A **SURUHANJAYA PENCEGAHAN RASUAH MALAYSIA & ORS**
v. LATHEEFA BEEBI KOYA & ANOR

FEDERAL COURT, PUTRAJAYA
AHMAD MAAROP CJ (MALAYA)
RICHARD MALANJUM CJ (SABAH & SARAWAK)
B HASAN LAH FCJ
ABU SAMAH NORDIN FCJ
BALIA YUSOF WAHI FCJ
[CIVIL APPEAL NO: 01(f)-31-04-2015(W)]
9 AUGUST 2017

C

CIVIL PROCEDURE: *Judicial review – Proceedings – Certiorari – Application to quash notice under s. 30(1)(a) of Malaysian Anti-Corruption Commission Act 2009 to assist in investigation of corruption offence – Lawyers accompanied client to Malaysian Anti-Corruption Commission ('MACC') office to give statement – Notice*
D *issued ordering lawyers to give statements – Whether notice an act of intimidation – Whether notice issued mala fide or in bad faith – Whether MACC abused powers in issuing notice – Whether criminal investigative process amenable to judicial review – Whether actions or decisions of public authority in exercise of its powers open to judicial review*

E ***CRIMINAL LAW:*** *Corruption – Investigation – Lawyers accompanied client to Malaysian Anti-Corruption Commission ('MACC') office to give statement – Client a complainant against suspect in commission of corruption offence – Whether arts. 5(2) or 5(3) of Federal Constitution confers constitutional right on complainant to be represented by counsel – Notice under s. 30(1)(a) of Malaysian*
F *Anti-Corruption Commission Act 2009 ordering lawyers to give statements – Whether notice an act of intimidation – Whether MACC abused powers in issuing notice – Whether notice was for lawyers to assist in investigation of corruption offence – Whether notice issued mala fide or in bad faith*

A police report was lodged against the suspect, the Chairman of the National
G Feedlot Corporation ('the company') by the complainant, an advisor to the company. The complainant alleged, among others, was that the suspect had exerted undue pressure on him to bribe the police as an inducement to close the investigation into allegations of improprieties in the company. Pursuant to the report, the first appellant, an anti-corruption body, summoned the
H complainant to its office to assist in the investigations and to have his statement recorded. The complainant went to the first appellant's office to give his statement with his lawyers, namely the respondents. The respondents insisted that they be allowed to be present during the recording of their client's statement contending that their client had a constitutional
I right to be represented by counsel. After recording the complainant's statement, the respondents were informed orally that they were also required

to give their statements in order to assist in the investigation. The respondents protested and refused to do so. Hence, on the same day, the third appellant, an investigation officer of the first appellant, issued a notice under s. 30(1)(a) of the Malaysian Anti-Corruption Commission Act 2009 ('the Act') to each respondent ordering both of them to be present at the first appellant's office on 23 March 2012 to be examined orally for the purposes of assisting the first appellant in the investigation of an offence of corruption under s. 16(b) of the Act. The respondents informed the first appellant in writing that they would not be present at the first appellant's office, as directed. The respondents filed an application for leave to apply for judicial review under O. 53 of the Rules of the High Court 1980 ('RHC') for, *inter alia*, an order of *certiorari* to quash the notice issued under s. 30(1)(a) of the Act. The High Court granted the application and quashed the said notice on the ground that it was issued as an act of intimidation against the respondents acting as counsel for their client and an abuse of the appellants' powers under the Act and therefore void and unlawful. The Court of Appeal agreed with the High Court and dismissed the appellants' appeal. The appellants were granted leave to appeal to this court on the following question of law: whether a criminal investigative process such as a notice of investigation under s. 30(1)(a) of the Act was amenable to judicial review.

Held (allowing appeal)
Per Abu Samah Nordin FCJ delivering the judgment of the court:

(1) The respondents' client was the complainant against a suspect in the commission of a corruption offence under s. 16(b) of the Act. He was a witness and not a suspect or an arrested person or a person 'unlawfully detained'. Thus, arts. 5(2) or 5(3) of the Federal Constitution does not confer any constitutional right on the complainant to be represented by counsel during the recording of his statement as a witness. (para 27)

(2) An allegation that the notice was issued as an act of intimidation or was issued *mala fide* based on the unmeritorious contention that the complainant had a constitutional right to be represented by counsel during the recording of his statement as a witness could not be the basis for quashing the notice issued under s. 30(1)(a) of the Act. The allegation of *mala fide* against the appellants in issuing the notice was purely because of the respondents' sheer insistence that they be allowed to be present during the recording of their client's statement. What actually happened was the reverse. The respondents had in fact been allowed to be present although the appellants held the view that the respondents' client had no constitutional right to be represented at that stage. There was also no provision in the Act giving the solicitors the right to be present during the recording of their client's statement in the course of investigation. (paras 30 & 34)

