IN THE FEDERAL COURT OF MALAYSIA AT PUTRAJAYA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO: 01(f)-38-12/2020(W)

Between

Sundra Rajoo a/l Nadarajah … Appellant

And

1. **Menteri Luar Negeri, Malaysia**
2. **Peguam Negara Malaysia**
3. **Suruhanjaya Pencegahan Rasuah Malaysia**
4. **Kerajaan Malaysia … Respondents**

Coram:

Tengku Maimun binti Tuan Mat, CJ
Rohana binti Yusuf, PCA
Mohd Zawawi bin Salleh, FCJ
Zaleha binti Yusof, FCJ
Zabariah binti Mohd. Yusuf, FCJ
Harmindar Singh Dhaliwal, FCJ
Rhodzariah binti Bujang, FCJ

JUDGMENT OF THE COURT

INTRODUCTION

[1] The appellant is the former director of the Asian International Arbitration Centre ('AIAC') or as it was formerly known, the Kuala Lumpur Regional Centre for Arbitration or 'KLRCA'. AIAC was established under the auspices of the Asian-African Legal Consultative Organization ('AALCO').

[2] The 1st respondent is the Minister of Foreign Affairs, the 2nd respondent is the Attorney General of Malaysia ('AG'), the 3rd respondent is the Malaysian Anti-Corruption Commission ('MACC') and the 4th respondent is the Government of Malaysia.

[3] This appeal primarily concerned the question of legal immunity. On the one hand, the appellant claimed statutory legal immunity from 'legal processes' which he construed to include criminal proceedings. On the other hand, the respondents, particularly the 2nd respondent acting in the capacity of Public Prosecutor ('PP') claimed immunity from judicial scrutiny against his decision to prosecute the appellant.

[4] Upon hearing parties and upon careful reflection, we were constrained to allow the appeal. We now provide the grounds for our decision.

THE SALIENT FACTS

[5] The facts of the appeal, which are largely uncontentious, were adequately set out in the submissions of parties and the documents in the appeal record. We respectfully adopt and restate them as follows, subject to some modifications.

[6] The present appeal arose from three charges preferred against the appellant before the Sessions Court Kuala Lumpur. The charges were in relation to allegations of criminal breach of trust under section 409 of the Penal Code. Of note, the charges expressly alleged that the offences were committed by the appellant in his capacity as 'the Director of AIAC'.

[7] The appellant had authored a treatise entitled '*Law, Practice and Procedure of Arbitration*' (2nd edition, LexisNexis, 2016). The alleged offences were in respect of the appellant having had dominion over AIAC funds and having used them to purchase copies of his books for AIAC.

[8] The appellant promptly responded to these allegations in a statement taken from him by the 3rd respondent. The appellant's response was that the copies of his book were purchased with a view to promote and market AIAC, that AIAC benefited from an author's discount, that the monies were all paid to the international publishing house and that all and any royalties earned by the appellant were channelled back to AIAC. The appellant also claimed that AIAC and AALCO were fully aware of the transactions and had approved them for the purposes mentioned, to wit, promotional and marketing activities on behalf of AIAC.

[9] The appellant claimed that due to certain events which took place after 19.11.2018, he was led to believe that he was to be prosecuted. Fearing that the respondents would not respect his legal immunity status, the appellant filed an application for judicial review to seek, among others, declaratory and prohibitory reliefs to give effect to his legal immunity status and to stop all or any criminal proceedings in that regard.

[10] The hearing for leave to commence judicial review was fixed for hearing on 26.3.2019 and the AG's Chambers were duly notified of this on 7.3.2019. Materially, the AG's Chambers wrote back to the appellant's solicitors vide letter dated 20.3.2019 informing that they were aware that leave was to be heard on 26.3.2019 but that they believed such application was totally irrelevant to any eventual prosecution of the appellant.

[11] A letter dated 22.3.2019 written by His Excellency Professor Dr Kennedy Gastorn (Secretary General of AALCO) to the 1st respondent indicated that the 1st respondent had written to the Secretary General of AALCO seeking a waiver of the appellant's immunity. The letter also indicated that the 2nd respondent had been corresponding with the Secretary General via email on the subject of criminal proceedings against the appellant with the request for an ad hoc waiver of immunity.

[12] In that letter dated 22.3.2019, the Secretary General of AALCO provided a detailed account on the extent of the 1st, 2nd and 4th respondents' request for waiver and His Excellency's reasons for refusing to accede to the said request. For ease of reference, the relevant contents of the letter are reproduced below:

"4. The Attorney General of Malaysia later, in his email to me of 25 February 2019, clarified that:

> 4.1. The waiver being sought is only in respect of the criminal proceedings related to Sundra Rajoo, not the AIAC.
>
> 4.2. The request is for an ad hoc waiver, with no permanent amendments made to the Host Country Agreement between AALCO and the Government of Malaysia.
>
> 4.3. The Host Country Agreement is governed by the laws of Malaysia, (including Act 485), and in line with principles of public international law, and therefore the signatory requesting for the immunity can certainly withdraw any immunities which it has requested. Sundra Rajoo, being a former high officer, having helmed leadership for almost a decade, is a representative of the organization within the meaning of section 8A(2) of Act 485.
>
> 4.4 Section 8A(1) of the Act states that privileges and immunities are for the benefit of AIAC, and not for the personal benefit of Sundra Rajoo.
> …

45. Pursuant to 4.1 above, I am not sure how the immunity of Datuk Sundra Rajoo, as a former High Officer of the AIAC, for acts done in official capacity, can realistically be granted without directly or indirectly waiving also immunity of AALCO or the AIAC especially for its archives and documents supposed to be inviolable under Article III(2) of the Host Country Agreement? Article III(2) of the Host Country Agreement serve the legitimate purpose of protecting the independence of AALCO and AIAC, which is crucial for the effective performance of their functions. Prosecution and or defense of the alledegly (*sic*) misappropriation of AIAC's funds against Datuk Sundra Rajoo will be substantiated by documents and or information in AIAC's possession. Yet, none is certain as to which and how many documents will be needed once the trial begins. So, waiving immunity under Art. III(6) also entails waiving immunity

> under Art. III(2) of the Host Country Agreement to the satisfaction of both, the prosecution and defense sides in the case. A waiver of this nature will likely disrupt activities of AALCO and it may be a '*pandora box*' which I am afraid to open in the interests of AALCO.".

[13] In a subsequent letter dated 10.7.2019, the Secretary General of AALCO again wrote to the 2nd respondent informing him that the transactions which became the subject of the charges were known to AALCO and/or AIAC and that they were fully endorsed as such:

> "On 25 March 2019, you informed me that charges were instituted against Datuk Prof. Sundra Rajoo on the basis of MACC's investigations. In my letter to you of 3 April 2019, I objected to the charges against Datuk Prof. Sundra Rajoo on the basis of immunities granted to him under the Host Country Agreement as the charges related to promotion activity of the AIAC through purchase and distribution of his book "Law, Practice and Procedure in Arbitration" of 2016. It covered services and arbitral regimes of the AIAC, among others. AALCO was aware, participated and supported such promotion activities as it greatly enhanced the position of the AIAC in the international arbitral community. Needless to mention that he donated all royalties received from the purchase of the books by the AIAC back to the AIAC.".

[14] Despite the Secretary General's letter dated 22.3.2019, and the impending hearing of the application for leave to commence judicial review, on 22.3.2019 itself the 2nd respondent had already issued to the 3rd respondent his consent to prosecute the appellant. If we understand the appellant's submissions correctly, the 2nd respondent had already made up his mind about charging the appellant notwithstanding the outcome of AALCO's decision on whether or not to waive the appellant's immunity.

[15] In any case, the appellant's application for leave to commence judicial review proceedings against the three charges was eventually dismissed. On appeal, the Court of Appeal held that the appellant had met the threshold for leave. The Court of Appeal reversed the High Court and the matter was remitted to the High Court for hearing of the substantive application before a different Judge. The substantive judicial review application was heard and decided on 31.12.2019 pending which the criminal proceedings in the Sessions Court were stayed. The application for judicial review was allowed by the High Court. Aggrieved, the respondents appealed to the Court of Appeal. The appeal was allowed.

THE MATERIAL PROVISIONS

[16] Before summarising the decisions of the Courts below, we think it is necessary to first reproduce the legal provisions which were material to the question of the appellant's legal immunity. The relevant statute is the International Organizations (Privileges and Immunities) Act 1992 ('Act 485'). In this judgment, our references to 'sections' or 'Schedules' are to the 'sections' or 'Schedules' of Act 485, unless expressed otherwise.

