1. ADMINISTRATIVE AND CONSTITUTIONAL LAW

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Introduction

1.1 In 2014, the major developments in the field of public law pertained primarily to constitutional law. The equality guarantees embodied in Art 12 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Singapore Constitution") was the focal point for the majority of constitutional law cases. The decisions provide us with an elaboration of the nature of the "reasonable classification" test as a threshold test and the inter-relationship between Arts 12(1) and 12(2). A recurrent theme was the importance of resisting the judicialisation of politics as a facet the principle of separation of powers extant in the Singapore constitutional order.

1.2 The administrative law cases were generally applications of existing, well-established principles, though the justification for extending natural justice principles to contract law appears to rest on the importance of protecting important interests of the individual, rather than regulating a private body with some sort of public law function.

ADMINISTRATIVE LAW

Scope of judicial review

1.3 Statutes may oust or truncate the scope of judicial review, which gives rise to the question of whether courts will defer to parliamentary intention or invoke constitutional or common law principles to circumvent such preclusive or limitation clauses.

1.4 Under s 33B(2)(*b*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"), the Public Prosecutor may issue a certification that an accused person has substantively assisted the Central Narcotics Bureau ("CNB") in disrupting trafficking activities within or outside Singapore. Section 33(B)(4) provides:

> (4) The determination of whether or not any person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities shall be at the sole discretion of the Public Prosecutor and no action or proceeding shall lie against the Public Prosecutor in relation to any such determination unless it is proved to the court that the determination was done in bad faith or with malice.

1.5 In *Cheong Chun Yin v Attorney-General* [2014] 3 SLR 1141 ("*Cheong Chun Yin*"), the applicant sought leave to bring judicial review proceedings against the Public Prosecutor ("PP") who had determined that the applicant had not substantively assisted the CNB and had consequently not certified this to a court under s 33B(2)(*b*) of the MDA. The applicant and his accomplice had been convicted and sentenced to death for drug trafficking. If the applicant had a certificate that he had substantively assisted the police, the court would under s 33B(1)(*a*) of the MDA be able to impose life imprisonment rather than the death penalty on him.

1.6 The statute under s 33(B)(4) provides for judicial review only on the grounds of bad faith or malice and thus is a limitation clause. It is also accepted that the ground of unconstitutionality is available as an additional basis for challenging an exercise of discretion. The applicant argued, citing *Re Application by Yee Yut Ee* [1977–1978] SLR(R) 490 at [18]–[31] and *Stansfield Business International Pte Ltd v Minister for Manpower* [1999] 2 SLR(R) 866 at [21]–[22], that this clause did not oust judicial review of a decision made in excess or lack of jurisdiction: *Cheong Chun Yin* at [17]. That is, the applicant relied on the doctrine of jurisdictional error of law to circumvent s 33B(4): *Cheong Chun Yin* at [28]. The applicant argued that an error of law was committed as the PP had failed to make an "allowance" that the information provided by the applicant was not adequately investigated at that time and was not useless, and had failed to consider what value may have been gained from such information as may have been derived were there a proper investigation: *Cheong Chun Yin* at [18].

1.7 On the facts, the court held that the alleged errors of law related to the applicant's dissatisfaction over the way the CNB had conducted the investigations. The court would not review the adequacy of the investigations: *Cheong Chun Yin* at [32]. In any event, the evidence presented at trial did not support a finding that investigations were inadequate: *Cheong Chun Yin* at [34]. Nonetheless, the court appeared to hold that judicial review was limited to the grounds provided for in the statute (bad faith and malice) and unconstitutionality: *Cheong Chun Yin* at [31]. In other words, it appears that within the context of the MDA in relation to the power to certify substantive assistance, the court would treat parliamentary intention as determinative and not review an

exercise of discretionary power on, *eg*, the grounds of *Wednesbury* unreasonableness.

Condition precedent and want of jurisdiction

1.8 The applicant in *Zheng Jianxing v Attorney-General* [2014] 3 SLR 1100 sought leave to file an application for a quashing order in respect of his admission to a Drug Rehabilitation Centre ("DRC") in 2006 made by an order of the deputy director of the CNB on 11 May 2006 ("the 2006 DRC order"). It was because of this order that Zheng Jianxing ("Zheng") was later subject to an enhanced punishment under s 33A(1) of the MDA.

1.9 Zheng argued that the exercise of discretion for the DRC order depended on the existence of an objective fact, that is, accurate results of urine tests conducted under s 31(4)(*b*) of the MDA. The applicant contended that the variance in the results of the two urine analysis certificates issued by the Health Sciences Authority ("HSA") was so "vast" as to be well above the "maximum 20% allowable difference": at [10]. As such, Zheng asserted that the deputy director should not have relied on these urine tests results and hence lacked authority to make the 2006 DRC order because of the absence of a precedent requirement.

1.10 The objective fact which forms the basis for the condition precedent for exercising the director's discretion under s 34(2)(*b*) of the MDA was that the director must have acted on either the result of the medical examination conducted on the subject under s 34(1) of the MDA or the results of both urine tests conducted following the s 31(4)(*b*) procedure. The tests must be positive for the presence of a controlled or specified drug before the director could under s 34(2)(*b*) of the MDA commit the person to a rehabilitative institution.

1.11 The High Court held that the director's right to exercise his discretion under s 34(2)(*b*) of the MDA arose provided two urine tests with positive results of the relevant drug were conducted. The director was the "sole judge" in deciding whether to make an order for admission to a DRC and the court should not review whether the director was correct in exercising his discretion, provided the director acted fairly, in good faith, and followed the statutory procedure: at [31]. Even the 20% variance between test results did not preclude the director from relying on the HSA certificates as these still constituted evidence of the presence of the relevant drug. It was the presence rather than the quantity of the drug which was at issue: at [32].

1.12 The applicant failed to make out a *prima facie* case of reasonable suspicion that the statutory condition precedent conditioning the

exercise of the relevant discretion was not established. At the very least, the applicant had to provide some evidence of possible lapses in the conduct of the tests on the urine specimens, which the applicant did not: at [35]. The standard of proof at this threshold stage was low, but evidence and arguments provided at this stage were not to be "skimpy or vague"; rather, the "fullest evidence and strongest arguments" should be placed before the court: at [35], citing *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue* [2006] 3 SLR(R) 507 at [24].

1.13 However, the application was dismissed because it was out of time, more than seven years late, given that O 53 r 1(6) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) requires that an application for leave to apply for a quashing order should be made within three months after the date of the proceeding or unless the delay is accounted for to the court's satisfaction.

