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**PRINCIPAL**

**TAN SRI DATO' SRI DR. MUHAMMAD SHAFEE ABDULLAH,**  
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BPTC (Lincolns)  
**WEE YEONG KANG,** LL.B. (HONS) MMU

Our Ref: S4308 MSA/MFS/RH/WA

Your Ref:

7th August 2018

**Y.A.A. TAN SRI ZAHARAH BINTI IBRAHIM**

**Hakim Besar Malaya**

Kamar Hakim Besar Malaya

Mahkamah Persekutuan Malaysia

Aras 5 Selatan, Istana Kehakiman, Presint 3

62506 Putrajaya.

*(Menerusi Setiausaha Yang Amat Arif)*



73099

Yang Amat Arif Tan Sri,

**RE: (1) PUBLIC PROSECUTOR V DATO' SRI MOHD NAJIB BIN TUN HAJI  
ABDUL RAZAK  
CRIMINAL CASE NO. WA-45-2-07/2018  
CRIMINAL CASE NO. WA-45-3-07/2018  
(2) CHANGE OF JUDGE HEARING THE TRIAL AND PROCEEDINGS**

Terlebih dahulu, kami merakamkan setinggi-tinggi tahniah diatas pelantikan Y.A.A. Tan Sri sebagai Hakim Besar Malaya yang mana kami pasti Y.A.A. Tan Sri akan laksanakan tugas tersebut dengan cemerlang dan berlandaskan lunas undang-undang etika dan keperluan kehakiman yang tidak berbelah bahagi. Dengan izin, kami teruskan surat ini didalam Bahasa Inggeris.

We represent Dato' Sri Mohd Najib Bin Tun Abdul Razak ("DS Najib") in the above proceedings.

We have been reliably informed that the Honourable judge, Dato' Indera Mohd. Sofian Abd. Razak ("Justice Sofian") has been transferred from being a judge in the High Court Criminal Division (No. 3) to the Kuala Lumpur High Court Civil Division (No. 10). The Honourable Judge, Justice Mohd Nazlan bin Mohd Ghazali ("Justice Nazlan") has now taken over the Kuala Lumpur High Court Criminal Division (No. 3) with effect from the 1<sup>st</sup> of August 2018. This effectively means that the above cases involving DS Najib will now be presided by Justice Nazlan instead of being continued in hearing by Justice Sofian. As Y.A.A. Tan Sri is fully aware, DS Najib's case has been fixed for case management and hearing of an application of a "gag" order this coming Wednesday, 8<sup>th</sup> of August 2018.

On that note, we would like to register our comments as follows:-

1. The defence has no objection to any judge in the Criminal Division in the Kuala Lumpur High Court hearing these cases. Given the credentials of Justice Nazlan, we have every confidence in the selection of Justice Nazlan to preside over the above cases. Had Justice Nazlan been a judge in the Criminal Division on the day our client was charged, Justice Nazlan would have been a qualified and suitable as any other judges in that division as Justice Sofian was.
2. Our client and us, however, are concerned about the process of transfers of the affected judges in the Criminal Division in the midst of a created controversy, purportedly of Justice Sofian's possible bias in view of the fact that his older brother is the chief of an UMNO Division in Pahang (Benta). He is also the state

executive councillor and Benta UMNO state assembly man and that DS Najib, until recently (12<sup>th</sup> May 2018) was the UMNO President and continue to be an ordinary member of UMNO, and UMNO Division Chief in Pekan.

3. From the outset, we state categorically for the record that the defence did not request for Justice Sofian to preside over the above cases, rather his Lordship, we are told, was selected by strict adherence to due process of the Court. This matter was subsequently confirmed by the Federal Court Chief Registrar's office in a statement issued on 6<sup>th</sup> July 2018, namely, that the selection of Justice Sofian to preside over the above cases was done randomly through the Court e-filing portal. Parties would confirm that we were made to wait in the Kuala Lumpur Sessions Court (No. 2) for about an hour before we were told that the matter was being transferred to the Kuala Lumpur High Court Criminal Division (No. 3), presided by Justice Sofian.

4. There have been some allegations of bias against Justice Sofian which the defence believes are wholly unwarranted, unjustified and baseless in fact and in law. Justice Sofian was not afforded the opportunity to consider if on that basis alone, he should consider recusing himself upon an application by any party or on his own volition. In law, Justice Sofian has no legitimate reason to recuse himself, as the highest judicial authorities in the Commonwealth and here have held that:

- (i) When a possible disqualification of a judge does not relate to his financial or proprietary interest in the outcome of a case (an automatic disqualification case situation), which this is not, then the only other consideration is apparent bias (see House of Lords decision in *Ex Parte Pinochet Ugarte (No. 2) (1999)*)



*1 All ER 577 at 586* per Lord Browne-Wilkinson). In an apparent bias situation, the judge is not in any way a party to the proceeding but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial for example because of his friendship with a party (an example of this is demonstrated in the Federal Court case of *Dato' Tan Heng Chew v. Tan Kim Hor (2006) 2 MLJ 293*, which relate to the conduct of a judge).

