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1. ADMINISTRATIVE AND CONSTITUTIONAL LAW

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Introduction

1.1 The major public law cases in 2018 related to constitutional law developments in public law, although the High Court in *Nagaenthran a/l K Dharmalingam v Attorney-General*[1] ("*Nagaenthran*") discussed the question of the constitutionality or legality of ouster or limitation clauses, and whether, in the case of a limitation clause, such as s 33B(4) of the Misuse of Drugs Act[2] ("MDA"), judicial review extended to grounds of review not statutorily enumerated. The question of whether the Public Prosecutor's power under s 33B impinged on judicial power was also considered in *Abdul Kahar bin Othman v Public Prosecutor*[3] ("*Abdul Kahar*").

1.2 The case of *Attorney-General v Wham Kwok Han Jolovan*[4] ("*Wham*") was the first case for scandalising the court brought under s 3(1)(*a*) of the Administration of Justice (Protection) Act 2016[5] ("AJPA") under which the common law test of "real risk" was replaced by the statutory test of "risk" that a contemptuous statement would undermine public confidence in the administration of justice.

1.3 In relation to constitutional law, there was some discussion about the role of the Attorney-General as the guardian of public interest in *ARW v Comptroller of Income Tax*.[6] The Personal Data Protection Commission noted in passing in *My Digital Lock Pte Ltd*[7] that, following *Lim Meng Suang v Attorney-General*[8] ("*Lim*"), there was no constitutional right to privacy; neither was it likely that Singapore courts would follow the approach of the Indian Supreme Court in *Justice KS*

1 [2018] SGHC 112.
2 Cap 185, 2008 Rev Ed.
3 [2018] 2 SLR 1394.
4 [2018] SGHC 222.
5 Act 19 of 2016.
6 [2018] 1 SLR 499 at [17]–[21].
7 [2018] SGPDPC 3 at [25].
8 [2015] 1 SLR 26 at [44]–[47].

Puttaswamy (Retd) v Union of India,[9] which recognised the right to privacy as a constitutional right. The Singapore Court of Appeal had instead left it open for a right to privacy to be developed by way of "the private law on privacy".[10]

1.4 In relation to administrative law, the cases affirmed existing tests, such as the requirement that a *prima facie* case of reasonable suspicion that a ground of review had been violated must have been made for leave to be granted for a judicial review application, as in *Re Nalpon, Zero Geraldo Mario*,[11] this being a "modest threshold".[12]

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Natural justice and s 33B(4) of Misuse of Drugs Act[13]

1.5 One of the issues raised in *Abdul Kahar* was a challenge against s 33B(4) as being unconstitutional for violating natural justice rules, on the basis that s 33B(4) ousted judicial review. The Court of Appeal took note that the High Court in *Nagaenthran* had stated that, in principle, s 33B(4) could be circumvented "where the PP's decision is tainted by a jurisdictional error of law". *Nagaenthran* is now pending appeal to the Court of Appeal.

1.6 However, Tay Yong Kwang JA said it was unnecessary to decide this point as an alleged breach of natural justice argued in an application to reopen concluded criminal appeals was relevant "only if it is shown that it could have led to a different outcome".[14] The applicant here had failed to show (a) what it was he would have put to the Public Prosecutor; (b) how he was not allowed to do so; and (c) how, if it had been done, this "might reasonably have led to a different outcome in terms of what the PP decided".[15]

Bad faith

1.7 The High Court in *Adili Chibuike Ejike v Attorney-General*[16] ("*Adili*") affirmed that it fell to an applicant for judicial review to

9 Writ Petition Civil No 494 of 212.
10 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [49].
11 [2018] 2 SLR 1378.
12 *AXY v Comptroller of Income Tax* [2018] 1 SLR 1069 at [34].
13 Cap 185, 2008 Rev Ed.
14 *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 at [57].
15 *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 at [57].
16 [2018] SGHC 106.

demonstrate "sufficient interest" in the matter and to disclose a *prima facie* case of reasonable suspicion of bad faith on the part of the Public Prosecutor under s 33B(4) of the MDA in favour of granting the remedies sought by the applicant. Section 33B(4) provides:

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

On the award of a certificate, a death sentence would be modified to life imprisonment.

1.8 On the facts of the case, an argument that the Public Prosecutor acted in bad faith was not successfully established. See Kee Oon J clarified that this evidential burden could be discharged by "highlighting" circumstances of a *prima facie* case of bad faith, rather than producing evidence directly impugning the propriety of the Public Prosecutor's decision-making process, such as records of meetings showing that the decision was made by malice or unconstitutional considerations.[17] When a *prima facie* case is shown, then the Public Prosecutor is required to disclose his reasons for not issuing a substantive assistance certificate. Within the context of s 33B(4) of the MDA, bad faith refers to "the knowing use of discretionary power for extraneous purposes".[18]

1.9 Following the approach in *Muhammad Ridzuan bin Mohd Ali v Attorney-General*[19] ("*Ridzuan*"), See J stated that it was clear from the terms of s 33(4) of the MDA that the good faith co-operation of an applicant with the Central Narcotics Board ("CNB") in furnishing information was not a necessary or sufficient basis to grant a certificate of substantive assistance. The purpose of this provision was to enhance the CNB's operational effectiveness, which is a results-based test. Even if an applicant had in good faith provided all the knowledge he had in an accurate and true fashion, if it did not enhance the CNB's operational effectiveness in disrupting drug-trafficking activities, this alone did not suffice to warrant the certification.[20] See J also noted that the argument that the CNB had not properly followed up on information provided as an indicator of bad faith could not stand as this would be practically asking the court to adjudicate on the adequacy of CNB investigations,

17 *Adili Chibuike Ejike v Attorney-General* [2018] SGHC 106 at [22].
18 *AXY v Comptroller of Income Tax* [2018] 1 SLR 1069 at [27].
19 [2015] 5 SLR 1222.
20 *Adili Chibuike Ejike v Attorney-General* [2018] SGHC 106 at [25].

which would involve the court in a jurisdictional error, citing Tay Yong Kwang J in *Cheong Chun Yin v Attorney-General*[21] ("*Cheong Chun Yin*"). The CNB had the discretion to evaluate information and decide whether to pursue this as it was best placed to do so, given "its understanding of and access to intelligence gathering".[22] See J noted it would be "wrong for the courts to pass judgment on the adequacy of the investigations conducted by and the operational decisions made by the CNB",[23] noting that on the facts, the CNB had objectively made a "serious and genuine endeavour" to investigate the information provided.

1.10 As to the argument that a piece of information could be proven to be useful in the future, the court accepted it would be untenable to suggest that the certification decision should be indefinitely held in abeyance "until the information somehow proves to be of some use at some imponderable future point in time".[24] On the facts, over a year had passed since the CNB followed up on the applicant's information and as yet, no intelligence had been received and there was no indication if the Nigerian authorities would respond. Thus, the CNB was "entitled to decide how likely it [was] that the information [would] bear fruit". Chances that information would bear fruit after a long while were in any event "speculative and highly unlikely".[25]

Scope and legality of ouster clause

1.11 The decision of the Public Prosecutor not to issue a certificate of substantive assistance under s 33B(2)(*b*) of the Misuse of Drugs Act was challenged in *Nagaenthran*. This allows the court not to impose an otherwise compulsory death penalty sentence for a drug trafficking offence.

1.12 Section 33B(4) provides that it falls within the "sole discretion" of the Public Prosecutor to make this decision and no action shall be brought against the Public Prosecutor "unless it is proved to the court that the determination was done in bad faith or with malice". It is accepted too that one may challenge the Public Prosecutor's determination on grounds of unconstitutionality, as held in *Ridzuan*.[26]

1.13 The novel question raised in *Nagaenthran* involved the proper construction of s 33B(4); it concerned whether judicial review of a

21 [2014] 3 SLR 1141 at [32].
22 *Adili Chibuike Ejike v Attorney-General* [2018] SGHC 106 at [31].
23 *Adili Chibuike Ejike v Attorney-General* [2018] SGHC 106 at [31].
24 *Adili Chibuike Ejike v Attorney-General* [2018] SGHC 106 at [32].
25 *Adili Chibuike Ejike v Attorney-General* [2018] SGHC 106 at [32].
26 See para 1.9 above.

decision not to issue a s 33B(2)(*b*) certificate was available on grounds other than bad faith, malice and unconstitutionality, contrary to a "plain reading" of s 33B(4).[27] The basis for challenge was on grounds of relevancy, irrationality and the absence of a precedent fact.[28]

1.14 Section 33(B)(4) was challenged on two primary grounds. First, it was argued to be unconstitutional for contravening the judicial power vesting clause in Art 93 and the recognised constitutional principles of separation of powers, which formed part of the "basic structure" of the constitution, and the rule of law. Second, as the Public Prosecutor's decision was a nullity or non-determination, the s 33B(4) ouster clause was "irrelevant", in the sense that a legal provision cannot apply to a nullity. As such, a declaration that the determination not to issue the certificate was void should be issued.

