BAR MALAYSIA

v.

PEGUAM NEGARA MALAYSIA & ANOR

Court of Appeal, Putrajaya
Faizah Jamaludin, Lim Hock Leng, Nadzarin Wok Nordin JJCA
[Civil Appeal No: W-01(IM)-488-07-2024]
7 May 2026

Civil Procedure: *Judicial review — Appeal against dismissal of application for leave to challenge Attorney-General's (AG) decision to discontinue prosecution against 2nd respondent and seek discharge not amounting to acquittal (DNAA) — Decision made after prima facie case established and defence called — Whether appellant met requisite leave threshold — Whether separate test applied when decision under challenge was AG's exercise of prosecutorial discretion under art 145(3) Federal Constitution — Whether High Court erred in refusing leave on basis that appellant failed to adduce 'compelling and prima facie proof' as contemplated by Federal Court in Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors — Whether proposed challenge an impermissible collateral attack on criminal court's order — Whether presumption of legality of AG's prosecutorial decision a rebuttable presumption and could not operate as an absolute bar to leave — Whether impugned decision was arguably illegal, irrational and/or unreasonable — Whether appropriate, rare and exceptional case warranting judicial review*

The 2nd respondent was faced with 47 criminal charges involving criminal breach of trust, corruption and money laundering. After over 53 days of trial and 99 witnesses being called by the prosecution, the High Court on 24 January 2022 found that a *prima facie* case had been established on all 47 charges and called for the 2nd respondent to enter his defence. The 2nd respondent made written representations to the Attorney-General's chambers seeking a discontinuation of the prosecution. Thereafter, the High Court was informed by the Deputy Public Prosecutor (DPP) that the Attorney General (AG) had decided to discontinue the prosecution on all charges under art 145(3) of the Federal Constitution (Constitution) and s 254(1) of the Criminal Procedure Code (CPC) and applied for a discharge not amounting to an acquittal (DNAA) in respect of all the charges. The reasons advanced for the said decision *inter alia* were the need for further investigations and concerns about the manner in which the prior investigations were conducted. The High Court found that the prosecution had given 'cogent reasons' for seeking a DNAA and accordingly granted the same. The appellant then applied for leave for judicial review to challenge the AG's decision. The High Court refused leave on the basis of the appellant's failure to adduce 'compelling and *prima facie* proof' as contemplated by the Federal Court in *Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors* (*Sundra Rajoo*) and to displace the presumption of

legality attaching to the AG's decision. Hence the instant appeal. The issues that arose for determination were, whether the law recognised a leave threshold for judicial review challenges to prosecutorial discretion under art 145(3) of the Constitution that differed from the ordinary leave threshold under O 53 of the Rules of Court 2012 (ROC 2012) and if not, whether a single leave threshold should be applied in light of the AG's function as Public Prosecutor; whether the appellant had met the requisite threshold; whether the High Court was right in refusing leave on the basis that the appellant had failed to adduce 'compelling and *prima facie*' proof as contemplated in *Sundra Rajoo*; and whether the proposed challenge was a collateral attack on the High Court's order or was properly directed at an antecedent executive decision amenable to judicial review. The appellant submitted *inter alia* that the Federal Court's observations in *Sundra Rajoo*, wherein leave had already been granted by the Court of Appeal and was not appealed against, while highly persuasive, were not strict ratio on the question of leave and should not be treated as having rewritten O 53 ROC 2012. The appellant also submitted that the High Court had failed to appreciate that the impugned decision was arguably irrational and/or unlawful and was amenable to judicial review. The respondents however argued that the Federal Court's holding in *Sundra Rajoo* that 'any challenge must therefore pass a two-step threshold which must be satisfied at the leave stage', was the governing leave test in all art 145(3) cases including a decision to discontinue a prosecution or to seek a DNAA, and that the instant court was bound as a matter of precedent, to apply the 'two-step threshold' at the leave stage.

Held (allowing the appeal):

(1) There was nothing in O 53 ROC 2012 which suggested that different classes of public authority attracted different thresholds. Hence, it was not open to the courts to construct by judicial decision, 2 formally distinct leave tests, one for ordinary public law decisions and another for prosecutorial decisions under art 145(3) of the Constitution, unless such a distinction was compelled by binding authority or necessary implication. The purpose of requiring leave would be defeated if courts were to go into the matter in any depth at the leave stage. (paras 32-40)

(2) Although the Federal Court had in *Sundra Rajoo* held that the AG's prosecutorial discretion under art 145(3) of the Constitution was reviewable in appropriate, rare and exceptional cases and was cloaked with a presumption of legality and that a higher standard of scrutiny applied, it did not necessarily mean that the Federal Court's detailed articulation of what must be shown at the leave stage was likewise *ratio decidendi* of the case. The Federal Court's observations therein on what must be shown at the leave stage were not necessary to dispose of the appeal before it, which was on the substantive stage of the judicial review, and therefore, were obiter rather than binding ratio on the specific question of the leave threshold. (paras 58-65)

(3) Order 53 of the ROC 2012 did not prescribe different leave thresholds but prescribed a single test for leave, i.e. whether the application for judicial review

disclosed an arguable case that was not frivolous. The Federal Court's reference to 'compelling and *prima facie* proof' in *Sundra Rajoo* should not be read literally as requiring proof of the whole case at the leave stage. To interpret *Sundra Rajoo* as requiring near conclusive proof at the leave stage would be inconsistent with the procedure under O 53 ROC 2012 and the settled distinction between the leave threshold and the substantive merits of the judicial review. (paras 68-72)

(4) The presumption of legality in favour of the AG's prosecutorial decision remained relevant but was nonetheless a rebuttable presumption, and could not operate as an absolute bar to leave where the applicant identified facts which, if proven to the required standard, were capable of showing illegality, irrationality, *mala fides* and/or the taking into account of irrelevant considerations. The appellant's argument that the impugned decision was irrational or unreasonable in the public law sense was plainly arguable and not frivolous. The appellant's challenge was to the legality and rationality of the decision-making process. (paras 76, 83, 88 & 89)

(5) In the premises, the application was not frivolous and disclosed serious and arguable public law issues that should be heard at the substantive stage. It was an appropriate, rare and exceptional case which warranted judicial review of the AG's prosecutorial decision. Accordingly, applying the single leave test under O 53 ROC 2012 with the higher level of discipline required by *Sundra Rajoo*, the appellant had met the threshold for leave. (paras 90-92)

(6) Although the High Court had applied the correct authority, i.e. *Sundra Rajoo*, it had applied it without regard to its proper juridical context. At the leave stage, the question was whether the applicant had disclosed an arguable case that was not frivolous, and in art 145(3) cases, that test must be applied with greater discipline, caution and restraint, having regard to the constitutional status of the AG, the presumption of legality, the doctrine of separation of powers and the 'appropriate, rare and exceptional' nature of the case. The approach that the High Court had taken had the effect of collapsing the threshold inquiry into a determination of the merits of the reliefs sought in the judicial review. Accordingly, the High Court had erred in refusing leave for judicial review on the basis of the appellant's failure to adduce 'compelling and *prima facie* proof' at the leave stage. (paras 94-96)