[17] The material provisions of Act 485 are:

> "**Section 2**
>
> "high officer" means a person who holds, or is performing the duties of, an office prescribed by regulations to be a high office in an international organization;
>
> …

Section 4

(1) Subject to this section, and to subsections 11(3), 11(4) and 11(5), the Minister may by regulations either with or without restrictions or to the extent or subject to the conditions prescribed by such regulations—

…

(b) confer—

(i) upon a person who is, or is performing the duties of, a high officer all or any of the privileges and immunities specified in Part I of the Second Schedule; and

(ii) upon a person who has ceased to be, or perform the duties of, a high officer the immunities specified in Part II of the Second Schedule;

…

(7) A high officer or an officer of an international organization who is a Malaysian citizen is not entitled under this section to any of the privileges or immunities in the Second and Fourth Schedules respectively, except in respect of acts and things done in his capacity as such an officer.

Section 8A

(1) The privileges and immunities conferred under this Act are granted in the interests of the international organization and overseas organization and not for the personal benefit of the individuals.

(2) The appropriate authority of the respective international organization and overseas organization shall have the right and the duty to waive the privileges and immunities of any of its representatives, officials or experts in any case where, in its opinion, such privileges and immunities would impede the course of justice and could be waived without prejudice to the interests of the international organization and overseas organization.

(3) The international organization and overseas organization shall co-operate at all times with the appropriate authorities in Malaysia to —

(a) facilitate the proper administration of justice;

(b) secure the compliance of all domestic legislation; and

(c) prevent the occurrence of any abuse in connection with the privileges and immunities conferred under this Act.

SECOND SCHEDULE

(Section 4)

PART I

PRIVILEGES AND IMMUNITIES OF HIGH OFFICER OF INTERNATIONAL ORGANIZATION

The like privileges and immunities (including privileges and immunities in respect of spouse and children under the age of twenty-one years) as are accorded to a diplomatic agent.

PART II

IMMUNITIES OF FORMER HIGH OFFICER OF INTERNATIONAL ORGANIZATION

Immunity from suit and from other legal process in respect of acts and things done in his capacity as such an officer.".

[18] Acting under the International Organizations (Privileges and Immunities) Regulations 1996 ('1996 Regulations'), the 1st respondent vide regulation 2 expressly declared that KLRCA is an international organization, and in regulation 3, conferred privileges and immunities to KLRCA as per the First Schedule.

[19] The 1996 Regulations were enacted to give effect to the 'Agreement between the Government of Malaysia and the Asian-African Legal Consultative Organization Relating to the Regional Centre for Arbitration in Kuala Lumpur' ('Host Country Agreement').

[20] The 1996 Regulations were amended vide the Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) (Amendment) Regulations 2011 ('2011 Regulations'). The 2011 Regulations inserted the following important provisions material to the present appeal:

"**Regulation 1A**

"High Officer" means the person for the time being holding the post of Director of Kuala Lumpur Regional Centre for Arbitration.

…

Regulation 3A

(1) A High Officer, if he is not a citizen of Malaysia, shall have the privileges and immunities as specified in Part I of the Second Schedule to the Act.

(2) A High Officer, if he is a citizen of Malaysia, shall only be entitled to the privileges and immunities in respect of acts and things done in his capacity as the High Officer.

(3) A former High Officer shall have the immunities specified in Part II of the Second Schedule to the Act.".

[21] The appellant claimed that the immunity that he had was essentially derived from Part II of the Second Schedule, namely immunity from suit and from other legal process in respect of acts and things done in his capacity as such an officer.

[22] The respondents accepted and the Courts below proceeded on the basis that the appellant was entitled to immunity but they differed as to whether the scope of that immunity included immunity from criminal proceedings.

PROCEEDINGS IN THE HIGH COURT

[23] Principally, the appellant sought the following substantive reliefs:

"(1) A declaration that the appellant has immunity as a former High Officer being the Director of the Asian International Arbitration Centre ('the Centre') for acts done within his official capacity;

(2) A declaration that on a proper interpretation of Act 485, the appellant's immunity as a former High Officer cannot be waived;

(3) A declaration that in any event a Director, Acting Director or any other officer of the Centre or otherwise has no power to waive the appellant's immunity;

(4) An order of prohibition preventing the 2nd respondent from laying any charge or bringing any proceedings in any court in Malaysia against the appellant with regard to anything done by the appellant in his capacity as Director of the Centre, and more specifically with regard to any acts or omissions by the appellant during his term of office as Director of the Centre in relation to the property, funds or documents of the Centre or otherwise howsoever in relation to the affairs of the Centre.

(5) An order of prohibition preventing the 3rd respondent from arresting, detaining, issuing any warrant or other order or otherwise bringing any judicial proceedings whatsoever against the appellant with regard to anything done by the appellant in his capacity as Director of the Centre, and more specifically with regard to any acts or omissions by the appellant during his term of office as Director of the Centre in relation to the property, funds or documents of the Centre or otherwise howsoever in relation to the affairs of the Centre;

(6) An order of certiorari to remove into the High Court and quash forthwith any document purporting to waive the appellant's immunity; and

(7) Such further or other relief as is considered just by the Court.".

[24] As mentioned earlier, after hearing the substantive judicial review application, the High Court found in favour of the appellant. An order was granted in terms of all the prayers sought.

[25] On the immunity issue, the High Court, after considering various authorities, agreed with the appellant that the words 'and from other legal

process' in Part II of the Second Schedule were capable of a wide construction to include criminal proceedings. The learned Judge opined that if Parliament had intended to exclude criminal proceedings, it should have said so clearly.

[26] On the question of whether the 2nd respondent's decision to institute the charges was amenable to judicial review, the learned Judge opined that the High Court was the appropriate forum to determine the legality of the conduct of a public body exercising public law powers and that this was an appropriate case for it to invoke its supervisory jurisdiction. Mariana Yahya J (now JCA) held that:

> "[90] The applicant in this case alleged that the respondents are acting in excess of their jurisdiction and this court is thus being asked to exercise its supervisory jurisdiction, acting as a constitutional body, to review the actions of the executive branch of Government. Based on the facts of the case, this court is of the considered view that the applicant has come to the right court to determine if the executive branch of Government has acted beyond its powers.".

PROCEEDINGS AT THE COURT OF APPEAL

[27] The Court of Appeal agreed with the High Court that the words 'and from other legal process' in Part II of the Second Schedule include criminal proceedings. However, for three principal reasons, the Court of Appeal reversed the decision of the High Court.

[28] Firstly, the Court of Appeal opined that while the appellant was entitled to immunity, he was not entitled to 'complete immunity'. The Court of Appeal found thus:

> "89. In this connection, the respondent (Sundra Rajoo) being a former High Officer of AIAC, cannot have the benefit of complete immunity from criminal jurisdiction under Act 485. In our opinion, such result can only be achieved in a treaty by express Agreement, with the effect that it cannot be achieved by implication. In our view, parties to the 2013 Host Agreement did not intend to provide complete exemption from criminal jurisdiction to be a condition of the Agreement, to a former high officer.
>
> …
>
> 92. For these reasons, in our view, the presence of section 4(1) read together with Part II of the Second Schedule and section 4(7) of Act 485, is sufficient to reveal the clear intention of Parliament to enact that a former High Officer, shall only be entitled to immunity from criminal prosecution in respect of acts done by him in his capacity as a High Officer.
>
> 93. For these reasons, it is implausible to suggest that the legislation intended to accord complete immunity from criminal proceeding to a former High Officer who is a Malaysian citizen like the respondent in his case. That would in our view amount to altering the scope of Act 485.".

[29] Secondly, the Court of Appeal held that the proper forum to determine the appellant's immunity status was the criminal court and not the High Court in the exercise of its supervisory jurisdiction. In support of that proposition, the Court of Appeal relied on, among others, its prior decision in *Dato' Param Cumaraswamy v MBf Capital Bhd & Anor* [1997] 3 MLJ ('*MBf Capital*'). In essence, the Court of Appeal held that the matter ought to have proceeded to trial in the criminal court and that the appellant was entitled to invoke his immunity as a 'statutory defence' there (see paragraphs 109-110, Court of Appeal Judgment).

[30] Thirdly, the Court of Appeal held that in any event the decisions of the 2nd respondent, even though they are decisions of an Executive body, are premised on unfettered discretion and based on decided cases on the subject, such decisions are completely unamenable to judicial review no matter the circumstances.

