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1. ADMINISTRATIVE AND CONSTITUTIONAL LAW

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I. Introduction

1.1 2020 will be remembered as the year of disruption, with the outbreak of the COVID-19 pandemic and the imposition of safe distancing measures which have become integral to the new normal. During the Circuit Breaker period (7 April–1 June 2020), the judicial review of COVID-19 measures was made available, with such judicial review applications classified as "Essential and Urgent".[1]

1.2 In the field of public law, most of the major developments took place in constitutional law, as the administrative law cases dealt with mostly routine applications of existing principles. In fact, 2020 can be considered a bumper year for cases dealing with contempt of court, freedom of public assembly, the implied right to vote and to free and fair elections, the first two cases heard under the Protection from Online Falsehoods and Manipulation Act[2] ("POFMA") statutory regime which implicates free speech, and significant developments in the field of equality jurisprudence and approaches towards constitutional interpretation, particularly in clarifying what the presumption of constitutionality entailed.

ADMINISTRATIVE LAW

II. Delegation and the *Carltona* principle

1.3 The appellant in *Asia Development Pte Ltd v Attorney-General*[3] made a request to the Minister for Finance for a deadline extension for completing and selling property under s 74(1) read with s 74 (2B) of

1 Supreme Court of the Republic of Singapore, Registrar's Circular No 4 of 2020 (5 April 2020).
2 Act 18 of 2019.
3 [2020] 1 SLR 886.

the Stamp Duties Act[4] ("SDA"). He had earlier applied for remission of the additional buyer's stamp duty ("ABSD") on the property which had been granted subject to the completion of the sale by a specific date. The minister has discretionary power to grant the extension and exemption or remission of ABSD under s 74(1) of the SDA, subject to any conditions he might impose.

1.4 This application for a deadline extension was rejected on 22 May 2017 by the Chief Tax Policy Officer ("CTPO") of the Ministry of Finance, but not explicitly in the name of the minister. A letter dated 23 May 2017 ("23 May Decision") sent to the appellant's solicitors communicated this rejection under the Inland Revenue Authority of Singapore ("IRAS") letterhead, signed by a senior tax officer for the Commissioner of Stamp Duties. The appellant sought a quashing order to question the 23 May Decision. It was argued that the minister should have made the decision personally, rather than the CTPO who attested she made the decision to reject the request for a further deadline extension.[5]

1.5 The Court of Appeal noted that proceedings had been brought on the basis that the 23 May Decision was made by a Ministry of Finance officer; thus, the appellant could not change course and argue that the Commissioner of Stamp Duties made the decision, even if at various times correspondence regarding that decision was sent from the Commissioner and IRAS.[6] It considered the decision to have been made by the CTPO under the authority of the minister.

1.6 The Court of Appeal in applying the *Carltona* principle from *Carltona Ltd v Commissioner of Works*[7] ("*Carltona*") agreed with the High Court judge that the powers under ss 74(1) and 74(2B) of the SDA could be exercised by a Ministry of Finance officer on the basis of the minister's authorisation, rather than having to be exercised by the minister personally. This principle, derived from English administrative law, is that the duties imposed on ministers are normally exercised under the authority of a minister by responsible officials of the relevant ministry. Such decisions made by the official are constitutionally "the decision of the minister".[8]

1.7 The Court of Appeal considered the *Carltona* principle as "a sensible and pragmatic one" which made "the business of government

4 Cap 312, 2006 Rev Ed.
5 *Asia Development Pte Ltd v Attorney-General* [2020] 1 SLR 886 at [5].
6 *Asia Development Pte Ltd v Attorney-General* [2020] 1 SLR 886 at [7].
7 [1943] 2 All ER 560.
8 *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560 at 563, *per* Lord Greene MR.