(7) The default consequence of a discontinuance under s 254 of the CPC was a DNAA unless the court directed otherwise. A judge of the criminal court did not ordinarily adjudicate on the public law legality of the AG's decision to discontinue and seek a DNAA. The High Court's observation in this instance of 'cogent reasons' related to the choice between a DNAA sought by the prosecution and a DAA sought by the accused. It was not a finding on the legality, rationality and/or reasonableness of the AG's decision to discontinue the prosecution. Whether such decisions were illegal, irrational and/or unreasonable was a matter for the High Court's supervisory jurisdiction, exercised through judicial review. Accordingly, the applicant's

judicial review application was not a collateral attack on the criminal trial court's order of a DNAA in respect of all 47 charges against the 2nd respondent. (paras 99, 100, 101, 102, 103, 104, 105, 106, 107 & 109)

Case(s) referred to:

Arulpragasan Sandaraju v. PP [1996] 1 MLRA 588 (refd)

Association Of Bank Officers Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 1 MLRA 324 (refd)

Dalip Bhagwan Singh v. PP [1997] 1 MLRA 653 (refd)

IRC v. National Federation Of Self-Employed And Small Businesses Ltd [1982] AC 617 (refd)

J.B. Jeyaretnam v. The Attorney-General [1990] 2 MLRH 504 (refd)

Johnson Tan Han Seng v. PP & Other Appeals [1977] 1 MLRA 290 (refd)

Karpal Singh & Anor v. PP [1991] 1 MLRA 96 (refd)

Khairuddin Abu Hassan v. Tan Sri Mohamed Apandi Ali [2017] 3 MLRH 183 (refd)

Lai Soon Onn v. Chew Fei Meng & Other Appeals [2018] 6 MLRA 633 (refd)

Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Anor [2001] 5 MLRH 718 (refd)

Long Samat & Ors v. PP [1974] 1 MLRA 412 (refd)

Menteri Hal Ehwal Luar Negeri, Malaysia & Ors v. Sundra Rajoo Nadarajah [2020] 6 MLRA 347 (refd)

Mohd Nordin Johan v. The Attorney-General Malaysia [1982] 1 MLRA 345 (refd)

Mohd Rafizi Ramli v. PP [2014] 1 MLRA 663 (refd)

Muhibbah Engineering (M) Bhd v. Ketua Pengarah Hasil Dalam Negeri [2022] 5 MLRA 595 (refd)

Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal [2019] 3 MLRA 183 (refd)

PP v. Siti Aisyah & Anor And Another Case [2019] MLRHU 1554 (refd)

PP v. Zainuddin Sulaiman & Ors [1985] 1 MLRA 299 (refd)

PP v. Mohd Radzi Abu Bakar [2005] 2 MLRA 590 (refd)

R v. DPP, Ex P Kebilene [2000] 2 AC 326 (refd)

R v. DPP, Ex P Manning [2001] QB 330 (refd)

R(B) v. Director Of Public Prosecutions (Equality And Human Rights Commission Intervening) [2009] EWHC 106 (Admin) (refd)

Ramalingam Ravinthran v. Attorney General [2012] 2 SLR 49 (refd)

Repco Holdings Bhd v. PP [1997] 3 MLRH 304 (refd)

Sundra Rajoo Nadarajah v. Peguam Negara Malaysia [2019] MLRAU 287 (folld)

Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors [2021] 5 MLRA 1 (refd)

Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2005] 2 MLRA 698 (refd)

Teh Cheng Poh v. Public Prosecutor [1978] 1 MLRA 321 (refd)

Vigny Alfred Raj Vicetor Amratha Raja v. PP [2022] 6 MLRA 1 (refd)

WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 MLRA 257 (refd)

Young v. Bristol Aeroplane Co Ltd [1944] KB 718; [1944] 2 All ER 293 (refd)

Legislation referred to:

Criminal Procedure Code, ss 173(f), 180, 254(1), (3), 254A

Federal Constitution, art 145(3)

Rules of Court 2012, O 53 r 3(1), (2), (3)

Counsel:

For the appellant: Ambiga Sreenevasan (Edward Lee with her); M/s Sreenevasan, Steven Thiru (Gurjeevan Singh Sachdev with him); M/s Steven Thiru, S Sivaneindiren; M/s Cheah Teh Su, Karen Cheah Yee Lynn; M/s Chooi & Company, Abhilaash Subramaniam; M/s Abhilaash Subramaniam & Co, Gregory Das; M/s Cyrus Das

For the 1st respondent: Ahmad Hanir Hambaly @ Arwi (Imtiyaz Wizni Aufa Othman with him); AG's Chambers

For the 2nd Respondent: Hisyam Teh Poh Teik (Ahmad Zaidi Zainal, Guok Ngek Seong, Shahrul Fazli Kamarulzaman, Hamidi Mohd Noh, Mohd Shahril Madisa, Aiman Abdul Rahman, Atiqa Nazihah Azmi, Fatini Athirah Baharin, Nur Khairunnisa Sabirah Abdul Manan, Nurul Hanan Hazri, Mukhlis Zambry with him); M/s Shahrul Hamidi & Haziq

[For the High Court judgment, please refer to *BAR Malaysia v. Peguam Negara Malaysia & Anor* [2025] 1 MLRH 291]

JUDGMENT

Faizah Jamaludin JCA:

A. Introduction

[1] This is the unanimous judgment of this Court in the appeal by the Malaysian Bar against the High Court's dismissal of its application for leave for judicial review of the Attorney General's decision to discontinue prosecution and apply for a discharge not amounting to acquittal ("DNAA") of all the charges against the 2nd respondent.

[2] This appeal raises an issue of constitutional and public importance concerning the leave threshold for judicial review, where the Attorney General's prosecutorial discretion under art 145(3) of the Federal Constitution is challenged. It arises from the High Court's refusal to grant the Appellant, the

Malaysian Bar, leave to commence judicial review to challenge the Attorney General's decision — acting through the Deputy Public Prosecutor ("DPP") — to seek a DNAA in relation to 47 criminal charges against the 2nd respondent. The High Court dismissed the leave application on 27 June 2024. The Appellant now appeals against that decision.

[3] The proposed judicial review seeks to challenge the Attorney General's decision of 4 September 2023 to seek a DNAA under art 145(3) of the Federal Constitution and s 254(1) of the Criminal Procedure Code ("CPC") in respect of all 47 charges ("the impugned decision"). The Appellant says the decision is reviewable and that the leave threshold is met. The Respondents contend the High Court was right to refuse leave because the application does not satisfy the high threshold for challenging prosecutorial discretion.