Exhaustion of internal remedies/ouster clause

1.14 Under the Immigration Act (Cap 133, 2008 Rev Ed), the controller has the discretion to grant a re-entry permit ("REP") to a permanent resident ("PR") of Singapore. The Immigration and Checkpoints Authority of Singapore ("ICA") follows certain policies when issuing a REP, including the guideline that a PR will not automatically be granted a REP, and where a PR is under investigation or has been charged, convicted or is appealing against conviction, that a PR is not generally granted a REP until the matter is concluded: *Tey Tsun Hang v Attorney-General* [2015] 1 SLR 856 ("*Tey Tsun Hang*") at [28]. A REP is required for a PR who leaves Singapore to return to Singapore as a PR under s 11 of the Immigration Act. A PR who leaves Singapore without a valid REP loses PR status: *Tey Tsun Hang* at [10]. The issue of granting REPs was the subject of *Tey Tsun Hang*.

1.15 Tey Tsun Hang ("Tey"), a Malaysian citizen, who was at the relevant time under investigation by the Corrupt Practices Investigation Bureau, made an application for a REP which was rejected. Under s 11(6) of the Immigration Act, an aggrieved person may appeal by petition in writing to the Minister whose decision shall be final.

1.16 Tey sought leave under O 53 of the Rules of Court to bring judicial review proceedings against the ICA, seeking an order to quash the cancellation of Tey's application for the renewal of his and his daughter's REP for breach of natural justice, on grounds of unreasonableness and a mandatory order requiring the respondent to reinstate his and his daughter's PR statuses and to consider and process Tey's application for the renewal of his and his daughter's REPs in accordance with procedural propriety.

1.17 Quentin Loh J noted that s 39A of the Immigration Act precluded judicial review of any act or decision of the Minister or controller under the Immigration Act except where there was non-compliance with any procedural requirement in the Act. This purports to truncate judicial review. Loh J considered whether "ousting the jurisdiction of the court is *per se* wrong": at [39]. He noted that there was a similar clause in s 22(7) of the Planning Act (Cap 232, 1998 Rev Ed) considered in *Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 and there, an application for judicial review was refused because the applicant had failed to exhaust remedies through the ministerial appeal. The court found her reason for not doing so to be invalid – because s 22(7) of the Planning Act provides that the Minister's decision shall be final and cannot be challenged or questioned in any court. Loh J also reviewed the Malaysian decision of *Pikhak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72 where s 59A(1) of the Malaysian Immigration Act 1959/63 (No 155 of 1959) was similar to s 39A of the Singapore Immigration Act. The clear parliamentary intention there was to exclude judicial review save on grounds of procedural non-compliance with the Act.

1.18 Loh J concluded that there are "good and self-evident reasons" in national policy matters such as land planning, immigration, or defence to leave these decisions "to the executive arm and not the courts which are ill-equipped to make such decisions": *Tey Tsun Hang* at [44]. From the parliamentary debates surrounding the introduction of s 39A, it was clear that the intent of the provision was to ensure that the merits of immigration decisions would not be reviewed: *Tey Tsun Hang* at [44].

1.19 In examining the extent of s 39A, Loh J noted it was not a total ouster clause as judicial review still applied to non-compliance with statutory procedural requirements. He noted this was a "reasonable balance": *Tey Tsun Hang* at [45]. He then considered whether s 39A ousted jurisdiction over the matters Tey had raised before the court. On the facts, there were no statutory requirements regulating the controller's discretion in relation to REPs; thus, his case "lies in the realm that is indeed precluded by section 39A": *Tey Tsun Hang* at [46]. It appears that the learned judge considered that for the Immigration Act at least, parliamentary intention was determinative in relation to the scope of judicial review.

1.20 Furthermore, Tey had failed to exhaust his remedies by way of his statutory right to appeal to the Minister against the ICA decision, which, *inter alia*, jeopardised his application for leave as he came to the court as a first resort: *Tey Tsun Hang* at [47].

Bad faith

1.21 The High Court in *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2014] 4 SLR 773 ("*Muhammad Ridzuan bin Mohd Ali*") rejected applying a different, less onerous standard of bad faith to the exercise of executive discretion under s 33B(4) of the MDA. The Attorney-General accepted (at [57]) that bad faith could encompass extraneous or improper purposes, preconceived bias and making decisions in a wholly arbitrary or capricious fashion.

1.22 The applicant argued for an unusually broad conception of bad faith, such that "bad faith" should be understood to include taking into account improper considerations, failing to follow proper procedure, which would be to broaden bad faith to include "illegality" and "procedural impropriety" as grounds of review under the standard *GCHQ* test adopted in *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525. Indeed, the scope of judicial review would be cabined where there is a clear statutory indication limiting the available grounds of judicial review to bad faith under s 33B(4) of the MDA. The court held that the applicant had failed to produce any evidence to establish a *prima facie* case that the PP had exercised discretion in bad faith or for an improper purpose and thus failed to discharge the burden to make good his assertions: *Muhammad Ridzuan bin Mohd Ali* at [62].

Natural justice and social clubs

1.23 The application of natural justice rules to social clubs arose in the case of *Khong Kin Hoong Lawrence v Singapore Polo Club* [2014] 3 SLR 241 ("*Khong Kin Hoong Lawrence*"). In his capacity as Honorary Secretary of the Singapore Polo Club, the plaintiff had used the club's e-blast system without permission from the committee to question the propriety of the committee members' decision to amend the results of a motion of no confidence, which the committee members were the subject of.

1.24 Five committee members who comprised the discipline tribunal suspended the plaintiff for two months prior to a decision that the plaintiff, a club member, had acted in a manner prejudicial to the interests of the defendant by his use of the e-blast system.

1.25 The Singapore Polo Club is an unincorporated association and the relationship between members and the social club is based on contract. Tan Siong Thye JC (as he then was) described the rules of natural justice as "universal rules that govern the conduct of human behaviour" which were accepted as being of "paramount importance" which were implied contractual terms: at [23].

1.26 As the Court of Appeal held in *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR(R) 802 ("*Kay Swee Pin*"), disciplinary bodies of social clubs were bound to act in accordance with natural justice or a duty to act fairly; where coercive and extensive disciplinary powers of suspension and expulsion are concerned, "the more rigorous the application of the rules of natural justice", as in the present case: *Khong Kin Hoong Lawrence* at [24], citing *Kay Swee Pin* at [10].

1.27 The High Court found that the defendants had breached the test of apparent bias and the duty to act impartially. Integral to the rule against actual and apparent bias, a tribunal hearing a disciplinary proceeding should be "disinterested and independent": *Khong Kin Hoong Lawrence* at [26], citing *Re Shankar Alan* [2007] 1 SLR(R) 85 at [42]. In *Kay Swee Pin*, the Court of Appeal found that the involvement of an interested party in the disciplinary proceedings of private association, such as social and recreational clubs, was a breach of natural justice: *Khong Kin Hoong Lawrence* at [27], citing *Kay Swee Pin* at [77].

