1. ADMINISTRATIVE AND CONSTITUTIONAL LAW

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Introduction

1.1 The major developments in the field of public law in 2015 related primarily to the field of constitutional law as administrative law cases basically applied existing principles.

1.2 With respect to constitutional law, most cases involved Pt IV liberties pertaining to Arts 9, 12, 14 and 15 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution"). The primacy of text and historical intent were affirmed as methods of constitutional interpretation as well as the principled judicial commitment not to engage in legislation by interpretation, which reflects the Singapore model of the separation of powers. The dualist commitment to treating international law and municipal law as distinct spheres of law was underscored and applied to peremptory norms. An objective test of review predicated on the rule of law principle was applied to preventive detention cases under the Criminal Law Temporary Provisions Act (Cap 67, 2000 Rev Ed) ("CLTPA") where an order for detention was found to be illegal for falling without the ambit of conduct contemplated by the Act. In the field of contempt of court and "scandalising" the court, the "real risk" test was applied and affirmed, and "fair criticism" was treated as an element of liability rather than as a defence. With respect to political libel, further guidance was shed on calculating the quantum of damages by taking into consideration not only the fact that the object of the speech might be a "public person" with higher reputational interests but also the situation and credibility of the speaker. What also warrants mention is the calibrated form of "balancing" in a case involving religious liberty, which is distinct from previous more "categorical" approaches in favour of statist considerations.

ADMINISTRATIVE LAW

1.3 Some of the cases where decisions were found to be *ultra vires* were straightforward as in the case of *Tan Lip Tiong Rodney v Commissioner of Labour* [2015] 3 SLR 604. An injured employee lacked

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the mental capacity to decide whether to make a claim under the statute or under common law. His next of kin also lacked the requisite capacity to do so on his behalf as they had not been duly appointed as deputies by the court under the Mental Capacity Act (Cap 354, 2009 Rev Ed). Therefore, when the Commissioner of Labour issued a notice of assessment in response to the next of kin's claim to collect compensation under the Work Injury Compensation Act (Cap 345, 2009 Rev Ed) for the injured employee, this notice was issued *ultra vires* and hence a nullity: at [46].

1.4 The High Court in *Wham Kwok Han Jolovan v Attorney-General* [2016] 1 SLR 1370 affirmed the principle that a quashing order could only apply with respect to a decision or determination, and held that a police warning had no legal effect and did not affect the rights or liabilities of its recipient. It constituted no more than the opinion of the relevant authority that the recipient had committed an offence, that of allowing foreigners to participate in a vigil at Hong Lim Park, contrary to para 4(1)(*b*) read with para 4(2) of the Public Order (Unrestricted Area) Order 2013 (S 30/2013) ("the Order"). Wham was given a warning which communicated to the recipient that if he participated in conduct prohibited by law in the future, "leniency may not be shown to him and he may be prosecuted for it": at [33]. However, this warning was not binding on the recipient and did not amount to a pronouncement of guilt or factual finding. The recipient could dispute the appropriateness of the warning by sending a letter to the Central Police Division: at [34]. Further, the Attorney-General was not bound to consider a prior warning in making decisions to prosecute: at [37]. The High Court also stated (at [44]) that courts should not take prior warnings into account during sentencing. It concluded (at [45]) that there was no decision for the court to quash.

Exhaustion of domestic remedies

1.5 In general, parties must exhaust domestic remedies before applying for judicial review. In *Tey Tsun Hang v National University of Singapore* [2015] 2 SLR 178 ("*Tey Tsun Hang*"), the High Court was of the opinion that the sacked professor would not be given leave for judicial review because he had failed to pursue his alternative remedies. These included petitioning his employer, the National University of Singapore ("NUS"), for reinstatement and, if he thought NUS had breached the employment agreement, commencing an action for breach of contract: at [48].

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Time limits and leave to apply for judicial review: Order 53 r 1(6) of the Rules of Court

1.6 The Court of Appeal in *Per Ah Seng Robin v Housing and Development Board* [2016] 1 SLR 1020 ("*Per Ah Seng Robin*") departed from the High Court's decision ([2015] 2 SLR 19) that the appellants had applied for leave for a quashing order out of time, after the terms of O 53 r 1(6) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) which state:

> Notwithstanding the foregoing, *leave shall not be granted to apply for a Quashing Order* to remove any judgment, order, conviction or other proceeding for the purpose of its being quashed, *unless the application for leave is made within 3 months after the date of the proceeding or such other period (if any) as may be prescribed by any written law* or, *except where a period is so prescribed, the delay is accounted for to the satisfaction of the Judge* to whom the application for leave is made; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the Judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired. [emphasis by the Court of Appeal omitted]

1.7 In calculating the stipulated three-month period, it is accepted that time generally runs from the date of the impugned decision, or where a multi-step decision process is involved, from the date of the final step in that process: at [51]. However, the Court of Appeal noted (at [51]) that this was "not an inflexible or unyielding rule". In *UDL Marine (Singapore) Pte Ltd v Jurong Town Corp* [2011] 3 SLR 94 ("*UDL Marine*"), the court had permitted time to start running later as the respondent had demonstrated conduct indicative of a willingness to reconsider its earlier decision: *Per Ah Seng Robin* at [52]. Even where the Jurong Town Corp had indicated in its first rejection letter that its decision was final, its subsequent conduct demonstrated that it was open to reconsidering this decision.

1.8 On the facts of *Per Ah Seng Robin*, the Court of Appeal found that even though the Housing and Development Board ("HDB") had informed the appellants in writing on various occasions that the Minister's decision was final and not open to review, this was "a mere reiteration" of the HDB's and Minister's legal positions under s 56 of the Housing and Development Act (Cap 129, 2004 Rev Ed) ("HDB Act"). It did not "necessarily" indicate they would not be open to reconsidering the compulsory acquisition of the flat: *Per Ah Seng Robin* at [56].

1.9 Indeed, on the evidence, the HDB's "course of conduct as a whole" indicated it was willing to reconsider its decision: *Per Ah Seng Robin* at [56]. This was evident in the long-drawn-out process where the HDB sought more clarificatory information from the appellants and met

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Per many times after the Minister's letter of 14 March 2011 which had rejected the appellant's appeal. As late as 2013, the HDB was prepared to give Per time to submit further relevant information which would be considered: *Per Ah Seng Robin* at [56]. The Court of Appeal agreed with the appellant that the date from which the three-month period in O 53 r 1(6) should be reckoned was the date of the last correspondence, 4 April 2014, the date of the final rejection. On this reckoning, the appellants were well within the three-month period as they had commenced Originating Summons No 440 of 2014 on 15 May 2015.

1.10 Even if time was taken to run from 11 March 2011 when the Minister's letter was issued, the Court of Appeal stated their view that the appellants had satisfactorily accounted for the delay. This is because the appellants were "continuing to engage the HDB" to persuade it to change its mind and "thus could not be expected to commence litigation": *Per Ah Seng Robin* at [58]. The appellants had sought non-legal avenues of redress, such as approaching their Member of Parliament ("MP") for help, and the Court of Appeal noted that "a certain measure of latitude should be granted to applicants who seek to resolve disputes amicably without resorting to judicial review proceedings": *Per Ah Seng Robin* at [60]. There were therefore grounds to suggest that the HDB was open to reconsidering its decision.

Substantive grounds of review: Illegality and irrationality

1.11 The Court of Appeal in *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 ("*Tan Seet Eng (CA)*") at [77]–[82] clarified that "illegality" and "irrationality" were separate heads of review, even if they overlapped, in that a decision could be "both illegal and irrational at the same time": at [81]. Illegality (at [80]):

> … serves the purpose of examining whether the decision-maker has exercised his discretion within the scope of his authority and the inquiry is into whether he has exercised his discretion in good faith according to the statutory purpose for which the power was granted, and whether he has taken into account irrelevant considerations or failed to take account of relevant considerations.

Conversely, irrationality (at [80]):

> … is a more substantive enquiry which seeks to ascertain the range of legally possible answers and asks if the decision made is one which, though falling within that range, is so absurd that no reasonable decision-maker could have come to it.

1.12 In the immediate case, applying an objective test of review, the Court of Appeal found that the grounds put forward did not fall within the scope of the circumstances under which the powers of preventive

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detention under the CLTPA could be exercised by the Minister on two bases.

1.13 First, while reprehensible, the activities of running a match-fixing syndicate do not rise to the level of "activities of so serious a nature" as to bring it within the ambit of the CLTPA. What are essentially corrupt practices are not comparable in gravity to the activities contemplated by the CLTPA, such as activities relating to gang culture, drug trafficking and loansharking syndicates, with the unifying theme being to ensure that Singapore citizens should not have to live in fear of violent acts and lawlessness: at [121] and [139].

1.14 Second, the reasons for detention fell outside the objective of the CLTPA to protect public safety, peace and good order in Singapore. While the running of the match-fixing syndicate took place from Singapore and runners were recruited in Singapore, there was nothing to suggest how these acts could affect peace, public safety and good order within Singapore. The matches in question took place outside Singapore and there were no indications that criminal syndicates would take root in Singapore as a result of the appellant's activities: at [146].

1.15 Thus, the reasons for Tan's detention did not afford a legal basis for detention, and the appellant's detention was unlawful for being beyond the scope of the power vested in the Minister under the CLTPA. The court did not consider it necessary to consider other substantive grounds of challenge based on irrationality: at [149].

1.16 All public processions in Singapore need a police permit, which may come with conditions. In *Vijaya Kumar s/o Rajendran v Attorney-General* [2015] SGHC 244 ("*Vijaya Kumar*"), the applicants for judicial review, who were participants in a Thaipusam procession, wanted to challenge the police decision to permit this procession subject to prohibitions on musical accompaniment as being irrational in the *Wednesbury* sense.

1.17 Other non-religious processions such as the Chingay and St Patrick's Day parades had not been subject to similar conditions, and it was contended that the police had considered irrelevant considerations in taking note of the fact the Thaipusam procession had a religious aspect: at [15] and [42]. This, it was alleged, was a breach of Art 12(1) of the Constitution which prohibits "deliberate and arbitrary discrimination against a particular person", with arbitrariness implying the absence of any rationality: at [42], citing *Public Prosecutor v Ang Soon Huat* [1990] 2 SLR(R) 246.

1.18 The High Court in *Vijaya Kumar* did not consider the fact that the police took into account the religious nature of an application for a

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permit for a Thaipusam procession, in stipulating musical restrictions, to be irrational in the *Wednesbury* sense, arbitrary or an irrelevant consideration: at [47]–[48]. Indeed, it pointed out that the grant of a licence for a Thaipusam procession is an exception to the general policy of the police not to grant permits for religious foot processions: at [43]. The need for express police authorisation for the playing of music and musical instruments in public processions as required under reg 8(2)(*c*) of the Public Order Regulations 2009 (S 487/2009) ("2009 Regulations") remained applicable for all religious processions "due to communal sensitivities and the potential for communal disturbance and strife": at [43]. The Thaipusam procession was in fact treated more favourably than other religious processions in so far as the police discretion to enforce reg 8(2)(*c*) was applied in a "more nuanced fashion" as religious hymns could be sung during the procession and music broadcast from three points near the temples: at [43].

1.19 In addition, the Thaipusam procession could be distinguished from the Chingay and St Patrick's Day processions as there were distinct factors justifying differential treatment. The Thaipusam procession was religious in nature and brought out "a higher order of public order concerns" as it took place "on a larger scale in a different location and had a much longer route and duration": at [44]. The St Patrick's Day parade took place on a weekend for three hours, and the Chingay Parade took place on two nights for two hours, as opposed to the Thaipusam procession, which frequently was staged during weekdays and working hours: at [45]–[46]. It was not irrational for the court to draw a distinction between religious processions and "secular" or cultural parades like Chingay and St Patrick's Day, which posed a lesser public order concern. The involvement of a constitutional liberty does not operate as a trump here, given that the manifestation of religious practice is not absolute but subject to public order considerations under Art 15(4) of the Constitution.

1.20 Thus, the police had not acted arbitrary or irrationally; the High Court pointed out (at [47]) that "history and current events" in Singapore and globally gave "ample justification" to the police to "pay special attention to events involving a religious element", which might spur hostility from third parties or disorder by trouble-making participants. These were relevant considerations. The High Court was solicitous towards concerns about "Singapore's history of racial riots and its multi-religious make-up": at [49]. Thus, reasonableness must be contextually assessed against this Singapore particularity.

1.21 The grant of a permit with conditions relating to the playing of musical instruments during the Thaipusam festival was "clearly linked to legitimate public order considerations": at [35]. These were based on police assessments of ground conditions in relation to crowds and traffic

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and the possibility of conflict between individuals following from playing musical instruments during a religious foot procession. Given Singapore's multi-religious composition and history of race riots, the risk of conflict "could not be said to be unreal": at [49]. The High Court noted that the threshold for judicial intervention on grounds of irrationality was "relatively high", and noted that the music restrictions were not "so outrageous in defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it", citing (at [48]) the seminal House of Lords decision of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 ("*GCHQ*").

1.22 In *Per Ah Seng Robin* (above, para 1.6), the appellants challenged a HDB decision to compulsorily acquire their flat as being irrational and illegal in nature. This has to be understood against the rationale underlying the HDB Act.

1.23 The Singapore government often provides subsidies to allow eligible persons to purchase HDB flats, though flat owners are expected to adhere to 14 conditions established under s 56 of the HDB Act. Breaching any of these conditions, such as unauthorised subletting of the entire flat without written approval, may result in the compulsory acquisition of the flat by the HDB. The rationale for this rule is that the public housing programme is intended for owner occupation rather than a means of generating rental income: at [76]. HDB lessees are to continue to live in flats they sublet to ensure subtenants do not cause nuisance to their neighbours: at [77].

1.24 The appellants, a married couple with a daughter, had allegedly let out their whole flat, although they contended they had only let out two rooms and kept one room. As they did not lock the room they retained, it became occupied without their permission when they went to temporarily stay with relatives to care for Per's widowed mother. The High Court held that it was right of the HDB to take back the flat on this ground, which was appealed against.

1.25 The HDB had given notice of intention to compulsorily acquire the flat under s 56(1)(*h*) of the HDB Act. This contained information that an interested person could object to the acquisition and compensation offered by the HDB within 28 days of being served the notice: ss 56(4)–56(6) of the HDB Act states that if aggrieved by the HDB's decision, an appeal can be made to the Minister within 28 days and his decision "shall be final and not open to review or challenge on any ground whatsoever". The appellants did appeal to the Minister after the HDB rejected their reasons that they had only rented two of three rooms of the flat and were staying in a private condominium on a temporary basis to take care of an elderly relative. The HDB

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subsequently lodged the relevant instruments with the Registrar of Titles to vest the title of the flat in itself in 2011.

1.26 In 2014, the appellants sought leave for quashing orders with respect to the HDB's notice of intention on 6 October 2010 to compulsorily acquire the flat, the HDB's decision of 29 November 2010 to reject the appellants' appeal against the compulsory acquisition of the flat, the Minister's decision of 14 March 2011 to reject the appeal and the HDB's notice of vesting of 20 April 2011: at [29].

1.27 The appellants argued that the HDB's and Minister's decisions were illegal and irrational on the basis that only two bedrooms had been sublet and not the entire flat. It was argued that the HDB had misdirected itself in regarding the appellants' failure to live in continuous occupation of the flat as a factor making the subletting illegal.

1.28 The Court of Appeal found the first argument to be without merit as the HDB officers had objective evidence that the whole flat had been illegally sublet: at [80]. This included ashtrays on the living room table, which a family with a young child would not allow; in addition, all three sparsely furnished bedrooms were occupied by one foreign worker with one single bed *per* room. There were no personal effects in the flat which would suggest a family of three resided there. In addition, one of the occupiers admitted in his statement that the appellants were not living there.

1.29 The appellants' explanation that they were too trusting in not locking the bedroom they used was "all too lame an excuse", given that strangers were living in the flat: at [80]. The court did not find Per a truthful person, having concealed from the HDB his ownership of other private properties. Although the subtenancy agreement stated that only two rooms were sublet, this did not necessarily reflect reality. As such, the HDB was "amply justified" in deciding to compulsorily acquire the flat. In addition, the HDB took a relevant consideration into account, that is, the non-continuous occupation of the appellants in the flat, as it complemented the evidence of illegal subletting: at [82]. Thus, the HDB and Minister did not act illegally or irrationally: at [83].

Natural justice

1.30 The appellants in *Per Ah Seng Robin* argued that natural justice had been breached in relation to a HDB decision to compulsorily acquire a flat which had been illegally sublet. The basis for this was that the HDB did not disclose evidence in the form of four items it had relied upon in its decision-making process. The basic idea of fairness is that

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there is a general duty to disclose an adverse report so that an affected party can respond to it to make corrections or controvert it: at [88]–[89].