[4] Beyond the immediate dispute, this appeal concerns how the High Court should approach the leave stage when judicial review is sought of the Attorney General's exercise of prosecutorial discretion under art 145(3) of the Federal Constitution and s 254(1) of the CPC. In particular, these questions arise:

(a) Does the law recognise a leave threshold for judicial review challenges to prosecutorial discretion under art 145(3) of the Federal Constitution that differs from the ordinary leave threshold under O 53 of the Rules of Court 2012?

(b) If not, should a single leave threshold be applied, albeit with greater discipline, caution and restraint in light of the constitutional status of the Attorney General's function as Public Prosecutor?

(c) Has the Appellant met the requisite leave threshold in its application for judicial review of the Attorney General's impugned decision?

(d) Was the learned High Court Judge right to refuse leave on the basis that the Appellant had failed to adduce "compelling and *prima facie* proof" as contemplated by the Federal Court in *Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLRA 1, FC ("*Sundra Rajoo*")?

(e) Is the proposed challenge an impermissible collateral attack on the criminal court's order, or is it properly directed at an antecedent executive decision amenable to judicial review?

[5] In our view, these questions engage the boundary between prosecutorial independence and judicial oversight; the separation of powers and the rule of law; and the relationship between the criminal court's adjudicative role and the civil court's supervisory jurisdiction. They also engage in the purpose of leave in judicial review. Leave is not a mere formality, but neither should it become a *de facto* final hearing.

The Appeal And Procedural History

[6] The leave application was heard as an opposed leave hearing. On 27 June 2024, the High Court dismissed it with no order as to costs. The Appellant filed its notice of appeal on 23 July 2024.

[7] The Appellant challenges the High Court's refusal of leave in its entirety. In summary, it contends that the learned Judge erred in applying the leave principles; in treating *Sundra Rajoo* as governing the leave stage in the same way as the substantive stage; in failing to appreciate the significance of the chronology of the criminal proceedings; in failing to appreciate that the impugned decision was arguably irrational and/or unlawful; and in failing to recognise that the impugned decision remained amenable to judicial review. It further contends that the decision to seek a DNAA was contrary to the statutory scheme in ss 254 and 254A of the CPC; irrational in the Wednesbury sense; tainted by irrelevant considerations; contrary to the public interest; contrary to the Public Prosecutor's Direction No 2/2019; and unlawful by reason of the indefinite or undefined period for which the prosecution was discontinued.

[8] The learned High Court Judge's grounds of judgment show that the learned Judge treated the leave application as being governed by the Federal Court's observations in *Sundra Rajoo* concerning a "two-step threshold", and concluded that the Appellant failed to produce evidence that "singularly leads to the inevitable conclusion" that illegality or irrationality had been made out on a *prima facie* basis — a standard inconsistent with the function of leave under O 53. The learned Judge therefore held that the presumption of legality attaching to the Attorney General's decision had not been displaced.

Factual Background

[9] In setting out the background of this case, it is important to keep the events in chronological order.

[10] In late 2018 and early 2019, the 2nd respondent was formally charged with a total of 47 offences, including criminal breach of trust, corruption, and money laundering. At the time these charges were brought, the 2nd respondent did not hold any public office. The prosecution subsequently transferred the case to the High Court, where the trial commenced on 18 November 2019 before the Criminal Division of the High Court in Kuala Lumpur.

[11] On 24 January 2022, the learned trial judge, Collin Lawrence Sequerah J (now FCJ), determined that the prosecution had established a *prima facie* case on all 47 charges, after the prosecution had called 99 witnesses over 53 days of trial, and called upon the 2nd respondent to enter his defence.

[12] On 2 December 2022, the 2nd respondent was appointed as the Deputy Prime Minister of Malaysia. Thereafter, he made a number of written representations to the Attorney General's Chambers seeking a discontinuance of the prosecution.

[13] On 4 September 2023, the DPP informed the learned trial judge that the Attorney General had decided to discontinue the prosecution on all charges under art 145(3) of the Federal Constitution and pursuant to s 254(1) of the CPC, and apply for a DNAA for all the charges.

[14] The DPP then advanced 11 reasons in support of the request for a DNAA. These reasons included, among others, the need to re-examine defence testimonies and the representations; the need for further detailed and comprehensive investigation; concerns about the manner in which the investigation had previously been conducted; the possibility of selective prosecution; and matters said to arise from the proposed Royal Commission of Inquiry ("RCI") concerning the former Attorney General's memoir and from an internal memorandum circulating on social media. The DPP informed the trial judge that the Attorney General was seeking a DNAA for all the charges against the 2nd respondent and that he opposed a discharge amounting to an acquittal ("DAA") sought by the 2nd respondent.

[15] The trial judge ultimately ordered a DNAA. In doing so, His Lordship observed in his oral judgment delivered *ex tempore* that the prosecution had given "cogent reasons" to seek a DNAA, though no timeline had been furnished for the further investigation or the proposed RCI. His Lordship placed on record that while he could not question the Attorney General's powers under art 145(3) of the Federal Constitution and s 254 of the CPC to withdraw charges at any time before judgment, the DPP's application was made at an advanced stage of the trial: the trial had continued over 77 days, the defence had begun its case, and 15 defence witnesses had been called. His Lordship ended his *ex tempore* judgment with the following remark:

> "Should the prosecution decide in the near future that they will not proceed any further with the charges, then much precious judicial time would have been wasted and a great amount of taxpayers' money would also have been wasted."

[16] The 2nd respondent initially appealed against the DNAA order but later withdrew that appeal. The practical result of the withdrawal is that a DNAA in respect of all 47 charges remained in place.

[17] On 2 December 2023, the Appellant filed its application for leave to commence judicial review. Among the reliefs sought were *certiorari* to quash the impugned decision, declarations that the impugned decision was null and void and/or unreasonable, and *mandamus* directing the Attorney General to act in accordance with law and, if thought fit, to recharge the 2nd respondent and seek reinstatement of the criminal proceedings under s 254A of the CPC. In the alternative, the Appellant also sought disclosure of the materials, reasons, and particulars relied upon in arriving at the impugned decision.

B. The Parties' Principal Contentions

The Appellant's Case

[18] The Appellant argues, first, that the learned High Court Judge erred in applying at the leave stage a test more onerous than the established threshold for judicial review under O 53 of the Rules of Court 2012. In support of this argument, the Appellant relied on *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 MLRA 257, FC; *Association Of Bank Officers Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 1 MLRA 324, SC; *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2005] 2 MLRA 698, CA; and *Muhibbah Engineering (M) Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2022] 5 MLRA 595, CA. The Appellant maintains that, at the leave stage, the Court's assessment should be confined to determining whether the proposed challenge is arguable and not frivolous. It submits that the merits of the case and any substantive issues of law are matters to be addressed at the substantive hearing, not at the leave stage.