LEAVE QUESTIONS

[31] The appellant was granted leave to appeal to this Court on the following questions of law ('Questions'):

> "**Question 1**
>
> Whether the words "immunity from suit or from other legal process" in the Second Schedule of International Organizations (Privileges and Immunities) Act 1992 ('Act 485') includes criminal proceedings?
>
> **Question 2**
>
> Whether the immunity granted to various persons pursuant to Act 485:
>
> 2.1 are limited by the words of section 8A(1) of Act 485 only to acts and things done that are not for their personal benefit; and
>
> 2.2 accordingly, whether charges can be laid against such persons notwithstanding the absence of a waiver by the appropriate authority of the international organization?

Question 3

Whether the exercise of the Attorney General's discretion pursuant to Article 145(3) of the Federal Constitution is amenable to judicial review in appropriate circumstances?

Question 4

Whether the High Court in judicial review proceedings has the jurisdiction and power, in appropriate cases,

4.1 to grant relief including to quash criminal charges laid by the Public Prosecutor, and

4.2 to issue orders of prohibition against proceedings in subordinate courts."

OUR DECISION/ANALYSIS

Questions 1 and 2 – Legal Immunity

[32] We shall, in this judgment, first deal with the question of whether the appellant was entitled to legal immunity from criminal jurisdiction as claimed. In our view, the question could be further broken down into the following sub-questions:

(i) First, do the words 'and from other legal process' in Part II of the Second Schedule include 'criminal proceedings';

(ii) Second, assuming the answer is 'yes', was the appellant within the scope of the provision on immunity in Part II of the Second Schedule; and

(iii) If so, did section 8A(1) have the effect of qualifying or diminishing the extent of the immunity conferred on the appellant?

Principles of Statutory Construction of Domestic Legislation Dealing with Public International Law Issues

[33] The crux of the submission made by learned Senior Federal Counsel ('SFC') appears to be that the impugned words must be read down to exclude criminal proceedings by virtue of the specific phraseologies adopted by Parliament throughout Act 485 and having regard to the various schemes of privileges/immunities enacted by it in Act 485 and other related written laws.

[34] Learned SFC highlighted how different Acts of Parliament expressly confer immunity from criminal process and jurisdiction whereas Act 485 does not. And, even if Act 485 did purport to confer immunity from criminal proceedings, the Act used different wordings in different parts to suggest different implications. The appellant, according to learned SFC, is only immune from 'legal process' whereas other parts of the Act (which are inapplicable to the appellant) use words such as 'legal process of every kind'. Learned SFC therefore submitted that unless Parliament quite clearly provides for immunity from criminal proceedings, Act 485 cannot be construed as conferring such immunity.

[35] With respect to learned SFC, we were unable to agree with her. The method of construction that she advanced is but one settled cannon of statutory interpretation. It is correct to say that where Parliament uses one

method of phraseology in one part and another in some other part, the words could be construed to mean different things. However, that method is not conclusive in determining legislative intent. Statutory construction is not an exact science. When exercising their interpretive role, the Courts must be cautious to construe legislation by having regard to their overall purpose and the subject upon which they touch.

[36] For example, we have held in *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 CLJ 441 at paragraph 36, that courts will not interpret social legislation literally if the consequence of such an interpretation would be to diminish the protective effect of such legislation. In short, different rules might be applied depending on the subject matter and statute under interpretation.

[37] In the present appeal, we were asked to interpret a law passed by Parliament concerning the Federation of Malaysia's compliance with international law. Act 485 serves to ratify an international agreement governed by international law, in this context, the Host Country Agreement. Further, the law on immunity (whether in connection with diplomatic officials or international organisations) significantly impacts Malaysia's international relations.

[38] This much is clear from learned SFC's submission – that short of clearly excluding immunity in respect of criminal proceedings, Parliament has left the words 'and from other legal process' vague and ambiguous. We were therefore left with the question on how the Courts are to construe legislation dealing specifically with public international law issues. The High Court and the Court of Appeal were ad idem that 'any other legal process' includes criminal proceedings and we found no reason to depart

from their concurrent findings. However, our approach in this regard slightly differed from the High Court and the Court of Appeal in the construction of the impugned words 'and from legal process'.

[39] The general proposition in construing statutes in a system that observes the dualist concept of international law is that international law will not apply in Malaysia unless expressly ratified and domesticated by Parliament (see for example *Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal* [2011] 6 MLJ 297; [2011] 8 CLJ 766).

[40] In construing ambiguous domestic law, if there are at least two possible interpretations, that is, one which puts the State in breach of its international law obligations and the other which does not – the Courts ought to prefer the approach which secures the State's compliance with international law. One strong authority for this proposition is the following dictum of Diplock LJ (as he then was) in *Salomon v Commissioners of Customs and Excise* [1966] 3 All ER 871 at pages 875-876:

> "If the terms of the legislation are not clear, however, but are reasonably capable of more than one meaning, **the treaty itself becomes relevant, for there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations**; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred. Thus, in case of lack of clarity in the words used in the legislation, the terms of the treaty are relevant to enable the court to make its choice between the possible meanings of these words by applying this presumption.". [Emphasis added]

[41] The above passage applies in relation to cross-references to treaty obligations which is what the Host Country Agreement essentially is. To that extent the passage applies to the present appeal (see also the judgment of the High Court of Australia which endorses the same method of interpretation in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353).

[42] The approach taken by the Federal Court of Ottawa in *Re Canadian Security Intelligence Service Act* [2008] 4 FCR; 2008 230 FC 301 ('*CSISA*') also commended itself to us. In that case, the relevant enforcement agency had applied to the Court for a warrant to sanction extraterritorial investigations (the exact details of the locations are redacted). The law under which the application for warrant was made was silent as to whether the Court can order a warrant to be executed beyond Canada's borders. The Court held, in essence, that while the law was silent as to whether it could order an issuance of a warrant beyond, the Court was not prepared to read the statute in a way which would essentially condone the State's violation of the customary international law concept of territorial integrity.

[43] The following dictum of LeBel J of the Supreme Court of Canada in *R v Hape* [2007] 2 SCR 292 ('*Hape*') is also on point, at page 323:

> "It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law. The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result. R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 422, explains that the presumption has two

> aspects. First, the legislature is presumed to act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations. The second aspect is that the legislature is presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them.".

[44] The above judgments of Canadian Courts though not binding on us are highly persuasive because they concern the same subject decided in a country with a legal system similar to ours. The reasoning of *Hape* as applied in *CSISA*, in our view, also resonates with the general position of customary international conduct codified in Article 4(1) of the Articles on the Responsibility of States for Internationally Wrongful Acts 2001 ('ARSIWA 2001') which provides:

> "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, **judicial** or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State." [Emphasis added]

[45] The point is that if domestic legislation directly conflicts with international law, then the Courts of a dualist system must give priority to domestic law over international law. Any breach of the international law would be as a result of the conduct of the Legislative and Executive arms of Government. However, where the legislation is ambiguous and capable of an interpretation which favours international law, the Courts ought not to put the State or the other branches of Government in a position which

would render them in breach of international law whether it be conventional international law (treaty law) or customary international law.

[46] An example of a case where the Judiciary was compelled to give effect to unambiguous domestic legislation over customary international law is *Public Prosecutor v Narogne Sookpavit & Ors* [1987] 2 MLJ 100 (at pages 105-106). The present appeal is not such a case.

[47] Based on the foregoing principles, the question we were required to ask ourselves was whether interpreting the vague and ambiguous provisions of Act 485 in the manner suggested by the respondents would be inconsistent with public international law.

Construction of the Words 'And From Other Legal Process' and Whether The Appellant Was Functionally Immune to Criminal Proceedings

[48] The purpose of immunity in international law, in the context of diplomatic officials is to respect the sovereign independence and territorial integrity of the sending State. Interfering with the official, who is taken to represent that State, is a violation of the sacred customary principle of non-intervention. Similar observations can be made in respect of international organisations.

[49] In our context, we take particular note of Articles I and III of the Host Country Agreement which specifically require that the 4th respondent respect the independence of AIAC and the inviolability of its property, assets and archives. Parliament honoured this agreement by enacting into the First and Second Schedules the relevant privileges and immunities.