practicable".[9] It extracted two propositions from Lord Greene MR's statement in *Carltona*: first, that ministers in general could not expected to exercise each of their functions in person; and second, ministers are responsible for the decisions of his or her officials acting under his or her authority and in turn are answerable to Parliament. It falls to ministers to ensure that the duties and functions in question are carried out by "duly experienced and qualified officers".[10] Whether the *Carltona* principle applies would "depend on a contextual inquiry that considers the nature, scope and purpose of the function vested in the Minister, and the relevant language of the statute and of the specific provision in question".[11]

1.8 On the facts, there was nothing in the terms of ss 74(1) and 74(2B) of the SDA to require the personal exercise of the powers by the minister.[12] The powers were "unexceptional" and "likely to involve a substantial volume". The Court of Appeal noted that between 2016 to 2018, some 1,700 applications pertaining to stamp duties were made, which would require the minister to deal with two every day, if he was required to personally process these applications.[13] It noted too that s 35 of the Interpretation Act[14] supported the view that the minister did not have to exercise his power in person, but that this could be done by a duly authorised public officer. Thus, the CTPO was a duly qualified officer acting under the minister and there was "nothing improper" about her discharging her duties in considering whether to grant a deadline extension to the appellant for purposes of ABSD remission under the SDA.[15]

1.9 Nonetheless, as a matter of best practices, the Court of Appeal recommended that "a certain measure of formality" in communicating decisions would be useful to prevent confusion, such that for future decisions, the minister and the IRAS should "carefully explicate which party made the decision in question and the statutory powers engaged".[16]

III. Excessive judicial interference

1.10 Although on the facts no excessive judicial interference was found, the Court of Appeal in *Muhammad Nabill bin Mohd Faud v Public*

9 *Asia Development Pte Ltd v Attorney-General* [2020] 1 SLR 886 at [10].
10 *Asia Development Pte Ltd v Attorney-General* [2020] 1 SLR 886 at [9].
11 *Asia Development Pte Ltd v Attorney-General* [2020] 1 SLR 886 at [9].
12 *Asia Development Pte Ltd v Attorney-General* [2020] 1 SLR 886 at [10].
13 *Asia Development Pte Ltd v Attorney-General* [2020] 1 SLR 886 at [10].
14 Cap 1, 2003 Rev Ed.
15 *Asia Development Pte Ltd v Attorney-General* [2020] 1 SLR 886 at [13].
16 *Asia Development Pte Ltd v Attorney-General* [2020] 1 SLR 886 at [16].

Prosecutor[17] provided six non-exhaustive guidelines in relation to the issue of excessive judicial interference in the specific context of criminal proceedings, where especial prudence, caution and restraint were warranted, compared to civil proceedings, given the severe consequences such interference might exert on an accused person's life and liberty.[18] For example, the judge should not ask leading questions which may help a party with the cross-examination of a witness, nor should the judge fill any gaps in the Prosecution's case, as the Prosecution bears the burden of proving its case against the accused person beyond a reasonable doubt.[19]

1.11 Excessive judicial interference is distinct from the question of apparent bias, which focuses on impressions a fair-minded observer might be left with; it addresses whether, in descending into the arena, the court acted in a way which impaired its ability to evaluate and weigh the case presented by both sides, resulting in actual prejudice.[20]

A. Leave, standing, remedies

1.12 In appropriate cases, an application for leave in judicial review proceedings may be disposed of on its merits even at the leave stage; in these "rolled-up" applications, the leave and substantive questions are dealt with at the same time, which saves time and cost.[21] This has been justified on the basis that splitting the leave stage from the substantive arguments rarely confers any benefit and becomes artificial, particularly where all relevant parties and information are before the court and the parties are prepared to make full arguments: if leave was granted, it was difficult to see "what newer materials or arguments could have been presented at the subsequent merits stage".[22] Conversely, in *Syed Suhail bin Syed Zin v Attorney-General*[23] ("*Syed Suhail*"), where a *prima facie* case of reasonable suspicion had been made, this merited further examination at judicial review proceedings where further materials could be adduced and arguments fully made.[24]