1.31 The Court of Appeal worked through each of these four items. First, an anonymous tip-off that the appellants were not living in the flat was simply an assertion which gave rise to the investigation, rather than the basis for the HDB action: at [85]. Second, the brief statement by one of the occupiers that the appellants did not reside in the flat and that his employer paid the monthly rental was information which had been communicated to the appellants in the HDB's letter of intention dated 17 July 2010. Third, photographs taken by HDB officers were shown to Per during his meetings with the officers, which he did not dispute. Further, these photographs "informed the appellants of the case which they had to meet"; their correspondence with the HDB showed that they clearly understood the case against them: at [87].

1.32 With respect to the fourth item, the private investigator's report, the court noted that the duty to disclose evidence is not an absolute one and is subject to exceptions, such as where it would not be in the public interest to disclose it: at [90]. Quoting from *De Smith's Judicial Review* (Lord Woolf *et al* eds) (Sweet & Maxwell, 7th Ed, 2013) at para 8-020 (at [91]), disclosure could be restricted to protect:

> … the internal workings of the decision-maker; the sources of information leading to the detection of crime or other wrongdoing; sensitive intelligence information; and other information supplied in confidence for the purposes of government, or the discharge of certain public functions.

1.33 The private investigator's report would contain details of his investigatory methods such that there were "cogent public interests that militate against the disclosure": at [93]. Publicising these methods may allow people to "game" the system: at [93]. Further, the non-disclosure was "wholly immaterial" as the report was not the basis for the HDB's decision but instead motivated the on-site inspection. The evidence found from the on-site visit motivated the HDB decision. In addition, the non-disclosure of the report did not hamper the appellants from making "meaningful representations" to the HDB and Minister to controvert the accusations made against them and thus did not breach the rules of natural justice: at [93]–[94].

Natural justice and social clubs – Rule against bias and principle of necessity

1.34 Although the legal relationship between social clubs and their members is contractual, the Court of Appeal has held that the expulsion

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of a club member must accord with rules of natural justice: *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR(R) 802 ("*Kay*") at [39]. This is because natural justice rules, being "universal rules that govern the conduct of human behaviour", are implied contractual terms in these cases: *Khong Kin Hoong Lawrence v Singapore Polo Club* [2014] 3 SLR 241 ("*Khong*") at [23].

1.35 The rule against bias was at issue in *Sim Yong Teng v Singapore Swimming Club* [2015] 3 SLR 541. The first plaintiff had been suspended from membership under r 15(d) of the club rules, under which two requirements must be met. First, the member has to be convicted in a court of law of any offence involving an element of moral turpitude or dishonesty. Second, the management committee ("MC") is to be of the opinion that if that member remains a member, this would place the club in disrepute or embarrass it. On such issues, the court noted it would be slow to disturb the findings of the MC and would not embark on a "minute scrutiny of the correctness of the decision of the MC", only considering if it was *intra vires* and *bona fide*: at [79]. The High Court found (at [81] and [82]) that the MC had formed a "reasonable opinion" which was "logically supported" by the evidence, and that the MC was in a "much better position" than the court to determine the standing of the club's reputation.

1.36 On 3 April 2013, the MC decided to suspend the plaintiff's membership after his insider trading conviction and after giving him a hearing ("the 3 April 2013 decision"). After this, a new MC was elected. The MC president approached some members of the new MC for their views on the 3 April 2013 decision, and eight of them expressed their support through signed letters dated 25 July 2013.

1.37 The 3 April 2013 decision was declared null and void for breach of natural justice in Originating Summons No 572 of 2013, after which, the new MC decided to restart the r 15(d) process against the first plaintiff and his wife, the second plaintiff. The plaintiffs before the next MC meeting contended that the MC had prejudged the matter, as evidenced by the 25 July 2013 letters.

1.38 During this decision-making process, those involved in the 3 April 2013 decision were not included in the new MC's meeting as they had a conflict of interest; as such, there were six members present, the minimum needed for a quorum, as provided under r 21(c) of the club rules which requires not less than one half of the total MC members. While the MC could co-opt a further two members into the MC under r 21(a)(vii), these members would have no voting powers: at [5].

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1.39 On 8 October 2013, by a 5:1 majority, the MC decided that the requirements of r 15(d) were satisfied and decided to suspend the first plaintiff, who challenged this decision, *inter alia*, for breach of natural justice: at [26]–[27].

1.40 The High Court noted (at [42]) that the rigour with which natural justice was to be applied would vary with the particular circumstances of each case. In club cases, the more extensive and coercive the disciplinary power is, the more rigorous the application of natural justice rules will be, applied as implied contractual terms: at [43].

1.41 In the instant case, the decision was not one involving fact-finding as in *Kay* or *Khong*; rather, it involved inferences from the established fact of an insider trading offence. Under r 15(d), if the MC finds that the offence involved moral turpitude and not terminating club membership would bring the club into dispute or embarrass it, the only course of action available to it is to suspend membership and give the suspended member a six-month period to transfer membership: at [45]. This would not involve any severe loss in economic value but only entail a loss of social value and consequential reputational damage. The rules of natural justice were thus not to be applied with the same rigour as they had been in *Kay* and *Khong*: at [47].

1.42 The High Court held (at [52]) that there was no reason in principle why the principle of necessity should only be confined to bodies exercising statutory functions; it could apply to the disciplinary proceedings conducted by a social club.

1.43 This principle provides that at common law, a person disqualified from decision-making may, nonetheless, have to decide the matter in the absence of a competent alternative forum to hear it or, if his presence is needed, to form a quorum: at [49], quoting from *Halsbury's Laws of Singapore* vol 1 (Singapore: LexisNexis, 2012) at para 10.056. The principle of necessity can be read into club rules to ensure that natural justice rules not frustrate the MC's decision-making powers so as to make it powerless to act as the club rules required.

1.44 The High Court stated (at [52]) that the threshold for invoking the principle of necessity is "high"; for the court to hold that it applies, it would have to ensure that all practical alternatives are unavailable and that the decision maker has done all it can to reduce any bias or reasonable suspicion of bias. It was found to apply on the facts, as it was not an option to co-opt members into the MC as they would lack voting power under r 21(a)(vii), and the power of the MC under r 15(d) was "non-delegable": at [53]. The MC had decided to exclude from the decision-making those MC members who were part of the 3 April 2013

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decision and the complainant. The remaining six members who were the "least tainted" (at [74]) could form the quorum and although they had written the 25 July letters supporting the original 3 April 2013 decision to suspend the plaintiff, they were the least susceptible to bias allegations. The MC had thus done everything it could to reduce any reasonable suspicion or apprehension of bias: at [54].

1.45 As the important matter of club reputation was at issue, the High Court held (at [55]–[56]) that the principle of necessity would prevail over natural justice rules to the extent necessary for the club to safeguard its reputation.

1.46 However, although the rule of necessity applied, the judge was disposed to scrutinise the decision even more closely to see if the committee operated out of an open mind or allowed its previous views to determine its decision, to ensure it had discharged its duty to act fairly: at [57].

1.47 The test of apparent bias was not met on the facts. This test is defined as "whether a reasonable and fair-minded person sitting in court and knowing all the relevant facts would have a reasonable suspicion or apprehension that a fair trial is not possible": at [71]. In the present case, the question was whether a reasonable and fair minded person present at the MC meeting, which was not a trial, knowing the facts, would entertain a reasonable suspicion or apprehension that the MC's decision was biased or predetermined or both. This was an objective test, considered from the perspective of a reasonable member of the public and not the court: at [71], following *Re Alan Skankar* [2007] 1 SLR(R) 85 at [82].

1.48 While it is not objectionable that decision makers might have a predisposition towards a particular outcome, what is objectionable is a predetermination, where the decision maker makes up his mind at too early a stage: at [63], citing *R (Lewis) v Redcar and Cleveland Borough Council* [2009] 1 WLR 83 at [106]–[109].

1.49 The High Court thus held (at [64]) that there was insufficient evidence to conclude that the MC or its members had closed their mind during the hearing up till the date of the 8 October 2013 decision, or that they had any bias towards the plaintiff.

Scope of judicial review – Contractual matters

1.50 Judicial review is a discretionary public law remedy. As such, if a dispute is contractual in nature, it would not be susceptible to judicial review, as in *Tey Tsun Hang* (above, para 1.5). Here, a university

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professor was first suspended and then terminated from employment for actions in breach of the code of conduct of his employer, NUS, for receiving gifts and having an intimate relationship with a student. The decision in question stemmed from an agreement between employer and employee and was considered purely contractual in nature.

1.51 It is established law in Singapore that when ascertaining whether a body is susceptible to judicial review, two questions must be answered: first, whether it is a public body; and second, whether it is on this specific occasion, exercising public law functions: at [36], following *UDL Marine* (above, para 1.7).

1.52 NUS is a university corporatised under the National University of Singapore (Corporatisation) Act (Cap 204A, 2006 Rev Ed). Even if NUS was a public body in one particular context, this does not mean all its decisions are subject to judicial review: at [37]. It is a question of not just the nature of the decision maker but also the nature of the decision actually made in the particular instance: at [37]. As noted in *Public Service Commission v Lai Swee Lin, Linda* [2001] 1 SLR(R) 133 at [44], a statutory body does not always exercise a statutory power in making certain decisions: at [39].

1.53 In the immediate case, NUS's power stemmed from the employment agreement between the university and Tey and, in the absence of any statutory restrictions underpinning the employment relationship, was purely contractual in nature. As no public law function was involved, it was not subject to judicial review.

Standing and remedies

1.54 A Sikh religious counsellor to Sikh prison inmates does not have the standing to bring an application for judicial review under O 53 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("RoC 2006") to quash the Singapore Prison Service's ("SPS") hair grooming policy which allegedly violates the prisoners' Art 15 constitutional rights to religious practice in the form of wearing unshorn hair as part of the basic tenets of Sikhism.

1.55 Originally in *Madan Mohan Singh v Attorney-General* [2015] 2 SLR 1085 ("*Madan Mohan Singh*"), the challenge was brought by the applicant counsellor and a Sikh inmate, Jagjeet Singh, to the effect that Jagjeet's Art 15 constitutional rights had been violated by the SPS: at [17]. Jagjeet and the applicant withdrew their originating summons before the hearing. The applicant alone filed a new originating summons to which Jagjeet for "some unexplained reason" (at [17]) was not party to seeking a quashing order as well as a declaration, which

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under O 53(1)(1) of the RoC 2006 is contingent on leave being granted to apply for a quashing order.

1.56 The applicant lacked standing to apply for a quashing order; his intent appeared to be to challenge the substance of the SPS practice of labelling Sikh inmates as "practising" or "non-practising" which his affidavit averred would be contrary to his religious conviction and conscience: at [29]. His basic concern seemed to be that Sikh inmates should be allowed to keep unshorn hair as part of his Art 15 religious freedom rights even if this decision was made after admission to prison. The policy only permitted Sikh prisoners to keep unshorn hair and beard if it was unshorn at the point of admission. The latest originating summons was brought in January 2014, whereas the SPS since 2013 had abandoned the objected-to terminology: at [31]. The court held (at [31]) on the "plain interpretation" rule that the very object the applicant sought to quash no longer existed when the originating summons was brought, mandating that it be struck out under O 18 r 19 of the RoC 2006.

1.57 In applying the "substantive interpretation" approach to considering the quashing order, the test for whether the applicant had standing to quash it was found to be established clearly in *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1, which followed the approach towards "private rights" adopted in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 and applied in *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [72]–[76].

1.58 Essentially this requires that (a) a personal right of the applicant must have been violated; (b) the applicant must have a "real interest" in bringing the action; and (c) a "real controversy" must exist between the parties: *Madan Mohan Singh* at [33]. This test also applies to constitutional rights such that an "actual or arguable" violation of a constitutional right must be shown to establish standing. If this can be shown, then the applicant has "a *prima facie* 'real interest' in bringing the action": *Madan Mohan Singh* at [34].

1.59 The High Court found that the applicant had suffered no violation of his Art 15 right to propagate his faith by the decision of the SPS not to renew his volunteer pass, and that there was no "logical link" between the non-renewal of the pass and the hair grooming policy whose substance the applicant sought to quash. If the hair grooming policy violated religious practice, this would be suffered by the Sikh inmates rather than the applicant. A Sikh prison inmate would have standing to challenge the hair grooming policy but not the applicant; despite his personal interest in the matter as their religious counsellor, none of his personal rights were affected.

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1.60 Thus, the High Court held that the applicant lacked standing to seek the quashing order as he had suffered no violation of any personal right and did not have a real interest in the matter: *Madan Mohan Singh* at [18], [45] and [59].

1.61 In contrast, all three applicants in *Vijaya Kumar* (above, para 1.16) were held to have standing to challenge the constitutionality of prohibitions on music that attended the grant of permission to hold a Thaipusam religious procession. Two were Hindus whose legal standing was enhanced as they had also participated in the 2015 Thaipusam procession. The third applicant, also a Hindu, was a spectator and photographer during a part of the procession but Tay Yong Kwang J accepted he had sufficient standing as a Hindu watching the procession, because he could not be said to be a mere "concerned citizen" or "busybody" with no real interest in wanting the procession to be conducted after his religious beliefs: at [22]. In other words, the personal rights of the applicants in the form of allegedly infringed constitutional rights to religious freedom under Art 15 were engaged. Hindus involved in the procession could argue their Art 15 freedoms were infringed, rather than the broader category of non-Hindus or citizens generally concerned with upholding constitutional freedoms.

1.62 Tay J refused to confine standing merely to the applicants for the police permit who were most directly affected by the restrictions imposed in terms of the conduct of the Thaipusam procession. He pointed out (at [23]) that as Thaipusam is celebrated by Hindus, people professing to adhere to that religion would have legal standing to challenge decisions affecting what they believe to be "the proper practice of that religion". If an applicant for judicial review is in fact not a Hindu but a charlatan, evidence could be adduced to this effect. Standing was thus grounded on the profession of Hinduism, with no evidence to show otherwise: at [26].

1.63 Standing was granted even if the time frame was such that the applicants could not challenge the music conditions before the conclusion of the Thaipusam procession. This is because the applicants were challenging the 42-year policy rather than the latest decision conditioning the permit on music restrictions; it was appropriate for the applicants to challenge "policies and conditions which applied in the past and which would in all likelihood be applied to future processions": at [25]. However, on the facts, there was no *prima facie* case of reasonable suspicion on constitutional (Arts 12 and 15) or administrative (irrationality) grounds and leave was not granted.

1.64 The issue of which party could bring a cause of action under the Town Councils Act (Cap 329A, 2000 Rev Ed) ("TCA") and Town Council Financial Rules (Cap 329A, R 1, 1998 Rev Ed) where a Town

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Council breached its statutory duties with respect to the management of its accounts and funds was raised in *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474. Although the issue of standing was resolved by reference to the terms of the governing statute, the court in the course of the judgment made a few observations about the remedy of declarations which is of relevance to administrative law. The Ministry of National Development ("MND") sought various declarations, including a declaration to the effect that the Government through the MND had an interest in ensuring the defendant did all things necessary to administer moneys it held in accordance with law and the TCA.

1.65 Where the town council does not comply with its statutory duties, s 21(1) of the TCA provides that certain parties or persons may apply to court for an order compelling the town council to carry out the requirement or perform its duty. As a matter of statutory construction of s 21(2) of the TCA, the MND was found not to have standing to bring a claim against the Aljunied-Hougang-Punggol East Town Council ("AHPETC"), which breached several of its duties under the TCA, such as failing to transfer funds into the sinking fund at the stipulated time. Several lapses in governance were also found, in a report authored by the Auditor-General who was appointed by the Deputy Prime Minister and Minister for Finance to conduct an audit on AHPETC financial accounts for financial year 2012/2013: at [12].

1.66 The court found that the remedy provided for in s 21(2) of the TCA is for "any person for whose benefit … that requirement or duty is imposed on the Town Council" and this did not include the MND or Government. Instead, this refers to the residents of the town, whether they are flat-owners, or those who own flats in that town but may reside elsewhere, as they pay conservancy charges: at [60]. Persons in this group must show that the breach of duty they complain of was one imposed on the Town Council for his or her benefit. Quentin Loh J rejected the argument that a "person" within s 21(2) included the MND who had a duty to ensure public funds were safeguarded at all times and to protect residents' interests. This is because while two groups of people were mentioned, they had in common "the determining factor of staying within the town": at [63].

1.67 In the course of the judgement, reference was made to the legislative purpose of the TCA and various parliamentary debates. The basic philosophy was that power was to be devolved to the Town Council, headed by the elected MP, and to the residents to serve and to run local estates; through enhanced citizen participation, the system of representative government in Singapore would be strengthened: at [42]–[45]. The Town Councils were to enjoy a measure of independence in managing HDB housing estates, giving the residents a

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say in how to shape their environment and requiring them as citizens to choose their MPs carefully: at [64]. The Government through the MND was not expected to bail a Town Council out if it engaged in financial mismanagement: at [66]–[67]. Given this statutory framework, Loh J concluded (at [68]) that it was unlikely that Parliament intended for the Government or MND to take advantage of the s 21(2) remedy, particularly since the TCA "clearly delineated" the "extent of the MND's intervention in the affairs of a Town Council": at [71]. Thus, the MND did not have a right to make an application under s 21(2) for a court order compelling the AHPETC to comply with its various statutory duties under the TCA: at [84].

