

IN THE HIGH COURT OF MALAYSIA AT KUALA LUMPUR  
(CRIMINAL DIVISION)

**PUBLIC PROSECUTOR**

*against*

**KARPAL SINGH**

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**FIRST REPORT BY LAWASIA OBSERVER MARK TROWELL QC  
OBSERVER ALSO FOR THE AUSTRALIAN BAR ASSOCIATION AND  
LAW COUNCIL OF AUSTRALIA**

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## **Background**

### *The Anwar Trials*

1. In April 1999, the Deputy Prime Minister of Malaysia, Datuk Seri Anwar bin Ibrahim, was convicted after trial in the High Court at Kuala Lumpur of corruption and was sentenced by Justice Datuk Augustine Paul to six years imprisonment.
2. In September 1999, Mr Anwar again stood trial in the High Court at Kuala Lumpur this time before Justice Datuk Arrifin Jaka on a charge of sodomy.

### *The Offending Words*

3. One of the lead counsel appearing in the defence of Mr Anwar was prominent Malaysian lawyer Mr Karpal Singh, who had also formerly been a parliamentarian for the opposition *Democratic Action Party* (DAP). During the course of the trial, on the 10<sup>th</sup> September 1999, Mr Singh referred in open court to an Australian pathology report<sup>1</sup>, which referred to analyses of blood samples taken from the accused by his family at a time when he was in custody. The analyses revealed that abnormally high levels of arsenic had been found in his body.
4. Mr Singh spoke<sup>2</sup> of the dangerously high level of arsenic, stating that his client's family was alarmed at the position. He asked for an immediate adjournment so that Mr Anwar could be sent for medical treatment, adding that his client's life was obviously in jeopardy. Mr Singh went on to submit that an inquiry should be held and his client assessed by an independent overseas doctor. When Justice Jaka asked Mr Anwar how he felt, he replied that he did not feel his usual self and that he had lost both weight and hair.
5. Referring to the findings of the report (from which he was quoting), Mr Singh is alleged to have said words to the effect that:

"If he is slowly being poisoned, something must be done about it...It could well be that someone out there wants to get rid of him...even to the extent of murder...I suspect people in high places are responsible for this situation."
6. Mr Singh concluded by saying that whoever was responsible should be charged with attempted murder and that he had advised his client to lodge a police report to initiate an investigation.
7. Neither the trial Judge nor the Prosecutor (who was the then Attorney General, Sri Mohtar Abdullah) gave any indication that they were

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<sup>1</sup> *Gribbles Pathology Laboratory, Melbourne, Australia*

<sup>2</sup> *Account taken from New Straits Times report of 11<sup>th</sup> September 1999*

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concerned about the remarks, other than to agree that the allegation was serious and that an independent investigation was essential.

8. In response, the Attorney General cautioned against pointing the finger of blame too early or jumping to the conclusion that any poisoning was deliberate and said:

“It could be a case of deliberate poisoning by someone or some persons unknown whether in prison or in the precinct of the court or it could be accidental poisoning through food or drink consumed by the accused not only in prison, but in this court precinct...As the Public Prosecutor, I give assurance if evidence shows a deliberate criminal act to injure or poison Datuk Seri Anwar, I will act and leave no stone unturned”

9. Justice Jaka ordered that the accused be sent to hospital for examination.
10. Doctors from Malaysia, England and Australia subsequently performed analyses on urine and hair samples taken from the Mr Anwar. The results are unclear, but it seems that although traces of arsenic were found, they were not at dangerous levels. Malaysian doctors did confirm that Mr Anwar's physical symptoms were real and suggested that his condition be monitored. Of course, one might speculate that following the disclosure of the presence of arsenic in Mr Anwar's blood, had the poison then ceased to be administered to him, then its levels most obviously would have reduced significantly.

