

Court Upholds Right to Criticise Public Administration

By Claudia Cheah Pek Yee & Wong Juen Vei

Claudia Cheah Pek Yee and Wong Juen Vei explain a landmark decision by the Court of Appeal. In the recent landmark case of *Utusan Melayu (Malaysia) Berhad v Dato' Sri DiRaja Haji Adnan Bin Haji Yaakob* [2016] 5 CLJ 857 ("Utusan Case"), the Court of Appeal held that government and public officials cannot sue for defamation in their official capacity.

Background Facts

The Plaintiff, Dato' Sri DiRaja Haji Adnan Bin Haji Yaakob, is the elected representative for the State constituency of Pelangai and the Chief Minister of the State of Pahang. The Defendant, *Utusan Melayu (Malaysia) Berhad*, is the printer and publisher of a newspaper, *Mingguan Malaysia*, which is published every Sunday and available to the general public throughout Malaysia. The subject matter of the action concerned an article published on 9 Nov 2014 in a regular news analysis column of *Mingguan Malaysia* entitled "Hebat Sangatkah Adnan" ("Article"). The Plaintiff claimed that the Article has defamed him as it, inter alia, contained allegations which meant and were understood to mean that the Plaintiff had failed to carry out his duties as the Chief Minister of the State of Pahang and that he is unsuited to hold the position as the Chief Minister of that State. The Defendant applied for an order to strike out the Plaintiff's action on the grounds that it was scandalous, frivolous and vexatious and an abuse of the process of the court. The Defendant argued that the Article was a critique of the Plaintiff's administration as the Chief Minister of Pahang and the Plaintiff lacked locus standi to initiate and maintain the action in such official capacity.

Decision of the High Court

In response to the Defendant's contention that the Plaintiff lacked locus standi to initiate and maintain the action in his official capacity, the High Court noted that the Plaintiff's name was cited without reference to his official position as the Chief Minister of the State of Pahang. The High Court also noted that the Plaintiff was referred to as "Adnan" or "beliau" (i.e. 'he') at least 20 times in the Statement of Claim. On the basis of the foregoing, the High Court held that the Plaintiff was suing in his personal capacity and not his official capacity and dismissed the Defendant's application to strike out the Plaintiff's claim. The Defendant, dissatisfied with the High Court's decision, appealed to the Court of Appeal.

Decision of the Court of Appeal

The Court of Appeal by a unanimous decision allowed the Defendant's appeal and struck out the Plaintiff's claim. The Court of Appeal adopted the principle set out by the English House of Lords in *Derbyshire County Council v Times Newspapers Ltd* [1993] 1 All ER 1011 ("Derbyshire Principle"). In the case of *Derbyshire*, the *Derbyshire County Council* ("Council") sued the *Sunday Times Newspaper* for defamation in respect of articles published by the newspaper which questioned the propriety of certain investments made by the Council using monies in the superannuation fund. In dismissing the Council's claim, the House of Lords took the view that it is of the highest public importance that a democratically elected governmental body should be open to uninhibited public criticisms and that it would be contrary to public interest to fetter freedom of speech by restraining public critiques of such bodies. The Court of Appeal in the *Utusan Case* held that the *Derbyshire Principle* should apply alike under and be part of the Malaysian defamation law. The Court pointed out that the right of citizens to discuss or criticise the government and public officials is an integral part of the right to freedom of speech and expression which is already well-entrenched in Article 10 Clause (1)(a) of the Federal Constitution. Hence, this fundamental right must be given due recognition and protected as one which is guaranteed by the Federal Constitution and should not be inhibited by the threat of civil actions for defamation. The Court of Appeal also examined the provisions in the *Defamation Act 1957* and found that the said Act does not provide for the government or any individual members in the government who have conduct of public affairs to sue for defamation in their official capacity. Thus, the constitutional guarantee under Article 10 Clause (1)(a) remains intact and every citizen has the right to freedom of speech and expression including the right to discuss the government and public officials, as long as it is exercised within the permissible restrictions imposed by law. The Court of Appeal also provided a further reason for its conclusion that governments, public offices and bodies have no locus standi to sue



CLAUDIA CHEAH - PARTNER (SKRINE)

Claudia graduated from University of Manchester in 1997 and was admitted to the Malaysian Bar in 1999. She is currently a Partner in the Dispute Resolution Division. Her main areas of practice are Arbitration, Banking, Bankruptcy/Insolvency, Corporate & Commercial Disputes, Defamation, Wills and Probate Disputes.

for defamation. According to the Court, defamation is personal in nature and abates with the death of the complainant Plaintiff as provided under section 8(1) of the Civil Law Act 1956. However, governments, public offices and bodies go on, almost forever until and unless there is a change of law.