(3) The fact that the respondents did not interfere throughout the recording of their client's statement was no justification to hold that the appellants had abused their powers in issuing the notice. In the first place, it had not been shown that the respondents had any legal or constitutional basis to be present. Nor was it shown that their client had a constitutional right to be represented by counsel during the recording of their client's statement in the course of an investigation. There was no element of surprise or ambush. The respondents had been informed in advance that their statements may be recorded if they insisted on being present. They opted to be present, holding steadfastly to their contention that their client had a constitutional right to be represented. (para 31)

(4) Actions or decisions of a public authority in the exercise of its powers in the course of criminal investigation or enquiry is not open to judicial review. Therefore, the answer to the question posed to this court was that the exercise of legitimate power, namely, the issuance of the notice pursuant to s. 30(1)(a) of the Act by the first appellant through the third appellant was not amenable to judicial review. The notice was issued in order to assist the appellants in the investigation of a corruption offence under s. 16(b) of the Act. To hold otherwise, would expose the criminal investigative processes of all law enforcement agencies to constant judicial review. On the facts of this case, the respondents failed to establish that the notice was issued *mala fide* or in bad faith. (para 42)

Bahasa Malaysia *Headnotes*

Satu laporan polis dibuat terhadap suspek, Pengerusi National Feedlot Corporation ('syarikat') oleh pengadu, iaitu penasihat kepada syarikat itu. Pengadu mendakwa, antara lain, bahawa suspek telah menggunakan tekanan tidak wajar ke atasnya untuk memberi rasuah kepada pihak polis sebagai dorongan menutup siasatan terhadap dakwaan salah laku dalam syarikat. Berikutan laporan itu, perayu pertama, sebuah badan anti rasuah, memanggil pengadu ke pejabatnya bagi membantu siasatan dan untuk merakamkan kenyataannya. Pengadu pergi ke pejabat perayu pertama untuk memberikan kenyataan bersama dengan peguam-peguamnya, iaitu responden-responden. Responden-responden menegaskan bahawa mereka dibenarkan hadir semasa kenyataan anak guam mereka direkodkan dan menghujahkan bahawa anak guam mereka mempunyai hak perlembagaan untuk diwakili peguam. Selepas merakamkan kenyataan pengadu, responden-responden dimaklumkan secara lisan bahawa mereka perlu memberikan kenyataan untuk membantu siasatan. Responden-responden membantah dan enggan berbuat demikian. Oleh itu, pada hari yang sama, perayu ketiga, pegawai penyiasat untuk perayu pertama, mengeluarkan notis bawah s. 30(1)(a) Akta Suruhanjaya Pencegahan Rasuah 2009 ('Akta') kepada setiap responden memerintahkan mereka berdua hadir di pejabat perayu pertama pada 23 Mac 2012 untuk

diperiksa secara lisan bagi tujuan membantu perayu pertama dalam siasatan kesalahan rasuah bawah s. 16(b) Akta. Responden-responden memaklumkan perayu pertama secara bertulis bahawa mereka tidak akan hadir di pejabat perayu pertama, seperti diarahkan. Responden-responden memfailkan permohonan untuk kebenaran memohon semakan kehakiman bawah A. 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk, antara lain, satu perintah *certiorari* membatalkan notis yang dikeluarkan bawah s. 30(1)(a) Akta. Mahkamah Tinggi membenarkan permohonan dan membatalkan notis tersebut atas alasan bahawa ia dikeluarkan sebagai satu tindakan ugutan terhadap responden-responden selaku peguam bagi anak guamnya dan satu salah guna kuasa perayu-perayu bawah Akta dan dengan itu adalah terbatal dan melanggar undang-undang. Mahkamah Rayuan bersetuju dengan Mahkamah Tinggi dan menolak rayuan perayu-perayu. Perayu-perayu diberikan kebenaran untuk merayu ke mahkamah ini atas persoalan undang-undang berikut: sama ada proses penyiasatan jenayah seperti notis siasatan bawah s. 30(1)(a) Akta tertakluk pada semakan kehakiman.

Diputuskan (membenarkan rayuan)
Oleh Abu Samah Nordin HMP menyampaikan penghakiman mahkamah:

(1) Anak guam responden adalah pengadu terhadap suspek dalam perlakuan kesalahan rasuah bawah s. 16(b) Akta. Dia adalah saksi dan bukan suspek atau orang yang ditahan atau orang yang 'ditahan secara tak sah'. Oleh itu, per. 5(2) atau 5(3) Perlembagaan Persekutuan tidak memberi apa-apa hak perlembagaan atas pengadu untuk diwakili peguam semasa rakaman kenyataannya sebagai saksi.

(2) Dakwaan bahawa notis yang dikeluarkan adalah tindakan ugutan atau dikeluarkan secara *mala fide* berdasarkan hujahan tidak bermerit bahawa pengadu mempunyai hak perlembagaan untuk diwakili oleh peguam semasa rakaman kenyataannya sebagai saksi tidak boleh menjadi dasar membatalkan notis yang dikeluarkan bawah s. 30(1)(a) Akta. Dakwaan *mala fide* terhadap perayu-perayu dalam mengeluarkan notis adalah semata-mata kerana responden-responden begitu tegas agar mereka dibenarkan hadir semasa merakamkan kenyataan anak guam mereka. Apa yang sebenarnya berlaku adalah sebaliknya. Responden-responden telah dibenarkan hadir walaupun perayu-perayu berpendapat bahawa anak guam responden-responden tidak mempunyai hak perlembagaan untuk diwakili peguam pada peringkat ini. Tiada juga peruntukan dalam Akta yang memberikan hak kepada peguam-peguam untuk hadir semasa rakaman kenyataan anak guam dalam siasatan.