#### *Karpal Singh Charged with an Act of Sedition*

11. A month later, on 8<sup>th</sup> October 1999, the Public Prosecutor (as he was required to do under Section 5 of the *Sedition Act 1948*) authorised the prosecution of Mr Singh for sedition for the utterance of the words quoted above and designated the High Court as the place for trial. Having been charged, Mr Singh was admitted to bail<sup>3</sup>. The trial was ultimately listed to be heard in the High Court at Kuala Lumpur on 16<sup>th</sup>-26<sup>th</sup> October 2001 before Justice Datuk Augustine Paul.
12. This was not the first time Karpal Singh had come into conflict with the Government. For over 28 years he had been an opposition member of parliament and for some time had been deputy-chairman of the *Democratic Action Party* (DAP), which had played a prominent role in criticising the government of Dr Mahathir.
13. Mr Singh had on one occasion been imprisoned in 1987 under the *Internal Security Act*, and had many times challenged the Government with such legal actions as *habeus corpus*<sup>4</sup>.

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<sup>3</sup> Bail was fixed at RM 3,000, with a surety in a similar amount

<sup>4</sup> See *Minister for Home Affairs Malaysia & Anor v Karpal Singh* [1988] 3 MLJ 29

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14. On one celebrated occasion in London, Prime Minister Mahathir was drawn in an interview to exhibit his particular animosity towards Mr Singh, as he spoke of some jocular talk in Cabinet about hanging and shooting “*all the lawyers*”. He made the following comment:

“I cannot be against all the lawyers. Only against some of the lawyers maybe. I don't see why I should like Karpal Singh, for example, but not all the lawyers. But there are some lawyers who of course go all out and say things, which are nasty. Then I would like very much to hang the lawyers, these particular lawyers. But of course this is just a wish. It is not going to materialise.”

15. Mr Singh had no doubt also provoked the Prime Minister by insisting that he be called as a witness at the second trial of Mr Anwar. His request for a *subpoena* was refused by Justice Jaka. Despite threats by Mr Anwar to abandon his defence, the trial continued. However, Mr Singh again indirectly attacked the Prime Minister submitting that Justice Jaka should disqualify himself from hearing the trial because of previous financial connections with Dr Mahathir's son. The application was refused. Less than two weeks later, the complaint of sedition was brought against Mr Singh.

#### *Other Persons Charged*

16. It is important to observe that on the same day as Mr Singh was charged with sedition, the following people were also arrested and charged: Mohamed Ezam Mohd Noor, a youth chief from the *Parti Keadilan*, arrested on charges of sedition under the *Official Secrets Act*, presumably for writing articles alleging government corruption; Zulkifli Sulong, editor of the opposition *Partie Islamic SeMalaysia* newspaper *Harakah*, also arrested under the *Sedition Act*; Chia Lim Thye, owner of the publisher of *Harakah*, arrested under the *Sedition Act*, and Marina Yusof, vice-president of the *Parti Keadilan*, arrested on charges of sedition. Police also issued reports against the newspapers *Utusan Malaysia* and *Harakah*.

#### *International and Domestic Reaction*

17. The response of the *Malaysian Bar Council* was immediate. It adopted a motion urging the chief prosecutor to withdraw the charge. The Council President, Sulaiman Abdullah went further, stating that the resolution:

“...sends a very strong signal to persons in authority that lawyers are not prepared to just lie down and die. They are going to stand up for what they believe are fundamental rights in order to carry out their obligations.”

18. *Amnesty International* also gave its support in a press release issued on 17<sup>th</sup> January 2000, stating that:

"Charging political leaders and journalists with sedition threatens to strike at the heart of free speech in a democratic society. Charging lawyers with sedition for statements made in court in defence of their clients threatens the rights of fair trial. When such prosecutions appear to fall solely on opposition figures, public confidence in the rule of law and administration of justice risks being seriously undermined."

19. On 18<sup>th</sup> January 2000, the President of the *International Bar Association*, Klaus Bohlhoff, wrote to the Malaysian Attorney General, Datuk Mohtar Abdullah, in the following terms:

Dear Attorney-General

The International Bar Association (IBA), a federation of 180 Bar Associations and Law Societies, themselves representing over 2.5 million lawyers, and over 18,000 individual member lawyers from 183 countries, is concerned to learn that lawyer, Karpal Singh, has been charged for sedition.