The Court of Appeal noted that the Derbyshire Principle does not restrict the right of an individual holding public office from suing in a defamation action in his personal capacity where individual reputation is wrongly impaired. On the facts of the case, the Court of Appeal found that the Article, when read as a whole undoubtedly concerned the Plaintiff as the Chief Minister of the State of Pahang. A detailed perusal of the Plaintiff's pleadings also showed that the Plaintiff was suing in his official capacity as Chief Minister in respect of matters relating to the manner in which he conducts the affairs of the State and performs his official functions. The Court of Appeal agreed with the Defendant's submissions that as an elected representative and Chief Minister, the Plaintiff must be open to public criticism and hence ought to be precluded from suing for defamation in his official capacity.

Safeguards for Government and Public Officials

The Court of Appeal was mindful of the effect of its decision and interposed a note of caution that despite this decision, there are sufficient safeguards to protect the government and public officials from onslaughts on their reputation through malicious statements or falsehoods relating to their official performances. Where the right of freedom of speech and expression is abused or where any person by speech or writing seeks to calumniate any public authority or officials with malicious falsehood or false statements, the government through the Public Prosecutor could initiate prosecutions under various laws such as the Sedition Act 1948, the Penal Code, the Printing and Presses Publications Act 1984 and the Communications and Multimedia Act 1998. These would, in the opinion of the Court, be a more appropriate recourse to thwart the menace of malicious defamatory publications or words.

According to the Court of Appeal, another recourse available to government and public officials to protect their reputation is to defend themselves by public explanations or rebuttals, and through debate in the legislative body. The Court opined that government and public officials would be expected to convene press conferences to respond precisely to such publications. A responsible mainstream media organisation, practising its own media ethics with specific ethical principles and media standards, would be duty bound to publish this reaction or response so that the public can have access to balanced and fair reporting. With these safeguards in place, the Court of Appeal ruled that their decision is not discriminatory and would not stifle or stultify the rights of the government and public officials to protect their reputation and good name.

Comments

The Court of Appeal's decision in the Utusan Case is to be lauded as it recognises and upholds the fundamental right to freedom of speech and expression guaranteed under Article 10 of our Federal Constitution. Democratically elected government and public officials must be ready to accept public critique of their conduct of public affairs from members of the public as well as media organisations.

Editor's Note: The Plaintiff applied for leave to appeal to the Federal Court against the decision of the Court of Appeal.

Editor's Note II: On 13 February 2017, the Federal Court set aside the March 2016 decision of the Court of Appeal. Therefore, it has been decided that the defamation suit against the publisher will proceed to the High Court for trial.

The Federal Court Judge held that the question of whether a public official, in his legal capacity, could bring a suit to obtain legal remedy, could only be determined after a full trial i.e. after the merits of the case have been heard.

Further reading:

<http://www.freemalaysiatoday.com/category/nation/2017/02/13/high-court-to-hear-pahang-mbs-defamation-suit-against-utusan/>
 "This Article was first published in Issue 3/2016 of Legal Insights, a Skrine Newsletter. Reproduced with permission of Skrine."

Claudia (cpy@skrine.com) is a Partner in the Dispute Resolution Division of SKRINE. Her practice areas include banking litigation, land disputes and defamation. Juen Vei (wong.juen.vei@skrine.com) is an Associate in the Dispute Resolution Division of SKRINE. He graduated from Cardiff University in 2014.



**WONG JUEN VEI - ASSOCIATE
(SKRINE)**

Juen Vei graduated from Cardiff University in 2014. He started pupillage in Skrine and was admitted to the Malaysian Bar in August 2016 and thereafter, joined as an Associate with the Dispute Resolution Division in 2016. His areas of practice are Civil Litigation, Professional Liability, Defamation and Bankruptcy/Insolvency.