[50] High Officers who are not Malaysian citizens enjoy an elevated status of immunity which makes sense having regard to the fact that they, being citizens or officials from other States, might also attract sovereign immunity or immunity *ratione personae* if they are deemed diplomatic agents. This is by virtue of the fact that as per regulation 3A(1) of the 2011 Regulations, High Officers who are not Malaysian citizens enjoy an immunity status akin to a diplomatic agent as per Part I of the Second Schedule of Act 485.

[51] Pursuant to regulation 3A(2), High Officers who are Malaysian citizens enjoy a lesser degree of immunity, limited only to acts or things done in their capacity as High Officer (functional immunity). Under regulation 3A(3), former High Officers (whether Malaysian citizens or not) continue to enjoy functional immunity.

[52] The respondents suggested that the appellant, being a Malaysian citizen, cannot be deemed to be immune from the criminal jurisdiction of the Courts in his home State, Malaysia.

[53] During the course of our own research, there appears to be some authority for that assertion in the judgment of the Queen's Bench Division in *Khurts Bat v Investigating Judge of the Federal Court of Germany* [2012] 3 WLR 180 ('*Khurts Bat*').

[54] *Khurts Bat* concerned an appeal against an extradition order made by the District Court against the defendant, the Head of the Office of National Security of Mongolia. There was at the time, an outstanding international warrant of arrest against the defendant due to allegations against him for certain crimes such as kidnapping which took place in Berlin, Germany. The defendant was to be extradited to Germany from

the United Kingdom to answer to those allegations. In opposing the application for extradition, the defendant took up on appeal (among other issues), the argument that he was entitled to functional immunity under customary international law as he was sent on a special mission by the Government of Mongolia. The learned Judges of the Queen's Bench held that there was no customary rule suggesting that he was functionally immune to criminal proceedings. Moses LJ observed:

> "**100** I have to acknowledge that the evidence of state practice is not all one way. The ICTY recognised the immunity in question in *Prosecutor v Blaškić* 110 ILR 607. Sir Elihu relied strongly on *McElhinney v Williams* (1995) 104 ILR 691. But that was a civil case in which the defendant claimed damages for an alleged assault by a British soldier guarding a checkpoint. It does not, in my view, assist in relation to the issue in question.
>
> **101** For those reasons, I conclude there is no customary international law which affords this defendant immunity ratione materiae and I dismiss his appeal on that ground.".

[55] While the law expounded by the Queen's Bench Division in *Khurts Bat* appeared to support the respondents' submission that the appellant, a Malaysian, is not immune from criminal proceedings in his home-country, we considered the authority inconclusive. Firstly, the observation by Moses LJ (with which Foskett J agreed), was in respect of the absence of a clear rule of customary international law on functional immunity from criminal proceedings. That is not the case here because the appellant claims immunity under statute ratifying the immunities and privileges agreed to by the 4th respondent under treaty.

[56] Secondly, international law itself is not entirely clear on the subject. As one learned author, Sir James Crawford notes in '*Brownlie's Principles of International Law*' (8th edition, Oxford University Press, 2012) at page 499:

> "Whether and when state immunity will apply in domestic criminal proceedings is a complex question. In theory it should not matter for the purposes of immunity under international law if the conduct is classified by the forum state as civil or criminal. The European Convention impliedly endorses the absolute immunity of the state from foreign criminal jurisdiction. The UN Convention and the domestic statutes arguably implicitly allow a distinction on the basis of domestic characterization of t**he act by excluding criminal proceedings from their scope.**
>
> The scope of immunity from foreign criminal jurisdiction is yet to be conclusively determined. **Customary international law in principle extends immunity *ratione materiae* to acts of state officials undertaken in their official capacity; but there is practice supporting an exception if the act was committed in the territory of the forum state.**". [Emphasis added]

[57] The learned author's views appear to be premised on the distinction between absolute immunity (State immunity or immunity *ratione personae*) and functional immunity or immunity *ratione materiae*. But, what is clear is that international law is undecided on this issue. To illustrate, reference is made to the following extract from 'Sixth report on immunity of State officials from foreign criminal jurisdiction' by Special Rapporteur Concepción Escobar Hernández (12 June 2018, A/CN.4/722):

> "67. However, as already argued in the Special Rapporteur's second report, in practice it is possible to find various kinds of acts of an authority of the forum State which may have an impact on the foreign official and the immunity from

> foreign criminal jurisdiction that he or she possesses. These acts may be divided into three groups:
>
> ...
>
> 68. The answer to the question whether these acts are affected by immunity from foreign criminal jurisdiction cannot be as simple and automatic as that relating to the acts discussed in the previous paragraphs. On the contrary, whether or not these acts are affected by immunity will depend on various issues which must be considered one by one, namely: (a) the distinction between immunity from jurisdiction and inviolability; (b) **the separation between the person of the official and the assets the seizure of which is sought**; and (c) the binding and coercive nature of the measure and its influence on the foreign official's exercise of his or her functions. All these factors must also be considered in the light of the distinction between immunity *ratione personae* and immunity *ratione materiae*.". [Emphasis added]

[58] In the present appeal, whatever be the position in customary international law, the point remained that the 4th respondent had entered into the Host Country Agreement which is a binding international agreement incorporated by way of legislation through Act 485. Taking heed from the Special Rapporteur's report, in interpreting the words 'legal process', this Court also had to consider the conventional international law purpose of the immunity, which in this case, was to safeguard the independence of AIAC and AALCO.

[59] Learned SFC also referred us to the Diplomatic Privileges (Vienna Convention) Act 1966 ('Act 636') which seeks to ratify the Vienna Convention on Diplomatic Relations. She submitted that Act 636, unlike Act 485 expressly provides for instances of immunity for criminal proceedings. In our view, her submission speaks directly to our point that

Parliament in ratifying the Vienna Convention on Diplomatic Relations expressly catered for the difference between immunity from civil and criminal proceedings whether *ratione personae* or *ratione materiae*. However, in concluding the Host Country Agreement and others like it, and by ratifying them through Act 485, Parliament did not choose to exclude criminal proceedings.

[60] It is pertinent to state that we were guided by the general aim of the purpose of the immunity which was granted, to wit, to protect and preserve the inviolability of AIAC, its documents and its archives. Where the Malaysian former High Officer acts in his official capacity, the purpose of conferring that immunity remains the same whether the nature of the proceedings against him are civil or criminal unless the Host Country Agreement or Act 485 provided otherwise.

[61] In point of fact, the letter of the Secretary General of AALCO dated 22.3.2019 is a clear indication of why such immunity under Act 485 is necessary. Prosecuting the appellant was likely to whittle down the AIAC and AALCO's immunity status and would breach the inviolability of their records, documents, archives and general process of both institutions. This in turn would likely run the risk of jeopardising the independence and the immunity of both those institutions. We failed to see how the fact that this concerned a criminal case mitigated the effect of the purpose of the immunity. The risk of breach of confidentiality is the same whether the proceedings are criminal or civil.

[62] The relevant provisions of Act 485 which includes 'legal process' therefore ought to be reasonably construed to include criminal proceedings in line with the 4th respondent's international law obligations

unless Parliament clearly expressed the contrary intention. If the material provisions of Act 485 were read any other way, this Court would take the risk of exposing Malaysia to a violation of international law on immunities and privileges.

[63] Further, it was our view that section 8A(1) supports, rather than detracts from this conclusion. In our understanding of the section, it clarifies the rationale for extending criminal immunity to the appellant in his official capacity as it protects the integrity and independence of the AIAC and AALCO under the terms of the Host Country Agreement. It is for the benefit of those entities and not for the appellant's personal benefit. This correlates to the Special Rapporteur's report cited earlier which suggests that Courts should also have regard to 'the separation between the person of the official and the assets the seizure of which is sought'.

[64] Suffice it to say at this stage that where the Court is unsure whether the law confers immunity in respect of criminal proceedings or not, the court ought to err on the side of caution. In the present appeal, the appellant successfully established in fact and in law that his immunity status extended to criminal proceedings by the words 'and from other legal process' in the Second Schedule, Part II.

[65] We therefore agreed with the appellant that the Court of Appeal misdirected itself on the law. Part II of the Second Schedule unequivocally confers on former High Officers what is known in public international law as 'functional immunity' or immunity *ratione materiae* as opposed to absolute (or complete) immunity otherwise referred to as immunity *ratione personae*. The three charges quite clearly alleged that the appellant committed the criminal acts in his capacity as Director of AIAC. In fact and

in law, at the time he was presented with the three charges, the appellant was a 'former High Officer' entitling him to functional immunity. In our view, the Court of Appeal's conclusion was incongruous because on the one hand it held that 'legal process' in Part II of the Second Schedule includes criminal proceedings but on the other hand the appellant was not entitled to it because he was not completely immune. We noted that the appellant did not claim 'complete immunity', hence the distinction made by the Court of Appeal was irrelevant.