1.28 The settled test for apparent bias is that of "reasonable suspicion", which is an objective one based on perception, rather than truth: *Khong Kin Hoong Lawrence* at [30]. The relevant question is "whether a reasonable and fair-minded person knowing the facts and circumstances of this case would opine that there is a reasonable suspicion of bias" on the part of the five members of the 2013 committee present at the disciplinary meeting, who were also members of the 2012 committee which was the subject of the no confidence resolution: *Khong Kin Hoong Lawrence* at [32]. Tan JC found on the facts that there was "more than a reasonable suspicion of bias in the mind of a fair-minded and informed observer"; indeed, the evidence "point[ed] towards a real bias", which is a subjective state of mind, on the part of the five members since it was their standing and integrity which was at stake. They had a "strong vested interest" in seeing the no confidence resolution defeated: *Khong Kin Hoong Lawrence* at [36]. This put into serious question whether, by their presence at the disciplinary meeting, these five members were actually "acting honestly, fairly and in good faith", which were foundational values which "every legitimate tribunal must operate on": *Khong Kin Hoong Lawrence* at [33].

1.29 Tan JC further clarified that an interested tribunal matter is not merely confined to a person whose pecuniary interest might be affected, but would involve intangible losses, such as that of reputation and standing in the club, so as to taint such an arbiter with apparent bias: *Khong Kin Hoong Lawrence* at [37]. This is consistent with the House of Lords decision in *Pinochet No 2* [2000] 1 AC 119 at 145. The High Court held that the fact that five 2013 committee members were presiding over the disciplinary tribunal "gives rise to more than a reasonable suspicion of bias" from the eyes of a "reasonable observer who is not unduly

sensitive or suspicious and who is also not complacent": *Khong Kin Hoong Lawrence* at [40]–[41].

1.30 The issue of the principle of necessity was also considered. It had previously been unsuccessfully raised in *Anwar Siraj v Tang I Fang* [1981–1982] SLR(R) 391 as there was legislative provision for the disqualified arbiter to be substituted for by an alternative individual. The underlying rationale for this rule was to ensure that tribunals set up by statute to perform certain functions must not be frustrated in the discharge of their functions which must displace applicable natural justice rules: *Khong Kin Hoong Lawrence* at [43].

1.31 The constitution of the club provided that the committee had the power to institute disciplinary proceedings, which should be heard by five committee members to form a quorum: *Khong Kin Hoong Lawrence* at [45]. The two members of the 2013 committee who were not part of the 2012 committee were the only others who could have participated in the disciplinary proceedings but had been "simply absent with apologies": *Khong Kin Hoong Lawrence* at [46]. Tan JC said that even if it was not possible to have a quorum of five committee members untainted with apparent bias, it was "still preferable" to have a quorum made up of five members, two of whom were not tainted, to minimise doubts about perceived impartiality: *Khong Kin Hoong Lawrence* at [47]. In addition, there was a clause in the club constitution which empowered the committee to co-opt up to two committee members such that more neutral committee members could have been selected: *Khong Kin Hoong Lawrence* at [48]. There was also provision for an alternative in so far as there was a power to appoint and delegate to a sub-committee disciplinary powers under r 23(a) of the club constitution. Thus, Tan JC held that the rule of necessity did not apply to this case.

1.32 The other limb of natural justice, *audi alteram partem* or fair hearing, was also violated in so far as the plaintiff was not given adequate notice of the allegations made against him and a fair opportunity to be heard. In the letter requesting the plaintiff to attend the disciplinary meeting, he was only asked to explain his conduct in relation to his unauthorised usage of the club's e-blast database; he was not told of the charge that led to his suspension, which related to an e-mail he sent to the 2013 committee giving them 24 hours to respond to his demand that they disseminate the statement which he had already sent out to all members of the defendant. He was, thus, unable in the absence of adequate notice to have a fair opportunity to be heard: *Khong Kin Hoong Lawrence* at [62]–[64].

1.33 One might observe that the implication of natural justice terms into a contract between members of a private body operates as a

conceptual vehicle by which to exercise supervisory jurisdiction over a private body, which does not seem to be discharging any ostensible public functions. It appears that the motivation must be to ensure that individuals are treated fairly, particularly where an important interest in the form of some sort of loss, which may be pecuniary or intangible (*eg*, reputation), is at stake, as where a club member is deprived of club membership, a form of "forfeiture loss".

Remedies – Order 53

1.34 The High Court in *Muhammad Ridzuan bin Mohd Ali* (above, para 1.21) clarified that there was no procedural impediment to an inclusion of a prayer for declaration when applying for leave under O 53 for prerogative orders, as this was sought alongside leave for other prerogative orders. This would enable the applicant to "place his entire case before the court at the outset", and so enable the court to consider the complete scope of remedies being sought: at [32]. It was clear, though, that a party could not under O 53 apply for freestanding declaratory relief: *Cheong Chun Yin* (above, para 1.5).

Nature of mandatory order

1.35 While the applicant could ask the PP to reconsider an exercise of discretion, the court could not and would not direct the PP to exercise his discretion in a particular matter to produce a certain result, such as granting a certificate of substantive assistance under the terms of the MDA: *Muhammad Ridzuan bin Mohd Ali* at [33].

CONSTITUTIONAL LAW

Article 9(1)

1.36 One of the arguments raised in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 ("*Lim Meng Suang*"), which dealt with s 377A of the Penal Code (Cap 224, 2008 Rev Ed) which criminalises sodomy or acts of gross indecency between two male persons in public or private, was that Art 9(1) should be given a "purposive interpretation to include a limited right to privacy": at [30]. Article 9 provides: "No person shall be deprived of his life or personal liberty save in accordance with law."

1.37 Counsel opined that "life and personal liberty" at their core must "include a right of personal autonomy allowing a person to enjoy and express affection and love towards another human being": at [30].

This resembles the same kind of "make it up as you go along" approach towards reading into an open-textured constitutional provision whatever content one likes, based on a radical theory of autonomy, as was applied by the US Supreme Court in decisions like *Planned Parenthood v Casey* 505 US 833 at 852 (1992).