1.68 The High Court noted (at [158]) that its power to issue binding declarations under O 15 r 16 of the Rules of Court was "discretionary in nature" and that declarations would not be granted if these would not afford the plaintiff any real relief or serve any practical or useful purpose. A declaration that the Government through the MND had an interest in ensuring the defendant does all things necessary to administer and apply moneys in accordance with the law would not serve any useful purpose to the MND because the AHPETC had accepted that the first two quarterly sinking fund transfers for financial year 2014/2015 were late and that the last two quarterly transfers had yet to be made.

1.69 The High Court underscored that the HDB, as the lessor and owner of HDB estates and buildings (at [58]), could bring an action against AHPETC if it wished to do so: at [161].

Scope of s 6(3) of the Government Proceedings Act

1.70 The Government may be liable for the tortious acts of its public officers under s 5 of the Government Proceedings Act ("GPA") (Cap 121, 1985 Rev Ed). However, s 6(3) provides an exception:

> No proceedings shall lie against the Government by virtue of section 5 in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.

1.71 In *AHQ v Attorney-General* [2015] 4 SLR 760, AHQ and Ho Pak Kim Co Pte Ltd ("HPK") sued the Singapore government for two actions in tort for two separate court orders made against AHQ and HPK as aggrieved litigants. The District Judge allowed the application of the Government to strike out the statement of claim in both suits, after which AHQ and HPK appealed against the judge's decision.

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1.72 The complaints of AHQ and HPK related to acts done by judicial officers and judges in the discharge of their judicial responsibilities and therefore were acts covered under s 6(3) of the GPA, such that no reasonable cause of action against the Government was available.

1.73 Although the legal position was covered by statute, the Court of Appeal took pains to trace the history at common law in relation to judicial immunity and to restate important constitutional principles.

1.74 Judicial immunity has long been entrenched under the common law, where distinctions were made historically between superior and inferior court judges. The former enjoyed absolute immunity from suit for acts within and without their jurisdiction whereas inferior court judges were only immune from suit for acts done within their jurisdiction: at [9]–[10], discussing *Sirros v Moore* [1975] QB 118. Singapore legislation has eradicated this distinction to ensure that judges of the inferior courts as well as judicial officers of all Singapore courts would enjoy the same degree of immunity as superior court judges, that is, Supreme Court judges. These laws included s 68(1) of the State Courts Act (Cap 321, 2007 Rev Ed), s 79(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) and s 45(1) of the Family Justice Act 2014 (Act 27 of 2014): at [19].

1.75 Judicial immunity rests on the principle of the separation of powers, judicial independence and finality in the judicial process: at [27]. As such, aggrieved litigants should not be allowed to attempt to relitigate issues already conclusively decided by commencing actions against judges and judicial officers: at [28]. The aggrieved litigant is not without remedy, which would include "the appellate process, or even the setting aside of the decision concerned or the rehearing of the case in question in extremely limited situations": at [29]. While the law seeks to provide effective remedies to litigants, this has to be "weighed against the fact that genuine cases of judicial misconduct are few and far between" and that the balance in Singapore tilts in favour of the "countervailing policy consideration" that the Judiciary, to function effectively, must not be "harassed by frivolous claims and that finality in the judicial process is not undermined by collateral attacks against the Judiciary": at [29].

1.76 In identifying government immunity from tortious suits for judicial acts, the Court of Appeal approved the rationale articulated by the High Court of Ireland in *Kemmy v Ireland* [2009] IEHC 178: at [34]. While courts could be said to be part of organs of government, when a judge exercises judicial authority, he is "acting in an independent manner" and not as a state agent. A judge is "acting for the common good of the State and the society in administering justice": at [35]. Thus

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the rationale underlying s 6(3) of the GPA is to safeguard the administration of justice "by protecting judicial independence and finality in the judicial process": at [35]. The Government should therefore not interfere "with the judge's performance of the judicial function", given that judicial independence is a "fundamental tenet" of the Constitution: at [35]. As such, the Government is not to be held liable for the acts of the Judiciary which it neither controls nor influences: at [35].

CONSTITUTIONAL LAW

Article 9(1) – Meaning of "life and personal liberty" and "law"

1.77 The constitutionality of caning was challenged in *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 ("*Yong Vui Kong*"), where the appellant had been sentenced to a mandatory life imprisonment sentence and 15 strokes of the cane under s 33B of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). It was argued that this violated Art 9(1) of the Constitution on two bases.

1.78 First, caning constituted a form of torture and was contrary to "law" under Art 9(1) which requires the deprivation of life and personal liberty to be "in accordance with law". It was further argued that caning as a judicial sentence was prohibited by international law, common law and that the prohibition against torture was an unenumerated constitutional right. In addition, the manner in which caning was administered in Singapore was "so severe and painful" such that it constituted torture. Second, caning as applied to one already sentenced to life imprisonment served no lawful purpose and there was no evidence of its deterrent value; thus, it could not be "law" as it was irrational and illogical: at [6]. The second basis of irrationality was quickly dealt with, the argument being that a person suffering corporal punishment is apt to be bitter and more anti-social, such that it would be an unconstructive penalty. The Court of Appeal pointed out that the sentencing policy is a legislative matter. Further, there is insufficient evidence that caning lacks a deterrent effect, following Chan Sek Keong CJ's similar observations in relation to the mandatory death penalty in *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 ("*Yong Vui Kong MDP*") at [117]–[118]: at [101].

1.79 In relation to Art 9(1), at issue was the scope of "personal liberty" and whether this should, following past precedent, be restrictively construed only to apply to "unlawful incarceration or detention": at [13]. The "correct interpretation" was to be found by tracing the historical precursors of Art 9(1), which were found located

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in Art 5(1) of the Constitution of the Federation of Malaya 1957 ("Malaysian Constitution") and Art 21 of the Constitution of India 1950 ("Indian Constitution") as based on the American Due Process Clause found in the Fifth and Fourteenth Amendment of the US Constitution: at [16]. These were rooted in cl 39 of the 1215 Magna Carta which reads:

> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

1.80 Taking a broader reading of "life" than in previous cases, the Court of Appeal found that the execution of a caning sentence engaged Art 9(1). This was based on a study of the traditional understanding of "life and personal liberty", the court clearly eschewing a "living tree" approach by which judges as self-appointed moral arbiters sneak in their own value judgments, intruding upon the legislative province.

1.81 Sundaresh Menon CJ noted that aside from unlawful incarceration, cl 39 was also directed at the unlawful seizure of property and the unlawful use of force against a person: at [17]. The issue then turned to whether the ambit of cl 39 protection was modified when it was imported in the US Due Process Clause which contained the phrase "the deprivation of life, liberty or property". Menon CJ found no evidence of this; he cited William Blackstone's *Commentaries on the Laws of England*, noting that Blackstone had distilled the three primary rights of the English people as pertaining to the right of personal security, the right of personal liberty and the right of private property: at [18], citing William Blackstone, *Commentaries on the Laws of England*, Book I (Clarendon Press, 1765) at pp 125–134. Blackstone had defined the right of personal security as encompassing "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation". A person's body was also entitled "to security from the corporal insults of menaces, assaults, beating and wounding, though such insults amount not to destruction of life or member". Further, the right to personal liberty under the law of England consists in:

> … the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclinations may direct; without imprisonment or restraint, unless by due course of law.

Together with the right to property, as expounded by Blackstone, this constituted the traditional understanding of life and personal property.

1.82 In tracing the history of the Indian and Malaysian constitutions, Menon CJ noted (at [19]) that Art 21 of the Indian Constitution had departed from the US Due Process Clause in three respects. First, the

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word "property" was removed, as it was thought this would impede through invalidating beneficial socio-economic legislation. Second, the word "personal" was added to liberty to circumscribe its scope; otherwise, liberty might be broadly construed to encompass other liberties protected under Art 19, dealing with speech and assembly, *inter alia*. Lastly, "due process" was replaced by "procedure" to avoid the US Supreme Court approach of expansively imbuing "due process" with substantive content.

1.83 Of Art 5(1) of the Malaysian Constitution, Menon CJ noted that the Reid Constitutional Commission Report of 1957 had only mentioned, in describing personal liberty, freedom from unlawful arrest and detention. Nonetheless, he placed "little weight" on the omission of other forms of deprivation of "life and personal liberty" operating on what appears to be a presumption of continuity, "in the absence of clear words signifying an intention to depart from the traditional understanding of 'life and personal liberty'": at [20].

1.84 With respect to Art 9(1), clearly the right to property was removed expressly "to avoid litigation over the adequacy of compensation for compulsory land acquisition": at [21]. Aside from this, there was no evidence of intent to adopt a narrower meaning of "life and personal liberty".

1.85 Thus, with respect to the lineage Art 9(1), the Court of Appeal drew three clear propositions: first, the scope of Art 9(1) would be cabined by other fundamental liberties, as to the extent specific rights like freedom of movement were covered by Art 13, these would fall within the ambit of Art 9(1). Second, where the Legislature had considered and excluded specific rights like that of property, as clear from the Official Record of Singapore Parliamentary Debates of 22 December 1965 (at [21]), these would not be included in Art 9. Third, Art 9(1) did not merely cover arbitrary execution or unlawful incarceration. It drew content from the Blackstonian understandings, such that there would be a deprivation of "life: where unlawful force is used against a person "including by way of amputations, mutilations, assaults, beatings, woundings *etc*", which would entail a deprivation of "life": at [22]. Menon CJ noted that there was "no evidence in the historical record" to show that the meaning of "life" had been altered when Art 9(1) was adopted: at [23].

1.86 The argument that a prohibition against torture could be read into domestic law was raised and rested on three bases.

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International law

1.87 First, international law prohibits torture and this should be read into the Singapore Constitution either because it is an international law norm which was *jus cogens* or has peremptory status, or because it is a treaty norm, based on Art 15(1) of the Convention on the Rights of Persons with Disabilities (13 December 2006) ("CRPD"), to which treaty Singapore is a party: at [25].

1.88 A *jus cogens* norm has been defined under Art 53 of the Vienna Convention on the Law of Treaties (23 May 1969) (1155 UNTS 331) ("Vienna Convention") as one:

> … accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The unanimity of states is not necessary; a "very large majority" suffices: at [26]. The Court of Appeal accepted that the prohibition against torture was in fact a peremptory norm, citing cases from various domestic jurisdictions such as the US (*Siderman de Blake v Argentina* 965 F 2d 699 at 717 (9th Cir, 1992)) and the UK (*R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 at 198; *Al-Adsani v United Kingdom* [2001] ECHR 761 at [61]), as well as from international criminal tribunals (*Prosecutor v Anto Furundžija* IT-95-17/1-T (10 December 1998) at [153]). The respondent did not deny the peremptory nature of the norm. In making reference to the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (10 December 1984) (1465 UNTS 85) ("CAT"), the Court of Appeal noted that while Singapore is not party to this convention, ministerial statements before Parliament "have endorsed the view that torture is wrong and that no one should be subjected to it": at [27].

1.89 The Court of Appeal noted that even *jus cogens* norms do not automatically apply in the domestic context as Singapore takes a dualist view of international law under which international and domestic law are understood to operate in two separate legal systems: at [28]. Citing precedent with respect to customary international law ("CIL"), the position taken by Singapore courts is that a CIL norm does not form part of Singapore law "until and unless it has been applied as or definitively declared to be part of domestic law by a domestic court": *Yong Vui Kong MDP* at [91]. In other words, a CIL norm does not need to be legislatively incorporated to become part of the domestic legal order, but it must be "clearly and firmly established" as a CIL norm (*lex lata*) and receive judicial recognition as such. This has been described as the "transformation" doctrine: *Yong Vui Kong* at [30]. The

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Court of Appeal noted that the "transformation doctrine is more logically consistent with a dualist approach to international law": *Yong Vui Kong* at [31].

1.90 The court did not have to settle the monist/dualist issue definitively because whichever applied, the rank of an international law norm when received within the domestic legal order would be that of a common law norm which could be overridden in terms of legislative hierarchy by statute law, let alone constitutional law. The Court of Appeal in *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR(R) 103 at [94] had affirmed Lord Atkin's statement in *Chung Chi Keung v The King* [1939] AC 160 at 167–168 where CIL norms would be incorporated into domestic law "so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals".

1.91 The reason was that courts operating in a parliamentary democracy are "bound to implement the will of Parliament as embodied in domestic legislation" in so far as that legislation is not inconsistent with the Constitution: *Yong Vui Kong* at [33]. The Court of Appeal cited the Canadian decision of *R v Hape* [2007] 2 SCR 292 at [39] to elaborate upon the common law doctrine, which stated that Canadian courts would look to prohibitive CIL norms provided there was no conflicting legislation to interpret Canadian law and to develop the common law. It stated that this flowed from parliamentary sovereignty, under which the Legislature could "violate international law, but it must do so expressly": *Yong Vui Kong* at [33].

1.92 Thus, in terms of rank, the domestic status of an ordinary rule of CIL is that of a common law norm, which is subject to contrary domestic legislation. The Court of Appeal held that the same applies to a peremptory norm as well, rejecting the view that a peremptory norm of international law can overturn domestic legislation: *Yong Vui Kong* at [34]. This is because even though *jus cogens* norms may represent fundamental values or be elevated to the top of the international legal hierarchy, under the dualist theory, this does not implicate its rank domestically in such a way as to overturn legislation. In the words of the Court of Appeal (*Yong Vui Kong* at [35]):

> Under the dualist theory of international law, there is no reason why the elevation of a particular norm to the highest status under one legal system (international law) should automatically cause it to acquire the same status and take precedence over the laws that exist in another legal system (domestic law). The two systems remain separate and a court operating in the domestic system is obliged to apply domestic legislation in the event of an irreconcilable conflict between it and international law.

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1.93 The court did recognise that liability may be incurred at the international level: *Yong Vui Kong* at [35]. Delving into the drafting history of the Vienna Convention, the Court of Appeal noted that the purpose of a *jus cogens* norm is to invalidate treaties with incompatible provisions, implying that *jus cogens* norms as a concept operates at the level of interstate relations. In other words, "there was no suggestion that it would also have some special or extraordinary effect at the intra-state level": *Yong Vui Kong* at [36].

1.94 The Court of Appeal rejected the submission of the applicant that Singapore should switch to the monist system, as "no justification was advanced for such a radical departure": *Yong Vui Kong* at [37]. Furthermore, monism, or the automatic incorporation of an international law norm into the municipal legal system, would not settle the issue of "rank", that is, whether domestic law or the incorporated international law norm should take precedence in the event of a clash. The Court of Appeal noted that the jurist, Hans Kelsen, considered the primacy issue "to be a matter of ethical or political preference rather than legal science", such that monism did not invariably assume the supremacy of international law over domestic law: *Yong Vui Kong* at [37].

1.95 Assuming even that caning was torture, it is nonetheless mandated under domestic statute which the court was bound to implement, unless it is inconsistent with the Singapore Constitution. No authority was cited for the proposition that a peremptory international law norm automatically assumed constitutional rank when received into domestic law. In addition, the Court of Appeal invoked the principle of popular sovereignty in noting that if this were the case:

> … it would mean the content of our Constitution could be dictated by the views of other states, regardless of what the people of Singapore, expressing their will through their elected representatives, think.

Therefore, even peremptory international law norms cannot override a domestic statute "whose meaning and effect is clear": *Yong Vui Kong* at [38].

1.96 In relation to Art 15 of the CRPD which Singapore acceded to but has not yet incorporated into domestic law, the Court of Appeal noted that this prohibition against torture or cruel, inhuman or degrading punishment applies to all persons, not just disabled persons, after examining the treaty drafting history: *Yong Vui Kong* at [40]–[44]. Even so, Singapore does not recognise self-executing treaties as "this would allow the Executive to usurp legislative power": *Yong Vui Kong* at [45]. As a dualist jurisdiction, treaties must be incorporated by legislation before they would have the force of law within the domestic

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legal order and are not a source of independent rights and duties. The Court of Appeal accepted that as far as possible, domestic interpretation should be interpreted in a manner consistent with international obligations as accepted in *Yong Vui Kong MDP* at [59]. However, there are limits to this as "neither CIL nor treaty law can trump an inconsistent domestic law that is clear and unambiguous in its terms" and "pretending that the court is engaged in an interpretive exercise does not change this": *Yong Vui Kong* at [50].