The Appropriate Forum

[66] To reiterate, we found that the appellant acted within the scope of his function such that he is entitled to the immunity sought, that the appellant's functional immunity included immunity from criminal proceedings and that the question of 'personal benefit' under section 8A(1) of Act 485 did not arise because the appellant acted in his capacity as Director of AIAC and as such the immunity was to safeguard the interests of AIAC and AALCO. In other words, the immunity was not to benefit him but to respect the integrity and independence of AALCO and AIAC under the terms of the Host Country Agreement.

[67] The only question remaining at this stage is whether the Sessions Court was the appropriate forum or the only forum at which the appellant's immunity could have been determined.

[68] The respondents submitted, in support of the Court of Appeal's reasoning, that the matter, involving issues of fact, should effectively have been tested in the criminal court. The Court of Appeal even suggested that the appellant should be entitled to invoke immunity as a 'statutory

defence'. If these suggestions are understood correctly, they suggest that the appellant and any other person claiming functional immunity ought to be subject to full trial to prove evidentially that he acted within the scope of his functional immunity.

[69] The respondents relied on several authorities. In particular, learned SFC relied on the judgment of the Court of Appeal in *MBf Capital* (supra). In that case, the defendant, Dato' Param Cumaraswamy was sued for defamation for some comments he made that were published in the International Commercial Litigation Magazine under the caption 'Malaysian Justice on Trial'. The defendant applied to strike out the suit for the reason that those allegedly defamatory remarks were made during the course of his mission as Special Rapporteur on the independence of judges and lawyers which attracted functional immunity. In support of his claim to immunity, the defendant produced certificates from the Minister of Foreign Affairs and the Secretary General of the United Nations ('UNSG') stating his immunity.

[70] Zainun Ali JC (as she then was), whose judgment is reported in *Dato' Param Cumaraswamy v MBf Capital Bhd & Anor* [1997] 3 MLJ 300, held that those certificates were inconclusive to prove the fact that the defendant had made the alleged remarks within the scope of his functions. The High Court accordingly held that whether or not the defendant was protected by his immunity would have to be determined after full trial. Her Ladyship observed as follows, at page 316:

> "In the circumstances, I am unable to hold that the defendant was absolutely protected by the immunity he claimed.

That did not mean however, that the defendant was estopped from adducing further evidence at trial to support his claim.

If – at the end of the trial of the plaintiffs' action, after taking all evidence from the parties – I come to the conclusion that immunity attached to the defendant, the defendant may succeed at that stage.".

[71] The judgment was affirmed on appeal to the Court of Appeal (see *Dato' Param Cumaraswamy v MBf Capital Bhd & Anor* [1997] 3 MLJ 824) where Gopal Sri Ram JCA (as he then was), held at page 851:

"In our judgment, the defendant has failed to demonstrate that the learned judicial commissioner has committed an error that warrants appellate interference. She asked herself the right questions, took into account all relevant considerations and directed herself correctly on the applicable law. Above all, the order she made has not resulted in any injustice to the defendant. There has been no ruling against immunity, the judicial commissioner taking much care to leave that issue open to be decided at the trial of the action. **The defendant is entitled, at the conclusion of the trial, to a verdict in his favour in the event he establishes his claim to immunity on the facts.**".

[Emphasis added]

[72] With respect, what had escaped the attention of learned SFC was the fact that the matter of Dato' Param Cumaraswamy was eventually brought to the International Court of Justice ('ICJ') for an Advisory Opinion through a resolution passed by the United Nations Economic and Social Council which was communicated to the ICJ by way of a note from the UNSG. The ICJ considered written statements from numerous sources namely the UNSG, Costa Rica, Germany, Greece, Italy, Malaysia, Sweden, the United Kingdom and the United States of America. The ICJ eventually delivered its Advisory Opinion on 29.4.1999 in *Difference*

Relating to Immunity from Legal Process of a Special Rapporteur of The Commission on Human Rights [1999] ICJ Rep 62 (‘*Re Param Cumaraswamy*’).

[73] Most importantly, the Advisory Opinion reflects that the ICJ:

> “2. *Calls upon* the Government of Malaysia to ensure that all judgements and proceedings in this matter in the *Malaysian courts* are stayed pending receipt of the advisory opinion of the International Court of Justice, which shall be accepted as decisive by the parties.”.

[74] With that firmly in mind, this Court was minded to pay due regard to the Advisory Opinion of the ICJ. Substantively, the ICJ held that the Malaysian courts had essentially violated international law by failing to consider Dato’ Param Cumaraswamy’s immunity status in a summary manner. The ICJ made the following observation:

> “63. Section 22 (b) of the General Convention explicitly states that experts on mission shall be accorded immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission. By necessary implication, questions of immunity are therefore preliminary issues which must be expeditiously decided *in limine litis*. This is a generally recognized principle of procedural law, and Malaysia was under an obligation to respect it. The Malaysian courts did not rule *in limine litis* on the immunity of the Special Rapporteur (see paragraph 17 above), thereby nullifying the essence of the immunity rule contained in Section 22 (b). Moreover, costs were taxed to Mr. Cumaraswamy while the question of immunity was still unresolved. As indicated above, the conduct of an organ of a State – even an organ independent of the executive power – must be regarded as an act of that State. Consequently, Malaysia did not act in accordance with its obligations under international law.”.

[75] In our view, the judgment of the ICJ is correct and in light of it, *MBf Capital* (supra) cannot, with respect, be sustained as representing the current state of the law. It and any authorities which followed it or decided along similar lines are in the same vein no longer good law.

[76] In every case where immunity is claimed, certificates produced by the relevant authorities (especially the UNSG or other international bodies) are conclusive of that fact. If immunity is absolute (*ratione personae*) the production of the certificates would be the end of the matter. If the immunity is *ratione materiae* (functional) then affidavit evidence (which the Court should presume to be true) should be considered *in limine litis* to ascertain whether the conduct or omission of the official in question was within the scope of his functions. If they were, then they are cloaked with immunity.

[77] In any event, we did not think that it is sound judicial policy to suggest that functional immunity can be determined at trial or be treated as a 'statutory defence' because doing so would be to defeat the very purpose of immunity. The trial process and interlocutory processes such as discovery (in civil cases) have the effect of sidestepping the inviolability of archives and documents and hence defeat the purposes of immunity or in this appeal, the very legislative intent of Act 485. In our considered view, this is a complete answer to the otherwise legally unsustainable suggestion that the appellant's immunity can and ought to be determined at trial in the criminal court or that his immunity ought to be treated as a 'statutory defence'.

[78] This brings us to the related submission of the respondents that judicial review of the charges in the High Court was unnecessary in light of section 173(g) of the Criminal Procedure Code ('CPC').

[79] Learned SFC submitted that if the Sessions Court found that the appellant's immunity applies, the Court could have discharged the charges on the basis that they were 'groundless'. In this way, judicial review was unnecessary and this is quite apart from the further argument of the respondents that it is impossible.

[80] In response, learned counsel for the appellant submitted that the respondents' submission on section 173(g) of the CPC is not an answer to the issue. He argued that section 173(g) of the CPC presupposes that the charges were in the first place legally valid but deemed groundless based on decided principles. In the present case, he submitted, the charges are a nullity and it is only the Superior Courts that can legally review and quash the charges by virtue of their inherent powers of judicial review.

[81] With respect, we agreed with the appellant. The decision of the Supreme Court in *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544 ('*Karpal Singh*') provided a complete answer to the issue. At pages 548-549, Abdul Hamid Omar LP said:

> "… There is no provision in the Code for striking out proceedings or acquittal without hearing all evidence the prosecution has the capacity to offer, even though postponements are needed. If any party feels that the charge and consequent proceedings are illegal on the face of the record, which we feel is rare, his remedy is to take up appropriate proceedings before a High Court to quash the charge and the whole proceedings producing evidence to the

> satisfaction of the trial judge to adopt such a case. It is absurd and against common sense to believe that the legislature ever expected members of subordinate judiciary to exercise such vast powers, trespassing into the public prosecutor's area.".