1.38 The Court of Appeal rejected this argument for three reasons. First, established Singapore jurisprudence narrowly reads "personal liberty" as relating to issues of "unlawful incarceration or detention": *Lim Meng Suang* at [45]. Second, in construing Art 9 against its context and structure, it was clear that Arts 9(2) to 9(4) dealt with procedural safeguards relating to the arrest and detention of persons, relating as they did to *habeas corpus*, the right to counsel, the right to be informed of the grounds for arrest and to be brought before a magistrate within 48 hours. Thus, Art 9(1) "refers only to a person's freedom from an unlawful deprivation of life and unlawful detention or incarceration": *Lim Meng Suang* at [46]. Third, delving into the historical origins of Art 9 which is rooted in Art 21 of the Indian Constitution ("no person shall be deprived of his life or personal liberty except according to procedure established by law"), the Court of Appeal noted that India's constitutional framers deliberately rejected adopting the wider formulation of the American due process clause in the Fifth and Fourteenth Amendments ("without due process of law"). In addition, they adopted provisions akin to Arts 9(3) and 9(4) of the Singapore Constitution. Thus, there was no original intent to impute an expansive meaning into the phrase "life or personal liberty" in Art 21 (although this has in fact taken place as a matter of Indian constitutional interpretation): *Lim Meng Suang* at [47]. The Court of Appeal also sounded a note of caution in relation to foreign cases which had to be understood in the context of their "unique social, political and legal circumstances" and with heed given to the different textual formulation of a rights clause where these were "materially different" from Singapore's Art 9(1): *Lim Meng Suang* at [48].

1.39 The Court of Appeal was of the opinion that any privacy rights ought to be developed by way of private law and that the appellant's formulation of a privacy right was "vague and general", containing "the seeds of an unlimited right": *Lim Meng Suang* at [49]. Such an indeterminate right could (*Lim Meng Suang* at [49]):

> … be interpreted to encompass as well as legalise all manner of subjective expressions of love and affection, which could (in turn) embody content that may be wholly unacceptable from the perspective of broader societal policy.

This could conceivably extend to paedophilia, bestiality and consensual adult incest, for example, which implicates questions of whether law should enforce "broader social morality".

1.40 The Court of Appeal also rejected arguments that Art 9 was violated because "act of gross indecency with another male person" was considered too vague for the provision to be considered "law". This is because the concept of "indecency" is one familiar to other Singapore laws, such as the Women's Charter (Cap 353, 2009 Rev Ed). Furthermore, the Court of Appeal considered that at the core, s 377A criminalised "sexual acts between males": *Lim Meng Suang* at [51].

1.41 Section 377A was considered neither arbitrary nor absurd. With respect to the former, counsel made a bare assertion, "without any legal substantiation whatsoever", that the purpose of the provision in "signalling societal disapproval of grossly indecent acts between males was arbitrary": *Lim Meng Suang* at [52]. Counsel's weak argument that it was "absurd" to criminalise "a minority of citizens" based on what was asserted to be a "core aspect of their identity" was rejected, as it was based on a controversial proposition that sexual orientation was supposedly immutable. Given that there are "conflicting scientific views" on this point, the Court of Appeal refused to play politics and entertain extra-legal arguments as it would "be premature to express any conclusive views on it": *Lim Meng Suang* at [53] and [176].

Article 9(3)

1.42 As an aspect of procedural fair process, Art 9(3) of the Singapore Constitution provides:

> Where a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

The provision itself does not stipulate the point in time when this entitlement applies.

1.43 This issue was again raised in the case of *James Raj s/o Arokiasamy v Public Prosecutor* [2014] 2 SLR 307 ("*James Raj*") where the applicant under the name of "The Messiah" had hacked various computer websites. The applicant was arrested on 4 November 2013 and charged for offences under the Computer Misuse and Cybersecurity Act (Cap 50A, 2007 Rev Ed) and the MDA. Requests made by his counsel to meet with the applicant on the 11th and 12th of November were rejected: at [2]. Counsel sought a declaration, *inter alia*, that Art 9(3) confers an immediate right to counsel upon the request of a person remanded for investigations and that the arrested person be granted immediate access to his counsel. By the time judgment was delivered, the question was moot as access to counsel was granted on 3 December 2013. Nonetheless, the High Court, in light of the important constitutional matters raised, gave a decision on the question of whether

the applicant was entitled to the order sought on 29 November 2013, the date when the parties filed their submissions on what "reasonable time" constituted.

1.44 Applying the precedent of the Court of Appeal decision of *Jasbir Singh v Public Prosecutor* [1994] 1 SLR(R) 782 ("*Jasbir*"), Choo Han Teck J noted that the court held that entitlement to consult counsel was not a right to be immediately enjoyed after arrest, as the right would accrue upon the lapse of a "reasonable time" after arrest: *James Raj* at [3]. The proposition that the constitutional right to counsel does not entail immediate access was also affirmed, *obiter*, by "a differently-constituted Court of Appeal" in *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205: *James Raj* at [3]. The Court of Appeal in *Jasbir* had stated that the rationale for granting a "reasonable time" for investigations to be conducted "was to afford the police a degree of latitude in carrying out their investigations", which implicitly recognised that sometimes permitting an accused person access to counsel might hinder investigations: *James Raj* at [5], citing *Jasbir* at [48].

1.45 Choo Han Teck J questioned whether the Court of Appeal in *Jasbir* had given the correct interpretation to a statement by Wee Chong Jin CJ in the preventive detention case of *Lee Mau Seng v Minister for Home Affairs* [1971–1973] SLR(R) 135 ("*Lee Mau Seng*"), by citing *Lee Mau Seng* as authority for the "more negative and restrictive" reading of Art 9(3) that the constitutional right is not an immediate one. He observed that the court in *Jasbir* apparently "preferred the view that the right to counsel simply does not arise immediately upon arrest" in disdaining the view that a distinction could be drawn between "the time at which the right to counsel arises and the time at which that right may be exercised": *James Raj* at [4].

1.46 Choo J noted from the philosophical tenor of Wee CJ's judgment that his view was that fundamental constitutional rights are (*James Raj* at [6]):

> … not lightly to be curtailed by the needs of police investigations so much so that the only way in which such investigative needs may affect that right is where the right is explicitly and unambiguously limited or excluded by legislation [which is constitutional].

He concluded it was arguable that what Wee CJ meant was not that the police should be afforded a reasonable time for investigations, as the court in *Jasbir* so thought, but rather, that while an arrested person was entitled to consult counsel immediately upon arrest, a "reasonable time" should be allowed for "any necessary or unavoidable delay occasioned by practical or administrative concerns". This could include transferring the arrested person to the place of remand or the time taken to contact counsel: *James Raj* at [6].

1.47 Nonetheless, while casting doubt on the Court of Appeal's reading of *Lee Mau Seng* in *Jasbir*, Choo J said he was bound to follow the legal position that "reasonable time" was to be given to the police as an element of allowance in carrying out their investigations": *James Raj* at [6]. As such, Art 9(3) did not confer upon an arrested person an entitlement to consult counsel immediately upon request, given that the precedent of *Jasbir* provided that the availability of the right to counsel "depends entirely on investigative needs", such that the time where an arrested person was entitled to consult counsel "cannot be contingent upon the time at which an arrested person makes the request to consult counsel": *James Raj* at [7].