17 [2020] 1 SLR 984.
18 *Muhammad Nabill bin Mohd Faud v Public Prosecutor* [2020] [2020] 1 SLR 984 at [5] and [170].
19 *Muhammad Nabill bin Mohd Faud v Public Prosecutor* [2020] [2020] 1 SLR 984 at [171]–[180].
20 *Muhammad Nabill bin Mohd Faud v Public Prosecutor* [2020] [2020] 1 SLR 984 at [164] and [166].
21 *CBB v Law Society of Singapore* [2021] 3 SLR 487 at [25].
22 *Lee Pheng Lip Ian v Chen Fun Gee* [2020] 1 SLR 586 at [28].
23 [2021] 1 SLR 809.
24 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [85]–[86].

1.13 In applying for leave to commence judicial review proceedings, it is established that three conditions must be satisfied: (a) the subject-matter of the complaint must be susceptible to judicial review; (b) the applicant must have a sufficient interest in the matter to have standing; and (c) the materials before the court disclose an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies which the applicant seeks. For example, a person who makes a bare assertion that he was treated differently from other accused persons similarly situated would not satisfy the *prima facie* case of reasonable suspicion that such alleged differentiated treatment had being carried out "deliberately and arbitrarily against him in particular"; this followed the test for applying the Art 12 equality clause to executive actions, as set forth in *Muhammad Ridzuan bin Mohd Ali v Attorney-General*[25] ("*Ridzuan*").

1.14 As there is a presumption that constitutional office-holders and other administrative officials make decisions in accordance with the law, a party who is challenging an executive decision will only be given leave if he can adduce *prima facie* evidence that the relevant standard has been breached.

1.15 Many administrative law cases in 2020 involved the straightforward application of these conditions in deciding whether to grant leave for judicial review. For example, the issue of standing was not made out in *Ravi s/o Madasamy v Attorney-General*,[26] where the Singapore Police Force seized the electronic devices of Ravi, an advocate and solicitor, for investigations into offences which the advocate and solicitor had allegedly committed. Ravi sought a prohibiting order to prohibit the Attorney-General ("AG") and Police from reviewing the contents of the electronic device, until the court determined the extent of the alleged professional privilege that might apply. Ravi was found to lack standing, as he suffered no violation of a personal right as legal professional privilege belongs to the client rather than his solicitor.[27] The High Court noted that Ravi had not suffered "special damage" owing from the breach of a public right;[28] further, the present case did not involve an egregious breach of a public duty, as set forth in *Jeyaretnam Kenneth Andrew v Attorney-General*.[29]

25 [2015] 5 SLR 1222 at [49], cited in *Pannir Selvam a/l Pranthaman v Attorney-General* [2020] SGHC 80.
26 [2020] SGHC 221.
27 *Ravi s/o Madasamy v Attorney-General* [2020] SGHC 221 [94].
28 *Ravi s/o Madasamy v Attorney-General* [2020] SGHC 221 at [99]–[100].
29 [2014] 1 SLR 345.

1.16 In *Daniel De Costa Augustin v Attorney-General*,[30] ("*De Costa*") declaratory relief was not granted as there was no "real controversy", given that it was accepted that the right to vote was an accepted implied constitutional right.[31] Declaratory relief must serve a useful and practical purpose and be directed at determining legal controversies, not answering hypothetical questions.[32] In *De Costa*, since general elections had been called, during the COVID-19 pandemic, there was "nothing to suggest that this right is being directly threatened in any way".[33] The Court of Appeal in *De Costa* agreed that in principle, the right to vote encompassed "a right to free and fair elections", while recognising that the "precise content" of what constituted free and fair elections was "contestable".[34] Furthermore, the appellant lacked standing, not having suffered a violation of his right to vote, nor having suffered special damage over and above other citizens.[35]