I understand that Karpal Singh, one of Datuk Seri Anwar Ibrahim's defence counsel, was arrested on 12 January 2000. Two days later he was charged under S 4(1) of the Sedition Act 1948 for remarks he made in court in the course of the defence of Datuk Anwar Ibrahim. He has been released on a bail of MR3 000.

Under international law, lawyers' immunity is guaranteed by Article 20 of the UN Basic Principles on the Role of Lawyers which states that: "Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority". In addition, Article 1 6(a) of the same Principles states that "Governments shall ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference".

As you can well appreciate this is a matter of concern and I should be grateful for any information you could provide as to the basis of the charges brought against Karpal Singh and why they do not contravene the important principles set out above.

Respectfully yours,

Klaus Bohlhoff  
President

20. By media release of 18<sup>th</sup> January 2000, the President of the *Law Council of Australia*, Dr Gordon Hughes, expressed the Law Council's concern over Mr Singh's arrest:

"The Law Council is appalled at the arrest of prominent Malaysian lawyer Mr Karpal Singh on charges under Malaysia's

Sedition Act" says the President of the Law Council of Australia, Dr Gordon Hughes.

"We are particularly concerned at news reports that the arrest of Mr Karpal Singh is directly related to his role as a high profile member of the defence team in the trial of former Deputy Prime Minister of Malaysia, Anwar Ibrahim.

"Another prominent member of the Anwar Ibrahim defence team, and a former President of the Bar Council of Malaysia, Mr Zainur Zakaria, has already been jailed for contempt relating to his comments -in the trial alleging fabrication of evidence by the prosecution.

"The intimidation of lawyers who act for clients in matters not popular with Executive Government strikes at the very foundation of an independent legal system, and is contrary to the *United Nations Basic Principles on the Role of Lawyers*.

"I have written to the President of the Bar Council of Malaysia expressing the Law Council's ongoing support and encouragement for its stand in defence of basic freedoms and the Rule of Law in Malaysia."

21. Many organisations were to express similar sentiments in the forthcoming months, some addressed their protests directly to the Attorney General
22. On 3<sup>rd</sup> February 2000, *The Bar Association of India* wrote to the Malaysian Attorney General advising him that two days previously it had resolved as follows:

"The Committee also expressed grave concern over the prosecution of Mr Karpal Singh, who is defending former: Malaysian Dy. Prime Minister, Anwar before Malaysian Courts. The Committee expressed solidarity with Mr Karpal Singh and assured him all full support against any attempts on the part of the Government of Malaysia to victimise and pressurise him so as to prevent him from his duty and obligations to defend his client."

23. On 11<sup>th</sup> February 2000, President Mervyn G. Encanto on behalf of *LAWASIA* also wrote to the Malaysian Attorney General in the following terms:

"One of *LAWASIA's* primary objects is to promote the administration of justice, the protection of human rights and the rule of law within the region

We wish to express our grave concern over the recent charges laid against Mr. Karpal Singh with regard to statements he

made in court during the course of the defence of Datuk Anwar Ibrahim

It is a matter of concern to us that the laying of charges against Mr Singh for words spoken in the course of his duty as lawyer compromises the fundamental principle of the independence of lawyers, and as such may have far-reaching consequences for the profession. We draw your attention to Articles 16 (a) and 20 of the *United Nations Basic Principles on the Role of Lawyers* and request that the principles stated therein be adhered to

Of equal concern to us are the recent actions taken to restrain our member organisation, the Bar Council Malaysia, from holding meetings and discussions with regard to matters that it considers to be fundamental in its role in relation to the administration of justice in Malaysia."

24. The Council of LAWASIA, at its meeting in Christchurch, New Zealand in October 2001, later followed up the press release of its President by resolving as follows:

"The LAWASIA Council strongly believes that counsel must be entitled to speak without fear or favour when representing their clients in court proceedings.

In particular, the Council strongly believes that practitioners should be free from the threat of outside interference or intimidation relating to statements made in the course of court proceedings."