1.15 Chan Seng Onn J dismissed the application for leave for judicial review, on the basis that the applicant failed to show a *prima facie* case of reasonable suspicion that the Public Prosecutor's non-certification determination could be quashed on grounds listed under s 33B(2)(*b*) or beyond. While holding that s 33B(4) of the MDA was a "constitutionally valid" ouster clause, he stated that, "in principle", it did not exclude judicial review on the basis of "other jurisdictional errors of law" which would render the ouster clause inapplicable.[29]

1.16 Although the applicant abandoned his arguments based on the grounds of judicial review permitted under s 33B(4), Chan J offered his views, *obiter*, why these were not made out at the leave stage.

Bad faith

1.17 In relation to "bad faith", Chan J affirmed the Court of Appeal's decision in *Ridzuan*[30] which described bad faith within the meaning of s 33B(4) as "a knowing use of a discretionary power for extraneous purpose".[31] It was clear from an examination of ministerial statements in Parliament that the purpose was "to enhance operational effectiveness" of the CNB in the disruption of drug trafficking. A courier could promote uncertainty and thereby disrupt drug trafficking activities as drug syndicates would not know whether an apprehended courier would provide intelligence revealing their secrets.[32] The mere fact of full

27 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [37].
28 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [30].
29 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [43].
30 See para 1.9 above.
31 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [48].
32 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [48].

co-operation itself does not require the Public Prosecutor to issue a certificate of substantial assistance, as it falls to the Public Prosecutor to decide whether the assistance offered by the offender in question yields "actual results" in relation to disrupting drug trafficking.[33] If, for example, the offender had co-operated fully with the CNB in good faith by producing information falsely furnished to him by the drug syndicate, leading the CNB on a "wild goose chase", this would undermine the CNB's operational effectiveness.[34]

1.18 Chan J took note of the High Court decision of *Adili* which also concerned the Public Prosecutor's decision not to issue a certificate of substantive assistance. Although the applicant there had "done whatever he humanly could" by giving the CNB all the information within his knowledge, See J held that the Public Prosecutor was justified in his decision if this had been based on his determination that the information provided did not actually enhance the CNB's operational effectiveness in disrupting drug trafficking activities.[35] Even if the CNB had not contacted the Nigerian High Commissioner in Singapore, that did not mean the CNB or Public Prosecutor had acted in bad faith. The CNB had not rejected the information outright and, objectively, had attempted to investigate the provided information, this being a "serious and genuine endeavour on its part".[36]

1.19 See J noted the CNB was "best-placed" to make an assessment, given its expertise in intelligence gathering, on which pieces of information to pursue and which foreign agency to liaise with. It would "be wrong for the courts to pass judgment on the adequacy of the investigations conducted by and the operational decisions made by the CNB".[37] The CNB was also entitled to decide how likely information would bear fruit and, having regard to lapsed time, whether to cease further investigations after evaluation. It was not tenable to hold that the decision whether to issue a certificate must be "held in abeyance almost indefinitely" until the provided information "somehow proves to be of some use at some imponderable future point in time".[38] The Public Prosecutor's discretion under s 33B(2)(*b*) was not unconstitutional or done in bad faith.[39]

1.20 Thus, in *Nagaenthran*, the applicant had not been able to show how the information he provided had provided "positive assistance" in

33 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [51].
34 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [51].
35 *Adili Chibuike Ejike v Attorney-General* [2018] SGHC 106 at [24]–[25].
36 *Adili Chibuike Ejike v Attorney-General* [2018] SGHC 106 at [31].
37 *Adili Chibuike Ejike v Attorney-General* [2018] SGHC 106 at [31].
38 *Adili Chibuike Ejike v Attorney-General* [2018] SGHC 106 at [32].
39 *Adili Chibuike Ejike v Attorney-General* [2018] SGHC 106 at [33].

CNB efforts to disrupt drug trafficking in and beyond Singapore.[40] In other words, the test was one based on the Public Prosecutor's objective assessment of whether the information had a certain effect, rather than "subjective" factors such as the good faith of a particular drug offender doing all he can to assist CNB investigations, or his individual attributes such as psychiatric conditions which might impede the effective communication of information.[41]

Ouster clauses and jurisdictional errors of law

1.21 Although not established on the facts, Chan J found that it was "in principle" possible for an ouster clause to be circumvented when the Public Prosecutor's determination "is tainted by a jurisdictional error of law".[42] This does not close the door to the existence of non-jurisdictional errors of law.

1.22 The argument was advanced that s 33B(4) of the MDA was unconstitutional for being contrary to Art 93, the separation of powers and rule of law; if this was so, the supervisory jurisdiction of courts could not be ousted by statutory means such as s 33B(4). It was argued that since s 33B(4) vests sole discretion in the Public Prosecutor to decide whether to issue the requisite certificate except on stipulated grounds, this "effectively wrests judicial power away from the judiciary".[43] This violated Art 93 and the separation of powers principle in curtailing judicial power by limiting the power of judicial review over the executive exercise of discretion.[44] Section 33B(4) also violated the rule of law in curtailing the court's power to declare the legal limits on the Public Prosecutor's exercise of discretionary power,[45] following the principle in *Chng Suan Tze v Minister for Home Affairs*[46] ("*Chng Suan Tze*").

1.23 Chan J pointed out that the starting point for analysis was the presumption of constitutionality as courts assume that Parliament, in enacting legislation, complies with constitutional requirements.[47] He further noted that it had "empirically been shown to be a difficult one to rebut in practice" as courts have been "scrupulous" in according "due

40 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [53].
41 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [54].
42 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [69].
43 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [75].
44 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [76].
45 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [77].
46 [1988] 2 SLR(R) 525.
47 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [79].

weight" to the presumption in dealing with challenges against the constitutionality of statutory provisions.[48]

1.24 Chan J identified the "relevant principles" that would inform a finding of the constitutionality validity of ouster clauses in general.[49] The ouster clause would be valid provided that the determination it sought to exclude "from the province of judicial power is non-justiciable".[50] A finding that a determination is non-justiciable entails the court exercising its judicial power under Art 93 in finding that the curtailment of judicial power by the Legislature under Art 38 is legitimate. The Executive in exercising its executive authority under Art 23 is merely "exercising the power that has been legislatively allocated to it instead of the judiciary" regarding that particular determination.[51] He was critical of the applicant's submission citing a passage by the Court of Appeal in *Yong Vui Kong v Attorney-General*[52] ("*Yong*") that there would be "few, if any, legal disputes between the State and the people from which the judicial power is excluded".[53] The applicant urged that since judicial power was vested in the Judiciary under Art 93, this meant that the Judiciary should be vested with jurisdiction to hear and decide disputes arising out of the legality of the Public Prosecutor's decision not to issue a certificate under s 33(2)(*b*) of the MDA.