1.97 As s 33B(1)(*a*) of the amended MDA is clear in substituting life imprisonment and a minimum of 15 strokes by caning for the death penalty for the relevant class of persons, there was "no room" for the court to interpret it in a way to allow the appellant to escape a sentence of caning: *Yong Vui Kong* at [52]. A domestic statute mandating caning cannot be impugned "by reason alone of its incompatibility with international law" under a dualist system: *Yong Vui Kong* at [53].

Common law and fundamental rules of natural justice

1.98 Second, it was argued that there was a common law prohibition against torture and that this had been imported into domestic law under Art 162 of the Singapore Constitution: *Yong Vui Kong* at [54]–[58]. While agreeing with these propositions, the Court of Appeal noted the restrictive scope of the common law prohibition which has a "narrow and specific compass": *Yong Vui Kong* at [59]. The prohibition relates to the past practice of torturing suspects or witnesses to extract evidence and confessions, but does not cover the treatment of convicted criminals: *Yong Vui Kong* at [59]. Indeed, the Court of Appeal observed that judicial whipping as a general sentence in England was only abolished in 1948 and prison floggings in 1967: *Yong Vui Kong* at [60]. As such, the common law prohibition against torture clearly does not prohibit caning or other forms of corporal punishment: *Yong Vui Kong* at [60].

1.99 Even assuming caning fell within the common law prohibition against torture, which was legislatively enacted into Singapore law in 1963, the issue remains whether a general prohibition against torture can prevail over s 33B(1) of the MDA. It was argued that the prohibition against torture should be accorded constitutional status as a "fundamental rule of natural justice", which was read into the meaning of "law" under Art 9(1) in the Privy Council decision of *Ong Ah Chuan v Public Prosecutor* [1979–1980] SLR(R) 710 ("*Ong Ah Chuan*").

1.100 The Court of Appeal clearly stated that the fundamental rules of natural justice do not contain "substantive legal rights", basing this on case law and academic research. Natural justice is not the same as

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"natural law" but denotes procedural rights under the English system: *Yong Vui Kong* at [62]–[63]. At common law, the fundamental rules of natural justice relate to "procedural rights aimed at securing a fair trial": *Yong Vui Kong* at [64]. The court held that torture in the "narrow sense" where it is used to extract evidence to be used as proof in a judicial trial would violate the fundamental rules of natural justice as "to convict a person based on evidence procedure by justice strikes at the very heart of a fair trial": *Yong Vui Kong* at [64]. The fundamental rules of natural justice have nothing to say about the punishment of criminals after they had been convicted in a fair trial. Even if the common law prohibition against torture applied to a post-trial caning sentence, it would not have "constitutional force" as it is without the ambit of the "fundamental rules of natural justice", as discussed in *Ong Ah Chuan*: *Yong Vui Kong* at [64]. Further, it would be overridden by any later statute in time, such as s 33B of the MDA: *Yong Vui Kong* at [65].

1.101 A broader concept of torture had been discussed in *Yong Vui Kong MDP* where the court had observed that the conclusion that one could not read a prohibition against torture in the Constitution because the Government had considered and rejected a proposal to have an express prohibition did not mean that "an Act of Parliament that permits torture can form part of 'law' for the purposes of Art 9(1)": *Yong Vui Kong MDP* at [75]. The Court of Appeal in *Yong Vui Kong MDP* had also noted that currently, "no domestic legislation permits torture": *Yong Vui Kong MDP* at [75]. The Court of Appeal in *Yong Vui Kong* noted that the observation that no law permitting torture would form part of "law" for Art 9(1) purposes should not be read as referring to a broader idea of torture. Instead, the "more plausible view" was that the court was referring to the narrower common law prohibition, which as a fundamental rule of natural justice could not be derogated from by ordinary legislation: *Yong Vui Kong* at [67]. In any event, the Court of Appeal in *Yong Vui Kong MDP* did not consider caning "torture" as this was permitted under Singapore law, stating "no domestic legislation permits torture": *Yong Vui Kong* at [67]. Thus, the passage about torture in *Yong Vui Kong MDP* did not assist the appellant here.

1.102 Third, it was argued that the prohibition against torture and cruel and inhuman punishment should be read into the Constitution as part of the "first principles of natural law". In aid of this proposition, the appellant cited the case of *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 where Chan Sek Keong CJ stated that the separation of powers, as an unwritten principle, formed part of the "basic structure" of the Constitution. The Indian basic structure doctrine posits that certain parts of the Constitution are beyond amendment by Parliament: *Yong Vui Kong* at [68]–[69]. Aside from the separation of powers, the right to vote was a possible candidate as a norm which was part of the basic structure although historically, it had

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been recommended for inclusion in the Singapore Constitution by the 1966 Constitutional Commission but was not taken up by the Government. Nonetheless, the Court of Appeal took note that ministerial statements had been made before Parliament to the effect that the right to vote was "implied within the structure of our Constitution": *Yong Vui Kong* at [69]. So too, the philosophical basis of the right to vote was linked to the Westminster system of parliamentary government established by the Constitution in *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at [79]: *Yong Vui Kong* at [70]. Any candidate for the basic structure doctrine, be it a norm or a right, has to be "something fundamental and essential to the political system" established by the Constitution: *Yong Vui Kong* at [71]. As such, it did not apply in the present case as nothing in the system of government set up by the Constitution required a finding that the prohibition against torture formed part of its basic structure: *Yong Vui Kong* at [72]. The court expressed no view on whether the Indian basic structure was part of Singapore law: *Yong Vui Kong* at [72].

1.103 With respect to natural law, the Court of Appeal noted that in the absence of an express right, the courts are not at liberty to create a new right which they consider "desirable" or "part of natural law": *Yong Vui Kong* at [73]. Citing a Robert George article, the court pointed out that there is no consensus among scholars as to what natural law requires and that one view is that natural law requires judges to respect the boundaries of their own authority the constitution conferred upon them: *Yong Vui Kong* at [73], citing Robert P George, "The Natural Law Due Process Philosophy" (2001) 69 Fordham L Rev 2301 at 2303–2304. George noted there was nothing unjust or immoral about a constitution vesting strong judicial powers as a check against legislative power, nor was there anything "unjust or otherwise immoral about a constitution that does not confer upon courts even a limited power of judicial review". Another article by Phillip Hamburger explains how natural law was not a source of constitutional rights as far as the US Constitution was concerned but the reason why it was necessary to sacrifice natural liberty to the Government in a written constitution: Phillip Hamburger, "Natural Rights, Natural Law, and American Constitutions" (1993) 102 Yale LJ 907 at 956. The court rejected reading unenumerated rights into the Singapore Constitution on the basis of natural law, finding that this would be "not only undemocratic but also antithetical to the rule of law" with judges sitting as a super-legislature: *Yong Vui Kong* at [75]. This shows the importance given to political checks in Singapore's scheme of separation of powers.

1.104 The court considered, *obiter*, whether caning fell within the international law definition of torture, as contained in two treaties. The first was the Third Geneva Convention which was given effect to by the Geneva Conventions Act (Cap 117, 1985 Rev Ed), which was the only

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domestic statute with a definition of "torture": *Yong Vui Kong* at [77]. The court noted that the Convention is addressed towards the treatment of prisoners of war and "does not purport to lay down a definition of torture that is of general application to everyone": *Yong Vui Kong* at [78]. It interpreted Art 87 of the Third Sched of the Geneva Conventions Act not as viewing corporal punishment as a form of torture but as something which is prohibited "even though they might not necessarily rise to the level of torture": *Yong Vui Kong* at [78].

1.105 The second treaty cited was Art 1 of the CAT which international tribunals considered embodied torture in CIL: *Yong Vui Kong* at [79]. Article 1 notes that pain and suffering arising "only from, inherent in or incidental to lawful sanctions" is excluded from the definition of torture. It could be argued caning was a lawful sanction though the court indicated the term "lawful sanctions" was deliberately "left vague" by the drafters: *Yong Vui Kong* at [80]. Views to the effect that a lawful sanction must be lawful under national and international law were referenced from various reports under the auspices of United Nations human rights bodies or state opinions: *Yong Vui Kong* at [80].

1.106 The Court of Appeal, however, opined that such a view would rob the "lawful sanctions" exception of "any meaningful content": *Yong Vui Kong* at [81]. What is a lawful sanction should be determined by domestic law for Art 1 of the CAT to be workable. If it were determined by international law, the exception would be empty of meaning on two grounds. First, if the conduct in question is not "torture", there is no need to invoke the exception to torture. Second, if such conduct falls within the definition of "torture", the exception cannot be invoked as against conduct considered unlawful under international law: *Yong Vui Kong* at [81]. Given the competing views, the court did not rely on the "lawful sanctions" exception to decide whether caning constituted torture.

1.107 In addition, the CAT definition of torture distinguishes between "torture" and "inhuman punishment". Article 1 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (9 December 1975) (A/RES/3452(XXX)) states that torture constitutes "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment". The European Court of Human Rights ("ECtHR") in *Ireland v United Kingdom* [1978] ECHR 1 at [167] stated that the distinction between torture and inhuman punishment "derives principally from a difference in the intensity of the suffering inflicted". As the Court of Appeal in *Yong Vui Kong MDP* found there to be no constitutional prohibition against inhuman punishment in Singapore, the appellant would have to prove caning was not merely "inhuman punishment" but had "crosse[d] into the realm of torture": *Yong Vui*

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Kong at [83]. The Court of Appeal reviewed a series of cases which the respondent had submitted to demonstrate the severity and brutality of conduct constituting torture from the ECtHR which shared similar feature: *Yong Vui Kong* at [84].

1.108 The Court of Appeal highlighted two points. First, most of the cases related to "extra-legal acts of abuse" which public officers had committed with the view to extracting evidence or confession from individuals in custody or military officials committing war crimes during times of civil conflict. None related to the execution of a punishment prescribed by law. Second, the victims in the cases underwent greater and more severe levels of "physical and serious physical injuries and mental suffering that seemed to us to far exceed that caused by a sentence of caning": *Yong Vui Kong* at [85]. Although certain cases dealt with judicial corporal punishment, there was "no consensus" as to whether this constituted torture. In the various African cases where such punishment was held unconstitutional, the constitutions in question had express clauses outlawing inhuman punishment as well as torture: *Yong Vui Kong* at [86]. In *Tyrer v United Kingdom* [1978] ECHR 2, the ECtHR found that juvenile birching was "degrading punishment" rather than torture: *Yong Vui Kong* at [86].

1.109 Only one case treated corporal punishment as torture, which involved lashing the victim 15 times with a cat-o'-nine-tails (which consisted of a plaited rope instrument made up of nine knotted thongs of cotton cord, 30 inches long and less than one quarter of an inch in diameter each, attached to a handle) as part of a flogging sentence in *Caesar v Trinidad and Tobago* (Series C, No 123, Judgment of 11 March 2005) ("*Caesar*"). The cat-o'-nine-tails was abolished as an instrument of punishment in Singapore in 1954: *Yong Vui Kong* at [87].

1.110 The victim was flogged 23 months after sentencing, forced to see other prisoners flogged beforehand and remained in the infirmary for two months after being flogged. The Inter-American Court of Human Rights held that this was torture under Art 5(2) of the American Convention on Human Rights (22 November 1969). Another severe case involving corporal punishment which the parties referred to was *Curtis Francis Doebbler v Sudan* (2003) AHRLR 153 (ACHPR 2003) ("*Doebbler*"), where two female students were sentenced to fines and 25–40 lashes were to be carried out in public on their bare backs: *Yong Vui Kong* at [88]. The instrument used was "a wire and plastic whip which was not clean", and there was no supervising doctor present, exposing the victims to an infection risk. The African Commission on Human and Peoples' Rights held this violated Art 5 of the African Charter on Human and Peoples' Rights (21 October 1986) which prohibited "torture, cruel, inhuman or degrading punishment and treatment". The Commission used the language of "inhuman

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punishment" and did not seem to distinguish this from "torture": *Yong Vui Kong* at [88].

1.111 In ascertaining whether particular conduct was torture, the Court of Appeal stressed that a "fact-sensitive inquiry" was required which involved "holistic analysis of the purpose of the conduct, the manner of its execution and its effect on the recipient": *Yong Vui Kong* at [89]. Caning in Singapore while more severe than the juvenile birch did not rise to the level of torture or severity in *Caesar* or *Doebbler*: *Yong Vui Kong* at [90]. The Court of Appeal highlighted five features of Singapore caning, after noting it was "administered in public" and only for "punishment". First, the rattan cane used is not more than 1.27cm thick, as required by s 329(3) of the Criminal Procedure Code (Act 15 of 2010) ("CPC"). It is soaked in water before caning to ensure it does not split and is treated with antiseptic: *Yong Vui Kong* at [99]. Second, the caning has to be done in a single session under s 330(1) of the CPC. Third, the maximum number of strokes at any one time that can be inflicted on the offender is 24 strokes under s 330(2) of the CPC. It is further administered on the buttocks to minimise risk of injury to bone and organ and done in a "measured and controlled manner at regular intervals, rather than in a "haphazard and capricious fashion": *Yong Vui Kong* at [99]. Fourth, a medical officer has to be presented during caning to certify the offender is in a fit state of health to undergo the punishment, which has to be stopped if the offender is unfit to undergo the rest of the sentence under s 331(1) of the CPC. Fifth, women, and men above 50 and men sentenced to death whose sentences are not commuted may not be caned under s 325(1) of the CPC.

1.112 The court noted that while caning involves "a considerable level of pain and suffering", the "special stigma" of torture has been reserved by international courts and tribunals "for instances of severe and indiscriminate brutality" which is "simply not the case with caning that is administered in Singapore as a punishment for selected crimes": *Yong Vui Kong* at [90]. The commissioner who has a wide discretion to determine the mode of caning does not enjoy unfettered discretion in this respect as he has to implement this in a lawful manner which does not constitute torture. It falls on the appellant to prove that the commissioner has exercised this discretion in an unlawful manner, given the presumption of legality: *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [47]. The safeguards present ensure that the "present practice of caning" does not breach "the high threshold of severity and brutality" for it to be regarded as torture: *Yong Vui Kong* at [99].

1.113 While observing that the use of judicial corporate punishment is on the wane and that there is a "growing body of international opinion" that caning is inhuman punishment, the Court of Appeal

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underscored that there is no international consensus that "the use of caning as part of a regulated regime of punishment with appropriate medical safeguards constitute torture": *Yong Vui Kong* at [121]. True to a consistent vision of the separation of powers, any move to abolish caning is a matter to be taken before the "legislative sphere": *Yong Vui Kong* at [121].

Article 9 and CLTPA

1.114 Tan Seet Eng was arrested on 16 September 2013 for his alleged involvement in global match-fixing activities. He was further detained for a 14-day period under s 44(3) of the Criminal Law (Temporary Provisions) Act (Cap 67, 2000 Rev Ed) ("CLTPA") on 20 September 2013 and finally, on 2 October 2013, the Minister for Home Affairs issued a preventive detention order for a 12-month period under s 30 of the CLTPA for global match-fixing activities while operating from Singapore. Under s 30, the Minister may, with the Public Prosecutor's consent, issue an order where he is satisfied that a person has been associated with "activities of a criminal nature" such that it was necessary for the applicant to be detained in the interests of "public safety, peace and good order".

1.115 This was upheld by the High Court in *Tan Seet Eng v Attorney-General* [2015] 2 SLR 453 ("*Tan Seet Eng (HC)*") on grounds of administrative legality. A person could be detained under the CLTPA even if there was sufficient evidence to charge him with another offence, illegal betting in this case, as detention served a preventive purpose in the interests of society, while criminal law was punitive of a past act of the person: at [40]. The High Court underscored (at [41]) that the Public Prosecutor, "the holder of the high office responsible for all prosecution in Singapore", had to give his consent to such a detention order.

1.116 The applicant proceeded under O 54 r 1 of the Rules of Court. The Attorney-General argued (at [17]) that the applicable test was that in *Kamal Jit Singh v Minister for Home Affairs* [1992] 3 SLR(R) 352 ("*Kamal Jit Singh*"), where it was held that an applicant had to show "probable cause that the detention was unlawful". The Attorney-General argued that even if the grounds of review set out in *GCHQ* (above, para 1.21) applied (illegality, irrationality, procedural impropriety), the application would nonetheless fail.

1.117 There is no ouster clause under the CLTPA. The High Court took note that the Court of Appeal in *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 ("*Chng*") had rejected the subjective discretion test in relation to the Internal Security Act (Cap 143,

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1985 Rev Ed) ("ISA") detention orders and accepted the proposition that in *habeas corpus* proceedings, the burden initially fell on the detaining authority to justify the legality of the detention: *Tan Seet Eng (HC)* at [23]. In applying the objective test, the Court of Appeal in *Chng* affirmed that the scope of judicial review with respect to the exercise of discretion under ss 8 and 10 of the ISA is limited to illegality, irrationality or procedural impropriety. Although *Chng* was legislatively overruled with respect to ISA cases, and given that the CLTPA has no ouster clause, the High Court in *Tan Seet Eng* said "it may be argued" that the Court of Appeal's observations with respect to the applicable scope of review was "still relevant to challenges made" to CLTPA detention orders: *Tan Seet Eng (HC)* at [25].

