and 10(5) of the Advocates Ordinance (Sabah Cap 2). The Sabah judicial reviews are a challenge to the constitutionality of the decisions of the Sabah State Government, the Minister of Local Government and Housing of Sabah and various local councils in Sabah in demanding the applicants cease operation of slot machines in Sabah.
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- H [12] The petitioner's expertise in Malaysian law is also recognised internationally. He was retained by the claimants in *Belhaj & Anor v Straw & Others* Claim No HQ12X02603 brought in the High Court of Justice (Queen's Bench Division) in London to prepare an expert opinion on the Malaysian law on the subject of rendition or forcible removal. The subject of the opinion was complex, covering areas as diverse as constitutional law, extradition, immigration and a number of torts. In addition, in 2009, the petitioner was awarded the Index on Censorship Freedom of Expression: The Bindmans Law and Campaigning Award. The said award 'aims to recognise lawyers and campaigners who have fought repression or who have struggled to change political climates and perceptions, especially those who have used or
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established legal means to fight injustice in the field of freedom of expression’. A

[13] I am satisfied based on what has been said above, that the petitioner has the relevant and requisite specialised knowledge required for the JR proceedings and the civil suit. He is eminently qualified and has all the necessary expertise, skill and knowledge to act as the senior and lead counsel for PETRONAS. B

[14] The final point is this delicate issue of the availability of local expertise or unavailability of it, so to speak. C

[15] Mr Alvin Chong has pointed out that the pre-eminent Sarawak senior counsel who has experience in the matters in issue in the JR proceedings and the civil suit is Dato’ Sri Fong Joo Chung. However, being the state legal counsel, he undoubtedly will be retained by the comptroller and the Sarawak State Government. Two distinguished senior lawyers have been approached, namely Mr Chong Siew Chiang and Mr George Lo Kuin Fah, but they have declined the brief. Mr Desmond Sahathevan has also mentioned the names of three senior members of the Sarawak Bar said to possess the requisite expertise or knowledge. There is no reported cases in the law reports on related matters or constitutional issues said to have been handled by any one of the senior lawyers. And I agree with Mr Alvin Chong that considerable experience and expertise in tax law per se is only one of the matters of consideration. The key component of the proceedings in the present case is about constitutional issues. D
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[16] Quite apart from the limited local expertise, PETRONAS has been placed in a difficult position given the position taken by the Advocates Association of Sarawak and a group of 50 lawyers on the subjects in issue. G

[17] The background to this is that the Sarawak State Government had taken issue with the regulating of upstream activity in Sarawak by PETRONAS. It took the stance that it was entitled to regulate such activity under the Sarawak Oil Mining Ordinance 1958 (No 4 of 1958) (‘the OMO’). This led to the state government establishing Petroleum Sarawak Bhd (PETRONAS) and it asserting control under the OMO. PETRONAS and the Sarawak State Government have been in an impasse over that issue since. This issue has in the meanwhile featured in discussions on the Malaysia Agreement 1963 in the *Jawatankuasa Teknikal untuk menyemak Pelaksanaan Perjanjian Malaysia 1963 (MA63)*. The impasse had ultimately led to the article 4 challenge. H
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[18] Following the commencement of that challenge, in June 2018, a widely reported meeting took place between the Right Honourable the Chief Minister of Sarawak, the Assistant Minister of Law of Sarawak, and the Advocates

- A** Association of Sarawak. The meeting was attended by some 50 Sarawak lawyers and it was reported that, 'The lawyers are doing it for free ... we are going all the way for Sarawak, tooth and nail, not even an inch we will surrender. Everyone is united in support of the Chief Minister on this suit. It is a good thing for Sarawak'. It was also reported that the Advocates Association of Sarawak 'are with us (the Sarawak State Government) and giving their full support'; and that a special taskforce would be formed to assist the Sarawak State Government 'in looking into all matters relating to the Malaysia Agreement 1963 (MA63) and Sarawak's rights'.
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- C** [19] To my mind, this rather vocal stance of the local bar, is the more reason for allowing PETRONAS to be represented by its counsel of choice.
- [20] For the reasons stated above, I am persuaded that it would be in the interest of justice to allow the petition with global costs of RM3,000 to the Comptroller of SST Sarawak and the Sarawak State Government.
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Application allowed.

Reported by Mohd Kamarul Anwar

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