[19] Secondly, the Appellant contends that *Sundra Rajoo* did not displace those established leave principles. Learned counsel for the Appellant, Mr S. Sivaneindiren, stressed that the Federal Court in *Sundra Rajoo* was deciding the substantive stage of the judicial review, as it was not an appeal against the grant of leave. The Court of Appeal's earlier leave decision in *Sundra Rajoo Nadarajah v. Peguam Negara Malaysia* [2019] MLRAU 287, CA — delivered by Abdul Rahman Sebli JCA (later CJSS) — was not appealed against, and the matter proceeded to the substantive stage at the High Court. The appeal to the Federal Court was against the decision of the Court of Appeal in *Menteri Hal Ehwal Luar Negeri, Malaysia & Ors v. Sundra Rajoo Nadarajah* [2020] 6 MLRA 347, CA — delivered by Hanipah Farikullah JCA (later FCJ) — in allowing the Menteri Hal Ehwal Luar Negeri's appeal against the decision of the High Court in the substantive judicial review. The Appellant argues that, for this reason, the Federal Court's statements in *Sundra Rajoo* on what must be shown at the leave stage were *obiter dicta* and thus should not be treated as having created a new, separate leave test for all cases involving prosecutorial discretion.

[20] Thirdly, learned counsel for the Appellant, Dato' Ambiga Sreenevasan, argues that, in any event, even if *Sundra Rajoo* applied in a stricter sense, the threshold for leave is met in this case. The Appellant relies on the chronology: the 2nd respondent was charged when he did not hold public office; the High Court subsequently found a *prima facie* case on all 47 charges and called for the defence; the 2nd respondent was later appointed Deputy Prime Minister and made representations seeking a discontinuance; and the Attorney General thereafter decided to discontinue the prosecution and seek a DNAA in respect of all charges.

[21] Fourthly, learned counsel for the Appellant, Mr Steven Thiru, submits that judicial review of a decision to discontinue a prosecution or seek a DNAA should not be approached in precisely the same way as judicial review of a

decision to prosecute. He relies on Commonwealth authorities, including *R v. DPP, ex p Kebilene* [2000] 2 AC 326, *R v. DPP, ex p Manning* [2001] QB 330, together with references to *R(B) v. Director of Public Prosecutions (Equality and Human Rights Commission Intervening)* [2009] EWHC 106 (Admin), in *Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal* [2019] 3 MLRA 183, FC, to submit that decisions not to prosecute or to discontinue are, conceptually, more amenable to review because the criminal process itself no longer provides a practical avenue of challenge. He therefore argued that the threshold should not be set too high in such cases.

[22] Fifthly, the Appellant argues that the challenge was not a collateral attack on the criminal court's DNAA order. It submits that the true target of the challenge was the Attorney General's antecedent executive decision to discontinue the prosecution and seek a DNAA, not the subsequent judicial order which followed as a consequence of that prosecutorial election. It relies upon the Federal Court's majority decision in *Vigny Alfred Raj Vicetor Amratha Raja v. PP* [2022] 6 MLRA 1, FC, where the Court held that under s 254(3) of the CPC the default order following a discharge under s 254(1) is a DNAA unless the court specifically directs otherwise. It also relies on Sundra Rajoo for the proposition that the decision to charge and, by implication, to discontinue is an executive decision amenable, in principle, to judicial review.

[23] Sixthly, the Appellant places significant reliance on the Public Prosecutor's Direction No 2/2019. It drew the Court's attention to para 4 of that Direction, which states, in substance, that if a trial has commenced and witnesses have testified, the decision would ordinarily be to reject the representation and allow the trial to run its course, and that only in "very exceptional" cases should discontinuance occur after trial has started. The Appellant submitted that the Attorney General's decision was at least arguably contrary to his published prosecutorial policy, and this was itself relevant to the issue of irrationality.

The 1st Respondent's Case

[24] The Attorney General's position, as submitted by learned Senior Federal Counsel ("SFC"), Tuan Ahmad Hanir bin Hambaly, was more categorical. The learned SFC submits that the application for judicial review was plainly a challenge to the exercise of the Attorney General's prosecutorial discretion under art 145(3); thus, the two-step test in *Sundra Rajoo* governed the leave threshold.

[25] The learned SFC argues that the Appellant had failed to satisfy the two-step test in *Sundra Rajoo* because the decision to seek a DNAA was made within the powers conferred on the Attorney General by art 145(3) and s 254 of the CPC. He submits that (i) under *Vigny Alfred Raj* the Public Prosecutor need only inform the court of the decision to discontinue, and a DNAA then follows by operation of law without the need to furnish cogent reasons; (ii) the Public Prosecutor's Direction No 2/2019 was subject to exceptions and was not binding on the Attorney General; (iii) any allegation that the 2nd respondent's

office as Deputy Prime Minister was taken into account was speculative; and (iv) there was no duty to furnish reasons or documents to the Malaysian Bar.

The 2nd Respondent's Case

[26] Learned counsel for the 2nd respondent, Datuk Hisyam Teh Poh Teik, submits that the appeal must fail on three grounds: (i) the Appellant had not met the high threshold in *Sundra Rajoo*; (ii) the criminal trial judge, in his *ex tempore* judgment, had already found the DPP's application for a DNAA justified and the reasons advanced cogent; and (iii) the learned High Court Judge, in refusing leave, committed no appealable error.

[27] Additionally, the 2nd respondent relies on a line of pre-*Sundra Rajoo* authorities emphasising the breadth of the Attorney General's prosecutorial discretion, including *Long Samat & Ors v. PP* [1974] 1 MLRA 412, FC; *Johnson Tan Han Seng v. PP & Other Appeals* [1977] 1 MLRA 290, FC; *PP v. Zainuddin Sulaiman & Ors* [1985] 1 MLRA 299, SC, and *PP v. Siti Aisyah & Anor And Another Case* [2019] MLRHU 1554, HC.

[28] Datuk Hisyam also stressed the importance of the demarcation between civil and criminal courts and referred to the following cases *Lai Soon Onn v. Chew Fei Meng & Other Appeals* [2018] 6 MLRA 633, CA; *J.B. Jeyaretnam v. The Attorney-General* [1990] 2 MLRH 504, HC, and *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Anor* [2001] 5 MLRH 718, HC.

C. Issues

Issue 1: Does The Law Recognise A Leave Threshold For Judicial Review Challenges To Prosecutorial Discretion Under Article 145(3) Of The Federal Constitution That Differs From The Ordinary Leave Threshold Under Order 53 Of The Rules Of Court 2012?

Issue 2: If Not, Should A Single Leave Threshold Be Applied, Albeit With Greater Discipline, Caution And Restraint In Light Of The Constitutional Status Of The Attorney General's Function As Public Prosecutor?

[29] Having set out the facts and the parties' principal contentions, we consider Issues 1 and 2 together.

[30] Both issues concern the leave threshold for judicial review and whether a separate test applies when the decision under challenge is the Attorney General's exercise of prosecutorial discretion under art 145(3).