[82] The decision of the 2nd respondent to prefer charges against any person is an executive one. The core purpose of judicial review within the scheme of our constitutionally ordained regime of separation of powers generally presupposes that the Judiciary is constitutionally and inherently obligated to review the Executive's and/or Legislative's unlawful action or inaction. It is therefore fitting and appropriate that where it is alleged that the charge is a nullity, the proper forum to decide the question is the High Court acting within its supervisory jurisdiction.

[83] As such, it was correct in principle for the appellant to initiate judicial review proceedings as the issue was not capable of resolution in a criminal court much less before a subordinate Court. We were therefore unable to agree with the submission of the respondents or the reasoning of the Court of the Appeal which suggested otherwise.

[84] Before we conclude the discussion on this issue, we would like to address the fears expressed by learned SFC in her submission that such judicial review would become a routine tactic in criminal cases, placing another obstacle in the path of prosecution. Concerns were also expressed about the danger of bringing unmeritorious and tactical applications that have more to do with tripping up prosecution than a genuine desire to vindicate an accused's entitlement to a trial in accordance with the law. There will be 'tsunami' of such applications and they would engulf and inundate the courts.

[85] Further, it was contended that the process to seek judicial review would cause delay for a criminal trial, which might put the accused into a worse position, especially when such application is dismissed or leave to appeal is granted.

[86] With respect, we disagree. We are mindful of the necessity to ensure that the use of judicial review as delaying tactic does not become routine as it might if judicial review of decision to prosecute become commonplace. We consider the civil courts already have, based on established principles, the capacity to deal with such applications before them and the competency to prevent abuse of the courts' process. Experience in other jurisdictions showed that the High Court would rarely intervene in relation to prosecutorial decision-making process. This power to intervene has been expressed in a number of different, but consistent ways, by the courts:

(a) 'sparingly exercised' (*R v DPP ex parte C* [1995] 1 Cr App R 136, 140);
(b) 'very rare indeed' (*R (Pepushi v Crown Prosecution Service* [2004] EWHC 798 (Admin), paragraph 49;
(c) 'very rarely' (*R (Bermingham) v Director of Serious Fraud Office* [2007] 2 WLR 635, para 63);
(d) 'only in very rare cases' (*SU Crown Prosecution Service* [2015] EWHC 2868 (Admin),at paragraph 15.

[87] It is clear that save in wholly exceptional circumstances, the proper course to take is to challenge the decision to prosecute in the criminal courts.

[88] Having said that, we hasten to add that the decision by the AG/PP to prosecute can have enormous consequences for the accused person, the injured party and society at large. For an accused in particular, the consequences of being charged include the irretrievable loss of reputation, distress and disruption of work and family relations. If the law has been misunderstood or misapplied by the AG/PP, as apparent in the present appeal, the appellant ought to be given an opportunity to have such discretion reviewed by way of judicial review. Further, the Court has the responsibility to prevent the criminal justice system from being arbitrarily used against an individual and to prevent an innocent person from going through a criminal proceedings if the AG/PP had failed to exercise his discretion in accordance with law to prosecute. To allow a matter without merit to be pursued through criminal court would have huge impact on the accused's life and career and would cause unnecessary expenditure of time and effort and would place extra costs on the public purse.

[89] In an appropriate and exceptional cases, it would be better to quash the decision to prosecute before the criminal proceedings commence so that unnecessary suffering of the accused caused by improper prosecution can be minimised.

[90] In the circumstances, we answered Question 1 in the affirmative and Question 2 (as a whole) in the negative.

Questions 3 and 4 – The AG/PP's Powers to Institute, Conduct and Discontinue Proceedings under Article 145(3) of the FC and their Amenability to Judicial Review

The Law

[91] The respondents argued that based on decided cases, the discretion of the 2nd respondent to institute, conduct and discontinue proceedings in court under Article 145(3) of the FC is unfettered and entirely unamenable to judicial review. The gist of the argument centres on public policy concerns based on high authorities.

[92] The appellant put up a measured response. Learned counsel took pains to emphasise that he was not making the case that the 2nd respondent's powers under Article 145(3) are amenable to judicial review in the same way that other executive bodies are. Learned counsel stressed that the focal point of Question 3 is in the words 'appropriate circumstances'. He traversed various cases indicating an inherent tension by the Courts to balance discretion grounded on public policy with the concept of accountability, separation of powers and Rule of Law. He also submitted that there is nothing in Article 145(3) or any law passed by Parliament constitutionally or statutorily insulating the 2nd respondent from judicial review. The existing policy on judicial review was entirely a creature of the common law.

[93] Learned counsel for the appellant took us through a wealth of cases in the Commonwealth countries as regards their treatment of the powers of their respective Attorney General. He also pointed out to us key passages from historical documents such as the Reid Commission Report on the extent of powers envisaged for the 2nd respondent during the drafting stages of our FC. As much as we were grateful to counsel and his team for the extent of their research, we were satisfied that the facts of the present case did not require us to leap to such lengths to resolve

Question 3. We shall refer to foreign case law for guidance only where necessary.

[94] The public policy concern that the respondents advanced is adequately captured by Gopal Sri Ram JCA (sitting in the High Court) in *Repco Holdings Bhd v Public Prosecutor* [1997] 3 MLJ 681, at page 689:

> "The importance of the propositions formulated by the learned Lord President in these two cases is that, as a matter of public law, the exercise of discretion by the Attorney General in the context of art 145(3) is put beyond judicial review. In other words, the exercise by the Attorney General of his discretion, in one way or another, under art 145(3), cannot be questioned in the courts by way of certiorari, declaration or other judicial review proceedings.
>
> I think that the proposition is not only good law but good policy. For, were it otherwise, upon each occasion that the Attorney General decides not to institute or conduct or discontinue a particular criminal proceedings, he will be called upon to a court of law the reasons for his decision. It will then be the court and not the Attorney General who will be exercising the power under art 145(3). That was surely not the intent on our founding fathers who framed our Constitution for us.".

[95] There is much wisdom in the above observation. For instance, in an ordinary case, the AG/PP charges someone but the Court for some reason decides that he should not have done so. Or if it were the other way around: the AG/PP decides not to prefer a charge against someone for whatever reason yet the Court decides otherwise and compels him to do so. An overzealous Judiciary which imposes no fetter upon its own powers of review vis-à-vis the discretionary powers of the AG/PP runs the risk of arrogating the executive power of the 2nd respondent to the Court.

[96] The AG/PP by constitutional design has access to the police, investigation papers and other core decisive material which ultimately factor into his decision to charge or not to charge a person or to otherwise discontinue proceedings. The AG/PP is the guardian of public interest and so he factors not just the law and legal principles but also matters relevant to public policy and national security. The Courts, also by constitutional design, do not have the same benefit. Such design is inherent in the mechanism of our adversarial system which is grounded or rooted in the doctrine of separation of powers. Some degree of judicial deference to Executive discretion of the AG/PP is necessary so as not to stymie our justice system.

[97] Deference does not however translate to complete surrender. Ours is a system built on constitutional supremacy where accountability, separation of powers and Rule of Law take centre stage. Much headway has been made in our constitutional jurisprudence to curate the fine balance between policy considerations on the one side, and the adjudication and supervision of the legality of State action by the judicial branch – on the other. This gradual shift from unfettered discretion to restricted supervision is apparent from the judgment of this Court in *Peguam Negara Malaysia v Chin Chee Kow and another appeal* [2019] 3 MLJ 443 (‘*Chin Chee Kow*’).

[98] Apart from *Chin Chee Kow*, the other cases material to this appeal are:

(i) *Long Bin Samat v Public Prosecutor* [1974] 2 MLJ 152 (‘*Long bin Samat*’);

(ii) *Johnson Tan Han Seng v Public Prosecutor (and other cases)* [1977] 2 MLJ 66 (‘*Johnson Tan*’);

(iii) *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 (‘*Teh Cheng Poh*’);

(iv) *Public Prosecutor v Zainuddin* [1986] 2 MLJ 100 (‘*Zainuddin*’);

(v) *Karpal Singh* (supra); and

(vi) *Repco Holdings* (supra).

[99] The appellant submitted that in all the above cases, while the Courts have appeared to unanimously hold that the powers of the AG/PP are unfettered and unamenable to judicial review, there appears to be a lesser observed dicta suggesting that the AG/PP’s powers are reviewable in certain cases. For the purposes of this judgment, we did not think it was necessary to delve into the minutiae to piece together passage by passage these supposed ‘contradictions’. We found two dicta to be precisely on point.