1.25 Chan J said that this reading of the passage from *Yong* was "strict and uncompromising" and "missed the point underlying the proper application of Art 93".[54] This was that there were "ultimately some legal disputes" between the State and the people that should "properly be excluded from the province of judicial power". The Court of Appeal in *Yong* had noted that matters "intrinsically incapable of submission to … an adjudication" would vary greatly in "different legal contexts".[55] It had cited Viscount Radcliffe in *Chandler v Director of Public Prosecutions*,[56] who considered the question of whether to have and house nuclear armaments was inappropriate for a judge or jury as it involved "an infinity of considerations, military and diplomatic, technical, psychological and moral" beyond the province of judicial assessment.[57] *Yong* stood for the proposition that most rather than all

48 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [79].
49 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [82].
50 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [82].
51 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [82].
52 [2011] 2 SLR 1189.
53 *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [31].
54 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [84].
55 *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [31]–[32].
56 [1964] AC 763.
57 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [84].

legal disputes between the State and the people should be subject to judicial review.[58]

1.26 Chan J approved as key principles in determining the constitutionality of ouster clauses three key concepts gleaned from the Court of Appeal decision in *SGB Starkstrom Pte Ltd v Commissioner for Labour*,[59] which summarised "the justificatory principles underlying the traditional account of judicial review":[60]

> (a) the constitutional doctrine of separation of powers, where limited review on grounds of the legality of administrative action is based on "a proper understanding of the role of the respective branches of government … in a democracy where the Constitution reigns supreme";[61]
>
> (b) the need to "uphold Parliament's intention" as statutorily expressed, which vests certain powers in the executive; and
>
> (c) pragmatic concerns about institutional competence, such as the inappropriateness of judicial review over "decisions which are laden with issues of policy or security or which call for polycentric political considerations".

In other words, the constitutional doctrine of separation of powers requires that the courts exercise "due deference", both to the Legislature in the instant case with respect to legislative intent, as well as to the Executive, where executive action is at issue, with respect to institutional competence.[62]

1.27 Guidance as to what legal disputes are to be considered as falling outside the province of judicial review under Art 93 was to be drawn from *Lee Hsien Loong v Review Publishing Co Ltd*,[63] as affirmed by the Court of Appeal in *Tan Seet Eng v Attorney-General*[64] in its observations about justiciability and judicial deference to executive action.[65] There, Sundaresh Menon JC (as he then was) rejected a categorical approach, favouring one which varied the intensity of review according to the context and common sense.[66] Justiciability turned not

58 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [85].
59 [2016] 3 SLR 598 at [58].
60 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [87].
61 *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598 at [58], citing *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [99].
62 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [88].
63 [2007] 2 SLR(R) 453.
64 [2016] 1 SLR 779.
65 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [100].
66 *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [98].

on the source but the subject matter in question. In general, courts should exercise restraint taking note of the co-equality of the various branches of government; courts should be reticent to review cases involving the "intricate balancing" of "competing policy considerations", where a judicial pronouncement could "embarrass some other branch of government" or in relation to decisions where political accountability rather than legal accountability was to be preferred.[67] Chan J took note of two further cases where ouster clauses were upheld. In *Borissik Svetlana v Urban Redevelopment Authority*,[68] the matter at hand involved considerations of fact, law, degree and policy which were better addressed by the appeal procedure to the minister provided by the Planning Act.[69] The finality clause was thereby upheld.

1.28 In *Tey Tsun Hang v Attorney-General*,[70] the relevant ouster clause was s 39A of the Immigration Act[71] which permitted judicial review only on ground of non-compliance with procedural requirements. The determinant factor was the "good and self-evident reasons" in leaving to the executive certain matters implicating national policy, such as that relating to land planning, immigration or defence, as the courts were ill-equipped to engage with such decisions. In addition, this reading of the Immigration Act was consistent with parliamentary intentions.[72] In addition, Quentin Loh J noted that s 39A was not an absolute but partial ouster clause, allowing review for non-compliance with procedure which he found to be a "reasonable balance".[73] Loh J found that the court's jurisdiction to review the decision not to renew the re-entry passes of the applicant by the Immigration and Checkpoint Authority was ousted as none of the permissible grounds under s 39A was relied on.[74]

1.29 On the facts of the instant case, Chan J opined, *obiter*, that the decision of the Public Prosecutor not to issue a certificate of substantive assistance under s 33B(4) of the MDA was "clearly non-justiciable".[75] Courts were ill-equipped to holistically address the "panoply of extra-legal factors"[76] involved in assessing whether an offender had rendered substantive assistance in disrupting drug trafficking activities. This was

67 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [89].
68 [2009] 4 SLR(R) 92.
69 Cap 232, 1998 Rev Ed. *Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 at [29].
70 [2015] 1 SLR 856.
71 Cap 133, 2008 Rev Ed.
72 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [92].
73 *Tey Tsun Hang v Attorney-General* [2015] 1 SLR 856 at [45].
74 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [92].
75 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [94].
76 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [94].

a point affirmed by the Court of Appeal in *Ridzuan*[77] and an approach in accordance with the underlying statutory intent, as evident in parliamentary debates, as noted in *Prabagaran a/l Srivijayan v Public Prosecutor*[78] ("*Prabagaran*"). Further, the Court of Appeal has recognised the "unique qualities" that render the office of the Public Prosecutor most suited to conduct the s 33B(2) assessment such that the curtailment of judicial review under s 33B(4) was "clearly appropriate".[79]

1.30 Chan J found that s 33B(4) did not contravene Art 93 but was rather "an exemplar of the separation of powers principle in action". Further, as the Public Prosecutor did not have "unfettered discretion" under s 33B, being subject to limited review which posed an "appropriate limit" on the Public Prosecutor's discretion, the rule of law was not contravened.[80] Judicial review was available on grounds of bad faith and malice under s 33B(4), which was not a "complete" but a "partial ouster clause". As such, it was "fair" to find Parliament had provided the same "reasonable balance" that Loh J found in *Tey Tsun Hang*;[81] thus, s 33B(4) of the MDA was a "constitutionally valid" ouster clause which "properly circumscribes judicial review" to the limited grounds of bad faith, malice and unconstitutionality. As such, it was not open to the applicant to impugn the Public Prosecutor's determination on grounds of relevancy, precedent fact or irrationality.[82]

1.31 Chan J addressed the applicant's argument based on utilising "a very sophisticated judicial technique"[83] first deployed in the House of Lords decision of *Anisminic Ltd v Foreign Compensation Commission*[84] ("*Anisminic*"). Where a decision has been tainted by an error of law, this renders the decision a nullity or non-decision to which the ouster clause does not apply, that is, the decision is subject to judicial review. Chan J examined the decision of Lords Pierce, Reid and Wilberforce[85] in considering the questions: (a) when an error of law was a jurisdictional error of law; and (b) whether administrative decisions would be rendered a nullity only by a jurisdictional error of law.[86] In subsequent UK decisions referenced,[87] including *R v Lord President of the Privy*

77 *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 at [66].
78 [2017] 1 SLR 173 at [52].
79 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [96].
80 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [97].
81 *Tey Tsun Hang v Attorney-General* [2015] 1 SLR 856 at [45].
82 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [99].
83 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [101].
84 [1969] 2 AC 147.
85 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [103].
86 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [104].
87 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [105].

Council, ex parte Page,[88] Chan J noted that the distinction between a jurisdictional and non-jurisdictional error of law was taken to have been "completely obliterated", such that any error of law could render a decision a nullity and was reviewable. Thus, he found that a jurisdictional error of law committed in making a determination would render it a nullity to which an ouster clause would be inapplicable.[89] On the facts of the present case, Chan J found that this meant the applicant could at least rely on the precedent fact principle of review, which was "the only ground of review" raised by the applicant not mentioned in s 33B(4) of the MDA which "clearly involves a jurisdictional error of law". This understanding of "jurisdiction" maps with Lord Reid's narrow conception of jurisdiction in *Anisminic* and the collateral fact doctrine.