(3) Fakta bahawa responden-responden tidak membuat sebarang gangguan semasa kenyataan anak guamnya dirakamkan bukanlah justifikasi untuk memutuskan bahawa perayu-perayu telah salah guna kuasa dalam

mengeluarkan notis itu. Tidak ditunjukkan bahawa responden-responden mempunyai apa-apa dasar undang-undang atau perlembagaan untuk hadir. Juga tidak ditunjukkan bahawa anak guamnya mempunyai hak perlembagaan untuk diwakili oleh peguam semasa kenyataan anak guamnya dirakamkan semasa siasatan. Tiada elemen mengejutkan atau serangan hendap. Responden-responden dimaklumkan terlebih dahulu bahawa kenyataan mereka mungkin dirakamkan jika mereka berkeras untuk menghadirkan diri. Mereka memilih untuk hadir, berpegang teguh pada hujah mereka bahawa anak guam mereka mempunyai hak perlembagaan untuk diwakili.

(4) Tindakan atau keputusan pihak berkuasa awam dalam pelaksanaan kuasa mereka semasa siasatan jenayah atau pertanyaan tidak terbuka pada semakan kehakiman. Oleh itu, jawapan kepada soalan yang diajukan oleh mahkamah ini adalah bahawa dalam menjalankan kuasa yang sah, iaitu, pengeluaran notis menurut s. 30(1)(a) Akta oleh perayu pertama melalui perayu ketiga tidak tertakluk pada semakan kehakiman. Notis dikeluarkan untuk membantu perayu-perayu dalam siasatan kesalahan rasuah bawah s. 16(b) Akta. Memutuskan sebaliknya, akan mendedahkan proses siasatan jenayah semua agensi penguatkuasaan undang-undang kepada semakan kehakiman berterusan. Berdasarkan fakta kes ini, responden-responden gagal membuktikan bahawa notis yang dikeluarkan adalah *mala fide* atau dengan niat jahat.

Case(s) referred to:

Ahmad Azam Mohamad Salleh & Others v. Jabatan Pembangunan Koperasi Malaysia & Ors [2004] 4 MLJ 86 ***(refd)***

Australian Broadcasting Tribunal v. Bond and Others [1990] 94 ALR 11 ***(refd)***

Chng Suan Tze v. Minister of Home Affairs [1988] 2 SLR (R) 525 ***(refd)***

City Growth Sdn Bhd & Anor v. The Government of Malaysia [2005] 7 CLJ 422 HC ***(refd)***

Datuk Seri Ahmad Said Hamdan & Ors v. Tan Boon Wah [2010] 6 CLJ 142 CA ***(refd)***

Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia [2013] 2 CLJ 1009 FC ***(refd)***

Empayar Changgih Sdn Bhd v. Ketua Pengarah Bahagian Penguakuasa Kementerian Perdagangan Dalam Negeri & Hal Ehwal Pengguna Malaysia & Ors (Civil Appeal No. 01(f)-21-09-2012(W)) (Unreported) ***(refd)***

Hashim Saud v. Yahaya Hashim & Anor [1977] 1 LNS 32 HC ***(refd)***

In Re Groban 352 US 330 (1957) ***(refd)***

Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 4 CLJ 169 CA ***(refd)***

Manjit Singh Kirpal Singh & Another v. Attorney General [2013] 2 SLR 844 ***(refd)***

Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

R v. Director of Public Prosecutions ex p Kebeline [2000] 2 AC 326 ***(refd)***

R v. Sloan [1990] 1 NZLR 474 ***(refd)***

Reg v. Tower Hamlets London Borough Council, Ex parte Chetnik Developments Ltd [1988] AC 858 ***(refd)***

Savrimuthu Sinnapan v. PP [1987] 1 CLJ 368; [1987] CLJ (Rep) 322 SC ***(refd)***
Tan Eng Chye v. Director of Prisons (No. 2) [2004] SLR 521 ***(refd)***
Yeap Hock Seng @ Ah Meng v. Minister For Home Affairs, Malaysia [1975] 2 MLJ 279 ***(refd)***

Legislation referred to:
Anti-Money Laundering, Anti-Terrorism Financing And Proceeds of Unlawful Activities Act 2001, ss. 4, 50(1)
Criminal Procedure Code, s. 117
Federal Constitution, art. 5(2), (3)
Malaysian Anti-Corruption Commission Act 2009, ss. 16(b), 30(1)(a), (3), (6)
Rules of the High Court 1980, O. 53 rr. 2(4), 3
Legal Profession Act (Cap 161) [Sing], s. 90(1)