[100] The first is the earlier cited passage from the judgment of the Supreme Court in *Karpal Singh*. There, the Court suggested that where charges are a nullity, the decisions of the AG/PP are reviewable as the only form of legal redress.

[101] The second is the passage from *Zainuddin* (supra) which ought to be read in the context of the earlier decision of the Privy Council in *Teh Cheng Poh* (supra) and a later decision in *Lim Kit Siang v Dato Seri Dr*

Mahathir Mohamad [1987] 1 MLJ 383 ('*Lim Kit Siang*'). In *Zainuddin*, Salleh Abas LP observed, at page 103, that:

> "The law and Constitution in giving the Attorney-General an exclusive power respecting direction and control over criminal matters expect him to exercise it honestly and professionally. The law gives him a complete trust in that the exercise of this power is his and his alone and that his decision is not open to any judicial review. If he is a Minister of the Government he is answerable to Parliament and to his cabinet colleagues, and if he is not, the Government will answer for him in Parliament, whilst he himself will be answerable to the Government, and if he is a civil servant he will be answerable also to the Judicial and Legal Service Commission, though anomalously he is a member of it. Members of the public expect that he exercises his power *bona fide* and professionally in that when he prefers a charge against an individual he does so because public interest demands that prosecution should be initiated and when he refrains from charging an individual or discontinues a prosecution already initiated he also acts upon the dictate of public interest.".

[102] At first blush, the passage suggests that the AG/PP's powers are entirely unreviewable. Yet, the Court unanimously stated that the AG/PP is required to act bona fide in the exercise of his discretion and that he is subject to scrutiny but within the political process. In our view, the passage must be assessed in context and this is where the decisions in *Teh Cheng Poh* and *Lim Kit Siang* are relevant.

[103] In *Teh Cheng Poh*, Lord Diplock observed as follows at page 56:

> "There are many factors which a prosecuting authority may properly take into account in exercising its discretion as to whether to charge a person at all, or, where the information available to it discloses the ingredients of a greater as well as a lesser offence, as to whether to charge the accused with the greater

> or the lesser. The existence of those factors to which the prosecuting authority may properly have regard and the relative weight to be attached to each of them may vary enormously between one case and another. All that equality before the law requires, **is that the cases of all potential defendants to criminal charges shall be given unbiased consideration by the prosecuting authority and that decisions whether or not to prosecute in a particular case for a particular offence should not be dictated by some irrelevant consideration.**". [Emphasis added]

[104] *Teh Cheng Poh* was decided in 1978 but the same learned judge Lord Diplock, in 1984, delivered the leading speech in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 ('*CCSU*') where His Lordship restated the classic grounds of judicial review, to wit, illegality, irrationality, procedural impropriety and proportionality. At pages 410-411 of *CCSU*, Lord Diplock described his understanding of what 'irrationality' and 'procedural impropriety' mean. He loosely described the former to mean considering irrelevant considerations or leaving out relevant considerations and the latter to mean the violation of the rules of natural justice – encapsulating its twin pillars – the rule against bias (*nemo judex in causa sua*) and the right to be heard (*audi alteram partem*). If we analyse *Teh Cheng Poh* in light of the same judge's decision in *CCSU*, it would appear that if the traditional requirements of judicial review are met, the AG/PP's powers are reviewable to that extent (subject to certain qualifications stated further below).

[105] And thus, *Zainuddin* must be read down to harmonise it with the prior decision in *Teh Cheng Poh*. Salleh Abas LP, the same judge who decided *Lim Kit Siang* roughly a year after *Zainuddin*, observed thus at pages 386-387:

> "When we speak of government it must be remembered that this comprises three branches, namely, the legislature, the executive and the judiciary. The courts have a constitutional function to perform and they are the guardian of the Constitution within the terms and structure of the Constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review — a concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of judges over legislators but of the Constitution over both. The courts are the final arbiter between the individual and the State and between individuals *inter se*, and in performing their constitutional role they must of necessity and strictly in accordance with the Constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action. If that role of the judiciary is appreciated then it will be seen that the courts have a duty to perform in accordance with the oath taken by judges to uphold the Constitution and act within the provisions of and in accordance with the law.".

[106] Salleh Abas LP who wrote the judgment in *Lim Kit Siang* was surely aware of his prior judgment in *Zainuddin* and before that, *Teh Cheng Poh*. Reading the passage in *Zainuddin* harmoniously with *Teh Cheng Poh* (decided prior) and *Lim Kit Siang* (decided right after), it is clear that it was not the articulation of those cases that the AG/PP's exercise of power should be absolutely immune from judicial review and scrutiny.

[107] It appears that the High Court based its decision to review the 2nd respondent's discretion in this case on the decision of this Court in *Chin Chee Kow*. The ratio of the judgment is disclosed in the following dictum of Mohd. Zawawi Salleh FCJ:

> "[83] We hasten to add that unfettered discretion is contradictory to the rule of law. Therefore, the AG's power to give consent or otherwise under s 9(1) of Act 359 is not absolute and is subject to legal limits.".

[108] The Court of Appeal rejected the High Court's reading of *Chin Chee Kow* for the reason that the discretion in that case was a statutory one and not a constitutional one under Article 145(3) of the FC. With respect, we found no basis for such distinction. The ratio of *Chin Chee Kow* though decided on the basis of statutory discretion does not posit the proposition that constitutional discretion remains unreviewable. At the end of the day, discretion, whether statutorily or constitutionally prescribed, involves the exercise of powers of the same constitutional entity (the AG/PP) in the same Executive capacity and thus brings it squarely within the compass of judicial review.

[109] That said, we accept that at stake in all review cases is the notion that the Courts must be cautious not to run awry of the fine dividing line of the doctrine of separation of powers. In this regard, while the AG/PP's powers are reviewable, the AG/PP's discretion under Article 145(3) of the FC, as a matter of policy, remains subject to a higher threshold of scrutiny. The following passage of Chan Sek Keong CJ in *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 ('*Ramalingam*') offers some guidance:

> "44 In view of the co-equal status of the two aforesaid constitutional powers, the separation of powers doctrine requires the courts not to interfere with the exercise of the prosecutorial discretion unless it has been exercised unlawfully. The prosecutorial power is part of the executive power, although, under existing constitutional practice, it is independently exercised by the Attorney-General as the Public Prosecutor. **In view of his high office, the courts should proceed on the basis that when the Attorney-General initiates a prosecution against an offender (regardless of whether he was acting alone or in concert with other offenders), the Attorney-General does so in**

> **accordance with the law. In other words, the courts should presume that the Attorney-General's prosecutorial decisions are constitutional or lawful until they are shown to be otherwise.**". [Emphasis added]

[110] Thus, the Singapore Courts too have departed from the notion that AG/PP's powers are unreviewable but they had taken the stance that the review process be subject to higher standards. In constructing that standard, they have decided that the doctrine of presumption of constitutionality applicable to Acts of Parliament are equally and analogously applicable to the decisions of the AG/PP under Article 35(8) of the Singapore Constitution which is *in pari materia* with Article 145(3) of our FC. That means that the decisions/discretions of the AG/PP are subject to a 'higher standard of review'.

[111] This left us with the residual question as to what that 'higher standard of review' means. Again, the Singapore Court of Appeal's judgment in *Ramalingam* offers some guidance:

> "71 Given that there are many legitimate reasons for the Prosecution to differentiate between the charges brought against different offenders involved in the same criminal enterprise, such differentiation *per se* does not necessarily mean that the Prosecution has not given unbiased consideration to the offender or offenders in question, or that the Prosecution has taken into account irrelevant considerations. Put another way, such differentiation, without more, does not raise an inference of breach of Art 12(1). Rather, in the absence of *prima facie* evidence to the contrary, the inference would be that the Prosecution has based its differentiation on relevant considerations. This conclusion does not mean that an aggrieved offender can never prove a case of unlawful discrimination. Such a case may be self-evident on the facts of a particular case (for example, where a less culpable offender is charged with a more serious offence while his more culpable co-offender is charged with a less

serious offence, when there are no other facts to show a lawful differentiation between their respective charges).”.

[112] Article 145(3) of the FC provides the AG/PP with a wide discretion to institute, conduct or discontinue any proceeding for a criminal offence. This wide discretion means the AG/PP has sole and exclusive discretion in that only he/she can exercise such power. However, the AG/PP does not have absolute or unfettered discretion under Article 145(3). As alluded to in the preceding discussion and following from it, it is our judgment that in appropriate, rare and exceptional cases, such discretion is amenable to judicial review.