1.32 On the assumption that all errors of law were jurisdictional errors of law, Chan J noted that the Court of Appeal had yet to directly address the principle that jurisdictional errors of law could render administrative decisions a nullity, such that ouster clauses would not apply, although it had been noted in *Per Ah Seng Robin v Housing and Development Board*[90] ("*Robin Per*") that the courts had viewed ouster clauses "with circumspection".[91] Chan J referred to *Re Application by Yee Yut Ee*[92] ("*Yee Yut Ee*") and *Stansfield Business International Pte Ltd v Minister for Manpower*[93] ("*Stansfield*") which had addressed this principle.[94] Both indicated judicial willingness not to apply an ouster clause where an administrative decision was tainted by a jurisdictional error of law.[95]

1.33 Chan J did not find *Cheong Chun Yin* persuasive in refusing to apply the principle that jurisdictional errors of law would taint an administrative decision to which an ouster clause cannot apply. There, Tay J read s 33B(4) plainly in finding that only bad faith, malice and unconstitutionality were available grounds of review.[96] Chan J found that Tay J had not engaged with the authorities and propositions raised in *Yee Yut Ee*[97] and *Stansfield*.[98] He found support in the principle from the Court of Appeal's reflections in *Ridzuan*,[99] *obiter*, that it seemed

88 [1993] AC 682.
89 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [108].
90 [2016] 1 SLR 1020.
91 *Per Ah Seng Robin v Housing and Development Board* [2016] 1 SLR 1020 at [64].
92 [1977–1978] SLR(R) 490.
93 [1999] 2 SLR(R) 866.
94 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [110].
95 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [114].
96 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [115].
97 *Re Application by Yee Yut Ee* [1977–1978] SLR(R) 490.
98 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [116].
99 See para 1.9 above.

intuitively inconceivable that an aggrieved person would be left without a judicial remedy where relevant considerations had been ignored. He also opined that it appeared from relevant parliamentary debates in 2012 that it was important to "adopt the principle of circumventing ouster clauses by construing administrative decisions as a nullity" where tainted by a jurisdictional error, as the integrity of the system depended on the Public Prosecutor acting in a consistent and predictable manner, to encourage the co-operation of couriers to provide substantive assistance. Chan J said in so far as the stipulated grounds under s 33B(4) were insufficient to ensure this "desired level of predictability and consistency", there was a "strong argument" in favour of recognising additional grounds of review where jurisdictional errors had been committed.[100]

1.34 Chan J offered his provisional views on the question of whether all errors of law were jurisdictional errors of law such that they would render tainted administrative decisions nullities; if so, the applicant would be able to rely on grounds of review not stipulated in s 33B(4), that is, precedent fact review, relevancy and irrationality. The court in *Yee Yut Ee* and *Stansfield* did not cite *Anisminic* for the proposition that "effectively" all errors of law are jurisdictional errors of law.[101] *Yee Yut Ee* was concerned with a patent error of law, while Warren Khoo J in *Stansfield*, while finding that a breach of natural justice was reviewable despite an ouster clause under s 14(5) of the Employment Act,[102] cited the Privy Council decision of *South East Asia Firebricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union*[103] which retained the dichotomy between jurisdictional and non-jurisdictional errors of law.[104] The precedents thus provided no clear guidance to the question.

1.35 He stated that if the principle that all errors of law were jurisdictional were adopted in Singapore, ouster clauses would effectively be useless since all errors of law were reviewable. He considered that this view did not align with the "green light" approach towards judicial review, as set forth by Chan Sek Keong CJ extra-judicially in an article,[105] which was cited approvingly in *Jeyaretnam Kenneth Andrew v Attorney-General*.[106] This was considered "the most

100 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [116].
101 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [121].
102 Cap 91, 1996 Rev Ed.
103 [1981] AC 363.
104 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [122].
105 Chan Sek Keong, "Judicial Review – From Angst to Empathy: A Lecture to Singapore Management University Second Year Law Students" (2010) 22 SAcLJ 469.
106 [2014] 1 SLR 345 at [48].

accurate reflection" of socio-political culture in Singapore, where good government is to be sought primarily through "the political process and public avenues" rather than seeking redress for bad government "through the courts".[107] Courts were "supporting members in a tripartite government" which helped good government by clearly articulating rules and principles for the Government to abide by.[108] The green light approach thus did not sit well, in Chan J's opinion, with "a situation where any administrative decision" is a nullity where tainted by an error of law.[109]

1.36 However, it is unclear what the nature of the relationship between the "green light approach" and the scope of judicial review is. The green light approach speaks of a preference for non-legal methods of promoting good governance which does not exclude legal remedies in the form of judicial review; it does not speak to whether all errors of law are reviewable; the only link one may hazard is that if all errors of law were reviewable, that might lead to an increase in public law litigation, which would impact the socio-political culture.

1.37 Chan J considered whether judicial review on any one of three grounds not listed in s 33B(4) was available. First, the applicant argued that the Public Prosecutor had failed to take relevant considerations into account. This was because there was no evidence that the information provided by the applicant to the CNB at the time of his arrest in 2009, prior to the first set of information provided to the CNB on 26 February 2013, was placed before the Public Prosecutor. As such, he had failed to take relevant considerations into account, which impugned the legality of the administrative decision.[110] However, Chan J found that the applicant had failed in his duty to disclose all relevant information in relation to the ground of relevant considerations despite having ample opportunity to.[111] The applicant had not shown what was distinct about the earlier information compared to the first set of information given; thus, Chan J had no basis to see whether relevant considerations had been ignored in the decision-making process.[112] The burden of proof lay on the applicant to provide "sufficient evidence" to show the Public Prosecutor had failed to take relevant considerations into account, given the presumption of legality that applies to the actions of the Attorney-General. Despite arguing that the information provided in 2009 had not been acted upon, Chan J stated it should be presumed that the CNB and

107 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [123].
108 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [123].
109 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [123].
110 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [127].
111 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [130].
112 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [133].

Public Prosecutor followed up on any reliable leads provided by the evidence given by the applicant.[113]

1.38 Second, invoking precedent fact review, the applicant argued that since the CNB did not promptly follow up on the information provided in 2009, which was now stale, it was impermissible for the Public Prosecutor to exercise his power to determine whether substantive assistance had been provided. The applicant argued the "precedent fact" was that the information he provided on arrest should not become "stale through the passage of time since his arrest"; only if the precedent fact of the information remaining usable exists would the Public Prosecutor be able to make his non-certification decision. In *Chng Suan Tze*, the Court of Appeal stated that whether a statutory discretion was subject to any precedent fact depended on the construction of the legislation conferring this power. If precedent fact review was available, then judicial review will engage the question of review by asking whether there was sufficient evidence to establish the precedent fact.[114] However, precedent fact review would not be available where Parliament's intent was to entrust all relevant decision-making, including the determination of facts, application of the relevant rules to the fact and exercises of discretion to the decision-maker.[115] Chan J considered that precedent fact review did not apply to s 33B(2)(*b*) of the MDA as the statutory terms "in his determination" denoted Parliament's intent to entrust the Public Prosecutor with the task of determining whether a person's evidence had provided substantial assistance to the CNB's anti-drug trafficking mission.

1.39 Lastly, the applicant argued the Public Prosecutor had acted irrationally in making the non-certification determination.[116] Chan J noted the standard for irrationality was "very high",[117] especially given the duty of the Public Prosecutor to issue a certificate of substantive assistance "if the facts justify a finding" that substantive assistance had been rendered to the CNB.[118] As such, there would be "very few instances" where the Public Prosecutor's exercise of discretion would be considered irrational. Chan J found the factors relied upon by the applicant were "woefully insufficient"; these included the fact the applicant had provided "copious amounts" of information, that the veracity of the individuals he mentioned was not disputed, that the applicant was handicapped in his communication abilities by his

113 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [134].
114 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [108].
115 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [138].
116 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [141].
117 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [143].
118 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [143].

"borderline intellectual functioning", and the information provided in 2009 was not stale.[119]

1.40 Given the "outcome-driven approach" that underlies the "entire substantive assistance edifice" generally, and the Public Prosecutor's discretion under s 33B(2)(*b*) of the MDA, irrationality was not made out.[120] Chan J found that given the absence of cogent evidence, what had been presented was a "hopeless case"[121] for judicial review of the Public Prosecutor's discretion in not issuing the desired certificate.

CONSTITUTIONAL LAW

Role of Attorney-General and judicial power

1.41 In *Abdul Kahar*, the applicant had been convicted of two capital drug trafficking offences in 2013. The Court of Appeal set aside the finding by the High Court judge that the applicant was a courier for purposes of s 33B(2)(*a*) of the MDA. The applicant was then sentenced to death. The Court of Appeal heard and dismissed his appeal against conviction and sentence in 2015 ("CA4"). The applicant by criminal motion applied for the Court of Appeal to reopen CA4, raising arguments relating to constitutionality and the interpretation of s 33B of the MDA.