For the appellants - Suzana Atan; SFC
For the respondents - Puravalen, Oh Choong Ghee & Shahid Adli Kamarudin; M/s Daim & Gamany

[Editor's note: For the Court of Appeal judgment, please see Suruhanjaya Pencegahan Rasuah Malaysia & Ors v. Latheefa Beebi Koya & Anor [2015] 6 CLJ 476 (overruled); For the High Court judgment, please see [2013] 8 CLJ 855 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Abu Samah Nordin FCJ:

[1] This is an appeal by the appellants against the decision of the Court of Appeal which dismissed their appeal and affirmed the decision of the Kuala Lumpur High Court. The first appellant is an anti-corruption body specially established under the Malaysian Anti-Corruption Commission Act 2009 ('the Act') to promote integrity and accountability in the public and private sector. It is equipped with wide powers to investigate into and prosecute offences of corruption under the Act and certain offences, described as "prescribed offence" under the Penal Code, Customs Act 1967 and Election Offences Act 1954. The second appellant is the Government of Malaysia, which is a nominal party to this action. The third appellant is the investigation officer of the first appellant with the rank of an assistant superintendent.

[2] The appellants are dissatisfied that their notice under s. 30(1)(a) of the Act, directing the respondents to be present at the first appellant's office to be orally examined for purposes of assisting the first appellant in an investigation of a corruption offence under the Act was set aside by the High Court.

Facts In Brief

[3] On 27 January 2012 one Shamsubahrin bin Ismail ('the complainant') lodged a police report against Dato' Seri Salleh bin Ismail ('the suspect') who was the Chairman of National Feedlot Corporation ('the company'). The complainant was an advisor to the company. The complainant alleged, among others, that the suspect had exerted undue pressure on him, through telephone and SMS to bribe the police as an inducement to close the investigation into allegations of improprieties in the company.

[4] Pursuant to the report, the first appellant summoned the complainant to its office to assist in the investigation and to have his statement recorded. On 19 March 2012 the complainant went to the first appellant's office to give his statement. He came with his lawyers, namely the respondents.

[5] The respondents insisted that they be allowed to be present during the recording of their client's statement, contending that their client had a constitutional right to be represented by counsel. The first appellant objected to their presence and indicated to them that there was no provision in the Act giving them any right to be present. Owing to the respondents' uncompromising insistence and tense situation, the first appellant finally relented and allowed them to be present. But they were informed in advance that there may be a need to record their statements as well.

[6] After recording the complainant's statement, the respondents were informed orally that they were also required to give their statements in order to assist in the investigation. The respondents protested and refused to give their statements.

[7] Hence, on the same day, that is, 19 March 2012 the third appellant issued a notice under s. 30(1)(a) of the Act to each respondent ordering both of them to be present at the first appellant's office on 23 March 2012 to be examined orally for the purposes of assisting the first appellant in the investigation of an offence of corruption under s. 16(b) of the Act. Section 16(b) of the Act makes it an offence for any person, by himself or in conjunction with any other person, who corruptly gives, promises or offers to any person any gratification as an inducement or reward on account of:

(a) any person doing or forbearing to do anything in respect of any matter or transaction; or

(b) any officer of a public body doing or forbearing to do anything in respect of any matter or transaction.

[8] Under s. 30(6) of the Act it is mandatory to comply with the said notice, notwithstanding any written law or rule of law to the contrary and anyone who contravenes the notice to be present and to be orally examined commits an offence, punishable with a fine not exceeding RM10,000 or to imprisonment not exceeding two years or to both (s. 69 of the Act).

[9] On 22 March 2012, three days after being served with the notice, the respondents informed the first appellant in writing that they would not be present at the first appellant's office, as directed.

[10] On 30 April 2012 the respondents filed an application for leave to apply for judicial review under O. 53 of the Rules of the High Court 1980 (RHC) for the following reliefs:

(i) for an order of *certiorari* to quash the notice issued under s. 30(1)(a) of the Act;

(ii) for a declaration that the said notice is unlawful, *ultra vires* and/or an abuse of powers under the Act;

(iii) for a declaration that the first appellant had no power to record the statement of solicitors who represented their client during the recording of their client's statement. Leave was granted.

[11] After hearing the substantive motion, the High Court granted the application for judicial review and quashed the said notice on the ground that it was issued as an act of intimidation against the respondents acting as counsel for their client and an abuse of the appellants' powers under the Act and therefore void and unlawful.

[12] The appellants appealed to the Court of Appeal against the decision of the High Court. The Court of Appeal dismissed the appellants' appeal. It agreed with the High Court that the issuance of the notice was clearly an act of intimidation and an abuse of the first and third appellants' powers under the Act. It further held that the notice was not issued in good faith. The Court of Appeal held the view that the discretionary power to issue the notice under s. 30(1)(a) of the Act is not an unfettered discretion but subject to a stringent requirement that it must, as the Federal Court in *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 held, be exercised for a proper purpose and not unreasonably, having regard to all relevant considerations and disregard all improper considerations.