Order 53 of the Rules of Court 2012

[31] Any analysis of the legal framework governing judicial review must begin with O 53 itself. As explained by the Federal Court in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd (supra)*:

> "Under this order two stages are anticipated, with the leave stage being the first, to be followed closely by the substantive hearing after successfully obtaining leave at the High Court."

[32] The provisions in O 53 set an initial threshold. Order 53 r 3(1) states that an application for judicial review may not be made unless leave has first been granted. The application is *ex parte* and supported by *affidavit* evidence. Under O 53 r 3(2), the application is made *ex parte* to a Judge in Chambers and must be supported by a statement and an affidavit verifying the facts relied on. Order 53 r 3(3) requires notice of the application, together with copies of the statement and affidavits, to be given to the Attorney General's Chambers no later than three days before the hearing date.

[33] Nothing in O 53 suggests that different classes of public authority attract different leave thresholds. The Rules contemplate a single leave jurisdiction. That, in our view, is the correct procedural starting point.

[34] It is therefore not immediately open to the courts to construct, by judicial decision, two formally distinct leave tests — one for ordinary public law decisions and another for prosecutorial decisions under art 145(3) — unless such a distinction is compelled by binding authority or necessary implication.

[35] The orthodox Malaysian authorities on leave for judicial review have long stressed that the leave stage is a filter.

[36] In *Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association (supra)*, the Supreme Court held that the guiding principles are that the application is not frivolous and that there is an arguable case. That formulation was expressly adopted by the Federal Court in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd (supra)*, where it held:

> "[12] At the leave stage, on a quick perusal of the material available, if the court thinks that subsequently at the substantive hearing stage an arguable case may be disclosed, and the relief sought may be granted, leave should be granted (*IRC v. National Federation of Self-Employed And Small Businesses Ltd* [1982] AC 617)."

[37] The Federal Court also re-emphasised its earlier decision in *Mohd Nordin Johan v. The Attorney-General Malaysia* [1982] 1 MLRA 345, FC (per Raja Azlan Shah Ag LP) that leave should not be refused *in limine* if the point taken is not frivolous.

[38] To a similar effect, the Court of Appeal in *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors (supra)* (per Gopal Sri Ram JCA) cautioned that the courts "should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous". The same principles were reiterated by the Court of Appeal in *Muhibbah Engineering (M) Bhd v. Ketua Pengarah Hasil Dalam Negeri (supra)*.

[39] These authorities show that the leave stage is not intended to become a final adjudication of the issues.

[40] As Lord Diplock explained in *IRC v. National Federation Of Self-Employed And Small Businesses Ltd* [1982] AC 617 at 643 — cited with approval by the Federal Court in *WRP Asia Pacific* and the Court of Appeal in *Tang Kwor Ham* — the purpose of requiring leave would be defeated if courts were to go into the matter in any depth at the leave stage.

[41] In our judgment, the architecture of O 53 supports this approach. The application is *ex parte* and supported by affidavit evidence. There is no discovery, no cross-examination, and limited or no access to the respondent's internal materials.

[42] Further, as the Evidence Act 1950 does not apply to affidavits, the leave court must be careful not to impose an evidential burden that is practically impossible for the applicant to discharge at that stage.

Article 145(3) Of The Federal Constitution: Prosecutorial Discretion And The Federal Court's Decision In *Sundra Rajoo*

[43] For the purposes of this appeal, it is necessary to place the orthodox O 53 jurisprudence alongside the specific jurisprudence applicable to the Attorney General's prosecutorial discretion under art 145(3) of the Federal Constitution.

[44] The history of Malaysian law on this subject is clear. Before the Federal Court's decision in *Sundra Rajoo*, the authority treated the Attorney General's decision to institute or discontinue criminal proceedings as enjoying wide discretionary protection. The Court of Appeal in the substantive *Sundra Rajoo* appeal — *Menteri Hal Ehwal Luar Negeri, Malaysia & Ors v. Sundra Rajoo Nadarajah* — referred to the leading authorities, namely *Long Samat v. PP (supra)*; *Johnson Tan Han Seng v. PP & Other Appeals (supra)*; *Teh Cheng Poh v. Public Prosecutor* [1978] 1 MLRA 321, PC; *PP v. Zainuddin Sulaiman & Ors* [1985] 1 MLRA 299, SC; *Karpal Singh & Anor v. PP* [1991] 1 MLRA 96, SC; *Repco Holdings Bhd v. PP* [1997] 3 MLRH 304, HC; *Mohd Rafizi Ramli v. PP* [2014] 1 MLRA 663, CA and *Khairuddin Abu Hassan v. Tan Sri Mohamed Apandi Ali* [2017] 3 MLRH 183, HC.

[45] The older line of authority undoubtedly remains relevant as background to the development of the jurisprudence specifically available to the Attorney General's prosecutorial discretion under art 145(3).

[46] However, the law was materially clarified by the Federal Court in *Sundra Rajoo*. The Court held that prosecutorial discretion under art 145(3) is wide but not absolute or unfettered, and that in "appropriate, rare and exceptional circumstances" it is amenable to judicial review.

[47] The Federal Court rejected the notion that constitutional discretion is immune from supervision. It held that discretion, whether statutory or

constitutional, remains an executive power and is susceptible to judicial review, albeit under a higher standard of scrutiny.

[48] The significance of the Federal Court's decision in *Sundra Rajoo* cannot be overstated. It did not abolish prosecutorial independence, nor did it invite the courts to supervise prosecutorial decision-making routinely. What it did was to reaffirm, consistently with the rule of law, that all public power has legal limits, and that the Attorney General's constitutional status does not place him beyond all review.

[49] The Federal Court was equally careful to state that review must be approached with caution and with due regard to the separation of powers. It adopted, by reference to Singapore jurisprudence, including *Ramalingam Ravinthran v. Attorney General* [2012] 2 SLR 49, the notion that prosecutorial decisions are cloaked with a presumption of legality and are subject to a higher standard of review.

[50] The difficult question before this Court is not whether *Sundra Rajoo* made prosecutorial discretion reviewable; it plainly did. The question is whether the Federal Court in *Sundra Rajoo* also established a separate legal test for leave applications whenever art 145(3) arises, and if so, whether this formulation constitutes binding *ratio decidendi* at the leave stage.

Whether A Separate Threshold Applies?

[51] The Respondents' argument is straightforward. They say that the Federal Court in *Sundra Rajoo* held that "any challenge must therefore pass a two-step threshold which must be satisfied at the leave stage", namely: first, the applicant must show a recognised legal basis such as illegality, procedural impropriety, irrationality or *mala fides*; secondly, the applicant must adduce "compelling and *prima facie* proof" that the prosecutorial discretion falls within those grounds. They submit that this is the governing leave test in all art 145(3) cases, including a decision to discontinue a prosecution or to seek a DNAA.