1.118 The High Court in *Tan Seet Eng* accepted that an objective test applied with respect to the order for the review of detention ("ORD") under the CLTPA. While the ISA deals primarily with "national security" issues, the CLTPA addresses issues "relating to public safety, peace and good order": *Tan Seet Eng (HC)* at [25]. The applicant thus relied, unsuccessfully, on the three grounds of illegality, irrationality and procedural impropriety, which was the approach adopted in another CLTPA detention case, *Re Wong Sin Yee* [2007] 4 SLR(R) 676, but failed to establish probable cause that the detention was unlawful on these grounds: *Tan Seet Eng (HC)* at [28]. Although a detention order violates the constitutional right to personal liberty under Art 9, no challenge was made before the High Court as to the constitutionality of the CLTPA.

1.119 The High Court rejected the argument on grounds of "illegality" to the effect that the activities undertaken by the applicant fell without the category of CLTPA offences. This is because s 30 of the CLTPA does not specify any particular category of offences. As the CLTPA is preventive rather than punitive in nature, the focus is "on the risk that the person poses to society": *Tan Seet Eng (HC)* at [31]. While the CLTPA was originally devised to deal with secret societies, drug trafficking and illegal money-lending syndicates, it is not confined to such criminal activities, nor does a requirement of physical violence apply: *Tan Seet Eng (HC)* at [32] and [35]. The terms "public safety, peace and good order" are words capable of "encompassing a wide range of situations" and it could be "reasonably argued" that good order requires soccer participants, in a sport which "undoubtedly commands world-wide interest", to play to win and not be bribed to do otherwise: *Tan Seet Eng (HC)* at [35]. Further, there is no reason to limit s 30 to criminal activities carried out within Singapore, provided some risk is posed to Singapore's public safety, peace and good order: *Tan Seet Eng (HC)* at [45].

1.120 The High Court found that on the totality of evidence, the *GCHQ* threshold of irrationality had not been satisfied, which applies to

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decisions which are "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it": *Tan Seet Eng (HC)* at [50]. The applicant had acknowledged he had given loads to third parties on multiple occasions and received betting tips in return: *Tan Seet Eng (HC)* at [49]. This provided "some objective grounds" for ordering the initial and continued detention of the applicant: *Tan Seet Eng (HC)* at [50].

1.121 The challenge on the ground of procedural impropriety failed, even if the wrong police officer (from the Commercial Affairs Department and not the Corrupt Practices Investigation Bureau) took down his statement under s 26 of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed). This is because there is nothing in the CLTPA to suggest that the Minister can only consider evidence admissible in a court of law as a rationale for preventive detention laws "was the recognition that the evidence collected by the authorities may not be admissible in a court of law": *Tan Seet Eng (HC)* at [52].

1.122 The Court of Appeal in *Tan Seet Eng (CA)* (above, para 1.11) set out the appropriate approach for the O 54 procedure, formerly known as the writ of *habeas corpus*, now the ORD. It noted (at [47]) that judicial review is "distinct" from ORD proceedings although substantial overlap is possible, as in the present case, "where the detention in question is the result of the exercise of a discretionary power by the Executive".

1.123 It confirmed (at [61]) that an objective standard of review of executive discretion applied, going through previous case law which applied the "subjective test" until this was departed from in the seminal decision of *Chng* (above, para 1.117). The court appreciated (at [61]) that a subjective test meant it would be "bound to accept whatever was put before it". The Court of Appeal in *Chng* had in this context equated the subjective test with the possibility of arbitrary detention and accordingly rejected it.

1.124 It further confirmed, with respect to the scope of judicial review, that the traditional *GCHQ* test applied, that is, illegality, irrationality and procedural impropriety, where no precedent fact was involved: *Tan Seet Eng (CA)* at [62] and [63]. In such cases, the courts could not inquire into the evidential basis of facts found by the Executive, as Parliament could entrust the responsibility to make decisions as to what the facts are to a particular decision maker: *Tan Seet Eng (CA)* at [64]. The Court of Appeal in *Tan Seet Eng (CA)* thus rejected the "probable cause" test applied by the prior Court of Appeal decision of *Kamal Jit Singh* (above, para 1.116), which also dealt with s 30 of the CLTPA: *Tan Seet Eng (CA)* at [66]. This test would require the applicant to raise "a *prima facie* case as to the legality of his detention to

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warrant a substantive inquiry into the matter": *Tan Seet Eng (CA)* at [68]. It identified three main reasons for finding that the probable cause test was wrong in the present context.

1.125 First, the traditional test is supported by history. The Court of Appeal was "inclined" to agree with the respondent's suggestion that the probable cause test stemmed from a failure to appreciate "a historical difference between *habeas corpus* and judicial review proceedings": *Tan Seet Eng (CA)* at [67]. Historically, the writ of *habeas corpus*, the precursor of the ORD, was seen as a "powerful weapon against oppression"; it was a command from the Crown for which some basis had to be shown, before it was issued, by "probable cause": *Tan Seet Eng (CA)* at [70]. This refers to the burden the applicant must discharge at the initial stage of the ORD application to establish a *prima facie* case that his detention was unlawful: *Tan Seet Eng (CA)* at [70] and [73]. This is distinct from the extent to which the court can inquire into the unlawful detention, where the traditional test applied: *Tan Seet Eng (CA)* at [73].

1.126 It is true that "the scope of review for ORD applications" is largely dependent on "the general concept of judicial review" which broadly refers to the High Court's supervisory jurisdiction to ensure executive powers are exercised lawfully. Most ORD applications in the modern context relate to the lawfulness of detentions which are ordered in the exercise of executive powers: *Tan Seet Eng (CA)* at [67]. The traditional test is concerned with the scope of judicial review of the subject matter the court may inquire into where the primary decision-making power is one given to the Executive: *Tan Seet Eng (CA)* at [70].

1.127 Second, the traditional test is supported by consistency. There is no reason for thinking a different test should apply to detentions under the ISA and CLTPA, and the traditional test had been applied to the exercise of powers under ss 8 and 10 of the ISA: *Tan Seet Eng (CA)* at [71].

1.128 Third, the respondent accepted that the test for ORD applications in the context of the CLTPA ought to be restated in terms of the traditional test which was "better defined". The court agreed that it "offers appropriate guidance." While the probable cause test is silent on how to establish unlawfulness, the traditional test addresses this precise issue: *Tan Seet Eng (CA)* at [72].

1.129 Thus, the Court of Appeal clearly stated the test for reviewing the exercise of ministerial powers under s 30 of the CLPTA, which was a "potentially draconian power" vested in the Executive: *Tan Seet Eng (CA)* at [74]. The exercise of such power could be "scrutinised

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objectively" on the "usual principles", beginning with the grounds on which the Minister has acted. This the court is to "closely scrutinise" and "consider objectively whether on the face of these grounds, the decision is open to challenge on the basis of illegality, irrationality or procedural impropriety": *Tan Seet Eng (CA)* at [74]. Such an approach had also been applied to *Teo Soh Lung v Minister of Home Affairs* [1990] 1 SLR(R) 347: *Tan Seet Eng (CA)* at [75].

1.130 The Court of Appeal devoted attention to making preliminary observations about the role of judicial review within the broader context of the separation of powers. Under the Singapore model, all branches are co-equal; the Judiciary bears the responsibility for "the adjudication of controversies" including the power to make authoritative pronouncements on the meaning of the Constitution and other laws. This encompasses a judicial role in pronouncing upon the legality of government actions: *Tan Seet Eng (CA)* at [90]. Nonetheless, where a decision involves a large policy content, courts face the complex question of deciding upon the appropriate degree of restraint, respect or deference towards the primary decision maker. The court acknowledged that though a line is maintained between assessing the merits of a decision and whether the principles of administrative legality have been adhered to, the line was a "fine line": *Tan Seet Eng (CA)* at [91]. Where matters pertaining to policy or security, or which call for "polycentric political considerations" are concerned, courts are not best equipped to scrutinise such decisions: *Tan Seet Eng (CA)* at [93].

1.131 Where national security is concerned, the courts "traditionally accorded deference to the Executive's determination", translating into a "less intense standard of review": *Tan Seet Eng (CA)* at [95]. In relation to CLTPA cases, as the individual is deprived of his liberty, it is for the Judiciary "to determine whether this has been done lawfully": *Tan Seet Eng (CA)* at [96]. While the courts are not to substitute its view for that of the Executive, this does not mean that the exercise of ministerial discretion "may not be scrutinised by the court at all": *Tan Seet Eng (CA)* at [97]. The court is not confined to "so narrow a role" as simply clerically verifying if all paperwork is in order and includes a bare ministerial recital conforming to the statutory formula: *Tan Seet Eng (CA)* at [97]. The Court of Appeal affirmed the pronouncement in *Chng* (above, para 1.117) at [86] that "all power has legal limits" and the "rule of law demands that the courts should be able to examine the exercise of discretionary power" applied to the present case since the ISA was not involved, affirming that the courts are in the final analysis "the arbiters of the lawfulness of actions including government actions": *Tan Seet Eng (CA)* at [98]. The application of the *GCHQ* principles of illegality, irrationality and procedural impropriety was premised on a "proper understanding of the role of the respective branches of

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government", within "a democracy where the Constitution reigns supreme": *Tan Seet Eng (CA)* at [99].

1.132 The Court of Appeal also noted a distinction, drawing from academic articles, between "non-justiciability" (which declares certain actions are inherently unreviewable) and "deference" (which does not preclude review; as a more flexible doctrine, it establishes that the appropriate degree of deference is discovered from balancing all the relevant factors in individual cases): *Tan Seet Eng (CA)* at [105], citing Aileen Kavanaugh, "Defending Deference in Public Law and Constitutional Theory" (2010) 126 LQR 222. This applies even to matters of "high policy", as discussed in *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453.

1.133 In ascertaining the proper scope of the CLTPA, the Court of Appeal examined its history: how it was originally designed to deal with gangsterism and later drug-trafficking, but has constantly addressed "real and physical threats of harm *within Singapore*" [emphasis in original]: *Tan Seet Eng (CA)* at [107]–[110]. When the CLTPA was re-enacted in 1999, first mention was made of syndicated criminal activities: *Tan Seet Eng (CA)* at [114]. The retention of the CLTPA has also been justified on grounds of its utility in relation to serious crimes where witnesses fear to testify for fear of reprisal: *Tan Seet Eng (CA)* at [115]. In its latest enactment in 2013, the Second Minister for Home Affairs mentioned before Parliament that the CLTPA had been used against those involved in global soccer match-fixing activities where organised syndicates used technology and transnational networks: *Tan Seet Eng (CA)* at [124]. Public safety, peace and good order transcended danger to life and limb, though the Minister gave the assurance that prosecution was the preferred course of action, with the CLTPA as a measure of last resort: *Tan Seet Eng (CA)* at [125].

1.134 The Court of Appeal discerned that the CLPTA cannot be applied to *any* criminal activity but is confined to those types of criminal offences of a "sufficiently serious nature". This gives rise to a fear of reprisals against witnesses, which would only arise for offences of a certain level of gravity: *Tan Seet Eng (CA)* at [119]. In addition, any offence against which the CLTPA is invoked must pertain to "harm to public order in Singapore": *Tan Seet Eng (CA)* at [120]. The power under the CLTPA is to be used "sparingly and in limited circumstances" as preventive detention is a departure from the normal situations where individuals are not deprived of their liberty "save upon a judicial determination of guilt following an open trial": *Tan Seet Eng (CA)* at [128].

1.135 In exercising power under the CLTPA the Minister is to state all grounds relied on for justifying the detention: *Tan Seet Eng (CA)*

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at [130]. On the facts of the instant case, the grounds for detention essentially related to the match-fixing activities undertaken by Tan from Singapore, in relation to matches which took place in Egypt, South Africa, Nigeria, Turkey, and Trinidad and Tobago: *Tan Seet Eng (CA)* at [131]. The Court of Appeal held that this fell outside the limits of his power for various reasons, indicating that even the broad powers under s 30 of the CLTPA do not mean that the CLTPA has "a loose or open-ended remit": *Tan Seet Eng (CA)* at [134]. Even if the range of offences to which it has been applied has broadened over time, their "core characteristics" have not: *Tan Seet Eng (CA)* at [134]. Indeed, the scope of power conferred by the Legislature to the Executive was "centrally one for the Judiciary": *Tan Seet Eng (CA)* at [134]. While the criminal activities of a serious nature need not have taken place in Singapore, they must have threatened the public safety, peace and order of Singapore: *Tan Seet Eng (CA)* at [137]. The Court of Appeal found that Tan had not engaged in any activities of so serious a nature as to bring his actions within the scope of CLTPA – he had merely run the syndicate from Singapore and recruited runners and agents in Singapore over a 13-month period which ended almost 2.5 years before he was served with a detention order: *Tan Seet Eng (CA)* at [139]. There was nothing to suggest that these activities, while reprehensible, had a bearing on public safety, peace and good order *within* Singapore. There were "few connections" with Singapore as the matches took place beyond Singapore shores; there was nothing to indicate that the applicant was working with overseas criminal syndicates or that the applicant had done anything to make these activities likely to take root in Singapore: *Tan Seet Eng (CA)* at [146]. As none of these grounds were found to fall within the circumstances justifying the power to detain under the CLTPA, the detention was found to be unlawful.

Article 12 – Equality

1.136 In *Yong Vui Kong* (above, para 1.77), one of the arguments raised in relation to the sentence of caning as set out in s 325(1) of the CPC was that it violated the Art 12(1) equal protection clause. This is because it excludes women and men over 50 from caning.

1.137 The Court of Appeal noted (at [104]) that the appellant's case here was "rather confused" because even if s 325(1) of the CPC was unconstitutional, it would not benefit him as it would be struck down to the extent of its inconsistency with Art 12. The appellant had stated that he was not saying that women and men above 50 should be caned but that the entire caning regime be declared void. The court noted that the statutory provisions regulating caning were generally phrased and did not discriminate against men aged 50 and below.

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1.138 The established test is that of reasonable classification, which requires that a classification be based on an intelligible differentia and that this bear a rational relation to the legislative object. It affirmed the Court of Appeal's decision in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 ("*Lim Meng Suang*") at [84] that there is no additional test of legitimacy as courts "should not be adjudicating on controversial issues of policy, ethics or social values" as these fell within the legislative sphere. However, the reasonable classification test itself imported a "limited requirement of legitimacy" such that a law with a "manifestly discriminatory object" would fail the first limb of the test: *Yong Vui Kong* at [106]. The differentia could be intelligible in the sense of it clearly distinguishing who is and is not covered by the law, but be "unintelligible" in so far as "no reasonable person would consider such a differentiating factor to be functional as an intelligible differentia": *Yong Vui Kong* at [106], citing *Lim Meng Suang* at [67].

1.139 With respect to the exclusion of women from caning, the Court of Appeal located the history of this in a statutory exemption of women from whipping in 1872, when s 72A of the Penal Code 1871 (SS Ord No 4 of 1871) was brought into effect. The Colonial Secretary explained the legislative object as being, by confining flogging to men alone, to "bring our statute book into conformity with the moral sense of the community": *Yong Vui Kong* at [108]. The Court of Appeal stated that in so far as women were excluded from whipping (and later caning) out of concern that they would in general be "less able to withstand caning", there was a "sufficient rational nexus" between the adopted differentia and s 325(1)(*a*) [of the CPC]": *Yong Vui Kong* at [110]. There were "obvious physiological differences between males and females" which Parliament was "legitimately entitled" to take into account: *Yong Vui Kong* at [110]. While this may not apply to every case, the reasonable classification test does not require a "perfect relation or complete coincidence" between differentia and object to be achieved: *Yong Vui Kong* at [110]. The Court of Appeal stated it was "not appropriate" for it to "pass judgment on the soundness or rationality of such gendered social attitudes": *Yong Vui Kong* at [111]. The present case did not fall into that category of rare cases where the legislative object was "so manifestly discriminatory" that no reasonable person would consider the differentia "a valid means of differentiation": *Yong Vui Kong* at [111]. In addition, no cheap charge of the colonial vintage of the law could be levied as s 325(1)(*a*) was re-enacted when the CPC was amended in 2010. In other words, the present Parliament ratified the law and its moral values, indicating that "our attitudes towards the relative acceptability of inflicting corporal punishment on men *vis-à-vis* women have yet to change": *Yong Vui Kong* at [111]. The law is therefore not "a colonial relic that no longer represents prevailing opinion": *Yong Vui Kong* at [111].