1.42 Three main constitutional arguments were raised. First, it was argued that the Public Prosecutor's role in determining whether an accused had provided substantive assistance to the CNB under s 33B(2)(*b*) of the MDA to help disrupt drug trafficking activities was unconstitutional as it amounted to a usurpation of the judicial power, violating the separation of powers. Second, s 33B(4) of the MDA was unconstitutional as it was "self-referentially inconsistent and is consequently self-defeating in purpose", and also infringed the rules of natural justice, contrary to Arts 9 and 12 of the Constitution of the Republic of Singapore[122] ("the Constitution"). Third, s 33B(2)(*a*) of the MDA was unconstitutional given the "inherent confusion" attending its "evolving interpretation", such that this may have caused "possible unfair discrimination" between persons awaiting capital punishment who shared the same legal guilt and thus breached Art 12(1). The Public Prosecutor pointed out that even if the relevant portions of s 33B were found to be unconstitutional, the law prior to the introduction of this

119 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [144].
120 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [144].
121 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [147].
122 1999 Reprint.

provision would still require the applicant to be sentenced to death.[123] Further, the "evolving interpretation" was unexceptional, being "the unremarkable result of the incremental development of case law" relating to s 33B(2)(*a*).[124]

1.43 Tay JA in addressing the argument that the Public Prosecutor's role under s 33B(2)(*b*) was a usurpation of judicial power noted that a version of this argument had been raised in *Prabagaran*.[125] There, the judicial power in sentencing involved determining "the appropriate punishment for a particular offender", while the power to prescribe punishment was part of legislative power.[126] The court in *Prabagaran* had noted that the Public Prosecutor's discretion did not relate to tailor-making what punishment the Public Prosecutor thought ought to be applied to a particular offender, but the more limited question of whether the offender had substantively assisted in disrupting drug trafficking offences within or outside Singapore.[127] Even if a certificate of substantive assistance is issued, it falls within the court's discretion to decide whether to impose the death penalty or an alternative sentence.[128] Section 33B(2)(*b*) did not usurp the judicial power as it did not give the Public Prosecutor "the power to decide the appropriate punishment for a particular offender".[129] Where the Executive may determine the duration of an offender's custodial term, this would violate judicial power, as in *Hinds v The Queen*[130] and *Mohammed Muktar Ali v The Queen*.[131]

1.44 Counsel for the applicant asserted, without citing authority, that s 33B(2)(*b*) provides for the Public Prosecutor to make a "subjective assessment" of the "objective requirement" on whether substantive assistance had been provided by the offender, and that "a subjective assessment is unconstitutional".[132] Tay JA pointed out that counsel did not address the point that the Public Prosecutor's subjective assessment "is constrained by the objective condition to which it pertains".[133]

1.45 Counsel also attempted to argue that the Public Prosecutor's discretion on whether to grant a certificate of substantive assistance had

123 *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 at [17].
124 *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 at [59].
125 See para 1.29 above.
126 *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 at [38].
127 *Prabagaran a/l Srivijayan v Public Prosecutor* [2017] 1 SLR 173 at [76].
128 *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 at [40].
129 *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 at [40].
130 [1977] AC 195.
131 [1992] 2 AC 93.
132 *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 at [42]–[43].
133 *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 at [43].

an impact on the sentence imposed on the accused person such as to render the Public Prosecutor's role a usurpation of judicial power. He argued that the present case fell within the threefold classification of cases identified by Chan Sek Keong CJ in *Mohammad Faizal bin Sabtu v Public Prosecutor*[134] ("*Faizal*"), united by instances where legislative provisions conferred on the Executive were found to have intruded into the court's sentencing powers so as to breach the principle of separation of powers.[135] The applicant argued that the Public Prosecutor's discretion under s 33B(2)(*b*) was "dangerously identical" to class (c) of the classification – "executive decisions not directly related to any charges 'but which had an impact on the actual sentence eventually imposed by a court'".[136]

1.46 Tay JA rejected this submission, pointing out that Chan CJ did not mean to convey that any law enabling the Executive to make decisions affecting an accused person's sentence would usurp judicial power in sentencing. On the facts of *Faizal*, the MDA provisions requiring the court to impose enhanced minimum sentences to accused persons whom the CNB Director (a member of the Executive) directed to be admitted to an approved institution, did not intrude upon the judicial power in sentencing.[137] The example Chan CJ had given in *Faizal* of a class (c) case was "far removed from the facts here".[138] This was the case of *State of South Australia v Totani*,[139] where legislation compelled the courts to impose control orders on an individual upon finding he was a member of an organisation which the Executive declared posed a risk to public safety and order. These orders which limited personal freedoms were imposed without judicial assessment by the court as to the risk posed to safety and order. This was effectively an executive and not judicial order, imposing a sentence without a finding of guilt, as the court noted in *Prabagaran*.[140] In the context of s 33B(2), judicial independence and impartiality was intact as the court determines the guilt of the party and applies the sentences legislatively prescribed in the MDA.

1.47 Thus, the Public Prosecutor's role in determining whether to issue a certificate of substantive assistance under s 33B(2)(*b*) of the MDA did not constitute a usurpation of the judicial power to sentence accused persons.[141]

134 [2012] 4 SLR 947 at [51].
135 *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 at [44].
136 *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 at [45].
137 *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 at [46].
138 *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 at [48].
139 (2010) 242 CLR 1.
140 *Prabagaran a/l Srivijayan v Public Prosecutor* [2017] 1 SLR 173 at [77].
141 *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 at [49].

1.48 Further, the Public Prosecutor's role under s 33B(2) of the MDA was found not to violate the Attorney-General's role under Art 35(8) of the Constitution which states the Public Prosecutor "shall have power … to institute, conduct or discontinue any proceedings for any offence". While this did not refer to the Public Prosecutor exercising any role in relation to sentencing accused persons, Art 35(7) also recognises that the Public Prosecutor is charged with discharging the functions conferred on him "under this Constitution or any other written law", such as the MDA. Thus, the Public Prosecutor's role under s 33B(2)(*b*) of the MDA could not be said to be *ultra vires* the Attorney-General's constitutional role.[142]

1.49 It was argued that s 33B(4) of the MDA was unconstitutional because its aim was to allow accused persons to challenge the Public Prosecutor's exercise of discretion under s 33B(2)(*b*) on grounds of "bad faith or malice". As it was "extremely difficult" for the accused to establish bad faith and malice, s 33B(4) was unconstitutional, being "self-referentially inconsistent" and "self-defeating in purpose".[143] Tay JA noted that while it would be "a rare case"[144] where an accused person could provide sufficient evidence to obtain leave to commence judicial review proceedings on the grounds stated in s 33B(4), the "difficulty" was "not so extreme" that it rendered s 33B(4) "inconsistent and self-defeating in purpose".[145] In *Ridzuan*,[146] the court stated that the accused did not need to produce evidence directly impugning how the Public Prosecutor exercised his discretion, such as records of meetings; instead, "inferences may be made from the objective facts".[147] For example, in a case of two co-offenders, an accused person need only show his involvement in an offence was "practically identical" to that of the co-offender and that both "gave the same information to the CNB", shifting the burden on the Public Prosecutor to justify a decision to grant only one certificate of substantive assistance.[148]

Articles 9 and 12 of the Constitution and s 33B(4) of the Misuse of Drugs Act

1.50 An argument was raised in *Nagaenthran* in the amended statement that the Public Prosecutor's non-certification decision was contrary to Arts 9(1) and 12(1) of the Constitution, although this was

142 *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 at [52].
143 *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 at [53].
144 *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 at [54].
145 *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 at [54].
146 See para 1.9 above.
147 *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 at [54].
148 *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 at [54].

abandoned before the court.[149] Chan J found the argument "utterly baseless"[150] and nothing more than a "bare assertion".[151]

1.51 He affirmed, following precedent, that the ground of unconstitutionality as a basis for a s 33B(4) challenge was available, flowing from the doctrine of constitutional supremacy which ensured that all government powers ultimately are "derived from and circumscribed by the Constitution", with the Judiciary having the power "to declare void any executive act that is unconstitutional".[152]

1.52 Parliament does not legislate in a vacuum, as noted by the law minister during the second reading of the Misuse of Drugs (Amendment) Bill[153] in 2012 that it "goes without saying" that the Public Prosecutor's discretion was subject to judicial review on ground of unconstitutionality.[154]

1.53 The presumption of legality applies with respect to the exercise of the non-constitutional powers of the Attorney-General as Public Prosecutor, a constitutional office-holder. Chan J noted that no evidence had been provided by the applicant to rebut the presumption of legality in relation to the Public Prosecutor's determination not to issue a certificate.[155] Article 9(1) provides that no person "shall be deprived of his life or personal liberty save in accordance with the law", while Art 12 provides for equal protection under the law. In this case, equal protection would be violated if there was a co-offender who had provided practically identical assistance and information to the CNB, and only one of them got the requisite certificate. Here, there was no other particular individual in the same circumstances and so there was no basis for making an Art 12(1) claim.[156]

Article 49

1.54 The question of whether by-elections should be called when a member of a Group Representation Constituency ("GRC") vacates his

149 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [45]–[46].
150 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [57].
151 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [66].
152 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [58].
153 *Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89 (K Shanmugam, Minister for Law).
154 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [58].
155 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [62].
156 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [64]–[65].

parliamentary seat arose in the case of *Wong Souk Yee v Attorney-General*.[157] Article 49(1) provides:

> Whenever the seat of a Member, not being a non-constituency Member, has become vacant for any reason other than a dissolution of Parliament, the vacancy shall be filled by election in the manner provided by or under any law relating to Parliamentary elections for the time being in force.