[13] On 6 April 2015 the appellants were granted leave to appeal to this court on the following question of law:

> Whether a criminal investigative process such as a Notice of Investigation under section 30(1)(a) of the Malaysian Anti-Corruption Act 2009 is amenable to judicial review.

[14] Section 30(1)(a) of the Act states:

> 30(1) An officer of the Commission investigating an offence under this Act may:
>
> (a) order any person to attend before him for the purpose of being examined orally in relation to any matter which may, in his opinion, assist in the investigation into the offence.

[15] Section 30(3) and (6) further state:

> 30(3) A person to whom an order has been given under paragraph (1)(a) shall:
>
> (a) attend in accordance with the terms of the order to be examined, and shall continue to attend from day to day where so directed until the examination is completed; and
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> (b) during such examination, disclose all information which is within his knowledge, or which is available to him, in respect of the matter in relation to which he is being examined, and answer any question put to him truthfully and to the best of his knowledge and belief, and shall not refuse to answer any question on the ground that it tends to incriminate him or his spouse.
>
> (4) ...
>
> (5) ...
>
> (6) A person to whom an order or a notice is given under subsection (1) shall comply with such order or notice and with subsections (3), (4) and (5), notwithstanding any written law or rule of law to the contrary.

Submissions Before This Court

[16] The crux of the appellants' contention is that the issuance of the notice to the respondents is not amenable to judicial review as it was issued by the first appellant through the third appellant in exercise of her statutory power granted by s. 30(1)(a) of the Act. Section 30(1)(a) of the Act confers a discretion on the officer of the first appellant to order any person, who in his or her opinion may be able to assist in the investigation of an offence under the Act, to be present and to be examined orally. The notice was issued in order to assist the first appellant in the investigation of a corruption offence under s. 16(b) of the Act. The issuance of the notice was merely an administrative decision made in the course of an investigation. It is contended that an application for judicial review under O. 53 r. 2(4) of the RHC 1980 can only be made by a person who is adversely affected by the decision of any public authority. Hence, not all decisions and actions of a public officer are reviewable under O. 53 r. 2(4) of the RHC. At the time the notice was issued there was no decision made by the first appellant on the outcome of the investigation as it was still in the midst of investigation of the alleged offence.

[17] It was held in *R v. Sloan* [1990] 1 NZLR 474 that:

> Secondly, ... it is not every decision made under the statutory authority that is subject to review. A decision must go beyond what is merely administrative or procedural ... or the exercise of a function rather than a power ... Quite plainly, the conclusions reached by the inspectors here are of this kind and so are not reviewable. To hold otherwise, would as

> Mr Neave submitted, open up the investigative process of all enforcement agencies to constant judicial review; and that cannot have been the intention of Parliament.

It is contended that the decision to issue the notice was merely an administrative decision and therefore is not subject to judicial review.

[18] The appellants also relied on the following authorities in support of their contention that the notice is not amenable to judicial review: *Australian Broadcasting Tribunal v. Bond and Others* [1990] 94 ALR 11, *Tan Eng Chye v. Director of Prisons (No. 2)* [2004] SLR 521, *Empayar Changgih Sdn Bhd v. Ketua Pengarah Bahagian Penguakuasa Kementerian Perdagangan Dalam Negeri & Hal Ehwal Pengguna Malaysia & Ors*, Civil Appeal No. 01(f)-21-09-2012(W) and *Datuk Seri Ahmad Said Hamdan & Ors v. Tan Boon Wah* [2010] 6 CLJ 142; [2010] 3 MLJ 193.

[19] Mr Puravalen, learned counsel for the respondents submitted that it was an act of intimidation and an abuse of powers to issue the notice to the respondents who merely acted as counsel during the recording of their client's statement. It was a violation of their client's fundamental right to counsel under art. 5 of the Federal Constitution to deny their presence. Further, there was no nexus between the offence being investigated and the respondents, who only acted as counsel for their client. The respondents also alleged that the notice was issued *mala fide* and not in good faith.

[20] Learned counsel for the respondents reminded us of the Federal Court's observation in *Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd*, which the Court of Appeal in the instant case had rightly followed, that the discretion conferred by law is not an unfettered discretion and must not be exercised for an improper purpose or unreasonably. It would be an abuse of power to issue the notice, as in this case, under the guise of investigation, to the respondents who merely represented their client, whose right to counsel is entrenched in the Federal Constitution, during the recording of their client's statement as a witness. The notice was clearly an act of intimidation to the respondents as the High Court had found that there was no evidence of interference by counsel during the recording of their client's statement.

[21] Learned counsel cited to us the decision of the Singapore Court of Appeal in *Manjit Singh Kirpal Singh & Another v. Attorney General* [2013] 2 SLR 844 where the court stated that delay occasioned by the review application *per se* was not a sufficient basis to exclude judicial review. In that case, the applicant sought to quash the decision of the Chief Justice in the appointment of a member of disciplinary tribunal under s. 90(1) of the Legal Profession Act (Cap 161). The court dismissed the originating summons on the ground that the power conferred by s. 90(1) of the LPA was clearly administrative and it was not conferred on the Chief Justice in his judicial capacity. That is not a case in favour of the respondents.