[52] Learned counsel for the 2nd respondent places considerable reliance on the doctrine of *stare decisis* in support of the Respondents' submission that the High Court was correct to apply what is described as the "two-step threshold" in *Sundra Rajoo*. Datuk Hisyam contends that this Court is bound, as a matter of precedent, to apply the "two-step threshold" at the leave stage.

[53] The Appellant maintains that this reading is too broad. It points out that the Federal Court in *Sundra Rajoo* was not deciding an appeal against the grant of leave.

[54] Leave had already been granted by the Court of Appeal in *Sundra Rajoo v. Peguam Negara Malaysia (supra)*, and that leave decision was not appealed. The Federal Court decided the substantive merits of the judicial review. The Appellant therefore submits that the Federal Court's observations on the leave

threshold, while highly persuasive, are not a strict ratio on the question of leave and should not be treated as having rewritten O 53.

[55] There is no dispute as to the governing principles. Under the doctrine of *stare decisis*, decisions of the Federal Court are binding on the Court of Appeal. Further, the Court of Appeal is generally bound by its own decisions, subject to the recognised exceptions stipulated in *Young v. Bristol Aeroplane Co Ltd* [1944] KB 718; [1944] 2 ALL ER 293, and affirmed in *Dalip Bhagwan Singh v. PP* [1997] 1 MLRA 653, FC.

[56] Our task, therefore, goes beyond identifying what the Federal Court said in *Sundra Rajoo*.

[57] We must determine the actual findings of that decision and assess whether the wording relied on by the Federal Court forms part of the binding *ratio decidendi*.

[58] There can be no dispute that the Federal Court's decision in *Sundra Rajoo* is a landmark decision, and its core holdings are binding. It is settled that the following principles form part of the *ratio decidendi* of the case:

(a) that the Attorney General's prosecutorial discretion under art 145(3) of the Federal Constitution is reviewable in appropriate, rare and exceptional cases;

(b) that such decisions are cloaked with a presumption of legality, and

(c) that a higher standard of scrutiny applies.

[59] These principles were necessary to the Federal Court's conclusion that the impugned prosecutorial discretion in that case was amenable to judicial review and that the High Court had the jurisdiction to grant the relief it did.

[60] Nonetheless, it does not necessarily mean that the Federal Court's detailed articulation of what must be shown at the leave stage is likewise *ratio decidendi* of the case. The grant of leave in *Sundra Rajoo* had already occurred; the Court of Appeal's decision in *Sundra Rajoo v. Peguam Negara Malaysia (supra)* was not appealed against and was not a live issue before the Federal Court.

[61] The appeal before the Federal Court in *Sundra Rajoo* was against the Court of Appeal's decision on the substantive merits of the judicial review in *Menteri Hal Ehwal Luar Negeri, Malaysia & Ors v. Sundra Rajoo Nadarajah (supra)*. It follows that the Federal Court's observations in paras 114 to 116 of *Sundra Rajoo* (referring to a "two-step threshold" at the leave stage) were not made in the course of deciding a question on leave.

[62] In *Arulpragasan Sandaraju v. PP* [1996] 1 MLRA 588, Edgar Joseph Jr FCJ cited with approval Cross' description of what constitutes *ratio decidendi* as a helpful guide:

> "The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the Judge as a necessary step in reaching his conclusion having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury".

[63] The Federal Court's observations in *Sundra Rajoo* on what must be shown at the leave stage, though unquestionably authoritative and deserving considerable respect, were not necessary to dispose of the appeal before them, which was on the substantive stage of the judicial review.

[64] For this reason, we regard those observations as not necessary to the disposal of the appeal and therefore properly characterised as *obiter dicta*, rather than a binding ratio on the specific question of the leave threshold. Nevertheless, they constitute significant guidance and must be applied with care.

[65] We find this distinction important because it avoids overstatement.

[66] To treat those observations as having created, by binding *ratio decidendi*, a wholly separate leave regime for prosecutorial discretion would, in our view, create doctrinal and practical difficulties:

- First, it would be difficult to reconcile with O 53 itself, which creates one leave jurisdiction, not two.
- Secondly, it would introduce uncertainty by requiring courts, at the threshold stage, to classify cases into different leave categories and to determine the exact content of a supposedly different test.
- Thirdly, it risks collapsing the leave stage into a premature merits determination, especially given that art 145(3) cases will often involve facts and reasons peculiarly within the executive's knowledge.
- Fourthly, it would be contrary to the principle expounded in *Young v. Bristol Aeroplane*, where the Court of Appeal may only depart from its earlier decisions in three situations, namely: where there are conflicting decisions of the Court of Appeal itself; where a previous decision is inconsistent with a Federal Court judgment, or where the earlier decision was made *per incuriam*.

[67] As the Court of Appeal's leave decision in *Sundra Rajoo Nadarajah v. Peguam Negara Malaysia (supra)* neither conflicts with a Federal Court judgment nor any earlier decision of the Court of Appeal, and was not made *per incuriam*, this Court is bound by it.

Our Findings On Issues 1 And 2

[68] Accordingly, to give proper effect both to O 53 and to the Federal Court's guidance in *Sundra Rajoo*, we hold as follows:

(a) Order 53 does not prescribe different leave thresholds. It prescribes a single test for leave;

(b) that test is whether the application for judicial review discloses an arguable case that is not frivolous; and

(c) where the application for judicial review concerns the exercise of prosecutorial discretion under art 145(3), the single leave test under O 53 must be applied with particular discipline, caution and restraint, having regard to: (i) the constitutional status of the Attorney General, (ii) the presumption of legality, (iii) the doctrine of separation of powers, and (iv) the principle that judicial review in prosecutorial discretion is confined to appropriate, rare and exceptional cases.

[69] The Federal Court's reference to "compelling and *prima facie* proof" should not be read literally as requiring proof of the whole case at the leave stage.

[70] Rather, it emphasises that in applications involving prosecutorial discretion, the applicant must move beyond bare assertion and show a properly particularised complaint grounded on objective material already available. The requirement is one of sufficiency of available material, not completeness of proof.

[71] In our judgment, this reading accords with the *ex parte*, affidavit-based structure of leave applications under O 53.

[72] To interpret *Sundra Rajoo* as requiring near-conclusive proof at the leave stage would be inconsistent with the procedure under O 53 and the settled distinction between the leave threshold and the substantive merits of judicial review.

Issue 3: Has The Appellant Met The Requisite Leave Threshold In Its Application For Judicial Review Of The Attorney General's Impugned Decision?

[73] In determining whether the Appellant has met the threshold for leave, this Court asks whether the application under O 53 raises an arguable case that is not frivolous on recognised public law grounds, including illegality or irrationality.

[74] Secondly, because the application concerns prosecutorial discretion under art 145(3), the Court must apply that test with particular discipline, caution and restraint, having regard to: (i) the constitutional status of the Attorney General;

(ii) the presumption of legality; (iii) the doctrine of separation of powers; and (iv) the "appropriate, rare and exceptional" nature of the case.