1.48 The courts have declined to adopt rigid rules as to when an arrested person has a right of access to counsel. One of the arguments raised by counsel was that access to counsel should be granted within 48 hours, which was based on Art 9(4) of the Singapore Constitution which requires that the arrested person be produced before a magistrate within 48 hours. Counsel offered four broad arguments to support this argument: first, that the arrested person should be entitled to instruct counsel when brought before the magistrate, which is when the Prosecution usually makes applications against the arrested person. Second, the Art 9(4) rationale is to allow the judicial authority to apply its mind to the case within 48 hours of arrest and this would be frustrated if the magistrate did not have the opportunity to hear the reasoned defence of the accused, who had not been able to instruct counsel. Third, the involvement of counsel at the early stages after arrest would help prevent false or coerced confessions or the possible situation where the accused failed to state a material fact. Lastly, the 48-hour time period would operate as a check on the police: *James Raj* at [9].

1.49 The courts, in declining to adopt rigid rules as to when an arrested person has a right of access to counsel, preferred a contextual approach. It clarified that as a constitutional right was at stake, the onus fell on the police to prove to the court's satisfaction that giving effect to the right to counsel would impede police investigations or the administration of justice. Further, as a constitutional fundamental right was implicated, the burden of proof was that "it is necessary, and not merely desirable or convenient, to derogate from it": *James Raj* at [12]. Practically speaking, the arrested person would have "little or no knowledge of what and how the investigation is proceeding" or how it "might be disrupted or tampered with": *James Raj* at [12].

1.50 On the facts of the case, the court accepted the Prosecution's submission that the case against the applicant and his accomplices was "complex" and might require "a significant amount of time to be completed": *James Raj* at [13]. This is because, for example, multiple separate offences were involved, some of which were trans-border in

nature; retrieving digital evidence was time-sensitive and multiple law enforcement agencies were involved in the investigations: *James Raj* at [11]. However, the Prosecution failed to provide substantive grounds to support the claim that allowing access to counsel would jeopardise these investigations, such as if the accused becomes unco-operative, fails to help the police collect the evidence, *etc*: *James Raj* at [13].

1.51 In the absence of evidence in the face of unsupported assumptions that counsel might advise the applicant to be unco-operative and silent, the High Court stated it was unable to make a ruling such that it could not hold that allowing the applicant access to counsel on 29 November 2013 would have hindered police investigations. It noted that reference to previous precedents, where time frames of two weeks to 19 days had been held to be a "reasonable time", was unhelpful as "each case turns on its own facts". Indeed, it was possible that "reasonable time" in a case could exceed two weeks: *James Raj* at [14].

1.52 Choo J also noted that if there were concerns that allowing access to counsel might result in the applicant consulting his counsel for hours and depriving the police of questioning time, this could be addressed "by delineating the content of the right to counsel", such as by specifying the number of hours *per* day that the accused could spend with counsel, as opposed to doing away with the right entirely while investigations were taking place. As investigators also needed access to a suspect, access to counsel was "not unlimited and unrestricted access": *James Raj* at [14]. In other words, efficiency concerns associated with police investigation could not trump other competing interests, especially where the constitutional rights of accused persons were concerned.

Article 12 and the "reasonable classification" test

1.53 The Court of Appeal in *Lim Meng Suang* (above, para 1.36) jointly heard two High Court decisions (*Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 and *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476) where the constitutionality of s 377A of the Penal Code was upheld. This provision, which has been the subject of heated political and public debate, criminalises sodomy between two male persons committed in public or in private. The Court of Appeal found s 377A was constitutional and did not violate either Art 9 or 12 of the Singapore Constitution. Both appeals were dismissed without costs being ordered, shutting the door to future challenges to this provision before the courts, as their remedy "lies, if at all, in the legislative sphere": *Lim Meng Suang* at [190].

1.54 In so ruling, a clear motif in the judgment is a vision of the separation of powers within Singapore's system of parliamentary government where the courts are careful not to usurp matters which fall within the legislative purview of Parliament. Otherwise, they would undermine the rationale for their existence, to serve as an "independent, neutral and objective forum" for adjudicating disputes on the basis of "objective legal rules and principles": *Lim Meng Suang* at [7]. To consider extra-legal arguments falling within the purview of the Legislature would be contrary to both substantive and procedural fairness: *Lim Meng Suang* at [12]. Such arguments are "legally irrelevant" and should be canvassed in the appropriate legislative forum: *Lim Meng Suang* at [156].

1.55 The desire to resist the judicialisation of politics is reflected in the adoption of the "reasonable classification" test, which operates with an attendant presumption of constitutionality, under which "our Legislature is presumed not to enact legislation which is inconsistent with the Singapore Constitution": *Lim Meng Suang* at [4]. In this respect, the Court of Appeal affirmed that colonial-era laws were part of the *corpus* of Singapore laws under Art 162 to which the presumption of constitutionality applied, though possibly with lesser force. Practically speaking, a court in "applying this presumption would have regard to all the circumstances of the case": *Lim Meng Suang* at [107].

1.56 A "vital distinction" was to be drawn between legal arguments and the objective voice of the law as opposed to extra-legal considerations or emotionally based arguments, such as some of the arguments raised by the appellants: *Lim Meng Suang* at [5], [8], [157] and [173]. For example, a purely rhetorical argument was that s 377A represented the "tyranny of the majority" against the minority; this could be turned on its head with the majority insisting they not be subject to the "tyranny of the minority". Jurisprudential issues relating to the Millian Harm principle and competing conceptions of harm, which may go beyond physical harm, and the argument of Lord Devlin that the law could regulate public morality or societal morality also were matters appropriate to the legislative sphere: *Lim Meng Suang* at [169].

1.57 Extra-legal considerations are only relevant "in so far as they impact the application" of constitutional rights: *Lim Meng Suang* at [6]. The "reasonable classification" test prevents courts from becoming "mini-legislatures": *Lim Meng Suang* at [70].

1.58 The Court of Appeal stressed that it was improper for a court of law to act as a mini-legislature and drew a distinction between the incremental law-making role of the courts in developing the common law and rules of equity through case law, and the process of legislative enactment or amendment. It noted that the Legislature was able to reject

common law and equity principles developed by the court: *Lim Meng Suang* at [79].

1.59 The affirmation of the "reasonable classification" test reflects this constitutional sensibility. The Court of Appeal also clarified that the "reasonable classification" test comprised "two closely related stages", which were "consecutive and cumulative", rather than three, as the High Court had suggested: *Lim Meng Suang* at [57] and [114]. Underlying both limbs of the test was logic and common sense: *Lim Meng Suang* at [63].