[22] Learned counsel for the respondents also cited the following cases where it was submitted that questionable exercise of discretion or abuse of powers by the public authority had been challenged in courts: *Savrimuthu Sinnapan v. PP* [1987] 1 CLJ 368; [1987] CLJ (Rep) 322; [1987] 2 MLJ 173, *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169; [2005] 6 MLJ 289, *Chng Suan Tze v. Minister of Home Affairs* [1988] 2 SLR (R) 525 and *Reg v. Tower Hamlets London Borough Council, Ex parte Chetnik Developments Ltd* [1988] AC 858.

[23] It was further submitted that the decision of this court in *Empayar Changgih Sdn Bhd*'s case that the exercise of power in the course of investigation is not open to review is only a general principle of law which is subject to exceptions where there is dishonesty, bad faith or presence of some other exceptional circumstance as pointed out in *R v. Director of Public Prosecutions ex p Kebeline* [2000] 2 AC 326 or in appropriate cases, where the action of the executive is inconsistent with the constitution and the law or in any manner arbitrary, irrational or *mala fides* or an abuse of power as was clarified by this court in *Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia* [2013] 2 CLJ 1009; [2013] 2 MLJ 321.

Decision

[24] The sole question of law for the court's determination is whether a criminal investigative process such as a notice of investigation under s. 30(1)(a) of the Act is amenable to judicial review. The appellants contend that it is not amenable to judicial review. The respondents, on the other hand, contend that it is amenable to judicial review and that the decision of this court in *Empayar Changgih Sdn Bhd*'s case that an exercise of power in the course of criminal investigation is not open to judicial review under O. 53 of the RHC is however subject to the exceptions that it is not tainted by claims of dishonesty, bad faith or other exceptional circumstance as was held in *Reg v. DPP exp Kebilene* or where, to quote the decision of this court in *Dr Michael Jeyakumar Devaraj*'s case "the policy or action of the executive is inconsistent with the constitution and the law or in any manner arbitrary, irrational or there are elements of *mala fides* and abuse of power". In short, the decision of the public authority in the course of criminal investigation or the decision of the executive is not totally unreviewable by way of judicial review.

[25] *Reg v. DPP exp Kebilene* was not considered in *Empayar Changgih Sdn Bhd*'s case and that both cases were also not considered in *Dr Michael Jeyakumar Devaraj*'s case. In that case, the Federal Court spelt out the circumstances where policy or executive decisions may be open to judicial review. Whether or not the court should interfere however depend on the facts of each case. In *Reg v. DPP exp Kebilene*, Lord Steyn at p. 371 said:

> My Lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review.

[26] The foremost reason, if not the sole reason, that triggered the respondents' application for a declaration that the notice is unlawful and void is because they claim that it is an abuse of powers by the appellants and an act of intimidation against counsel who insisted to be present during the recording of their client's statement as a witness. It was the respondents' assertion that their client had a constitutional right under art. 5 of the Federal Constitution to be represented by counsel, without however specifying which part of art. 5 that applies to their client.

[27] Article 5(2) of the Constitution speaks of the right of a person who is being unlawfully detained to make a complaint to the High Court. This is a provision where a person claiming to be unlawfully detained, ordinarily applies for a writ of *habeas corpus*. Article 5(3) speaks of a right of an arrested person to consult and to be defended by a legal practitioner of his choice. The respondents' client is the complainant against a suspect in the commission of a corruption offence under s. 16(b) of the Act. He is a witness and not a suspect or an arrested person or a person 'unlawfully detained'. So art. 5(2) or 5(3) of the Constitution does not confer any constitutional right on the complainant to be represented by counsel during the recording of his statement as a witness. Learned counsel's contention that their client has a constitutional right under art. 5 to be represented by counsel is just a bare assertion. Not a single authority is cited to us to back up such contention.

[28] In *In Re Groban* 352 US 330 (1957) the Ohio Supreme Court had to decide whether the witnesses (appellants) had a constitutional right under the due process clause of the fourteenth amendment to the assistance of their own counsel in giving testimony as witnesses at a proceeding conducted by the Ohio State Fire Marshall to investigate the causes of fire. The Ohio Supreme Court held (by a majority of five against four) that the appellants had no constitutional right to be assisted by counsel in giving testimony at the investigatory proceeding conducted by the Fire Marshall.