[75] It is important to remember that, while the Appellant's challenge to the impugned decision raises serious questions concerning the legality, rationality and/or proper limits of prosecutorial discretion, those questions are to be determined at the substantive stage of the judicial review. It would be wrong, at the leave stage, to dispose of such questions by treating the constitutional status of the Attorney General's prosecutorial discretion as if it were, in itself, an answer to the application. His discretion is undoubtedly wide. However, as held by the Federal Court in *Sundra Rajoo*, it is not immune from judicial review.

[76] Additionally, the presumption of legality in favour of the Attorney General's prosecutorial decision remains relevant. It reflects the constitutional status of the office and the institutional competence of the Public Prosecutor. Nonetheless, it is a rebuttable presumption. It cannot operate as an absolute bar to leave where the applicant identifies facts which, if proven to the required standard, are capable of showing illegality, irrationality, *mala fides*, and/or the taking into account of irrelevant considerations. The weight to be given to that presumption must be calibrated to the nature of the decision under challenge. A decision to commence a prosecution is not the same as a decision to discontinue a prosecution after a criminal court has already found a *prima facie* case and called for the defence.

[77] That difference is material. The Appellant argued that the threshold should be lower, or at least less exacting, where the challenge is to a decision not to prosecute or to discontinue proceedings than where the challenge is to a decision to prosecute. It relies on *R(B) v. Director Of Public Prosecutions* [2009] EWHC 106 (Admin), which was referred to by the Federal Court in *Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal (supra)*, for the proposition that the exercise of judicial review is less rare in the case of a decision not to prosecute because a decision not to prosecute is final in a way that a decision to prosecute is not, since the defendant may still challenge the prosecution in the ordinary criminal process. It also relies on *R v. DPP, ex p Manning* [2001] QB 330, in which Lord Bingham CJ observed:

> "the standard of review should not be set too high where judicial review is the only means by which the citizen can seek redress against a decision not to prosecute, else an effective remedy would be denied."

[78] We find force in the Appellant's argument. A decision to prosecute can often be challenged within the criminal process itself, such as by contesting the evidence, raising abuse of process arguments, making submissions at the close of the prosecution's case, calling evidence, and, where appropriate, appealing. By contrast, a decision not to prosecute, or to discontinue a prosecution, may have a final practical effect and remove the matter from judicial determination.

[79] In such a case, judicial review may be the only practical means by which the legality or rationality of the Attorney General's decision-making process can be examined. This does not mean leave must be granted as a matter of course. It means only that the presumption of legality cannot be used to shut out judicial review where the challenge is supported by identified and serious matters.

[80] In the present case, the significance of the criminal court's finding must not be understated. By that stage, the prosecution had closed its case, and a *prima facie* finding had been made on all 47 charges; the defence had commenced. The criminal court's finding was not merely a formal step. The Federal Court in *Arulpragasan Sandaraju v. PP (supra)* explained the importance of the court's evaluative function at the close of the prosecution case. The court is required to scrutinise and evaluate the evidence before deciding whether the accused should be called upon to answer the charge.

[81] The same principle was reaffirmed and clarified in *PP v. Mohd Radzi Abu Bakar* [2005] 2 MLRA 590, FC. The Federal Court held that, after the amendments of ss 173(f) and 180 of the CPC, the court must undertake a maximum evaluation of the prosecution's evidence before calling for the defence. The exercise involves an assessment of the credibility of prosecution witnesses and the drawing of inferences admitted by the prosecution's evidence. If, after such maximum evaluation, a *prima facie* case is made out, the defence must be called; and if the accused elects to remain silent, the court must proceed to convict.

[82] In this case, by the time the DPP conveyed the Attorney General's decision to discontinue the prosecution and seek a DNAA, the prosecution case had passed beyond the stage of mere allegation. The prosecution's evidence had undergone maximum evaluation by the trial judge, and the defence had already commenced.

[83] To our mind, viewed from that context, the Appellant's argument that the impugned decision was irrational or unreasonable in the public law sense is plainly arguable and is not frivolous. The Appellant's complaint is not that the Attorney General was bound to continue the prosecution merely because the trial court had found a *prima facie* case. Instead, it is that, given the prior maximum evaluation by the criminal court, the advanced stage of the proceedings, and the absence of any definite timeline for the proposed further investigation or the RCI, there is an arguable question whether there was cogent justification for the Attorney General's decision to discontinue the prosecution. Whether such justification exists is a matter for the substantive hearing, and not for determination at the leave stage.

[84] We also note the reasons the DPP advanced in support of the application for a DNAA. They included the need to re-examine defence testimonies and the representations; concerns about the earlier investigation; possible selective prosecution; matters said to arise from the proposed RCI concerning the

former Attorney General's memoir; and an internal memorandum circulating on social media. The DPP also referred to the possibility that the Attorney General's Chambers and the Malaysian Anti-Corruption Commission may have been manipulated or exploited by certain parties.

[85] These are serious matters. At the leave stage, they raise a legitimate question whether the discretion was exercised with proper considerations, or whether extraneous or insufficiently grounded matters may have entered the decision-making process.

[86] Further, the Public Prosecutor's Direction No 2 of 2019 provides relevant context. It states that where a trial has commenced, and witnesses have testified, the decision would ordinarily be to reject representations and allow the trial to complete; only in very exceptional cases should discontinuance occur after the trial has started. It also states that trials should proceed in parallel while representations are being considered and should not be postponed merely because representations have been made. The Public Prosecutor's Direction does not remove the Attorney General's constitutional discretion. It expressly preserves that discretion. However, it is relevant at the leave stage because it shows that prosecutorial authority itself recognised the exceptional nature of discontinuance after trial has commenced.

[87] The 2nd respondent was charged when he did not hold public office. After the prosecution had established a *prima facie* case, he was appointed Deputy Prime Minister. Thereafter, six representations were made, and the prosecution ultimately sought a DNAA. To be clear, the Court makes no finding at this stage whether the decision was politically influenced; that would be premature. The chronology is relevant only to the question of whether the complaint is arguable at leave, not as proof of improper purpose. But the sequence of events, when considered together with the advanced stage of the trial and the reasons advanced by the DPP for discontinuance, is sufficient to render the Appellant's complaint arguable rather than speculative.

[88] Properly characterised, therefore, the Appellant's challenge is not an attempt to convert judicial review into an appeal against the Attorney General's prosecutorial discretion. Nor is it an invitation to this Court to reassess the sufficiency of the prosecution's evidence. The challenge is directed at the legality and rationality of the decision-making process, i.e., whether relevant considerations were disregarded, whether irrelevant considerations were taken into account, whether the reasons advanced were capable of rationally justifying discontinuance at that late stage, and whether the decision was consistent with the proper administration of criminal justice.