1.60 In other words, they rejected the proposition of the High Court that a law could pass the "reasonable classification" test but still be unconstitutional provided "the object of the statute is illegitimate": *Lim Meng Suang* at [76]. The reason for this was grounded on the "wider conception of the separation of powers" and the principle that while courts could interpret statutes, they could not "amend or modify statutes" on the basis of "personal preference or *fiat*", as to do so would usurp the legislative function: *Lim Meng Suang* at [77]. If a court had the power over and above the level of scrutiny associated with the "reasonable classification" test to declare legislation unconstitutional on the basis of illegitimacy of object, this would confer on the courts "a licence to usurp the legislative function" as to the Legislature alone belongs the power to review and amend its own legislation: *Lim Meng Suang* at [82]. What was left unclear was what "legal basis" the court would have to declare a legislative object illegitimate because it is unconstitutional, which would lead to an unsatisfying circularity: *Lim Meng Suang* at [83]. Thus, there were "no legal standards" to assist the court in determining the legitimacy of a statute as "any purported standard would be extra-legal in nature", which was something "quintessentially within the sphere of legislative review": *Lim Meng Suang* at [85].

1.61 The first step of the test is to ask whether the legislative classification was based on an intelligible differentia. There was no difficulty in ascertaining what fell within and without the classification. The Court of Appeal noted that it would be "very seldom" that this limb of the test would be unsatisfied, as the term "intelligible" pointed to a "relatively low threshold" which would avoid "any consideration of substantive moral, political and/or ethical issues because these issues are potentially (and in most instances, actually) controversial": *Lim Meng Suang* at [65]. Again, this underscored the judicial concern with maintaining a strict division between law and the extra-legal. The Court of Appeal agreed with the High Court that something is intelligible if it is capable of being understood through the intellect or understanding, rather than senses: *Lim Meng Suang* at [65]. Something can be controversial but not unintelligible: *Lim Meng Suang* at [111]. This

reflected an orientation towards "value-neutrality" such that the threshold test required only "logic and coherence" in the statute, before the court could consider whether a statute violated Art 12: *Lim Meng Suang* at [66]. In other words, both limbs of the test do not address the concept of equality as such: *Lim Meng Suang* at [68].

1.62 The Court of Appeal went one step further than the High Court in so far as it stated that a classification could be apprehended by the intellect or understanding yet fail to be intelligible "to the extent that it is so unreasonable as to be illogical and/or incoherent", though such a finding must rest on a finding of incoherence or illogic of "an extreme nature": *Lim Meng Suang* at [67]. This would entail a differentia which is so extreme such that "no reasonable person" could contemplate this differentia as "being functional as an intelligible differentia", that is, no reasonable dispute could arise with respect to its illogicality and incoherence: *Lim Meng Suang* at [67]. In such cases, the second stage of the test is not engaged.

1.63 The second step is to ascertain if the classification is not purely arbitrary but bears a reasonable relation to the legislative objective: *Lim Meng Suang* at [60]. The Court of Appeal noted that the "reasonable classification" test in itself does not address fundamental questions such as when a certain level of equality should be legally mandated, which reflects the "very thorny nature of the concept of equality itself": *Lim Meng Suang* at [61]. This is because it is "incapable of furnishing" the normative basis for such an evaluation: *Lim Meng Suang* at [61].

1.64 The Court of Appeal described the "reasonable classification" test as an important "threshold legal test", such that a statute which fails to pass muster must be one "so legally illogical and/or incoherent that it would, *ipso facto*, be repugnant to any idea of legal equality to begin with": *Lim Meng Suang* at [62]. The test helps the courts to strike a balance between according leeway to the Legislature against ensuring laws which are patently illogical and/or incoherent did not pass muster: *Lim Meng Suang* at [70]. In a nutshell, if the "reasonable classification" test is not satisfied, it would be pointless to analyse the relevant statute "from the perspective of the concept of equality": *Lim Meng Suang* at [71]. The test has "substantive elements" and is not merely mechanical in requiring logic and coherence in the concerned statute: *Lim Meng Suang* at [71].

1.65 It is a prerequisite that the statutory purpose and object first be determined before one can ascertain whether the classification is reasonably related to it. The Court of Appeal observed that more often than not, the requisite "reasonable relation" would be found as there is no need for a perfect relation or "complete coincidence": *Lim Meng Suang* at [68]. However, this limb would not be satisfied where there is a

"clear disconnect" between the legislative purpose and the relevant differentia, though the Court of Appeal hastened to add that the final outcome would be determined by the specific facts as context before the court. It acknowledged that this could be seen as introducing "a limited element of illegitimacy" as part of the "reasonable classification" test, rather than an additional test: *Lim Meng Suang* at [84].

1.66 The Court of Appeal also noted that ascertaining the purpose of an Act could be a difficult task. It traced the historical roots of s 377A and located this in s 11 of the English Criminal Law Amendment Act 1885 (c 69) ("the 1885 Act"), noting that since this was not debated in the UK parliament, its purpose and object were unclear: *Lim Meng Suang* at [117]. Section 377A of the Penal Code (Cap 20, 1936 Rev Ed) ("1936 Penal Code") was introduced into the Straits Settlement in 1938, some 53 years later. It was not to be assumed that the provision shared the same rationale as its UK counterpart (whose purpose was unclear).

1.67 The objective evidence as to the purpose and object of s 377A, which was based on English law (s 11 of the 1885 Act), was itself unclear as references to two different statutes were made during the legislative debates: *Lim Meng Suang* at [118] and [122]. While Howell AG in his speech before the Straits Settlement Legislative Council referred to the need to strengthen the Minor Offences Ordinance 1906 (No 13 of 1906) ("1906 Minor Offences Ordinance"), the "Objects and Reasons" which accompanied the Penal Code (Amendment) Bill 1938 ("Objects and Reasons") referred to the need to supplement s 377 of the 1936 Penal Code: *Lim Meng Suang* at [122].

1.68 The 1906 Minor Offences Ordinance referred to "indecent behaviour" and persistent solicitation for immoral purposes under s 23 in public. Counsel for the appellant referred to Howell AG's reference to the 1906 Minor Offences Ordinance to argue that the reason why s 377A was introduced was for the narrow purpose of combating male prostitution. Thus, the application of s 377A beyond the ambit of the male prostitution scenario would, it was argued, be over-inclusive and unconstitutional: *Lim Meng Suang* at [131].

1.69 This was rejected firstly because s 23 goes beyond male prostitution and refers to the distinct limb of indecent behaviour. Further, the Objects and Reasons and other reports did not refer to the need to supplement the 1906 Minor Offences Ordinance but rather, to supplement s 377 of the 1936 Penal Code. It then provided that it was an unnatural offence to voluntarily have "carnal intercourse against the order of nature with any man, woman or animal". The explanatory note said that "[p]enetration is sufficient to constitute the carnal intercourse" referenced in the offence: *Lim Meng Suang* at [132].