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1.140 The court also observed that the Legislature had taken steps to "inject parity into our sentencing regime" as the 2010 amendments to the CPC allowed courts to impose imprisonment sentences in lieu of caning when a person is so exempt under s 325(1) or for medical reasons: *Yong Vui Kong* at [112]. This enables courts to send the message that "criminals of equal culpability are given sentences that reflect their culpability": *Yong Vui Kong* at [113]. Since people differ on whether caning or imprisonment is worse, neither punishment is "clearly worse than the other", and it cannot be said that males are treated in an "impermissibly unequal" manner compared to females: *Yong Vui Kong* at [113].

1.141 In relation to excluding males above 50 from caning, the Court of Appeal found that the use of age as a "convenient proxy" to screen out those likely to be unfit for caning was "plainly reasonable" and passed the second limb of the reasonable classification test given that there is "an inverse relationship between one's age and one's physical condition": *Yong Vui Kong* at [116]. While there are certainly men over 50 who would be fit for caning, showing the differentia to be over-inclusive, this is not fatal as a perfect coincidence is not required between differentia and legislative object. It is ultimately a policy decision for Parliament to make legitimately. Although all men need a medical certificate before they could be caned, which could address the issue of unfitness, the court found that Parliament could still exempt older men from caning "in the interests of administrative efficiency and/or out of an abundance of caution": *Yong Vui Kong* at [116].

1.142 The appellant had also argued that caning was introduced to serve racist objectives, being targeted at "the riffraff and scum of China": *Yong Vui Kong* at [117]. Even if this was so, the caning regime does not discriminate on basis of race; nor is it administered in a racist fashion: *Yong Vui Kong* at [119]. Even assuming corporal punishment had racist objectives, the fact is "that the punishment has been adopted by our own Parliament since Singapore's independence" and that Parliament "surely" could not be accused of any intent to discriminate against the Chinese or any race: *Yong Vui Kong* at [120]. As such the argument based on Art 12 failed.

1.143 In *Quek Hock Lye v Public Prosecutor* [2015] 2 SLR 563, the applicant had been convicted of a drug-trafficking offence under the MDA and sentenced to the mandatory death penalty. He sought to set aside the death sentence on the basis that s 27(6) of the MDA which was amended on 14 November 2012 by the Misuse of Drugs (Amendment) Act (Act 30 of 2012) ("the Amendment Act") was inconsistent with Art 12 of the Constitution. His appeals against conviction and sentence were dismissed on 9 April 2012.

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1.144 A new s 33B was introduced, which came into effect on 1 January 2013. This made certain changes to the application of the mandatory death penalty for drug offences by conferring discretion upon the court not to impose the death sentence if certain conditions were met. In place of the death penalty, a person could be sentenced to life imprisonment and a minimum of 15 strokes of the cane if the person proves his involvement in the crime was restricted to being involved in transporting a controlled drug, or if the Public Prosecutor certifies that the person has substantively assisted the Central Narcotics Board ("CNB") in disrupting drug-trafficking activities within or outside Singapore. Section 27 created a transitional framework, allowing people convicted of a s 5(1) or 7 MDA offence, such as the applicant, to be sentenced in accordance with s 33B. If the requirements of s 33B were met, the court would resentence the person accordingly; if not, it would affirm the imposed death sentence.

1.145 Article 12(1) was implicated in so far as the pertinent question under judicial consideration was whether the criteria adopted in s 27(6) of the MDA bore a rational relation to the MDA object. The issue of its retroactive operation was irrelevant to the applicant's case: at [25]. However, even if it was shown that s 27(6) of the MDA was unconstitutional, what would happen would be that part of the Amendment Act would be void to the extent of its inconsistency, such that the applicant would not be able to avail himself of the resentencing procedure, given that he was already sentenced to a mandatory death penalty: at [26]. Counsel for the applicant appreciated that even if the present application succeeded, the applicant would not benefit from it. Nonetheless, the object of the application was to give Parliament an opportunity to reconsider the law if s 27(6) of the Amendment Act was ruled unconstitutional: at [26].

1.146 However, the applicant failed to argue that s 27(6) of the Amendment Act was inconsistent with Art 12 as he had not rebutted the presumption of constitutionality: at [27]. The court applied the reasonable classification test under which a legislative classification to pass constitutional muster must be founded on an "intelligible differentia" and bear a "rational relation" to the legislative object.

1.147 Prior to s 27(6) of the Amendment Act, all persons convicted of drug-trafficking offences and sentenced to death were treated similarly. The applicant argued that after the Amendment Act, people in that same class would be differently treated depending on whether they satisfied the requirements in s 33B of the MDA, whether this be discretionary sentencing or life imprisonment. Under s 33(1)(*a*) of the MDA, the two "conjunctive requirements" are that (a) the offender proves on a balance of probabilities that his involvement in the offence is restricted to that of a "courier"; and (b) the Public Prosecutor certifies that he provided

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substantive assistance to the CNB in disrupting drug-trafficking activities within and without Singapore. Under s 33(1)(*b*) of the MDA in relation to life imprisonment, the offender must prove on a balance of probabilities that he was suffering from some abnormality of mind that substantially impaired his mental responsibility in relation to the offence and that his involvement was restricted to "courier" activities. The issue was whether these s 33B requirements were consistent with Art 12(1).

1.148 The test of intelligible differentia was satisfied as the requirements could not be said to be "illogical or incoherent": at [31]. With respect to the rational nexus test, the court examined the legislative purpose behind the MDA, which was to stamp out the illicit drug trade and prevent the spread of drug addiction in Singapore: at [33]. From examining ministerial statements during parliamentary debates, the court identified the policy reason behind the 2012 amendments as being "to maintain a strong law enforcement regime against drugs while refining the prescribed punishments to reflect the culpability of each offender", and to provide "an additional avenue to combat the drug trade", in relation to the courier's substantive co-operation exception in s 33B(2) of the MDA: at [35].

1.149 The court found (at [36]) that the differentia in s 33B of the MDA passed constitutional muster as there was "nothing unreasonable in Parliament's decision" not to impose the "ultimate punishment of the death penalty" on someone who played a "relatively restricted role" in the offence and who suffered an abnormality of mind which impaired his mental responsibility, which weakens the goal of deterrence. As to the substantive co-operation exception, the relationship between the differentia and object was "obvious". This was to "reach further into drug networks by obtaining assistance in disrupting drug trafficking activities" where the offender played a "key role" as courier in drug operations and was able to provide the CNB with a lead to identify the "suppliers and kingpins outside Singapore": at [36]. The court underscored (at [37]) that the reasonable classification test does not require a perfect classification and "complete coincidence" between the differentia and legislative objective; neither is it required that the adopted differentia be "the best differentia possible" in the sense of there being "no other better or more efficacious differentia which would further the social object and purpose of the particular statute".

1.150 In the case of *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222, two persons, the appellant and one Abdul Haleem, were involved in the same drug-trafficking activity and faced two charges of trafficking under s 5(1)(*a*) of the MDA. The first charge was a capital charge punishable under s 33 or 33B of the MDA while the other was a non-capital charge. They were both convicted of both offences in 2003. Section 33B(4) of the MDA provides two grounds

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for challenging the decision of the Public Prosecutor whether to grant an offender a certificate of substantive assistance in helping to disrupt drug-trafficking activities. These relate to bad faith or malice; in addition, the Public Prosecutor's decision can be challenged on the ground of unconstitutionality, flowing from the Singapore doctrine of constitutional supremacy: at [35].

1.151 Abdul Haleem alone was granted a certificate of substantive assistance under s 33B(2)(*b*) of the MDA; the appellant wished to challenge the non-certification decision on grounds that this was made in breach of the Art 12 equal protection clause or in bad faith: at [2]. Under s 33B(2)(*b*) of the MDA, the court has the discretion to sentence a person convicted of a s 5(1) offence, which carries a mandatory death penalty, to life imprisonment and 15 strokes of the cane if, for our purposes, the Public Prosecutor certifies he has "substantively assisted" the CNB in disrupting drug activities inside or outside Singapore. The Public Prosecutor only gave Abdul Haleem a certification of substantive assistance and subsequently, the judge sentenced Abdul Haleem to life imprisonment and 15 strokes of the cane for the capital charge, whereas the appellant was given the mandatory death sentence, in relation to the first charge. As the s 33B(2)(*b*) MDA power is an executive act, this must be constitutional and the court has power to declare any executive act void for contravening a constitutional provision: at [35]. The burden rests on the challenger to show a *prima facie* case of reasonable suspicion of breach of the relevant standard, flowing from the presumption of constitutionality and regularity as a matter of the separation of powers doctrine for the act of constitutional office holders and legal policy, for other officials: at [36].

1.152 On appeal, the appellant argued that he should receive a substantive assistance certificate as he had provided sufficient information. The Public Prosecutor's non-certification decision was sufficient to establish a *prima facie* case of reasonable suspicion of bad faith. He argued that the fact that he and Abdul Haleem were in the same or similar circumstances provided *prima facie* evidence that the non-certification decision was in breach of Art 12 of the Constitution. Lastly, he argued that "bad faith" within the meaning of s 33B(4) of the MDA would be made out if he could show that proper procedure was not followed here, specifically, because he had not been invited to provide CNB with information after the criminal trial.

1.153 The Court of Appeal held that the appellant had to establish a *prima face* case of reasonable suspicion that the Public Prosecutor had breached a relevant standard before leave would be given. The appellant is not required to provide evidence directly impugning the propriety of the Public Prosecutor's decision-making process, which he would not be privy to. He could discharge the evidentiary burden by highlighting

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circumstances which establish a *prima facie* case that the decision was made contrary to relevant standards: at [40] Inferences could be made from objective facts: at [43]. Prosecutorial discretion could be challenged if exercised arbitrarily, for an extraneous purpose, in violation of Art 12 and if made in bad faith: at [40]–[43].

1.154 Good faith co-operation with the CNB *per se* is not a sufficient basis for the Public Prosecutor to grant a certificate of substantive assistance; what is needed is assistance which enhances "the enforcement effectiveness of CNB", such as where drug trafficking is actually disrupted: at [45] and [48].

1.155 With respect to executive actions, the equal protection clause in Art 12 is breached if there is "deliberate and arbitrary discrimination against a particular person … [a]rbitrariness implies the lack of any rationality": at [49], citing *Public Prosecutor v Ang Soon Huat* [1990] 2 SLR(R) 246 at [23], as applied in *Eng Foong Ho v Attorney-General* [2009] 2 SLR(R) 542 at [30].

1.156 For an applicant to discharge his evidential burden that the Public Prosecutor acted arbitrarily in only granting one co-offender a certificate of substantive assistance, he would need to show two things:

(a) that his level of involvement in the offence and the knowledge he would have obtained of the drug syndicate would be "practically identical to a co-offender's level of involvement and the knowledge the co-offender could have acquired" (at [51]); and

(b) that both would have provided "practically the same information to the CNB", but only one got a certificate: at [51].

This would suffice to show a *prima facie* case of reasonable suspicion of the Public Prosecutor acting arbitrarily as it would raise questions as to why one and not the other co-offender was granted the certificate.

1.157 The evidentiary burden then shifts to the Public Prosecutor to justify his decision, which is still possible. For example, there may be several co-offenders but one might have a sharper memory and thus provide "better information" that actually leads to the disruption of drug-trafficking activities; or while both co-offenders may have provided identical information, one may have provided it earlier leading to the disruption of the drug-trafficking activities, while the other may have withheld the information for a protracted period, rendering it of no operational use: at [52].

1.158 On the facts of the case, the co-offenders' levels of involvement in the crime were not identical. Abdul Haleem, for example, had direct

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interaction with the couriers which the appellant did not, even though he arranged for the drug deliveries. Bearing in mind the Art 12 requirement that like be treated alike (at [67]), the Court of Appeal proposed remitting the matter to the judge for him to receive Abdul Haleem's evidence so he could compare and determine whether the same information had been given by the appellant and Abdul Haleem: at [55]. The respondent objected to this and argued that courts were ill-placed to consider whether an offender had provided substantive assistance in disrupting drug-trafficking activities as this involved a "multi-faceted enquiry" engaging a "multitude of extra-legal factors": at [56]. The Public Prosecutor was best placed to make this determination as it was not a simple matter of comparing the information both had provided. The court accepted that it did not fall within its province to assess the sufficiency of information given.

1.159 The Court of Appeal decided that the affidavits filed by the respondent were dispositive in relation to the question of whether the appellant and Abdul Haleem had given practically identical information to the CNB: at [66]. Indeed, the respondent's affidavit clearly indicated that the two accused persons were not similarly situated as there were material differences in the information they had supplied: at [67].

1.160 Whether substantive assistance had been rendered was not to be proven in a court; otherwise, this would seriously jeopardise the battle against drug trafficking as well as the "general interest of society": at [66]. It fell to the Public Prosecutor to decide whether to award a certificate, bearing in mind he was dealing not with innocent persons but convicted persons. The object of s 33 of the MDA was not to bring about a softer approach towards the drug trade but to provide another way to combat trafficking; convicted drug traffickers were not entitled to this certificate but had to "earn" it, with the objective of getting at "the real kingpins behind the couriers": at [66]. As such, the Court of Appeal found that the appellant had failed to establish a *prima facie* case of reasonable suspicion that the non-certification decision breached Art 12.

1.161 One of the challenges raised in *Vijaya Kumar* (above, para 1.16) was whether Art 12(1) of the Constitution had been violated since a police permit authorising a Thaipusam procession while prohibiting musical accompaniment differed from permits given to "materially similar" processions such as the Chingay and St Patrick's Day parades, which were not subject to this prohibition: at [15].

1.162 The established approach towards reading Art 12 is that like cases be treated alike. Applying the reasonable nexus test, Tay J held that there was a reasonable nexus between the musical instruments restriction and the objective the Public Order Act (Cap 257A,

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2012 Rev Ed) and 2009 Regulations sought to achieve, that is, the preservation of public order. The police measures were neither illogical nor unreasonable, even if others may have taken greater risks by giving greater latitude; it was a *bona fide* assessment of order considerations against the event's scale, duration and religious element: at [41]. The reasonable classification test only requires that a classification be reasonable, not proportionate, in the sense of deploying the least restrictive measure. Here, the test invoked was whether the treatment accorded was a "deliberate and arbitrary discrimination", as applied in *Howe Yoon Chong v Chief Assessor* [1990] 1 SLR(R) 78: at [42].

1.163 The police in their affidavit explained how the general policy was not to grant permits for religious foot processions and that the grant of Thaipusam procession permits was an exception to the rule. The general rule in reg 8(2)(*c*) proscribed the playing of musical instruments in public procession unless the police otherwise so authorised; this applied to religious processions "due to communal sensitivities and the potential for communal disturbance and strife": at [43]. Over time, the discretion afforded by reg 8(2)(*c*) had been applied in a "more nuanced fashion", in allowing the singing of religious hymns and music to be broadcast from three music points near the temple. Article 12(1) was not violated and indeed, the Thaipusam procession was treated more favourably than other religious processions: at [43]. The High Court held that there were distinguishing factors that justified differentiated treatment between the Thaipusam procession and the Chingay and St Patrick's Day parades. The latter were "cultural" or "secular" processions; they did not have a religious element: at [45]–[46]. In addition, they were shorter in duration and more contained. Religious processions which took place on a larger scale over a longer duration translated into "a higher order of public order concerns": at [44]. Thus, there was no arbitrary and deliberate discrimination involved.

Article 14 – Public morality and public order

1.164 No constitutional arguments were raised as to the constitutionality of ss 292(1)(*a*) and 298 of the Penal Code (Cap 224, 2008 Rev Ed) in *Public Prosecutor v Amos Yee Pang Sang* (MAC Nos 902694 and 902695 of 2015). Nonetheless, the case is illuminating with respect to the limits of the Art 14 guarantee of free speech with respect to public morality and public order as grounds of permissible derogation.

1.165 Section 292(1)(*a*) of the Penal Code makes it an offence for whoever:

> … sells, lets to hire, distributes, transmits by electronic means, publicly exhibits or in any manner puts into circulation, or for purposes of sale,

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> hire, distribution, transmission, public exhibition or circulation, makes, produces, or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure, or any other obscene object whatsoever …

1.166 The accused had created a blog post depicting former Prime Minister Lee Kuan Yew and former British premier Margaret Thatcher engaging in anal intercourse. District Judge Jasvender Kaur noted that s 298 had been updated in 2008 to deal with the Internet as a new medium for transmitting obscenity: at [9]. The object of the statute was "the protection of minds" and the intent of the author or publisher was irrelevant: at [10]. Section 42 of the Penal Code defines "obscene" as matter which "tend[s] to deprave and corrupt persons" likely to see or hear the matter. District Judge Kaur noted (at [12] and [14]) that an allegedly corrupt image is judged by reference to "its impact on the primary readership", which in this case was teenagers, given that the accused was a teenager.