1.17 The High Court in *Lim Tean v Attorney-General*[36] did not consider the grant of a prohibiting order or a mandatory order appropriate in seeking to stop the police from conducting investigations with respect to two offences the plaintiff was charged with: criminal breach of trust and unlawful stalking under s 7 of the Protection from Harassment Act.[37] The High Court noted in its decision[38] that the Court of Appeal in *Anwar Siraj v Ting Kang Chung John*,[39] had cited an English authority to the effect that English courts would not issue *mandamus* in telling the police how and when to exercise their powers in specific situations, as the court was not in a position to determine what action particular situations would require.[40]

1.18 The High Court in the present case considered that the same approach of accepting that it was not for courts to instruct law enforcement agencies on how to do their job should also apply to situations such as the present one. Here, the applicant sought relief from the court to mandate the police to halt investigations; it was not appropriate "for the Court to direct the police on when to commence or stop tits investigations".[41]

30 [2020] 2 SLR 621.
31 *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 at [9]–[12].
32 *Tok Ee Cheng v Jardin Smith International Pte Ltd* [2021] 3 SLR 595 at [10]–[11].
33 *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 at [13].
34 *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 at [13].
35 *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 at [15].
36 [2020] SGHC 270.
37 Cap 256A, 2015 Rev Ed.
38 *Lim Tean v Attorney-General* [2020] SGHC 270 at [30].
39 [2010] 1 SLR 1026.
40 Clive Lewis QC, *Judicial Remedies in Public Law* (Sweet & Maxwell, 4th Ed, 2009) at para 4-084.
41 *Lim Tean v Attorney-General* [2020] SGHC 270 at [31].

1.19 The same applied in relation to the exercise of the Attorney-General's discretion, over matters like requests for witness immunity, which would involve an exercise of executive power of constitutional significance. The Court of Appeal in *Gobi a/l Avedian v Attorney-General*[42] ("*Gobi*") noted that after the Attorney-General exercises his prosecutorial discretion, the court will not interfere with this unless it was exercised unlawfully. Thus, a court can only direct a public body to consider exercising its discretion if the public body has yet to do so.[43] Where no request for witness immunity has been made, no decision to this effect had been made and "there is nothing to review".[44] Where the executive has had no opportunity to exercise its discretion, it cannot be faulted for failing to exercise its direction and a court exercising its supervisory jurisdiction cannot ask the executive body to make a decision.[45] Thus leave to commence judicial review to seek a mandatory order was not given.

B. Irrationality

1.20 The purpose of disciplinary proceedings under the Legal Profession Act[46] ("LPA"), is to "maintain the high standards and good reputation of the legal profession".[47] Complaints under the disciplinary framework of Pt VII of the LPA are to be made within six years after the conduct complained of, although s 85(4C) provides for a scenario where a solicitor in appropriate cases may be subject to disciplinary proceedings for conduct which took place outside the regular six-year limitation period. The time bar under s 85(4A) of the LPA is not absolute and the Law Society Council ("the Council") can apply to the court to allow it to refer complaints to the chairman even if the subject matter of the complaint is conducted which took place more than six years prior.

1.21 In *CBB v Law Society of Singapore*[48] ("*CBB*"), the applicant had made various complaints on 17 April 2018 against a lawyer, Lim, who had advised and acted for his mother in various matters: the establishment of a trust, transfer of assets between banks and the conduct of proceedings under the Mental Capacity Act.[49] These matters had taken place at various times before and after 17 April 2012. The Court of Appeal on 19 May 2015 had decided that the applicant's mother lacked mental capacity to

42 [2020] 2 SLR 883.
43 *Gobi a/l Avedian v Attorney-General* [2020] 2 SLR 883 at [47].
44 *Gobi a/l Avedian v Attorney-General* [2020] 2 SLR 883 at [48].
45 *Gobi a/l Avedian v Attorney-General* [2020] 2 SLR 883 at [48].
46 Cap 161, 2009 Rev Ed.
47 *CBB v Law Society of Singapore* [2021] 3 SLR 487 at [80].
48 [2021] 3 SLR 487.
49 Cap 177A, 2010 Rev Ed.

make two main sets of decisions involving the establishment of a trust and the transfer of assets between banks, owing to the undue influence of some of the applicant's mother's relatives.