[29] Mr Justice Reed who delivered the majority opinion of the court said:

> The proceeding before the Fire Marshal was not a criminal trial, nor was it an administrative proceeding that would in any way adjudicate appellants' responsibilities for the fire. It was a proceeding solely to elicit facts relating to the causes and circumstances of the fire. The Fire Marshal's duty was to "determine whether the fire was the result of carelessness or design", and to arrest any person against whom there was sufficient evidence on which to base a charge of arson.
>
> The fact that appellants were under a legal duty to speak and that their testimony might provide a basis for criminal charges against them does not mean that they had a constitutional right to the assistance of their counsel. Appellants here are witnesses from whom information was sought as to the cause of the fire. A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his

> counsel, nor can a witness before other investigatory bodies. There is no more reason to allow the presence of counsel before a Fire Marshal trying in the public interest to determine the cause of a fire. Obviously in these situations evidence obtained may possibly lay a witness open to criminal charges. When such charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defence. Until then, his protection is the privilege against self-incrimination.

[30] An allegation that the notice was issued as an act of intimidation or was issued *mala fide* based on unmeritorious contention that the complainant had a constitutional right to be represented by counsel during the recording of his statement as a witness cannot be the basis for quashing the notice issued under s. 30(1)(a) of the Act.

[31] The fact that the respondents did not interfere throughout the recording of their client's statement is no justification to hold that the appellants had abused their powers in issuing the notice. In the first place, it had not been shown that the respondents had any legal or constitutional basis to be present. Nor was it shown that their client had a constitutional right to be represented by counsel during the recording of their client's statement in the course of an investigation. There was no element of surprise or ambush. The respondents had been informed in advance that their statements may be recorded if they insisted on being present. They opted to be present, holding steadfastly to their contention that their client had a constitutional right to be represented.

[32] The appellant categorically denied that the notice was issued *mala fide* or in bad faith. The burden is on the respondents to show that the notice was issued in bad faith. Mere suspicion is not sufficient. The case of *Yeap Hock Seng @ Ah Meng v. Minister For Home Affairs, Malaysia* [1975] 2 MLJ 279 is an illustration that it would be an uphill task to prove an allegation of *mala fide*. In that case, the applicant applied for a writ of *habeas corpus*, alleging that he was unlawfully detained and that his detention was made *mala fide*.

[33] Abdoolcader J in dismissing the application for *habeas corpus* at p. 248 said:

> The onus of proving *mala fides* on the part of the detaining authority is on the applicant and is normally extremely difficult to discharge as what is required is proof of improper or bad motive in order to invalidate the detention order for *male fides* and not mere suspicion …
>
> It might perhaps be open to the applicant to suggest that the circumstances surrounding his case might possibly relate to some suspicion of *mala fides* but this cannot be taken for granted or considered sufficient proof by itself.

[34] In the instant appeal, the allegation of *mala fide* against the appellants in issuing the notice was purely because of the respondents' sheer insistence that they be allowed to be present during the recording of their client's statement. What actually happened was the reverse. The respondents had in fact been allowed to be present although the appellants held the view that the respondents' client had no constitutional right to be represented at that stage. There is also no provision in the Act giving the solicitors the right to be present during the recording of their client's statement in the course of investigation.

[35] The Court of Appeal which relied on the decision of this court in *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143, in holding that the notice was void on the ground that the appellants had exercised their discretion wrongly or unreasonably and not in good faith had quoted the observation made by Raja Azlan Shah Ag CJ (as he then was) out of context. In that case, the registered owner of the land who held title in perpetuity surrendered its land for purposes of subdivision and realienation. The appellant, in communicating the decision of the land executive committee stated that the approval for subdivision and realienation, was subject to the condition that the land would be realienated not in perpetuity but for a lease of 99 years, which the respondent seriously objected. The Federal Court held that the Government had no power to make the registered proprietor give up its freehold title and receive in exchange a 99-year lease. It was in that context that prompted Raja Azlan Shah, Ag CJ, to make the following observation:

> Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraints. Where it is wrongly exercised, it becomes the duty of the courts to intervene. I would once again emphasise what has been said before, that 'public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place'.

[36] It is wholly inappropriate to equate the decision of the third appellant in exercising her discretion in issuing the notice under s. 30(1)(a) of the Act with the decision of the Government in *Sri Lempah Enterprise Sdn Bhd*'s case. In the instant appeal, the third appellant is expressly empowered by law to issue the notice whereas in *Sri Lempah Enterprise Sdn Bhd*'s case the land executive committee had no power in law to order the registered landowner to give up its freehold title to the land and receive in exchange a leasehold title of 99 years.

[37] The weight of authorities tend to support the view that the actions or decisions of a public authority in exercise of its legitimate powers at the investigative stage are not amenable to judicial review. In *R v. Sloan* [1990] 1 NZLR 474, Sloan was convicted under the Gaming and Lotteries Act 1977

for operating an illegal game of chance by using certain machines. After his conviction, he converted the use of those machines to a prize competition, which is outside the scope of the Act. But the Inspectors of Gaming still considered the new scheme an illegal game and issued letters to Sloan to cease operations forthwith, coupled with a threat of enforcement. Sloan then applied for a review under the Judicature Amendment Act 1972 and sought a declaration that the new scheme was lawful under the Gaming and Lotteries Act 1977 and that no enforcement actions should be taken against him. The High Court dismissed the application for review, holding that the decision of the inspectors was not subject to review.