1.167 The learned judge underscored the importance of local context when it comes to issues of public morality, noting (at [16]) that she was "not concerned with standards in other countries" as the correct normative reference was "our current community's standards or conscience". In this respect, in addressing the test as to whether an image was obscene under section 24 of the Penal Code (Cap 224, 2008 Rev Ed) so as to have a tendency to "deprave and corrupt", District Judge Kaur asked was whether teachers or parents would approve of their students or teenage children viewing such images: she stated (at [20]) that this would "meet with their strongest possible disapproval and condemnation". She noted (at [23]) that "current societal norms" were "clearly against sexual experimentation by our young" and that the image of "two persons having anal sexual intercourse", an image of "unnatural intercourse", would "encourage sexual precociousness". Such an image would "not only tend to excite teenagers to try out different sexual positions but also deviant sexual activity *ie* anal intercourse": at [23], which would have "a tendency to corrupt and deprave" young minds. Given the internet's "pervasive reach", the impact on the potential readership would not be "negligible". Thus, the accused was found guilty and convicted of the charge under s 292.

1.168 Section 298 of the Penal Code makes it an offence if one, with deliberate intention of wounding the religious feelings of any person, causes any matter, however represented, to be seen and heard by that person. This section was amended in 2008 to include online transmissions.

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1.169 District Judge Kaur stated that to wound religious feelings meant "to give offence to any person". The subject matter in question, a video entitled "Lee Kuan Yew is Finally Dead" which was uploaded to Youtube, labelled both Lee and Jesus Christ, the central figure of Christianity, as "power hungry", "malicious" and "deceptive". This was "clearly derogatory and offensive to Christians": at [33]. A comment was considered insulting and offensive in insinuating Christians had no real knowledge of the Bible as they were manipulated by "a multitude of priests": at [33].

1.170 This offence does not require proof that religious feelings were wounded, but that there was a deliberate intent to wound religious feelings. If there is evidence that religious feelings are wounded, such as through witness evidence, this would go to influencing sentencing: at [37]. On the facts of the case, there was evidence that the accused knew that people would be offended by the video; in addition there was evidence that people were offended, found in comments left on the Youtube video: at [36]. The court noted that the video was made by a "16 year old teenager who plainly has a lot of growing up to do" and not someone who was "learned or of special influence", such that it was not surprising that "the negative reaction was limited to the comments that the accused received on social media": at [39].

1.171 On the facts of the case, the accused's intent was to make a comparison intended to denigrate Lee and Jesus. As there was no ambiguity here, the "real and dominant" test drawn from the Indian decision of *Narayan Das v The State* AIR 1952 Ori 149 at [47] was not appropriate; neither did an issue of "fair latitude" which arose in *Narayan Das* for religious discussion or free speech arise here: at [51].

1.172 Thus, the Art 14 guarantee of free speech may be restricted by considerations of public morality, which undergird obscenity laws, and for the public order purpose of guarding against the wounding of religious feelings. This reflects a clear rejection by Singapore courts of a liberal, rightist approach which confers on free speech a paramount value.

Article 14 – Contempt of court

1.173 The Court of Appeal in *Au Wai Pang v Attorney-General* [2016] 1 SLR 992 ("*Au Wai Pang v AG*") upheld the decision of the High Court in *Attorney-General v Au Wai Pang* [2015] 2 SLR 352 ("*AG v Au Wai Pang*") where Au was found guilty of scandalising the court with respect to his authorship and publication of a blog article entitled "377 Wheels Come off Supreme Court's Best-laid Plans".

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1.174 Belinda Ang Saw Ean J in *AG v Au Wai Pang* noted (at [6]) that the "leading local authority" on the law of scandalising contempt was *Shadrake Alan v Attorney-General* [2011] 3 SLR 778 ("*Shadrake*"). Ang J noted (at [9]) that Singapore law viewed the offence of scandalising contempt as "a reasonable limit upon freedom of speech", as limits on free speech are "necessary in the public interest so as to take into account the rights of others and the interests of the whole community". The "broad effect" of *Shadrake* was that the Attorney-General was to prove "the absence of fair criticism within the ambit of liability for scandalising contempt" which "ensures that the alleged contemnor … is not disadvantaged": at [11]. Criticism was fair "when there is a rational basis for the criticism and the rational basis is accurately stated. Criticism is not likely to be fair if it is not made in good faith": at [42]. Ang J treated "fair criticism" as falling within the ambit of liability rather than as a defence. This is distinct from the operation of "fair criticism" as a defence in the law of defamation: at [11]. Ang J noted that the Attorney-General could evidentially show the absence of good faith from indirect and circumstantial evidence: at [46]. She identified various factors that could be considered in deciding whether there was bad faith, including the defendant's prominence and content of publication and the size of its readership, as well as the tone, tenor and manner of criticism: at [51].

1.175 In particular, she noted that the adoption of the "real risk" test and placing the legal burden on the Prosecution to prove beyond reasonable doubt "calibrates" appropriately the tensions between free speech and the public interest in the public confidence in the administration of justice: at [11]. While the Attorney-General bears the legal burden, the party relying on fair criticism bears the evidential burden: at [43]. Ang J noted that publication of contemptuous speech occurs once the offending material is made available and where this is on the Internet, it is considered to be a continuing act as long as the material is left available in that medium: at [36].

1.176 The Court of Appeal noted that as a whole the article insinuated that two judges were not acting independently of each other, contrary to the fundamental principle of judicial independence, to allow the Chief Justice to be able to hear the later of two cases which both dealt with the constitutionality of s 377A of the Penal Code. The suggestion was that the later case of *Lim Meng Suang* (above, para 1.138), with the Chief Justice sitting as part of the coram, would influence the earlier case of *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 ("*Tan Eng Hong*"). The Chief Justice was Attorney-General at the time *Tan Eng Hong* was prosecuted and so, the author stated, would have to recuse himself. In other words, the article asserted that the Supreme Court's hearing calendar had been improperly manipulated: *Au Wai Pang v AG* at [9].

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1.177 The Court of Appeal affirmed the test applied in *Shadrake* that the test for *actus reus* was pegged at the level of there being a "real risk" that public confidence in the administration of justice would be undermined because of the impugned statement. A statement would not be contemptuous if it constituted "fair criticism": *Au Wai Pang v AG* at [17]. The *meas rea* test is simply the intention of the maker of the statement to publish the statement rather than the need to prove the intention to undermine public confidence in the administration of justice. The Court of Appeal in *Shadrake* had expressed its preferred position that fair criticism should be treated as an ingredient of the offence of contempt which the Prosecution had to prove, rather than a separate defence which the respondent would have to prove. The Court of Appeal assumed the approach that "fair criticism should go to liability", thus taking the appellant's case at its highest: *Au Wai Pang v AG* at [18].

1.178 The Court of Appeal also discussed the argument which the High Court judge had rejected to the effect that the *mens rea* test ought to be revisited in the light of the Privy Council decision of *Dhooharika v Director of Public Prosecutions* [2014] 3 WLR 1081 ("*Dhooharika*"), on appeal from Mauritius which was not binding precedent: *Au Wai Pang v AG* at [19]. It underscored that Singapore, as an independent nation, could not be bound by decisions from another jurisdiction: *Au Wai Pang v AG* at [20]. While not binding, the Court of Appeal considered it appropriate to consider *Dhooharika* as a matter of "general principle", with "particular regard to the circumstances of Singapore", so as to avoid throwing "the proverbial baby out together with the bath water": *Au Wai Pang v AG* at [21]. This more stringent *mens rea* test requires that the defendant must have intended to interfere with the administration of justice, although the Court of Appeal noted that the contrast between this approach and the Singapore approach was "more apparent than real": *Au Wai Pang v AG* at [22] and [24]. Ang J had noted in the High Court that equating *mens rea* with an intention to bring about a real risk of undermining public confidence in the administration of justice could, depending on the facts and in the overall scheme of things, "have the unintended consequence of raising the threshold for the test for liability for scandalising contempt to the extreme end of the legal spectrum required by the 'clear and present danger' test": *AG v Au Wai Pang* at [34]. This the Court of Appeal had rejected in *Shadrake*: *AG v Au Wai Pang* at [34].

1.179 The Court of Appeal stated that the approach in *Dhooharika* did not support the view that it would suffice for the alleged contemnor to "merely claim" it was not his subjective intention to undermine public confidence in the administration of justice. If this were the case, all contemnors would make this claim. The court would not be able to ascertain whether a declared subjective intention was true apart from

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relying on "relevant objective evidence" which would ordinarily be found in the text and context of the contemptuous words: *Au Wai Pang v AG* at [25].

1.180 The Singapore approach was clear in only relying on "objective evidence" to be taken into account particularly with respect to the element of fair criticism: *Au Wai Pang v AG* at [26]. This was preferable to the *Dhooharika* approach, particularly where this would encourage contemnors to make bare claims that they had "subjectively not intended" to undermine public confidence in the Judiciary: *Au Wai Pang v AG* at [26]. As such an approach had the potential for uncertainty and confusion, the Court of Appeal stated unequivocally: "[W]e prefer to retain our approach" (*Au Wai Pang v AG* at [26]). If *Dhooharika* stood for the proposition that the prosecutor had to prove the subjective intention and guilt of the defendant, such a "vastly" different approach was one the court would decline to adopt. It stated that any attempt to abolish the offence of scandalising the court should be effected by statute: *Au Wai Pang v AG* at [29]. While courts could not act as "mini-legislatures", they could develop common law principles, as had been done in relation to the shift from the "inherent tendency" to "real risk" test in *Shadrake*.

1.181 The Court of Appeal affirmed that the Singapore approach "strikes an appropriate balance" between free speech and the interests represented by the law of contempt. It provided that material issuing from the contemnor "in good faith and as fair criticism", assuming the "real risk" test was satisfied, would avoid the charge of scandalising contempt: *Au Wai Pang v AG* at [30]. If the alleged contemnor acted in bad faith, there was "no reason in principle why he or she should not be found guilty of the offence of scandalising contempt": *Au Wai Pang v AG* at [30]. Where newspapers republish contemptuous statements, the court would consider, on the basis of objective evidence, whether the alleged contemnor had acted pursuant to fair criticism: *Au Wai Pang v AG* at [30].

1.182 On the facts of the case, the article was found not to rest on objective facts and so lacked a rational basis; as such, it did not satisfy the element of "fair criticism": *Au Wai Pang v AG* at [34]. The court clarified that even if the article was found to rest on objective facts, it was still possible that the logical deductions drawn by the appellant might be found not to be written in good faith as fair criticism: *Au Wai Pang v AG* at [3]. A plain reading of the relevant article implied there was something "untoward or even sinister" in the alleged deliberate scheduling of *Lim Meng Suang* (above, para 1.138) ahead of the *Tan Eng Hong* (above, para 1.176) appeal: *Au Wai Pang v AG* at [43]. The thrust of the article was to allege that the Chief Justice had a vested, improper interest in upholding the constitutionality of s 377A of the Penal Code

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and that the High Court judge, Quentin Loh J, was complicit in this plan. This "insidious attack" on judicial independence and impartiality goes to "the very heart of what the … judiciary stands for and clearly undermines public confidence in the administration of justice": *Au Wai Pang v AG* at [48]. The tone of the article and "the abundance of insinuations" indicated that the article had not been written in good faith as fair criticism: *Au Wai Pang v AG* at [49]. The "rank absence" of any objective facts, only vague references comprising mainly "unsubstantiated views received from unidentified persons", indicated there was "no rational basis whatsoever" for the article: *Au Wai Pang v AG* at [51] and [50]. Further, the appellant in his affidavit had even attempted to rely on sources post-dating the publication of the article, which indicated that his efforts on a whole "come across as disingenuous": *Au Wai Pang v AG* at [53]. As such, the article did not constitute fair criticism and the court concluded, beyond reasonable doubt, that the article posed a real risk of undermining public confidence in the administration of justice: *Au Wai Ping v AG* at [53] and [54].

Article 14 – Political defamation

1.183 Singapore courts have rejected the American and European versions of the "public figure" doctrine with respect to the law of political defamation, which seeks to balance freedom of expression against the right to reputation protected by the law on defamation. This is based on the proposition that the limits of acceptable criticism of the official acts of politicians or other public figures were wider than for private individuals as such speech serves the public interest in having unconstrained public debate and effective democracy. The Court of Appeal in *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 1 SLR(R) 791 at [62] rejected this proposition, stating that the law of defamation protected the public reputation of public men and that it was also in the public interest in the maintenance of public character, without which public affairs could not be conducted.

1.184 However, when it comes to quantifying damages, Singapore courts have awarded higher damages where public leaders are concerned. The rationale of *Lim Eng Hock Peter v Lim Jian Wei* [2010] 4 SLR 357 ("*Lim*") at [12]–[13] was affirmed by the High Court in *Lee Hsien Loong v Ngerng Yi Ling Roy* [2016] 1 SLR 1321 ("*Roy Ngerng*"), a case where the defendant was found to have defamed the plaintiff such that only the issue of quantum of damages rather than liability was before the court.

1.185 The *Lim* rationale was to the effect that public leaders warranted higher damages because of the "greater damage" they suffered

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personally, as well as the reputation of the institution of which they were members (*Roy Ngerng* at [30], citing *Lim* at [12]):

> Public leaders are generally entitled to higher damages also because of their standing in Singapore society and devotion to public service. Any libel or slander of their character with respect to their public service damages not only their personal reputation, but also the reputation of Singapore as a State whose leaders have acquired a worldwide reputation for honesty and integrity in office and dedication to service of the people. In this connection, it is pertinent that it has been said that the most serious acts of defamation are those that touch on the 'core attributes of the plaintiff's personality', *ie*, matters such as 'integrity, honour, courage, loyalty and achievement'.

It would be a "serious matter" to defame a political leader as it damages "the moral authority" of that person to "lead the people and country": *Roy Ngerng* at [13]. This was reflected in the quantum of damages awarded to this class of plaintiffs. The court also noted in *Goh Chok Tong v Chee Soon Juan* [2005] 1 SLR(R) 573 that where the speaker and the object of the speech are "prominent public figures", the public perception of their integrity would affect their standing and have the capacity to damage the reputations of those they spoke ill of: *Roy Ngerng* at [31].

1.186 The plaintiff was the holder of the "highest political office in the country"; thus, the damages awarded would be "higher than what would be awarded to an ordinary individual", bearing in mind that public leaders held positions of "trust and confidence and their reputations are vital to their ability to lead and to be given the mandate to govern": *Roy Ngerng* at [31]. The defendant had published an article on his blog ("The Heart Truths to Keep Singaporeans Thinking") entitled "Where Your CPF Money is Going: Learning from the City Harvest Trial". This alleged that the plaintiff, as Prime Minister of Singapore, was guilty of criminal misappropriation of moneys paid into the Central Provident Fund ("CPF"). The link to the article was published on his Facebook page.

1.187 The defendant argued that because he was a "defamer of low credence", the readers of his article would be less likely to believe him, lessening the "gravity" of the accusation, which should result in lower general damages: *Roy Ngerng* at [34]. The court considered that the credibility of the defamer was relevant to how much injury the defamatory statement caused to reputation.

1.188 Lee Seiu Kin J stated there was a "continuum of damages" which would be commensurate with the defamer's standing or lack thereof, as the words of a "dishevelled tramp" was less capable of causing damage than that of a "CEO of a multi-national company": *Roy Ngerng* at [39].

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He considered a range of factors which might impact the credibility of the defamer, including the popularity of a blog where defamatory material is published. Lee J said that blog's popularity might be "indicative of its reach" but not necessarily its credibility. In addition, how the material was presented would affect credibility though on the facts, neither factor sufficed to elevate Ngerng's credibility to that of a "leading opposition politician" or "a publication with an international circulation": *Roy Ngerng* at [41]. Although the defendant portrayed himself as "the voice of truth", there was no evidence indicating he actually enjoyed such standing. He was simply "an ordinary citizen writing on his personal blog", notwithstanding attempts to "fashion himself as an investigative journalist of sort": *Roy Ngerng* at [42]. Given the defendant's standing and low credibility, Lee J found that this pointed to "a lower award of damages" than for other cases involving the defamation of public leaders. Other supporting factors might be the "greater degree of scepticism" visitors to the defendant's blog might have towards his views, given their knowledge that the defendant was under threat of a defamation suit: *Roy Ngerng* at [48].

1.189 The High Court considered two factors relevant to damage assessment in relation to the fact that the defamatory material was published on the Internet or cyberspace: first, the "percolation phenomenon"; that is, the ease with which online stories have the capacity to go viral and spread widely and quickly, as noted by Lord Judge CJ in *Cairns v Modi* [2013] 1 WLR 1015 (*Roy Ngerng* at [49]); and second, the longevity of the defamatory material, as Internet users would be able to retrieve this material long after the event. This factor would translate into an increase in damages, to take into account the risk of "future damage": *Roy Ngerng* at [50]. The fact that the material was published on a blog, rather than an institutional site which would imply the backing of an organisation, by itself did not mean that less credence would be given to defamatory allegations. There is no "hard and fast rule" that an article published in a blog "is less likely to be believed": *Roy Ngerng* at [55]. Instead, the court indicated that the presentation of the materials was a relevant factor: whether casual and incoherent, or whether well-structured and grammatical, bolstered by statistics and charts from verifiable resources and with quotes from reputable persons. The chief consideration was "the impact of the Article on the objective reader": *Roy Ngerng* at [55]. Well-written blog articles, as in the instant case, would be taken more seriously than poorly presented ones and, while less influential than a traditional newspaper, the defendant's blog's quality raised it above that of a "run-of-the-mill blog": *Roy Ngerng* at [55].