[113] In all challenges against the decisions of the AG/PP exercising his powers under Article 145(3) of the FC, the position is that his decisions are cloaked with the presumption of legality. The onerous burden lies on the challenging party to overcome the strong presumption of legality with compelling prima facie evidence of grounds to review the AG/PP’s decision within the recognised reasons for judicial review.

[114] Based on the foregoing authorities, it can be surmised that any challenge must therefore pass a two-step threshold which must be satisfied at the leave stage of any application for judicial review.

[115] Firstly, the burden of proof lies on the applicant. The applicant will have to show that he has a legal basis to challenge the decision of the AG/PP. This refers to the traditional grounds of judicial review and other bases implicitly recognised by the earlier judgments on this subject, including but not limited to:

(i) Illegality;

(ii) Procedural impropriety (e.g. breach of the rules of natural justice);

(iii) Irrationality (considering irrelevant considerations or ignoring relevant and material considerations);

(iv) Mala fides.

[116] Once the above legal grounds or any of them are clearly set out, the applicant will then have to adduce compelling and prima facie proof that the decision or omission of the AG/PP falls within those grounds or any one of them. In other words, the Courts are to presume, having regard to the doctrine of separation of powers, that all or any of the grounds were **not** made out unless the evidence singularly leads to the inevitable conclusion that they have been made. It is only after that threshold is crossed that the AG/PP bears the burden to justify his actions or inactions to the Court. *Ramalingam* at paragraphs 27-28 is instructive:

> "27 That the burden of proof lies on the offender in this regard is a wholly trite proposition that is reflected in s 103(1) of the Evidence Act, which states that "[w]hoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist". In constitutional challenges to the prosecutorial discretion based on an alleged breach of one or more of the fundamental liberties enshrined in the Constitution, it is only when enough evidence is adduced to show a prima facie breach that the evidential burden will be shifted to the Attorney-General to justify his prosecutorial decision.

> 28 However, once the offender shows, on the evidence before the court, that there is a prima facie breach of a fundamental liberty (*ie*, that the Prosecution has a case to answer), the Prosecution will indeed be required to justify its prosecutorial decision to the court. If it fails to do so, it will be found to be in breach of the fundamental liberty concerned. At that stage, the Prosecution will not be able to rely on its discretion under Art 35(8) of the Constitution, without more, as a justification for its prosecutorial decision.".

[117] Needless to say, the assessment of the law and the facts will depend on the unique circumstances of each and every case. We state again at the risk of repetition that the assessment in each and every case must be made having regard to the doctrine of separation of powers.

[118] Further, in making that factual assessment, the Court must also be satisfied that judicial review is the only method of redress available to the litigant. Put another way, if the Court is satisfied that the arguments centre around the substantive criminal process then the appropriate forum would be the criminal court and not any other Court. See for example the speech of Lord Hobhouse in *R v DPP, Ex Parte Kebilene and others* [2000] 2 AC 326, at page 394:

> "If the substance of what it is sought to review is the answer to some issue between the prosecution and defence arising during a trial on indictment, that issue may not be made the subject of judicial review proceedings.".

[119] In this regard, the Privy Council's decision in *Sharma v Brown-Antoine and others* [2007] 1 WLR 780 ('*Sharma*') has set out a good guidance to be considered in determining whether a decision to prosecute can be reviewed. In this case, the Privy Council conducted an extensive

review of the common law cases and held that (as gathered from the head notes):

(i) although a decision to prosecute was in principle susceptible to judicial review on the ground of interference with the prosecutor's independent judgment, such relief would in practice be granted extremely rarely;

(ii) in considering whether to grant leave for judicial review, the Court had to be satisfied not only that the claim had a realistic prospect of success but also that the complaint could not adequately be resolved within the criminal process itself, either at the trial or by way of application to stay the criminal proceedings as an abuse of process;

(iii) the Court's power to stay criminal proceedings for abuse of process should be interpreted widely enough to embrace an application challenging a decision to prosecute on the ground that it was politically motivated or influenced;

(iv) since, in all the circumstances, all the issues could best be investigated and resolve in a single set of criminal proceedings, permission for judicial review ought not to have been granted.

[120] The Privy Council decision in *Sharma* has been echoed in many of the recent pronouncement of the courts of the Commonwealth countries.

Application of the Law to the Facts

[121] On the facts of the present appeal, we were satisfied that the appellant correctly identified illegality as a ground for judicial review. More

specifically, the appellant adduced cogent documentary evidence to the effect that the 2nd respondent acted in contravention of the law in exercising his powers under Article 145(3) of the FC – specifically – in breach of Act 485 – rendering the charges null and void.

[122] The evidence on record led to no other conclusion but that the 2nd respondent knew or ought to have known that the appellant was covered by the scope of his functional immunity. Despite this, the 2nd respondent had obviously made up his mind to charge the appellant. One clear and direct indication of this is the 2nd respondent's issuance of his consent to prosecute the appellant to the 3rd respondent in spite of the letter from the Secretary General of AALCO of even date indicating that the 1st and 2nd respondents had already requested independently for an ad hoc waiver of immunity which requests were vigorously denied.

[123] On the factual matrix of this appeal, where the legal issue of immunity and jurisdiction can be determined ex facie, we were satisfied that this was a proper and appropriate case to be determined by judicial review and that the appellant could not avail himself of any other form of legal redress in any other Court.

[124] Hence, we found that the appellant had satisfied the two-step test. He identified illegality, the correct ground for review, and adduced compelling prima facie evidence to sustain that allegation. The 2nd respondent was unable to rebut those allegations and the presumption of legality over the 2nd respondent's exercise of discretion under Article 145(3) was successfully overcome. In those narrow circumstances, we allowed the appeal.

[125] As such we answered Question 3 in the affirmative with particular emphasis on the words ‘appropriate circumstances’. Our answer to Question 3 in the affirmative meant that it was not necessary to answer Question 4. The fact that the AG/PP’s powers are amenable to judicial review in appropriate circumstances means that the Court is fully empowered to issue the corresponding appropriate remedy provided for by paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and inherent in its supervisory jurisdiction to meet the justice of the case.

CONCLUSION

[126] For the aforesaid reasons, we found that the High Court had correctly ascertained the applicable law and properly applied it to the facts. It followed that we did not agree with the Court of Appeal and we accordingly unanimously allowed the appeal.

[127] On the reliefs however, we were minded to only restore the order of the High Court to the extent that it allowed prayer 1 of the judicial review application, which reads:

> “A declaration that the appellant has immunity as a former High Officer being the Director of the Asian International Arbitration Centre (‘the Centre’) for acts done within his official capacity.”.

[128] For convenience, we reproduce the Questions and our corresponding answers, as follows:

"**Question 1**

Whether the words "immunity from suit or from other legal process" in the Second Schedule of International Organizations (Privileges and Immunities) Act 1992 ('Act 485') includes criminal proceedings?

Answer: Affirmative.

Question 2

Whether the immunity granted to various persons pursuant to Act 485:

2.1 are limited by the words of section 8A(1) of Act 485 only to acts and things done that are not for their personal benefit; and

2.2 accordingly, whether charges can be laid against such persons notwithstanding the absence of the international organization?

Answer: As a whole, negative.

Question 3

Whether the exercise of the Attorney General's discretion pursuant to Article 145(3) of the Federal Constitution is amenable to judicial review in appropriate circumstances?

Answer: Affirmative, with particular emphasis on the words 'appropriate circumstances.'

Question 4

Whether the High Court in judicial review proceedings has the jurisdiction and power, in appropriate cases,

4.1 to grant relief including to quash criminal charge laid by the Public Prosecutor, and

4.2 to issue orders of prohibition against proceedings in subordinate courts.

Not necessary to answer.

[129] We made no order as to costs for the reason that this case concerned public interest.

Dated: 9th June 2021

(TENGKU MAIMUN BINTI TUAN MAT)
Chief Justice,
Federal Court of Malaysia.

List of Counsel

For the appellant:

Dato' Malik Imtiaz
(with him Shanmuga Kanesalingam, Dato' Abdul Shukor Ahmad, Dato' Baljit Singh Sidhu, Khoo Suk Chyi, Dinesh Kumar Paramasivam and Surendra Ananth).
[Messrs. Kanesalingam]

For the respondents:

Narkunavathy Sundareson SFC
(with her Kogilambigai FC and Noor Atiqah Zainal Abidin FC)
[Attorney General's Chambers]