1.70 This purpose of s 377A, to supplement s 377, was significant as it was consistent with s 23 of the 1906 Minor Offences Ordinance which proscribed "indecent behaviour", including but not confined to anal or oral sex. Section 23 was, however, confined to public conduct whereas s 377A was broader in reach as it would encompass "grossly indecent" acts between males in private. Like s 23, s 377A covered "grossly indecent" acts falling short of penetrative sex, and would necessarily also cover penetrative sex acts, as these constitute the most serious instances of acts falling within the category of "gross indecency": *Lim Meng Suang* at [133]. Thus, s 377A broadened the scope of s 377 by covering acts of penetrative sex and less serious acts of gross indecency committed between males. Today, with s 377 repealed, the Court of Appeal noted that a charge brought under s 377A could be brought for acts of penetrative sex between two males. That s 377A (public and private acts) is broader in scope than s 23 (public acts only) accounted for why Howell AG referred to the need to supplement the 1906 Minor Offences Ordinance in his Straits Settlement Legislative Council speech. It also accounts for why Howell AG stated that s 377A was based on English law, that is, s 11 of the 1885 Act, which has always been regarded as a provision of general application: *Lim Meng Suang* at [135].

1.71 The Indian Penal Code precursor to s 377 was also examined and found to be intended to have general application and also, to serve the purpose of enforcing societal morality. The Indian Law Commission referred to the offences as an "odious class of offences respecting which it is desirable that as little as possible should be said" [emphasis in original omitted]: *Lim Meng Suang* at [138]. The Commission did not want to elaborate on this "revolting subject" or to spark off public discussion, being of the opinion that "the injury which would be done to the morals of the community by such discussion" [emphasis in original omitted] would far outweigh any benefits from framing legislative provisions precisely: *Lim Meng Suang* at [138]. Thus, the narrow construction of the purpose of s 377A as dealing only with male prostitution would create an inconsistency and contradiction with the broader purpose of guarding against injury to the morals of the community, gleaned from documents evincing the intent of that clause or its precursors. Furthermore, both ss 377 and 377A were listed under the broad and general heading of "Unnatural offences" which goes against the narrow "male prostitutes" purpose unsuccessfully argued by the appellants: *Lim Meng Suang* at [140]. References to male prostitution in the Annual Reports on the Organisation and Administration of the Straits Settlement Police and on the State of Crime did not undermine this conclusion as clearly s 377A would cover grossly indecent acts between two males generally, as well as more specific acts involving male prostitutes: *Lim Meng Suang* at [125]–[127]. The Annual Reports also referred to female prostitution and the need for the police to safeguard "public morals" in a general sense: *Lim Meng Suang* at [142].

Thus, the Court of Appeal on the basis of this evidence and analysis concluded that s 377A was intended to be of general application, and not confined to the specific problem of male prostitution, which it also encompassed: *Lim Meng Suang* at [143].

1.72 The Court of Appeal rejected the argument that the original purpose of s 377A was to suppress male prostitution and only meant to cover other acts of gross indecency apart from penetrative sex acts; counsel referred to the prosecution of Oscar Wilde under s 11 of the 1885 Act for sexual acts with male prostitutes. Apart from the general nature of s 377A, the Court of Appeal stated that male prostitution would involve, among other acts, sodomy or penetrative sex: *Lim Meng Suang* at [146]. Furthermore, the point about Oscar Wilde was found to be "neutral" as Wilde had also been charged for sexual activity with men who were not prostitutes: *Lim Meng Suang* at [148].

1.73 Like the High Court, the Court of Appeal found a "complete coincidence" between the classification found in s 377A (male homosexuals or bisexual males engaged in acts of gross indecency with another male) and the legislative object (to make male homosexual conduct an offence because such conduct was not desirable): *Lim Meng Suang* at [27] and [153].

Articles 12(1) and 12(2)

1.74 The Court of Appeal also elaborated upon the nature of Arts 12(1) and 12(2). Article 12(1) provides: "All persons are equal before the law and entitled to the equal protection of the law." This general statement was described as a "declaratory statement of principles" rather than a set of specific legal criteria able to guide the court in deciding whether a particular statute breached Art 12: *Lim Meng Suang* at [90].

1.75 In contrast, Art 12(2), which prohibits discrimination on four specified grounds (religion, race, descent or place of birth), provides specific and concrete legal criteria which ensure that any statute which is discriminatory within the scope of Art 12(2) would be unconstitutional by virtue of Art 4, the supremacy clause. This is in addition to the "reasonable classification" test.

1.76 The Court of Appeal described Art 12(2) as representing a "more structured and principled" approach compared to the more open-ended formulation of other constitutional provisions, which places courts in the "unenviable position" of being "'mini-legislatures' of sorts": *Lim Meng Suang* at [92]. Surveying the South African, Canadian, American, Indian and Malaysian Constitutions, it noted that none

contained an equivalent clause to Art 12(2): *Lim Meng Suang* at [94]–[100]. It also noted the difficulties that courts reading such open-ended equality provisions would face in deciding "which particular ground of discrimination" ought to come within the ambit, giving rise to "every danger" it might act like a mini-legislature: *Lim Meng Suang* at [101].

1.77 It underscored that the terms "sex", "gender" and "sexual orientation" were not expressly prohibited grounds of discrimination under Art 12(2) which was "unsurprising" as Constitutions "reflect the social mores of the society" they operate within: *Lim Meng Suang* at [92]. Within the Singapore context, it fell to Parliament to amend the Constitution if it wanted to enlarge the grounds of non-discrimination, which provided the "necessary flexibility" to adapt laws to prevailing social mores: *Lim Meng Suang* at [92].

1.78 The Court of Appeal found that s 377A did not run afoul of Art 12(2) because after reviewing the historical and linguistic contexts, it concluded that that clause "does not address or encompass the subject matter of s 377A": *Lim Meng Suang* at [113]. It noted that the chief targets of the anti-discrimination clause as evident from the 1966 Constitutional Commission Report was to combat racial communalism and religious bigotry, and so protect racial and religious minorities (which are the only types of minorities recognised by Singapore law). The 1966 Commission did not consider sex or sexual orientation as grounds prohibiting discrimination and the court refused to read this into Art 12(2) as this would be beyond "the remit of the court" and should, if at all, be effected by constitutional amendment: *Lim Meng Suang* at [185].

CEDAW and Art 12

1.79 Reference was made to the Convention for the Elimination of all Forms of Discrimination against Women ("CEDAW") for the argument that this international treaty obliged Singapore to eliminate discrimination on the basis of sexual orientation: *Lim Meng Suang* at [186]. This in itself is a controversial proposition as CEDAW only refers to "gender" and not "sexual orientation" and both terms are not synonyms. The Court of Appeal did not find anything in Singapore's response to the CEDAW oversight committee that suggested that Art 12(2) should be expansively read to include discrimination based on "gender, sexual orientation or gender identity"; it was Art 12(1) rather than Art 12(2) which was referred to in the Singapore response. Article 12(1) provides for the "reasonable classification" test which would apply to all persons: *Lim Meng Suang* at [187]. In addition, CEDAW is not self-executing and Singapore views international and domestic law through dualist lens, that is, as separate legal systems. As

such, treaties do not automatically amend the Singapore Constitution to include new prohibited grounds of discrimination under Art 12(2).