1.190 One of the arguments raised was the chilling effect an award of high damages for political defamation would have on freedom of expression. Singapore courts had rejected the argument that damages be

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reduced because the plaintiff was a politician such as a Minister. Otherwise, this would "allow a person more latitude to make defamatory remarks" of that politician and "to escape with lesser consequences for the defamation he committed": *Roy Ngerng* at [94], citing *Tang Liang Hong v Lee Kuan Yew* [1997] 3 SLR(R) 576 ("*Tang*"), which "continues to be good law in Singapore" (*Roy Ngerng* at [95]). Otherwise, if damages were reduced because the object of defamation was a public leader, the equal protection guarantee under Art 12 of the Constitution would be violated: *Roy Ngerng* at [94].

1.191 The judge made clear that the defendant had been able to exercise his freedom of expression, having published almost 400 blog articles, many of which were critical of government policy: *Roy Ngerng* at [101]. In addition, Lee J made *obiter* comments on defences to political defamation, referring back to the Court of Appeal decision of *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 ("*Review Publishing*") at [99]. The defence of qualified privilege or the *Reynolds* test of "responsible journalism" flowed from a rebalancing of free speech and reputational interests in the English context. The expansion of these defences which do not require proof of truth had the effect of blunting the chilling effect of damages. The judge noted that developments elsewhere which recalibrated this balance inspired by the argument from democracy or truth as theories underlying freedom of expression did not entail treating free speech as a "fundamental right" or trump: *Roy Ngerng* at [105]. The judge also commented on the possibility left open by the Court of Appeal in *Review Publishing* that the "responsible journalism" approach of the English House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 could be adopted and adapted within the Singapore context in certain cases. Such cases must engage the public interest, as in the instant case concerning the alleged criminal mishandling of public moneys in relation to a state-administered pension fund by a head of government. Further, since the recalibration rested on awarding greater weight to freedom of expression, to reflect its location in a higher order legal norm, that is, the Constitution, Singapore citizens had to be involved, as in the instant case: *Roy Ngerng* at [107]. An application of the *Reynolds* responsible journalism test in the local context in cases involving speech with political overtones would translate into lower damages. Lee J had reservations with this view, in so far as it was inconsistent with the view in *Tang* in so far as it rejected a discount for damages where "political speech" was involved: *Roy Ngerng* at [108]. In addition, the proponent of a changed test bore the burden of providing evidence to show this was warranted by changes in political, social and cultural values: *Roy Ngerng* at [108].

1.192 Lee J was of the opinion that a discount in damages was not an appropriate way to give effect to a finding, if made, to shift the existing

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balance between constitutional free speech and protection of reputation in favour of the former. He considered significant the fact that English and Australian courts did not give effect to the *Reynolds* rationale in an "unqualified" manner but instead required that the act of publication be "reasonable" to attract privilege. This was a recognition that "there are limits to unrestricted communication in matters of public interest holding primacy in a democratic society": *Roy Ngerng* at [109]. The Court of Appeal in *Review Publishing* had noted that a new balance would not necessarily entail a complete immunisation of the defendant from liability, but rather entail adjusting the quantum of damages to the degree of care taken in making the publication: *Roy Ngerng* at [110].

1.193 On the facts of the instant case, the defendant was found to have acted with actual malice, in knowing that his article carried a defamatory imputation and that it was false and yet proceeding to publish it. Despite purporting to check facts for accuracy, he had failed to take steps to verify the information; while the defendant was free to criticise the CPF policy, he had no basis for calling the plaintiff a thief: *Roy Ngerng* at [113]. Given these facts, Lee J did not consider that the incorporation of the *Reynolds* rationale at the stage of considering quantum would warrant a downward calibration of damages to be awarded. In coming to a sum, the High Court considered that where Prime Ministers or political leaders were defamed, the upper limit of awards was pegged at $300,000. A "substantial reduction", effectively a 50% discount, was applied in this case given the "comparatively low standing" of the defendant, with damages fixed at $150,000: *Roy Ngerng* at [116].

Article 15 – Right to profess, practice and propagate religion

1.194 The Commissioner of Police is authorised under s 7 of the Public Order Act to grant permits for proposed public processions and to impose conditions which in his opinion are necessary to ensure the procession does not result in matters stipulated in ss 7(2)(*a*)–7(2)(*g*), such as public disorder, road obstruction, and feelings of enmity, hatred, ill-will and hostility between different groups in Singapore. Under reg 8(2) of the 2009 Regulations, seven conditions are deemed imposed on any police permit. Regulation 8(2)(*c*) provides that unless authorised, "no singing or music, gongs, drums or music-producing equipment shall be played".

1.195 A permit for the 2015 Thaipusam festival provided that no singing or music was to be played during the procession other than at three transmission points. Of the three applicants, two took part in the procession carrying a spike kavadi and milk pot, while the third was a spectator who took photographs. They contended that the use of the

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urumi, a type of drum, was integral to the religious procession, which is part of religious practice guaranteed under Art 15(1). As such, the music conditions were challenged as a violation of their constitutional rights.

1.196 The issue of whether granting a licence for a religious procession with conditions was constitutional arose in *Vijaya Kumar* (above, para 1.16). Specifically, what was challenged was the Government's 42-year-old policy which proscribed singing or music and the use of music-producing equipment like gongs and drums during Thaipusam foot processions.

1.197 The legal basis for this policy was found in s 8(2) of the Public Order Act read with reg 8(2)(*c*) of the 2009 Regulations. The terms of the licence itself did not constitute a complete but a partial ban on music during the Thaipusam procession, as music was permitted at the start and end of the procession on temple grounds.

1.198 The applicants sought a quashing order in relation to the policy of an outright ban on all music during the procession and to compel the police to issue a permit for the 2016 Thaipusam procession authorising the playing of musical instruments during the procession. In essence, their argument was that participating in a Thaipusam procession with full musical accompaniment was a religious practice protected under Art 15(1) of the Constitution. While recognising that Art 15(4) did not authorise religious acts contrary to public order, the applicants raised two challenges: first, whether the "religion-curtailing law" bore a "sufficiently compelling nexus to public order"; and second, whether there was a "real threat of violence or disturbance to public safety" that would justify limiting a fundamental right, as opposed to a "mere inconvenience": at [14].

1.199 A threshold question the High Court had to ascertain was whether playing musical instruments during the Thaipusam procession was essential to the Hindu religion, which would attract the Art 15(1) protection of religious practice.

1.200 The court showed an appreciation that there could be a diversity of religious practice within a religion like Hinduism and did not require that playing musical instruments be shown to be a "universal Hindu practice": at [30]. It noted that religious practices "do vary from place to place and among different groups of believers in the same faith": at [21]. Instead, a pragmatic rather than dogmatic approach was adopted in so far as it sufficed to show that four Hindus – the three applicants and their Hindu expert – "firmly believed" that it was essential to the Thaipusam procession. The court refrained from adopting what it termed a "legalistic" attitude in relation to deciding who qualified as an expert on Hindu practices, in accepting the expert opinion tendered by

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the applicants and authored by a Hindu who, not having academic or professional qualifications, had practical experience in organising the Thaipusam festival in Selangor for more than 40 years. This approach was particularly suitable in relation to religious rituals which were "not set out in writing": at [19].

1.201 The expert affidavit asserted that playing musical instruments was "crucial" in helping keep devotees in a trance and focused on the divine, and alleviating the pain of the piercings: at [17]. Music was an essential part of "the process" as well as "the nature of worship during Thaipusam and in the religion in general" and, it was argued, "essential to the religion and the practice of the religion of Hinduism"; further, there was "no evidence" to show such a belief to be an aberration in Hinduism nor objective evidence to show it was "totally unjustified" or "totally foreign" to Hinduism: at [21]. The subjective view of four Hindus, in the absence of contrary evidence, sufficed for the judge to treat playing music during the procession as integral to religious practice.

1.202 The High Court then considered the extent to which the music restrictions on the Thaipusam process were a justified derogation from Art 15(1), implicating public order concerns as stated in Art 15(4). If these restrictions were unrelated to public order, they would not be justified: at [30]. It noted that while "public order" was not defined, it did encompass danger to human life, safety and the disturbance of public tranquility, citing the Malaysian case of *Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1976] 2 MLJ 83 at [310]. It also cited the case of *Chan Hiang Leng Colin v Public Prosecutor* [1994] 3 SLR(R) 209 ("*Chan Hiang Leng Colin*") at [68], which rejected the American "clear and present danger" test in balancing Art 15(1) rights and limits, noting that the concept of public order was not dissimilar to the notion of "public peace, welfare and good order" under s 24(1)(*a*) of the Societies Act (Cap 311, 1985 Rev Ed): *Vijaya Kumar* at [32].

1.203 The court scrutinised the reasons underlying the police's decision to impose music restrictions and consider potential public order issues that might arise, considering the duration, scale and direction the procession would take, including a route which passed a mosque and two churches. The religious nature of the process was also considered, which the respondent considered "fundamentally different" from non-religious processions, given Singapore's history of riots arising out of a religious foot procession in 1964: *Vijaya Kumar* at [33]. The procession would take place over 3 km and last some 26 hours at the city centre fringe.

1.204 Superintendent Koh Tee Meng, who was involved in assessing the 2015 Thaipusam procession application, provided information in

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relation to how the police liaised with the Hindu Endowments Board, temple organisers, security providers, Traffic Police and Land Transport Authority to negotiate road closures and changes in vehicular traffic direction to accommodate the length and nature of the route. Superintendent Koh stated that the police considered that the music restrictions would reduce opportunities for friction between the participants and residents and other road users in the affected areas: *Vijaya Kumar* at [34]. The permit was granted after the assessment that compliance with the police conditions would not raise law and order issues.

1.205 The High Court considered that the measures were designed to preserve public order and that the police had "shown legitimate public order concerns": *Vijaya Kumar* at [35]. The purpose for the restrictions fell within Art 15(4) and implicated real rather than merely speculative public order concerns. The court found that the connection between the music restrictions and public order "was neither illogical nor unreasonable": *Vijaya Kumar* at [35]. The police were entitled to consider as a factor the potential communal disturbance and strife which musical accompaniment during the procession might cause and how the music restrictions could "go a long way in averting the potential for such disturbances and strife": *Vijaya Kumar* at [35]. While this was a judgment call, the police would have "access to ground intelligence" and was better positioned to determine what was necessary for public order and safety: *Vijaya Kumar* at [36]. As the matter concerned "complex polycentric considerations such as social policy and public order", the court was not the correct authority to adjudicate on the merits of the decision: *Vijaya Kumar* at [36]. Typical of the balancing approach, the issue was deconstitutionalised in so far as the chief question was the reasonableness of the police's decision, rather than the potential violation of a fundamental liberty.

1.206 It is clear that the court did not ignore the fact that a fundamental liberty was involved, though they rejected the argument that the correct legal test was to take as a starting point the "complete liberty" for Hindus to participate in Thaipusam with musical accompaniment, supplemented by targeted restrictions to address specific public order concerns: *Vijaya Kumar* at [37].

1.207 The court noted that the police had not imposed a blanket ban but confined the extent to which musical instruments could be used during the procession. Indeed, the police had "nuanced its approach over time in response to dialogue with the Hindu community": *Vijaya Kumar* at [38]. In 1973, the playing of musical instruments was completely banned so the 2015 conditions represented a liberalisation in terms of approach since then. Developments from 2011 onward indicated a growing accommodation in allowing religious hymns to be

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sung and allowing a third music point, with conditions in terms of when hymns could be transmitted (from 8.00am to 8.30pm) and volume conditions (65 decibels maximum). This "calibrated approach" to the use of music showed the police had "due regard" for the Art 15 rights which it sought to balance against "the exigencies of public order": *Vijaya Kumar* at [38]. This approach is reflective of the exhortation that in balancing a right against a recognised exception, "neither can be defined in such a way that renders the other otiose": *Attorney-General v Shadrake Alan* [2011] 2 SLR 445 at [57]. This is a normatively desirable approach, superior to that adopted in *Chan Hiang Leng Colin* (above, para 1.202) at [64], where public order was used as a categorical trump against the fundamental liberty in question, which precludes any genuine balancing of competing values. While considering public order, the police had made "incremental adjustments" to the music policy in taking into consideration the views of the Hindu community to accommodate "new realities": *Vijaya Kumar* at [51]. The High Court was satisfied that the authorities had acted reasonably and with due consideration for a constitutional liberty, and noted that future modifications with respect to the music condition would remain with the police.

1.208 While recognising the discretion of the police in this matter and their expertise and experience, the courts nonetheless balanced the competing interests and was satisfied that the police's balance of considerations was constitutional and legal. A blanket ban, though, may not pass constitutional or administrative muster.

1.209 The State recognises the rehabilitative force of religious faith in issuing volunteer passes to religious counsellors who work within prison inmates. The applicant in *Madan Mohan Singh* (above, para 1.55) was a Sikh counsellor who had served for about ten years from 2000, with the chief function being to teach Sikh inmates about the basic tenets of Sikhism. The applicant was active in trying to get the SPS to review its prisoner hair grooming policy in order to permit all Sikhs to wear their hair "unshorn" in fulfilment of religious obligation. He sought a declaration to the effect that his right to propagate his faith to Sikh prison inmates under Art 15(1) of the Constitution was infringed, as his volunteer pass was not renewed after it expired on 31 December 2011. The applicant had actively counselled Sikh inmates to keep their hair and beard unshorn during incarceration and to make requests to do so.

1.210 In general, the object of the strict SPS hair grooming policy that inmates had to have their hair and beard cut close was to maintain a secure and disciplined prison environment, and to prevent the concealment of weapons or contraband: at [7]. As an exception, all Sikh inmates who declared their religion to be Sikhism and who had unshorn hair and beard at the time of admission were permitted to continue this

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practice during the period of their incarceration: at [8]. Inmates with shorn hair or beard at the point of admission who later professed Sikhism were not permitted to have unshorn hair and beard. This policy had been in place for historical reasons for 40 years or so, since the inception of the SPS, and was justified on this basis: at [8].

1.211 The applicant had engaged the SPS, Sikh Advisory Board and Ministry of Home Affairs, seeking a review of the hair grooming policy, between November 2010 and March 2011. In particular, he argued that Sikh inmates who had shorn hair at the point of admission should be able to exercise their constitutional right to keep unshorn hair: at [10]. Various dialogue sessions and investigations were conducted by the relevant parties. Considering the applicant's actions to be a threat to the discipline and security of the prison, the SPS advised the applicant that his volunteer pass would not be renewed after it expired on 31 December 2011. The SPS considered that the applicant's action posed a "serious threat" to "the discipline, security, safety and order of the prison": at [12]. In 2013, at various dialogue sessions, the SPS stated that the current hair grooming policy would remain in place: at [16].

1.212 The High Court held that there was no link between the non-renewal of the applicant's volunteer pass and his right to propagate his religious faith. This is because there is no right to propagate faith within institutions like prisons, as members of the public do not have a right to free access to prison inmates: at [40]. Article 15 does not give rise to a constitutional right "to demand access into prison to propagate his/her religion" (at [41]) and access for prison volunteers is conditioned on terms set by the SPS, including the requirement that counselling sessions be conducted in a manner which gives due regard to the hair grooming policy, which the applicant had acknowledged: at [48] and [51]–[53]. Notably, there are other fundamental tenets of the Sikh faith such as keeping a *kirpan* (dagger) which the applicant did not challenge, showing that the applicant accepted that prisoners could not be allowed items which could hurt others, even if this was a religious obligation: at [44]. The High Court noted (at [55]) that the applicant's right to propagate his faith was not predicated on the Sikh inmates being able to practice what the applicant propagates; further, on the facts, the applicant had been able to teach various prison inmates all Sikh faith tenets, including the importance of keeping hair and beard unshorn: at [49].

1.213 As a side point, it is of interest that the applicant in the application for leave to bring O 53 judicial review proceedings had prayed for a quashing order to quash the labelling of Sikh prisoners as either "practising" and/or "non-practising" by the SPS. The applicant stated that this practice was applied in 2010 and had prompted him to request a review of the hair grooming policy. This potentially engages a

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question of Sikh theology, which is beyond the province of a secular state. By February 2013, the SPS had abandoned this distinction which could be theologically dubious, and applied the more factual descriptors, "shorn" and "unshorn" hair, to describe the inmates for purposes of the hair grooming policy.

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