### ***The Charge of Sedition***

25. The charge against Karpal Singh has been brought under the *Sedition Act 1948 (Akta Hasutan 1948)*.

#### ***The Charge Brought Against Karpal Singh***

26. The charge reads (in translation) as follows:

"That you on 10th September 1999 at about 9.10 a.m. in the High Court Kuala Lumpur in the Federal Territory of Kuala Lumpur in the trial of Public Prosecutor -vs.- Dato' Seri Anwar bin Ibrahim (WPPJ45-51-95) and Public Prosecutor -vs.- Sukma Darmawan Sasmitaat Madja (WWPJ45-26-99) during the course of your submissions over the issue in relation to allegations of arsenic poisoning of Dato' Seri Anwar bin Ibrahim did utter the following seditious words, namely, "It could well be that someone out there wants to get rid of him...even to the extent of murder. I suspect that people in high places are responsible for the situation." and you have thereby committed an offence under section 4(1)(b) of the *Sedition Act, 1948* (Act 15) punishable under section 4(1) of the same Act."

### *Origins of Sedition Act 1948*

27. The *Sedition Act* is a survivor of British colonial rule. It was enacted to deal with a perceived communist insurrection, but remained in force after independence in 1957, having been preserved under Article 162(1) of the Federal Constitution, which kept pre-existing statutes and created the power of the Malaysian government to amend and repeal them.
28. During the political unrest of 1969, a state of emergency was declared. Not only was Parliament suspended, but also the Act was amended so as to broaden its scope. Effectively, the Act of 1948 has over the past 50 years been adapted and extended well beyond the intended scope of the original legislators.

*Modification of Laws (Sedition)(Extension and Modification) Order 1969  
Emergency (Essential Powers) Ordinance No. 45, 1970*

### *Relevant Provisions of the Sedition Act 1948*

29. Section 4(1)(b) of the *Sedition Act 1948* creates the offence of sedition, providing that any person who “...utters any seditious words... shall be guilty of an offence...”.
30. The penalties provided on conviction are:

“...for a first offence to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both, and, for a subsequent offence, to imprisonment for a term not exceeding five years...”.

Section 4(1), *Sedition Act 1948*

31. Section 2 of the Act defines the meaning of the word “*seditious*” to include any “...words... capable of...having a seditious tendency”. The phrase “*seditious tendency*” is dealt with in Section 3(1). This is the key section of the Act. Essentially, the words, which are the subject of complaint, must be proved to have a tendency to produce any of the consequences described in that Section.
32. Six categories of “*seditious tendency*” are described in Section 3(1)(a)-(f). They are:
  - “(a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government;
  - (b) to excite the subjects of any Ruler or the inhabitants of any territory governed by any Government to attempt to procure in the territory of the Ruler or governed by the Government, the alteration, otherwise than by lawful means, of any matter as by law established;

- (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State;
  - (d) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State;
  - (e) to promote feelings of ill-will and hostility between different races or classes of the population of Malaysia; or
  - (f) to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the Federal Constitution or Article 152, 153 or 181 of the Federal Constitution.”
33. There are aspects of Section 3(1) of the Act that deserve mention. First, it should be noted that is immaterial whether the words used did or even could have produced one of the six categories of “*sedition tendency*”. Secondly, it is also immaterial whether the words used were true or false. Thirdly, an accused by uttering the words alleged to be seditious, does not have to intend that they result in one of the six categories of “*sedition tendency*”.

*Public Prosecutor v Ooi Kee Saik & Ors* [1971] 2 M.L.J. 108  
*Public Prosecutor v Fan Yew Teng* [1975] 1 M.L.J. 176

#### *Possible Defences?*

34. Indeed, there are provisions within the Act which suggest defences to an allegation of sedition. For example, Section 3(2)(b) of the Act provides that “words...” *do not have a seditious tendency only where they criticise error or defects*” in the Government or Constitution or the administration of justice with a view to their being remedied. The authorities suggest that the Act tolerates *bona fide* and fair criticism, but only so it seems to the extent that it does not have a tendency to produce any of the consequences set out in subsection 3(1).

*Section 3(2), Sedition Act 1948*  
*Public Prosecutor v Fan Yew Teng* [1975] 1 M.L.J. 176 per Abdul Hamid J.