1.55 Unlike the earlier case of *Vellama d/o Marie Muthu v Attorney-General*[158] ("*Vellama*"), which concerned a single member constituency, *Wong Souk Yee* related to a multi-member constituency GRC, as set out in Art 39A of the Constitution which was introduced by amendment in 1988. On 7 August 2017, the designated Malay member of the four-member Marsiling-Yew Tee GRC ("MYT GRC"), Halimah Yacob, resigned her parliamentary seat and office as Speaker to contest the presidential elections.

1.56 Wong, a voter in MYT GRC, sought mandatory orders requiring the remaining Members of Parliament ("MPs") of MYT GRC to vacate their parliamentary seats and for the Prime Minister to advise the President to issue a writ of election for MYT GRC. Alternatively, declaratory orders were sought that, (a) for s 24(2A) of the Parliamentary Elections Act[159] ("PEA") to be constitutional when read against Art 49(1), all MPs of a GRC should be required to vacate their seats when one or more MPs vacated their seat or when the minority MP belonging to the GRC vacated his or her seat; and (b) alternatively, that s 24(2A) of the PEA was void by dint of Art 4 as it was inconsistent with Art 49(1).

1.57 Section 24(2A) provides:

> In respect of any group representation constituency, no writ shall be issued … for an election to fill any vacancy unless all the Members for that constituency have vacated their seats in Parliament.

Chua Lee Ming J noted that there was no GRC scheme when Art 49(1) was enacted which requires the holding of a by-election where a parliamentary seat is vacated mid-term. The issue was how Art 39A, which introduced the GRC scheme in 1988, was to be read with Art 49(1).

1.58 The applicant raised three arguments in seeking mandatory orders that the remaining MYT GRC MPs vacate their seats and the PM

157 [2018] SGHC 80.
158 [2013] 4 SLR 1.
159 Cap 218, 2011 Rev Ed.

advise the President to issue a writ of election. First, it was argued Art 49(1) required that a by-election be called when a parliamentary seat was vacated for any reason other than the dissolution of Parliament, on a plain reading of the Article. For a by-election to be called, the remaining GRC MPs had to vacate their seats. The by-election would entail electing a new team of four MPs, including one from the Malay community, with all candidates coming from the same political party or running as independents.[160] In interpreting Art 49(1), the purposive approach applied in *Tan Cheng Bock v Attorney-General*[161] was adopted.[162] In considering the applicant's interpretation, this would only be possible if the remaining MPs "can be compelled to vacate their seats".[163] None of the grounds listed in Art 46(2), which deals with when a parliamentary seat becomes vacant, were applicable to the present case.[164]

1.59 Chua J found that the applicant's argument was "simply unworkable" as there was no legal basis to compel the remaining MPs to resign, and that Parliament was to be presumed not to have intended an unworkable or impracticable result.[165] Apparently, while the four MPs stand as a team, they do not fall as a team when one or more leave. This could mean that a four-person GRC could be left with a single MP, and that would be problematical in light of the fact that GRCs cover a larger constituency and one of the purposes behind the GRC is that these larger areas should be served by a full team of four.

1.60 Chua J accepted the argument of the respondent that an updating construction should be applied to Art 49(1) as this would serve parliamentary intention. Rather than assuming a legislative function, the court is "filling a gap where what is missing is self-evidently within the overall spirit of the legislation and is needed to give effect to the legislative intent".[166] The present issue was how Art 39A should interact with Art 49(1).

1.61 Chua J saw "no reason in principle" not to apply a tool of statutory interpretation to the Constitution as the Constitution should be "interpreted purposively to give effect to the intent and will of Parliament", as an updating construction seeks to do.[167] Whether this would be tantamount to introducing a constitutional amendment

160 *Wong Souk Yee v Attorney-General* [2018] SGHC 80 at [15] and [17].
161 [2017] 2 SLR 850.
162 *Wong Souk Yee v Attorney-General* [2018] SGHC 80 at [20].
163 *Wong Souk Yee v Attorney-General* [2018] SGHC 80 at [22].
164 *Wong Souk Yee v Attorney-General* [2018] SGHC 80 at [24].
165 *Wong Souk Yee v Attorney-General* [2018] SGHC 80 at [26].
166 *Comptroller of Income Tax v MT* [2006] 3 SLR(R) 688 at [48].
167 *Wong Souk Yee v Attorney-General* [2018] SGHC 80 at [31].

through constitutional interpretation could be addressed by considering whether an updating construction "would entail such a substantive change that it would be best left to the Legislature".[168]

1.62 Chua J applied the three-stage *Comptroller of Income Tax v MT*[169] ("*CIT*") test to the Constitution. First, the nature of the amendment is to be ascertained. The purpose of Art 39A was to introduce the GRC scheme. Subsequent to its introduction, amendments were made to ss 8A and 27A of the PEA.[170] Second, there was an ambiguity as to whether Art 49(1) applied only to single member constituencies or also GRCs.[171] Third, it was argued that an updating construction ought to be given to Art 49(1) as this would give effect "to the intent and will of the Legislature", as evident from parliamentary debates and the text of s 24(2A) of the PEA itself which states "no writ shall be issued … for an election to fill any vacancy unless all the Members for that constituency have vacated their seats in Parliament".

1.63 Chua J considered that an updating construction should be applied to Art 49(1) to reflect "the changes introduced by Art 39A".[172] Article 49(1) should be read as referring to "the seats of all the Members" in the GRC, even if it is singularly phrased ("the seat of a Member").[173] Chua J considered it apparent that Parliament's clear intent was that no by-election be held in a GRC unless all seats have been vacated since this was given effect in s 24(2A) of the PEA even if Parliament "inadvertently omitted to deal with Art 49(1)".[174] Chua J considered applicable the presumption that the Legislature intends the court to apply a construction which "rectifies any error in the drafting of a statute where it is required in order to give effect to the Legislature's intention".[175] Thus, a rectifying construction could be given to Art 49 "by adding language similar to that in s 24(2A) of the PEA".[176]

1.64 Chua J identified the possible interpretations of Art 49(1), both a rectifying and literal reading of Art 49(1) (which arguably did not apply to GRCs) and then related this to the legislative purpose which was "clear",[177] while noting the permissibility of considering extraneous material. The intent is that all elections in any GRC should be held in

168 *Wong Souk Yee v Attorney-General* [2018] SGHC 80 at [31].
169 [2006] 3 SLR(R) 688.
170 *Wong Souk Yee v Attorney-General* [2018] SGHC 80 at [33]–[34].
171 *Wong Souk Yee v Attorney-General* [2018] SGHC 80 at [35].
172 *Wong Souk Yee v Attorney-General* [2018] SGHC 80 at [38].
173 *Wong Souk Yee v Attorney-General* [2018] SGHC 80 at [38].
174 *Wong Souk Yee v Attorney-General* [2018] SGHC 80 at [41].
175 *Wong Souk Yee v Attorney-General* [2018] SGHC 80 at [39].
176 *Wong Souk Yee v Attorney-General* [2018] SGHC 80 at [41].
177 *Wong Souk Yee v Attorney-General* [2018] SGHC 80 at [47].

accordance with the number of candidates designated for that constituency and no by-elections are needed to fill any vacancy in the GRC unless all Members have vacated their seat.[178] Of the possible interpretations, the interpretation of the respondent applied through a rectifying or updating construction was to be preferred as it furthered the legislative purpose.[179]