(ii) And in *Locabail v Bayfield (2000) 1 All ER 65 at 77*, the Court of Appeal following *Pinochet (No. 2)* through Lord Bingham, Lord Woolf and Sir Richard Scott opined that an objection cannot be soundly taken on a judge's employment background or history, nor that of any member of the judge's family, or persons political associations, among others. This principle has been consistently applied in the Malaysian's jurisdictions from the High Court, Court of Appeal and the Federal Court. See:

(a) Decision of YA Dato' Mary Lim Thiam Suan in the case of *Pembinaan BLT Sdn Bhd v. Debessa Development Sdn Bhd [2015] 9 MLJ 335*; and

(b) Decision of YA Tuan Nantha Balan a/l E.S. Moorthy in the case of *Glomac Resources Sdn Bhd v. Majlis Agama Islam Wilayah Persekutuan & Anor [2016] 9 MLJ 584*.

(iii) The test for bias is "real danger of bias", nothing less. "Discomfiture" as sometimes wrongly advocated by some less informed legal quarters as a relevant consideration, is not a test known in law for recusal. A judge who

succumbs to recusal when legally it is wrong to do so is criticized by the Apex Court in Australia in *Livesey v. New South Wales Bar Associations (1983) 151 CLR 288 at 294* (Mason, Murphy, Brennan, Deane and Dawson JJ) in a terse manner:

*“It would be an abdication of judicial function and an encouragement of procedural abuse....”*

5. Evidently, Y.A.A. Tan Sri, the call by some quarters like the Bar Council and the G25, to name a few, for Justice Sofian to recuse himself was made without any legal basis nor relevant considerations.
6. Justice Sofian has no reasons to recuse himself and therefore need not have to disclose his elder brother’s position in UMNO politics. In the circumstances, he has no such duty in law.
7. Ironically, all concerned parties in the proceedings have not applied for Justice Sofian to be recused.
8. Given the high-profile nature of this case, we are very concerned that Justice Sofian was transferred without an opportunity being given to the learned judge (in consultation with parties) to decide on his recusal in an open court setting in a transparent manner. As it stands, Justice Sofian may be adversely viewed by the public due to his sudden transfer in the midst of a created controversy. Justice Nazlan too is placed in a position of discomfort as he may possibly be viewed (although we are confident this is not the case) as “a judge with a mission”. The lack of open court resolution of this impasse would breed public discomfiture against Justice Nazlan and the administration of justice as a whole. Neither of the

Justices are able to issue statements to the public to explain their conduct or predicament and this is well encapsulated in Lord Denning's reminder to us in *Blackburn (2) (1968) 2 All ER 319 at 320*:

*".... All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to the criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our own conduct itself to be its own vindication."*

However, Justice Sofian has no such opportunity to allow his own conduct to vindicate himself through that open court process.

9. Section 15 of the Courts of Judicature Act 1964 exists for a purpose. It provides for justice, prima facie, to be dispensed with an open court setting in the presence of the public and the press. It is here that a decision ought to be made for recusal by Justice Sofian and whatever the decision is, it would receive appropriate publicity and would save the day for justice.

*"Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial."* – (*Home Office v. Herman (1982) 1 All ER 532* – Lord Diplock quoting Jeremy Bentham)

Non-open decision making justice is, therefore, anathema to judicial independence and fairness.

10. The transfer of Justice Sofian at this stage may be prejudicial to our client's constitutional right to a fair trial. Justice Sofian has already heard and dealt with some preliminary matters.
  
11. Y.A.A. Tan Sri, we respectfully write to Y.A.A. to place these matters on record as both our client and ourselves, the latter as officers of the Court, feel compelled to raise these matters as they affect both the administration of justice and the integrity of the judiciary to which we are all beholden. The process of justice is not the sole monopoly of the judiciary. All stakeholders have rights and duties to draw to Y.A.A.'s attention matters of this sort as we believe that:

*"Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men." - (Per Lord Atkin in **Amard v AG of Trinidad & Tobago (1963) 1 All ER 704 at 709**).*

Independence of the Judiciary is sacrosanct. We need only be reminded of how we lost the respect and confidence of having an independent judiciary in the 1988 Judicial Crisis. We have not fully recovered from that.

12. In light of the above, Y.A.A. Tan Sri, this letter is merely to place our client's and our concern on record so that we are not faulted subsequently for not raising the same. In view of the importance and magnitude of the matters raised herein, we have been instructed by our client to place the same on record in open court.



Segala usaha dan perhatian Yang Amat Arif dalam hal ini, amatlah dihargai.

Sekian, terima kasih.

Yang benar,

  
TAN SRI DR. MUHAMMAD SHAFEE ABDULLAH  
Tetuan Shafee & Co.

S.k:

1) Setiausaha kepada

**YA Dato' Indera Mohd. Sofian bin Tan Sri Abd. Razak**  
Mahkamah Tinggi Kuala Lumpur (NCVC 10)  
Kompleks Mahkamah Kuala Lumpur  
Jalan Duta, 50480, Kuala Lumpur

Puan,

*Kami akan berbesar hati jika kandungan surat ini boleh dibawa kepada perhatian Yang Arif Hakim.*



2) Setiausaha kepada

**YA Tuan Mohd Nazlan bin Mohd Ghazali**  
Mahkamah Tinggi Kuala Lumpur (Jenayah 3)  
Kompleks Mahkamah Kuala Lumpur  
Jalan Duta, 50480, Kuala Lumpur

Puan,

*Kami akan berbesar hati jika kandungan surat ini boleh dibawa kepada perhatian Yang Arif Hakim.*





3) **ATTORNEY GENERAL OF MALAYSIA**

Attorney General's Chambers  
Presint 4, 62100  
Putrajaya, W.P. Putrajaya



SERAHAN TANGAN

4) Anakguam

SERAHAN TANGAN

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