35. I should point out that my brief analysis is not intended to be comprehensive, but only to provide some background to this report. The trial has not commenced and it may be inappropriate to discuss in detail the defences that will be advanced by Mr Singh.
36. However, it should be acknowledged that two excellent papers have significantly assisted my analysis of the law. First, the comprehensive opinion<sup>5</sup> provided by Michael Birnbaum QC of the United Kingdom Bar Human Rights Committee supplied by the Law Society of England at the request of the Malaysian Bar Council. Secondly, the

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<sup>5</sup> Opinion of Michael Birnbaum QC to Malaysian Bar Council

incisive report<sup>6</sup> of David K. Malcolm QC (as he then was, but now serving as Chief Justice of Western Australia and current Chairman of the Judicial Section of LAWASIA). His report was delivered to LAWASIA, as its observer at the trial of Dato' Param Cumaraswamy, which took place in the High Court at Kuala Lumpur in November-December 1996.

37. The Prosecution will undoubtedly attempt to prove two elements to establish the charge. First, that the accused uttered the words alleged to have been seditious. Secondly, that the words uttered by the accused were seditious.
38. No doubt the court transcript will have recorded what was said by the accused at trial on the morning of 10<sup>th</sup> September 1999. In that respect, proving that the accused uttered the words alleged to have been seditious would not be difficult. Proving the words were seditious is the crux of the case.

#### *Primary Defence*

39. Obviously, the primary defence will be that the words uttered by Mr Singh were not seditious, i.e. that the words used did not have any of the tendencies recited in Section 3(1).

#### *Particulars of Charge?*

40. The charge brought against Mr Singh alleges that on the 10<sup>th</sup> September 1999 in the High Court in Kuala Lumpur, he uttered the words allegedly expressive of a seditious tendency, but it fails to state which subsection of Section 3(1) he has breached.
41. Although it is possible to suggest that one or more categories may be relevant in the circumstances of this case, the Prosecution's failure to particularise the charge places the accused at a considerable disadvantage in preparing his defence.
42. This is a critical issue for the defence. Despite *obiter* to suggest that failure of the prosecution to identify which of the six tendencies in Section 3(1) it relies on could render the charge defective, it seems that such a requirement is unnecessary. One authority even suggests that the Prosecution can pick and choose from the tendencies as the trial progresses.

*Public Prosecutor v Oh Ken Seng* [1979] 2 M.L.J. 174 per Agaib Singh J.  
*Oh Ken Seng v Public Prosecutor* [1980] 2 M.L.J. 244  
*Public Prosecutor v Fan Yew Teng* [1975] 2 M.L.J. 235 (Court of Appeal)

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<sup>6</sup> Report of David K. Malcolm QC to Lawasia dated January 1986

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43. Mr Singh advises me that he has not requested particulars from the Prosecution in these terms. However, we have corresponded on this issue and he intends now to ask for particulars. He says that he doubts the Prosecution would refuse him. If that is so, then his defence will be assisted. If the Prosecution refuses his request, then he would be no worse off and there would be a further opportunity to again ventilate this issue before the courts.

### ***The Importance of the Case***

44. Some critics have suggested that the provisions of the Act have been used by the Government not only to restrict freedom of speech within the Malaysian community, but also parliamentary privilege and more recently the freedom of lawyers to speak openly in court on behalf of their clients.
45. Others have already suggested that as far as is known, the charging of Karpal Singh is the first instance anywhere in the world where a lawyer has been accused of sedition for words spoken in the defence of his client. Dato' Param Cumaraswamy (*UN Special Rapporteur on the Independence of Judges and Lawyers*) expressed his concern in these terms to LAWASIA:

“The implications of the charge against Karpal Singh on the independence of lawyers in Malaysia are a source of grave concern.”<sup>7</sup>

46. Michael Birnbaum QC has exhaustively dealt with these issues in his opinion.
47. It has always been accepted that in various circumstances advocates may be dealt with for acts of contempt or professional misconduct, which have occurred in court. However, to bring a criminal charge against an advocate for words spoken in the course of legal proceedings is an act capable of destroying the immunity of counsel, which public policy has determined should exist to ensure fairness within the justice system.
48. For these (and other reasons) the trial of Karpal Singh has significant legal importance.