1.65 The second argument raised by the applicant in her written submissions was that Art 39A(2) required that a GRC be represented by the designated minority community MP until Parliament was dissolved. Although this submission no longer applied after Wong in her oral submissions clarified that her case was that a by-election should be held if any GRC seat is vacated, Chua J nonetheless stated this submission would have failed for the same reasons the first argument failed as regardless of which MP vacated his seat: the remaining MPs could not be legally compelled to vacate theirs.[180]

1.66 The third argument related to the right to be represented in Parliament, as voters had "an implied right" under the Constitution to be represented by an elected MP of their choice until Parliament was dissolved.[181] Reliance was placed on the Court of Appeal's observation in *Vellama* that constituency voters "are entitled to have a Member representing and speaking for them in Parliament" as well as philosophical underpinnings of the right to vote in the Westminster model of government set up by the Constitution.[182] The applicant also relied on the Court of Appeal's observations in *Yong* that though not in the text, there was an implied right to vote.[183] Chua J considered that the voters in MYT GRC had not lost their right to be represented in Parliament as under the GRC scheme, voters vote for the GRC team, not individual MPs. The GRC team "represents the GRC in Parliament" and MYT GRC "continued to be represented in Parliament by the MYT GRC team", albeit minus one MP.[184]

1.67 Essentially, Chua J thought that the entire case rested on whether there was a legal basis for requiring the remaining GRC MPs to vacate their parliamentary seats when one of them so vacated. Section 24(2A) of the PEA indicated a clear intent that no by-election be held unless all MPs in the GRC had vacated their seats. No further inquiry into theories of representation was made, nor any investigation

178 *Wong Souk Yee v Attorney-General* [2018] SGHC 80 at [47].
179 *Wong Souk Yee v Attorney-General* [2018] SGHC 80 at [49].
180 *Wong Souk Yee v Attorney-General* [2018] SGHC 80 at [53].
181 *Wong Souk Yee v Attorney-General* [2018] SGHC 80 at [54].
182 *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at [79].
183 *Wong Souk Yee v Attorney-General* [2018] SGHC 80 at [56].
184 *Wong Souk Yee v Attorney-General* [2018] SGHC 80 at [57].

into whether the voter has a right to be represented by a fully constituted GRC team rather than a diminished one or whether one of the purposes underlying the constitutional rationale for the GRC scheme, gleaned from parliamentary debates, was to increase the size of the GRC team to ensure that the enlarged constituency is served by a fully staffed GRC team. If such an intention and interpretation could be imputed to Art 39A, this could pose a challenge to the consistency of s 24(2A) of the PEA with Art 39A.

Article 14: Free speech and contempt of court – Scandalising the court

1.68 The law on contempt of court in Singapore is regulated by the AJPA, which came into operation on 1 October 2017 and seeks to consolidate the law; its provisions prevail over the common law to the extent of inconsistency, although common law rules which are not inconsistent with the AJPA are preserved.[185]

1.69 The first proceedings for scandalising the court under s 3(1)(*a*) of the AJPA were brought against the respondents in *Wham*. This involved certain Facebook posts published under the "public" setting of Facebook's audience selector. Wham's post of 27 April 2018 stated: "Malaysia's judges are more independent than Singapore's for cases with political implications. Will be interesting to see what happens to this challenge." On 30 April 2018, the Attorney-General filed an application for leave to apply for an order of committal against Wham for scandalising contempt under s 3(1)(*a*) of the AJPA.

1.70 On 6 May 2018, Tan posted on his Facebook profile the statement: "By charging Jolovan for scandalising the judiciary, the AGC only confirms what he said was true."[186] On 7 May 2018, the Attorney-General sought leave to apply for an order of committal against Tan under s 3(1)(*a*). Section 3(1)(*a*) and its accompanying explanation state:

> 3.—(1) Any person who —
>
> (*a*) scandalises the court by intentionally publishing any matter or doing any act that —
>
> (i) imputes improper motives to or impugns the integrity, propriety or impartiality of any court; and

185 *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2018] 4 SLR 828 at [43].

186 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [4]–[5].

> (ii) poses a risk that public confidence in the administration of justice would be undermined; [the "risk" test] … commits a contempt of court.
>
> Explanation 1.—Fair criticism of a court is not contempt by scandalising the court within the meaning of subsection (1)(*a*).

1.71 Before the introduction of AJPA in 2017, the test for contemptuous speech which scandalised the Judiciary at common law was the "real risk" test, as stated in *Shadrake Alan v Attorney-General*[187] ("*Shadrake Alan (CA)*").

1.72 The constitutionality of s 3(1)(*a*) was challenged, as it allegedly violated the Art 14(1)(*a*) right to freedom of speech and expression. The respondents denied that they committed contemptuous speech and Wham alleged that his post constitutes fair criticism.[188]

1.73 Woo Bih Li J found that as Art 14(1)(*a*) authorised Parliament explicitly to make legislative provision for contempt of court, s 3(1)(*a*) was consistent with Art 14(1)(*a*) and therefore valid.[189] This minimalist test was consonant with the interpretive approach adopted in *Chee Siok Chin v Minister for Home Affairs*,[190] which maximises legislative discretion in so far as constitutional challenges were considered satisfied provided an impugned law falls within one of the permissible grounds of derogation listed under Art 14(1)(*a*).[191] Further, the presumption of legislative constitutionality "will not lightly be displaced".[192]

1.74 It was argued that if the "risk" under s 3(1)(*a*)(ii) includes a "remote or fanciful possibility" that public confidence in the administration of justice be undermined, this would violate Art 14; in addition, this test "has no nexus with maintaining public confidence in the administration of justice" and the common law "real risk" test was necessary for the offence of scandalising contempt "to survive a constitutional right to freedom of speech",[193] as it embodied the balance struck by the constitutional framers between free speech and protecting confidence in the administration of justice".[194]

1.75 Woo J noted that while the courts could judicially develop the common law on contempt, Art 14(2)(*a*) conferred upon Parliament the

187 [2011] 3 SLR 778.
188 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [2].
189 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [18].
190 [2006] 1 SLR(R) 582.
191 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [19].
192 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [21].
193 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [14]–[15].
194 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [22].

"final say" on how to strike a balance, and that Parliament had the power to "decide the extent to which this constitutional right should be restricted".[195] Through s 3(1)(*a*) of the AJPA, Parliament had legislatively overruled the "real risk" common law test and thereby enlarged the scope of conduct constituting contempt.[196] Section 3(1)(*a*) provides principles for determining whether scandalising contempt had been committed, which the courts were to interpret and apply in the exercise of their judicial power under Art 93.[197] Under the AJPA, Singapore citizens were not completely unable to criticise courts as there were defences to scandalising contempt listed in ss 14–19, and Explanation 1 to s 3(1) pointed out fair criticism of a court is allowed.[198] Thus, Woo J concluded s 3(1)(*a*) of the AJPA was consistent with the Art 14(1)(*a*) constitutional guarantee.[199]

1.76 Section 3(1)(*a*) of the AJPA codifies the common law in relation to the *mens rea* required for the offence of scandalising contempt: there is no need for there to be an intention to scandalise the court; what is required is "an intention to publish the contemptuous matter or to do a contemptuous act".[200] As for the *actus reus*, the conduct in question, where objectively interpreted, must impute improper motive or impugn the integrity, propriety or impartiality of any court. In ascertaining whether there was a "risk", Woo J first set out the applicable principles for the common law "real risk" test as articulated by the Court of Appeal in *Shadrake Alan*. The test should avoid the two extremes of finding contempt where there was only a remote or fanciful possibility that public confidence in the administration of justice would be undermined, or finding contempt only in the most serious situations. The court should consider the viewpoint of the average reasonable person in an "objective" inquiry.

1.77 In approaching s 3(1)(*a*) of the AJPA, Woo J rejected the view that if limb (i) was satisfied, limb (ii) was necessarily also satisfied.[201] Both were to be read discretely and must be separately satisfied for conduct to be considered scandalising contempt under the AJPA. It would be contrary to the approach of the Court of Appeal in *Shadrake Alan (CA)* to assume that whenever the integrity or impartiality of the court is impugned, there would necessarily be a risk that public confidence in the administration of justice would be undermined.[202] All

195 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [25].
196 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [26].
197 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [26].
198 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [27].
199 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [28].
200 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [34].
201 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [46].
202 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [49].

conduct had to be assessed and had to satisfy the "real risk" test at common law to be considered scandalising contempt.[203] The Court of Appeal in *Shadrake Alan (CA)* had expressly rejected the "inherent tendency" test as set forth by the High Court in *Attorney-General v Wain Barry J*,[204] as it could falsely be read to divorce the test from the actual or potential impact of the words on the public confidence in the administration of justice. The particular context and facts of each case had to be considered.[205] Like the common law test, the test under s 3(1)(*a*) was the same in so far as all conduct had to be assessed to satisfy the "risk" test.