Justiciability of Public Prosecutor power under s 33(B)(2)(*b*) of the MDA

1.80 Article 12 was implicated in *Muhammad Ridzuan bin Mohd Ali* (above, para 1.21) in relation to the applicant and his co-accused who were both involved in the same drug-trafficking activity, attracting charges which carried the sentence of capital punishment. Under the terms of s 33(B)(2)(*b*) of the MDA, the PP had only granted the co-accused a certificate of substantive assistance which helped disrupt drug-trafficking activities within or outside Singapore.

1.81 The applicant sought leave to apply for various orders, including a declaration that the PP had acted in bad faith in failing to grant the applicant a s 33B(2)(*b*) certificate and was in breach of Art 12 of the Singapore Constitution: at [1] and [18]. As such, while the applicant had been given the mandatory death sentence, his accomplice, having fulfilled the requirements of s 33(B)(2)(*b*) of the MDA, was given a life imprisonment sentence and 15 strokes of the cane. In so doing, the trial judge was exercising the discretion under s 33B(1)(*a*) of the MDA: at [12].

1.82 The High Court affirmed that exercises of executive power under s 33(B)(2)(*b*) of the MDA were justiciable on the grounds of bad faith, malice or unconstitutionality, as was consistent with parliamentary intent and previous decisions holding that exercises of executive decision-making power "cannot be allowed to override a fundamental liberty enshrined in the Constitution": at [38], citing *Ramalingam v Ravinthran v Attorney-General* [2012] 2 SLR 49 at [41].

1.83 The tests to be applied in relation to Art 12 challenges to executive acts were that if it entailed "intentional and arbitrary discrimination": at [42]; see also *Eng Foong Ho v AG* [2009] 2 SLR(R) 542. Arbitrariness implied "the lack of any rationality": at [42], citing *Public Prosecutor v Ang Soon Huat* [1990] 2 SLR(R) 246 at [23]. The exercise of executive decision-making power would also be subject to the principle under Art 12(1) that like should be compared with like: at [43].

1.84 The High Court found that the applicant had failed to discharge the burden of establishing a *prima facie* breach of the Art 12 equal protection clause as no evidence had been proved to indicate that the PP had arbitrarily or deliberately discriminated against him in not granting the applicant a certificate. A difference in outcome between the

applicant and his co-accomplice was not in itself sufficient to constitute a *prima facie* evidence of a breach of Art 12. Indeed, the applicant had provided no evidence that he provided the same level of assistance as his accomplice or, indeed, could have provided more information: [44] and [49].

1.85 The High Court took note from parliamentary debates that the purpose for introducing s 33B(2) of the MDA was "to enhance the operational effectiveness of the CNB": at [49]. Thus, determining whether a person had substantially assisted the CNB "involved a multi-faced inquiry" engaging various extra-legal factors, such as the operational value of any provided information, its veracity and its upstream/downstream effects: at [50]. This determination was "largely a value judgment" which entailed "a certain degree of subjectivity": at [50]. The court was cautious not to substitute its own judgment for that of the PP, who was "much better placed" to assess the operational value of the assistance provided. Thus, statutorily and as a matter of case law, judicial review was confined to the grounds of bad faith, malice and unconstitutionality. The court accepted that if the PP was made to justify decisions before courts in response to bare, unsubstantiated allegations, the CNB's operational effectiveness as well as maintaining the confidentiality of operational information would be hampered. Comparing the statements of both the applicant and his accomplice would be a superficial exercise from which one could not glean "extra-legal and operational considerations": at [51].

1.86 The High Court, noting the high constitutional office of the PP, also affirmed (at [72]) that a presumption of constitutionality applied that powers were regularly exercised, unless otherwise shown. This approach was also followed in *Cheong Chun Yin* (above, para 1.5) where a similar failed constitutional challenge was made against Art 12 for a non-certification decision: *Cheong Chun Yin* at [35]–[37]. Although the discretion to issue a certificate of substantive assistance was a statutory rather than constitutional power, in view of the Attorney-General's high constitutional office, the courts would proceed on the basis that the PP had exercised his powers according to law, unless otherwise shown. On the facts, the applicant was unable to provide any evidence to show that the PP deliberately and arbitrarily discriminated against him: *Cheong Chun Yin* at [36]–[37].

1.87 In *Ten Leu Jiun Jeanne-Marie v The National University of Singapore* [2015] 1 SLR 708, the plaintiff argued that Art 12 of the Constitution was breached as she had not received written grounds for a decision dismissing a discovery application. Her argument was that the failure to provide her with written judgments for appeals against decisions of assistant registrars violated Art 12 because other plaintiffs had been given written grounds in other cases. Aside from the holding

(at [33]) that judges do not have a duty to deliver written grounds in every case, the High Court rejected her argument as it was based on a "specious comparison" with other decisions where written decisions had been delivered. There was no normative right to written judicial decisions. The test applied was that like cases should be treated alike, not that all cases should be treated alike, when it came to issuing written decisions.

Article 14

1.88 The High Court in *Lee Hsien Loong v Roy Ngerng Yi Ling* [2014] SGHC 230 ("*Roy Ngerng*") affirmed that the right of free speech as embodied in Art 14 of the Constitution was not absolute but subject to the law of defamation. It held that the common law action of defamation was not unconstitutional, as the Court of Appeal explicitly affirmed in *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1990] 1 SLR(R) 337 ("*Jeyaretnam*") at [59]–[61]. Furthermore, the common law of defamation in Singapore is modified by the Defamation Act (Cap 75, 1985 Rev Ed) which has its origins in the Malaysian Defamation Ordinance 1957.

1.89 The High Court rejected the suggestion of the defendant that the decision of the Court of Appeal in *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 cast doubt on *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1990] 1 SLR(R) 337 and *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 1 SLR(R) 791: *Roy Ngerng* at [22]. The Court of Appeal had rejected the contention that Parliament did not enact legislation to restrict free speech under Art 14 when it became a constitutional right in Singapore on 16 September 1963. The Court of Appeal held that Parliament did enact restrictive legislation then, drawing from Art 162 which was a "law-enacting" provision which applied to the Defamation Ordinance. Article 162 provides that all laws prior to the commencement of the Constitution shall be construed as "coming into operation of this Constitution with such modifications, adaptations, qualifications and exceptions" as necessary to bring them into conformity with the Constitution: *Roy Ngerng* at [23].