### ***Adjournment of Trial***

49. On the morning of 16<sup>th</sup> October 2000, the parties appeared in the High Court before Justice Datuk Augustine Paul at Kuala Lumpur ready to commence the trial<sup>8</sup>.

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<sup>7</sup> Facsimile from Dato' Param Cumaraswamy to LAWASIA dated 14<sup>th</sup> January 2000

<sup>8</sup> Refer to newspaper articles attached to this report

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*Counsel at Trial*

50. The Prosecution was represented by Yaacob Sam, Salehuddin Saidin and Dzulkifi Ahmad. Mr Karpal Singh appeared for himself from the dock assisted by his sons Jagdeep Singh Deo, Gobind Singh Deo and Ram Karpal. Also appearing at the bar table on a 'watching brief' for the Malaysian Bar Council were Bar Council President Mah Weng Kwai and its Vice President Roy Rajasingham.

*Foreign Observers*

51. Mr Karpal Singh announced to the Court that there were a number of observers also present in court to include Anthony Arlidge QC for the *Bar Council of England and Wales*; Hong Kong barrister Paul Harris for the *International Bar Association*; Gerald Gomez for the *Commonwealth Law Association* and Dato' Param Cumaraswamy, the *UN Special Rapporteur on the Independence of Judges and Lawyers* and myself representing *LAWASIA*, the *Australian Bar Association* and the *Law Council of Australia*.
52. There were also other interested persons in court to include John Marshall, Head of Political, Economic and Public Diplomacy Section of the *British High Commission*; Leslie James from the *Canadian High Commission*; a representative from the *United States Embassy* and National Chairman of the opposition *Democratic Action Party* (DAP), Lim Kit Siang and his son Guan Eng.

*Reason for Adjournment*

53. It soon became apparent that a murder trial, previously listed before his Honour, had not concluded. It had originally been listed for two weeks beginning 9<sup>th</sup> October, but had been delayed because of the Judge taking an extension of his leave.
54. The murder case involved a well-known property developer from a prominent Malaysian family, Kenneth Fook Mun Lee, who had been charged with murdering accountant Lee Good Yew at Jalan Istana Baru in August 2000. Mr Lee had been in custody since his arrest soon after the killing.
55. Both the defence and the prosecution were asked to retire to the Judge's Chambers, where the parties agreed that Mr Singh's trial should be adjourned in circumstances where an accused was on trial for a capital offence and continued to remain in custody.
56. When the court convened, Justice Datuk Paul announced that it had been agreed that the trial would be adjourned and that he felt that:

"...notwithstanding the importance of Karpal Singh's case, I should finish the murder trial first as the accused is currently under remand."

*Judge's Orders*

57. His Honour made orders that:

- (a) the trial be adjourned to be heard over four days to commence on 14<sup>th</sup> January 2002;
- (b) Mr Singh's bail be renewed on its existing terms to enable him to be at liberty pending trial; and
- (c) the issue relating to the status to be given to observers and counsel appearing on a 'watching brief' be reserved to be decided at the reconvened trial.

*Will the Charge be Withdrawn?*

- 58. There is no doubt that the defence had little option other than to agree to an adjournment, particularly given the murder trial was part-heard and the accused was in custody and had been so for about 14 months.
- 59. The defence seemed to take the view that there was some indication that the Prosecution was reluctant to proceed with the charge and was looking for an opportunity to withdraw from the proceedings without losing face.
- 60. It was also claimed that the chances of the charge being withdrawn had also improved given the appointment of a new Attorney General, Ainum Mohd Saaid. She was not the person who had brought the charge in 1999 and was said not to favour it. However, that situation has changed because the new Attorney General has since resigned on grounds of ill health. Ainum's resignation takes effect on 31 December 2001. She is to be replaced by senior deputy public prosecutor Abdul Gani Patail. I am not able to say anything about his attitude towards Karpal Singh. However, it should be noted that Gani's appointment was considered controversial due to his involvement as chief public prosecutor in ex-deputy prime minister Anwar Ibrahim's sodomy and corruption trials. It is sufficient to say that the political opposition has been hostile to his appointment and that it attracted some controversy concerning whether it was constitutional. The Malaysian Bar Council would be better placed to make an assessment of his reputation.