[89] In our judgment, those matters cross the threshold for leave in an application for judicial review of the Attorney General's prosecutorial discretion. The challenge is to the legality and rationality of the decision-making process.

[90] The case is "appropriate, rare and exceptional" because several factors converge: the seriousness of the charges; the public interest in corruption prosecutions; the *prima facie* finding after maximum evaluation; the calling of the defence; the extent of proceedings already undertaken (including 99 prosecution witnesses over 53 days of trial and 15 defence witnesses); the timing and number of representations; and the practical finality of the discontinuance.

Findings On Issue 3

[91] We therefore hold that the application is not frivolous and discloses serious and arguable public law issues that should be heard at the substantive stage. This is also an appropriate, rare and exceptional case in which judicial review of the Attorney General's prosecutorial decision is warranted.

[92] Accordingly, we find that applying the single leave test under O 53 with the higher level of discipline required by *Sundra Rajoo*, the Appellant has met the threshold for leave.

Issue 4: Was The Learned High Court Judge Right To Refuse Leave On The Basis That The Appellant Had Failed To Adduce "Compelling And *Prima Facie* Proof" As Contemplated By The Federal Court In *Sundra Rajoo*?

[93] The learned High Court Judge approached the Appellant's application for leave on the basis that it was required — based on *Sundra Rajoo* — to produce evidence which would inevitably establish the grounds of review on a *prima facie* basis. His Lordship held:

> [50] In this regard, it was clearly propounded by the Federal Court, that the burden on the applicant is onerous, in that, **the court is 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 adduced by the applicant singularly leads to the inevitable conclusion that they have been made out**.
>
> [51] I have considered each of the matters raised by the applicant and even if the applicant relies on the grounds of illegality and/or irrationality, **I hold that the grounds are not made out as there is no evidence adduced by the applicant that singularly leads to the inevitable conclusion that either or both grounds have been made out on a *prima facie* basis**. The applicant has therefore failed to meet the two-step test. The presumption of legality of the Attorney General's decision to discontinue the criminal proceedings has not been rebutted by compelling and *prima facie* proof. Thus, the application for leave would also have been dismissed if the above submission had been pleaded properly by the applicant.
>
> [Emphasis added]

[94] It is evident from his grounds of judgment that His Lordship treated the Federal Court's observations in *Sundra Rajoo* as constituting a binding and separate leave test, without first addressing whether those observations formed part of the *ratio decidendi* of the decision. The approach he took had the effect

of collapsing the threshold inquiry into a determination of the merits of the reliefs sought in the judicial review.

[95] We find that although the learned Judge applied the correct authority, namely *Sundra Rajoo*, he applied it without regard to its proper juridical context. For the reasons explained under Issues 1 and 2 above, the passages in *Sundra Rajoo* referring to a "two-step threshold" at the leave stage were not necessary to the disposal of the appeal and should not be treated as having rewritten the orthodox leave test under O 53. At the leave stage, the question is whether the applicant has disclosed an arguable case that is not frivolous. In art 145(3) cases, that test must be applied with greater discipline, caution and restraint, having regard to the constitutional status of the Attorney General, the presumption of legality, the doctrine of separation of powers, and the "appropriate, rare and exceptional" nature of the case.

Findings On Issue 4

[96] For these reasons, we find that the learned High Court Judge erred in refusing leave for judicial review of the Attorney General's impugned decision on the basis that the Appellant had failed to adduce "compelling and *prima facie* proof" at the leave stage.

Issue 5: Is The Proposed Challenge An Impermissible Collateral Attack On The Criminal Court's Order, Or Is It Properly Directed At An Antecedent Executive Decision Amenable To Judicial Review?

[97] The Respondents contend that the Appellant's application for leave to commence judicial review against the impugned decision amounts to an impermissible collateral attack on the criminal court's order granting a DNAA for all the charges against the 2nd respondent.

[98] Learned counsel for the 2nd respondent relies on the trial judge's observation in his ex tempore judgment that the prosecution had advanced "cogent" reasons for discontinuing the prosecution and seeking a DNAA.

[99] As explained by the majority decision of the Federal Court in *Vigny Alfred Raj Vicetor Amratha Raja v. PP (supra)*, the default consequence of a discontinuance under s 254 of the CPC is a DNAA unless the court directs otherwise.

[100] The criminal court cannot compel the Attorney General, in his role as Public Prosecutor, to proceed with a prosecution once he has decided to discontinue it. The decision whether to continue or discontinue remains within the Attorney General's constitutional responsibility under art 145(3) of the Federal Constitution.

[101] It follows that the criminal court's DNAA order is the statutory consequence of the executive decision to discontinue.

[102] Thus, once s 254 of the CPC is invoked, the trial judge's function is narrowly confined to determining whether the discharge should amount to an acquittal or not. A judge of the criminal court does not ordinarily adjudicate on the public law legality of the Attorney General's decision to discontinue and seek a DNAA.

[103] In the present case, the learned trial judge's observation of "cogent reasons" related to the choice between a DNAA (sought by the prosecution) and a DAA (sought by the accused). It was not a finding on the legality, rationality and/or reasonableness of the Attorney General's underlying executive decision to discontinue the prosecution.

[104] Since the criminal court's DNAA order was a procedural consequence of the Attorney General's impugned decision, the Appellant is not attacking the criminal court's order granting a DNAA.

[105] What it challenges is the executive root of that order, i.e., the Attorney General's decision to discontinue the prosecution in respect of the charges against the 2nd respondent and to seek a DNAA.

[106] The Federal Court in *Sundra Rajoo* makes clear that the Attorney General's prosecutorial decisions are executive in nature, and that in appropriate, rare and exceptional cases, such prosecutorial decisions are amenable to judicial review.

[107] Whether such decisions are illegal, irrational and/or unreasonable is a matter for the High Court's supervisory jurisdiction, exercised through judicial review.

[108] The criminal trial process is not designed to determine whether a prosecutorial decision to discontinue is vitiated by public law error.

Findings On Issue 5

[109] We therefore find that the Appellant's application for judicial review was not a collateral attack on the criminal trial court's order of a DNAA in respect of all the 47 charges against the 2nd respondent.

D. Conclusion

[110] For these reasons, we respectfully disagree with the High Court's refusal of leave. In our view, the High Court applied an unduly exacting standard at the leave stage and went too far into matters properly reserved for the substantive hearing.

[111] We are satisfied that the Appellant's proposed challenge to the Attorney General's impugned decision is arguable and not frivolous. It rests on recognised public law grounds and is supported by objective material already available before the High Court. Leave ought therefore to have been granted.

E. Decision

[112] Accordingly, for the above reasons, our decision is as follows:

(a) The appeal is therefore allowed;

(b) The Order of the High Court dated 27 June 2024 is set aside;

(c) Leave is granted to the Appellant to commence judicial review against the Attorney General's impugned decision; and

(d) The matter is remitted to the High Court for the substantive hearing of the judicial review.

[113] There is no order as to costs.