1.78 The AJPA in replacing the real risk test with the risk test does not "define precisely what constitutes "risk". Woo J stated that the "risk" test still required a risk of undermining public confidence in the administration of justice and would "depend on the precise facts and context".[206]

1.79 Woo J took note of comments made by Quentin Loh J in *Attorney-General v Shadrake Alan*[207] ("*Shadrake Alan (HC)*") that a letter sent by a disappointed litigant to high public office holders but not the public in general would not "pose the slightest risk" of undermining public confidence in the administration of justice", applying the real risk test.[208] Woo J considered that this example would also not satisfy the "risk" test under s 3(1)(*a*) of the AJPA as the public would not be affected and those privy to the letter "would have been more discerning".[209]

1.80 The "risk" test was considered to be itself an "adequate formulation" not requiring further theoretical elaboration; thus, it was unhelpful to consider whether a "risk" would encompass "a remote or fanciful possibility".[210] Instead, the question was simply, from the point of view of the average reasonable person, whether the conduct in question posed a risk that public confidence in the administration of justice would be undermined.[211] In rejecting the suggestion that a quantitative test be applied, in terms of asking how many individuals in Singapore were aware of the conduct in question, Woo J noted that a "risk" under the AJPA concerned an outcome "that may arise in the

203 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [49].
204 [1991] 1 SLR(R) 85.
205 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [51].
206 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [57] and [59].
207 [2011] 2 SLR 445.
208 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [57].
209 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [59].
210 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [61].
211 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [61].

future", or may not.[212] The fact that many individuals may know of a conduct may help establish the existence of a "risk" and that generally the audience of the alleged contemnor, and its size, would be a relevant consideration in assessing risk, though a consideration of audience size did not require "an accounting exercise".[213]

1.81 Explanation 1 to s 3(1) of the AJPA provides that fair criticism of a court is not scandalising contempt within the meaning of s 3(1)(*a*). A court under the AJPA must first find that the conduct does not constitute fair criticism, which must be proved beyond reasonable doubt.[214] Following from the Court of Appeal's provisional views in *Shadrake Alan (CA)*,[215] "fair criticism" was not a defence. The Explanation to s 3(1) codified the common law concept of fair criticism as where conduct satisfying the "real risk" test is not scandalising contempt if it constituted fair criticism.[216] Similarly, conduct satisfying the "risk" test under ss 3(1)(*a*)(i) and 3(1)(*a*)(ii) would not be scandalising contempt if it constituted fair criticism, underscoring that whether the conduct constitutes fair criticism was separate from the question of whether the conduct satisfied the "risk" test under the AJPA.[217] Woo J offered two hypotheticals to demonstrate how the analysis for fair criticism and the risk test could differ.[218]

1.82 Fair criticism is criticism made "in good faith" which "is respectful".[219] The court must on an objective analysis of the precise facts and context determine whether the conduct in question constituted "fair criticism". Minimally it must be "premised on objective facts and on a rational basis".[220] Woo J made reference with approval to the factors articulated in *Attorney-General v Tan Liang Joo John*.[221] These included the degree to which the criticism was supported by argument and evidence, whether the manner of criticism was temperate and dispassionate or otherwise, the litigant's attitude in court and the number of instances of contemning conduct.[222]

212 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [63].
213 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [64].
214 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [66].
215 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [81].
216 *Au Wai Pang v Attorney-General* [2016] 1 SLR 992 at [17]–[18] and [30].
217 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [74].
218 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [74].
219 *Attorney-General v Tan Liang Joo John* [2009] 2 SLR(R) 1132.
220 *Au Wai Pang v Attorney-General* [2016] 1 SLR 992 at [34].
221 [2009] 2 SLR(R) 1132 at [16], [18] and [20].
222 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [73].

1.83 On the facts of the case, Wham in publishing his post on his Facebook profile satisfied the *mens rea* requirement.[223] Woo J found that Wham's post read objectively impugned the integrity and impartiality of Singapore's judges and courts as it alleged that they were not impartial in the discharge of the duties when dealing with cases involving Singapore government or political office holders and favoured them.[224] He rejected Wham's submission that both Singapore and Malaysian judiciaries were independent, but the Malaysian judiciary had greater qualities of independence.[225] Wham's post suggested that Singapore judges were more inclined to agree with the Singapore government's position and were thus less independent than Malaysia's judges, suggesting that a constitutional challenge had a better chance of success in Malaysia than Singapore.[226] Wham impugned not only the impartiality but also the integrity of Singapore courts in so far as judges who are partial in adjudicating cases with political dimensions "are not adjudicating such cases with integrity", which shows that the various conduct mentioned in the first limb of s 3(1)(*a*) of the AJPA can overlap.[227] Thus, the first limb of the *actus reus* of scandalising contempt under s 3(1)(*a*)(i) of the AJPA was satisfied with respect to Wham's post.

1.84 Woo J in applying the "risk" test held that the average reasonable person would interpret Wham's post to mean Singapore judges were not impartial and lacked independence in adjudicating such cases.[228] They would not read the post as meaning both Malaysian and Singapore judges were independent in such cases but Malaysian judges were more independent. In terms of Wham's audience, this was the public at large since anyone with Internet access could view it on his Facebook profile published under the "public" setting of Facebook's audience selector.[229] His Facebook profile was "followed" by 7,177 Facebook users.[230] Despite there being 33 people only who responded to his post, Woo J found that the post posed a "risk" of undermining public confidence in the administration of justice, knowing that the number of responders did not indicate how many people actually read the post.[231] The court must be satisfied beyond reasonable doubt that a "risk" existed, not whether it had had a certain result.

223 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [80].
224 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [86].
225 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [88].
226 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [88].
227 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [88].
228 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [91].
229 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [93].
230 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [92].
231 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [93].

1.85 Woo J found that Wham's post was not supported by argument and evidence or any comparison of judicial philosophies between Singapore and Malaysia, despite his submission that this was his intention. It was a "bare statement".[232] Wham submitted his understanding was based on at least three specific Malaysian cases where the Malaysian courts took a less conservative approach against the government than their Singapore counterparts. The Attorney-General rebutted this by pointing out that the Malaysian cases were decided in different contexts and concerned different legal provisions with which the Singapore cases were compared.[233] Woo J noted that his post did not mention this comparative case exercise and as such, it was unclear whether Wham had this in mind when publishing his post, as this explanation could be a "self-serving one", made *ex post facto*.[234] Woo J found no rational basis for Wham's post even if it was based on comparing three Malaysian and three Singapore cases as this would be "insufficient" to support his alleged understanding that Malaysian courts tended to rule more often against the Government than in Singapore.[235] Thus, Wham's post was not fair criticism, and Wham was found guilty beyond reasonable doubt of scandalising contempt under s 3(1)(*a*) of the AJPA.[236]

1.86 Similarly, Tan was also found guilty under s 3(1)(*a*) of the AJPA. Tan had asserted that "the AGC only confirms what (Jolovan) says is true"; this too was considered to impugn the integrity and impartiality of the courts, even if, as Tan submitted, he was only saying the Attorney-General's conduct conveys the impression Singapore judiciary was not independent.[237] Tan's post essentially repeated Wham's post, even if he was in addition criticising the Attorney-General for commencing proceedings against Wham.[238] By posting his remarks on Facebook, Tan's audience was also the public at large and Woo J found that given the precise facts and context, the second limb of s 3(1)(*a*)(ii) was also satisfied.[239] Without argument and evidence, Tan's post was also found not to constitute fair criticism and he was convicted for scandalising contempt under s 3(1)(*a*) of the AJPA.

232 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [96].
233 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [97].
234 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [98].
235 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [99].
236 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [105].
237 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [115].
238 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [115] and [120].
239 *Attorney-General v Wham Kwok Han Jolovan* [2018] SGHC 222 at [126].