61. The contrary view expressed was that the Prosecution's agreement to adjourn the trial had also been forced upon it and could not be interpreted as an act of conciliation. It was said that the Prosecution had come too far to now withdraw the charge and lose considerable face.
62. Should the trial proceed in January 2002, there is every risk that the foreign observers will be less in number than in October 2001. The reasons for that are obvious.
63. Some argue this may have the effect of reducing the pressure on the Government and create a climate that may be more amenable to the Attorney General withdrawing the charge. Alternatively, the prospect of less foreign observers attending at the trial may operate as an encouragement to the Prosecution to prosecute the charge.
64. Mr Paul Harris, who represented the *International Bar Association* at the hearing in October 2001, has expressed the view to me that the prospects of the trial starting will perhaps not be decided until a few days beforehand or possibly even the morning of the trial. He agrees that the local Bar may be over-optimistic in thinking that the charge may be dropped. Finally, it is his view that it may be that if a large number of foreign observers appear on the first day of the trial, it will be adjourned again, while if there are none present it will proceed.
65. If the Government's tactic is to shake off foreign observers by constantly finding reasons to adjourn the trial at the last moment, it is essential that the organisations sending observers do not waiver in their resolve to assist the process and ensure by the presence of those persons that justice is done.
66. Mr Singh advised me on 5<sup>th</sup> December 2001, that he has had "no indication so far the charge will be withdrawn."<sup>9</sup> He went on to say:

"...I intend to put in all I have and, with the assistance rendered by you and the others to whom I am deeply indebted, I hope justice will prevail in the end."
67. The outcome remains uncertain, but one fact cannot be overlooked. At the time of completing this report in early December 2001, there is still no indication that the Prosecution intend to do anything other than proceed with the trial.
68. Finally, another matter has arisen which may indirectly harden the Government's attitude towards Karpal Singh and possibly make an adjournment less likely. On 17<sup>th</sup> November 2001, the High Court ruled that the detention order issued against Mr Singh under the *Internal Security Act* in 1987 was unconstitutional. He had been

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<sup>9</sup> Fax Karpal Singh to Mark Trowell dated 5<sup>th</sup> December 2001

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detained for some 10 months in 1988-89 under an order issued by the Home Minister (who was then the current Prime Minister, Dr Mahathir). Justice Datuk Abdul Hamid Said has awarded Mr Singh costs and has reserved the assessment of damages until 20<sup>th</sup> February 2002. Of course, this was a claim brought by Mr Singh against both the Government and Dr Mahathir. One would think that given the decision, there would unlikely to be any concession given to Karpal Singh.<sup>10</sup>

*Status of Observers at Trial*

69. There is also another issue, which has not been resolved.
70. No mention was made of the defence's proposed application that Justice Paul *recuse* or disqualify himself from hearing the trial. It may have been a matter the defence believed should more appropriately be dealt with when the court hearing resumes in January 2002.
71. Also Justice Paul did not need to decide whether he would agree to the presence of foreign observers or counsel attending on a 'watching brief' at the resumed trial of Karpal Singh. That is a decision he reserved to the reconvened trial in January 2002.
72. The Prime Minister has made his position clear on this issue. When speaking of the *Anwar Ibrahim Trial* on 21<sup>st</sup> October 1998 Dr Mahathir is reported to have said that the Government would not entertain any application by foreigners to be observers at the forthcoming trial "*as the presence of foreign observers will put pressure on this country's judges*".
73. This was a curious statement, potentially creating the impression that appearing in Court is at the discretion of the Executive Branch of Government, rather than the judiciary. It might well have been political rhetoric on the part of the Prime Minister, rather than a true reflection of the legal process. However, from any reasonable perspective, it is a legal process under considerable threat.

MARK TROWELL QC

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<sup>10</sup> Refer to newspaper articles attached to this report

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