[38] *R v. Sloan* was favourably considered in *City Growth Sdn Bhd & Anor v. The Government of Malaysia* [2005] 7 CLJ 422. In the latter case, the applicants (City Growth Sdn Bhd & Anor) applied for leave under O. 53 r. 3 of the RHC for an order of *certiorari* to quash the order issued by the Deputy Public Prosecutor under s. 50(1) of Anti-Money Laundering, Anti-Terrorism Financing And Proceeds of Unlawful Activities Act 2011 (AMLA) directing the banks not to part with or deal in or otherwise dispose of the movable property, including any monetary instrument in the name of the applicants, based on information pursuant to investigation that the movable property is related to commission of an offence under s. 4 of the AMLA. The High Court dismissed the leave application, holding that the order of the DPP was not amenable to judicial review. If all decisions and actions of public authority of this nature are amendable to review, the government machinery may not be able to function smoothly as the investigation process of all enforcement agencies would be open to constant judicial review. The High Court in *City Growth Sdn Bhd*'s case had in turn followed its earlier decision in *Ahmad Azam Mohamad Salleh & Others v. Jabatan Pembangunan Koperasi Malaysia & Ors* [2004] 4 MLJ 86 where it held that the result of the inspection under the Cooperative Societies Act 1983 was not amenable to judicial review.

[39] The decision in *City Growth Sdn Bhd*'s case was cited and approved by this court in *Empayar Changgih Sdn Bhd'*s case. The appellant, Empayar Changgih Sdn Bhd, was in the business of manufacturing video compact discs, which was licensed under the Optical Discs Act 2000 (Act 606). A raid was conducted at the new office of the appellant based on information that an offence under the Act could have been committed. During the raid, certain machines and equipment were seized and removed from the premises, causing some damage to the machines and equipment. The appellant filed an application for an order of *certiorari* against the respondents to quash the decision of the second respondent who refused to release the seized machines and equipment, and for an order of *mandamus* to compel the second respondent to release and return the seized machines and equipment.

[40] Before the hearing of the judicial review application, the prayers were amended, limiting the reliefs only for a declaration that the seizure of the machines and equipment was done without reasonable cause. The High Court dismissed the application holding that, on the facts, the raid and seizure was based on a reasonable cause in exercise of an investigative function. Its decision was affirmed by the Court of Appeal. The appellant was granted leave to appeal to this court against the decision of the Court of Appeal. One of the questions of law posed was:

> Whether in a judicial review application which challenges the validity of the respondent's decision ... to seize any article, optical disc, thing, book or document under section 38(7) of the Act 606, it is necessary for the Respondents to justify the need for such seizure as being reasonably necessary in the context of the purpose for which the raid was conducted.

[41] The appeal was dismissed by this court. It was held in that case that an exercise of power in the course of a criminal investigation is not open to judicial review under O. 53 RHC. To hold otherwise would be exposing the criminal investigative process of all law enforcement agencies in the country to constant judicial review which surely could not have been the intention of Parliament. It was also held that the seizure was made in the course of a criminal investigation of an offence pursuant to the powers conferred by the Act. Such seizure was not amenable to judicial review. The appellant could have filed a writ action for damages.

[42] The general conclusion that can be drawn from the cases referred to above is that the actions or decisions of a public authority in exercise of its powers in the course of criminal investigation or enquiry is not open to judicial review. Therefore, the answer to the question posed to this court is that the exercise of legitimate power, namely, the issuance of the notice pursuant to s. 30(1)(a) of the Act by the first appellant through the third appellant is not amenable to judicial review. The notice was issued in order to assist the appellants in the investigation of a corruption offence under s. 16(b) of the Act. To hold otherwise, would expose the criminal investigative processes of all law enforcement agencies to constant judicial review. On the facts of this case, the respondents failed to establish that the notice was issued *mala fide* or in bad faith.

[43] It seemed that the decision of the High Court in quashing the notice was based on the respondents' contention that their client has a constitutional right to be represented by counsel during the recording of their client's statement. The High Court relied on the decision of this court in *Hashim Saud v. Yahaya Hashim & Anor* [1977] 1 LNS 32; [1977] 2 MLJ 116. This is what Her Ladyship said in para. 19 (CLJ); para. 7 (MLJ) of her judgment:

> In this case, I am of the opinion that there is no doubt that the issuance of the said notice affect the rights of the applicants and also their obligation as lawyers representing their clients. As the learned counsel for the applicants had put it, it is direct interference with the exercise of their duty to their client.

A **[44]** *Hashim Saud*'s case is not an authority that solicitors had a constitutional right to represent their client during the recording of the client's statement. The Federal Court's decision in *Hashim Saud*'s case was in respect of an arrested person's right of access to counsel. It was held in that case that the right to counsel of a person remanded under s. 117 of the
B Criminal Procedure Code started from the day of his arrest but it could not be exercised immediately if it impedes police investigation or the administration of justice.

[45] For the aforesaid reasons, we allow the appeal by the appellants and set aside the orders of the courts below. We make no order as to costs.

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