1.22 Only matters that took place in the six-year time frame (17 April 2012 to 17 April 2018) were referred to the chair, who constituted a Review Committee ("RC") under s 85(5) of the LPA to review those portions of the complaint. The RC directed the Council to dismiss the portions of the complaint relating to matters occurring before 17 April 2012 after which an Inquiry Committee was constituted to inquire into the complaint.

1.23 The Law Society Council had declined to exercise its discretion under s 85(4C) of the LPA to seek leave to refer a complaint to the Inquiry Panel Chairman for conduct that took place outside the six-year period, that is, before 17 April 2018. The Council informed the applicant that it was declining to apply for leave under s 85(4D) of the LPA as matters relating to the trust took place around 26 October 2010, and any related complaints should have been brought by 20 October 2016. After the Court of Appeal's 19 May 2015 decision relating to the applicant mother's mental disability, there was more than a year left for interested persons to have made the complaint.[50] This was communicated to the applicant by a letter dated 16 August 2018, which he apparently only received on 4 October 2018.

1.24 The applicant commenced judicial review proceedings on 13 November 2018. The High Court held that the applicant was able to show that the Council, in not seeking leave under s 85(4C) of the LPA to the RC, was irrational.

1.25 The Council's decision not to apply for leave to proceed with the entire complaint despite the time bar was challenged on *GCHQ*[51] grounds of review. One of the arguments raised was that the Council had acted irrationally in not seeking leave of court under s 85(4C) of the LPA. The two reasons stated in the 16 August 2018 letter were "without merit", that is, that the events occurred more than six years prior to the complaint, and that the applicant made the complaint in his personal capacity. The question arose whether this involved a failure to consider relevant considerations or whether irrelevant considerations were taken into account.[52]

50 *CBB v Law Society of Singapore* [2021] 3 SLR 487 at [9].
51 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.
52 *CBB v Law Society of Singapore* [2021] 3 SLR 487 at [82].

1.26 The High Court considered that only one of two arguments raised under the heading of "illegality" was appropriate, that is, that the Council did not decide whether to seek leave under s 85(4C) of the LPA in choosing to rely on the RC's recommendation. The argument that the Council failed to take into account relevant considerations was considered to fall under the claim of irrationality.[53]

1.27 Here, Aedit Abdullah J held that the fact that the applicant made the complaint in his personal capacity was not a relevant consideration for the purposes of deciding if leave should be sought under s 85(4C) of the LPA. Disciplinary proceedings did not vindicate the personal rights of the legal practitioner's client, which could be protected in ordinary civil proceedings.[54] Section 85(1) of the LPA allows anyone to make a complaint against a legal practitioner.[55]

1.28 Abdullah J considered that with respect to the reason that the matters complained of took place six years before the complaint, the Council had failed to take into account relevant considerations in making its decisions. The Council's reasons in focusing entirely on the applicant's failure to bring the complaint sooner apparently "neglected to consider the merits of the complaint entirely".[56] The seriousness of the alleged wrongdoing and the merits of the complaints were relevant considerations that should have been taken into account. There was no evidence before the court which indicated that these considerations had been factored into the decision on whether to seek leave.[57] This decision thus was "unreasonable in the *Wednesbury* sense".[58]

1.29 The High Court apparently treated "relevant considerations" as falling under the head of irrationality review, rather than illegality, even though the Court of Appeal in *Tan Seet Eng v Attorney-General*[59] affirmed that illegality and irrationality were "separate though overlapping heads of review",[60] serving a different purpose. There, illegality entailed enquiring into whether a decision-maker had exercised his discretion within the scope of his authority within the legislative scheme in good faith, to serve the statutory purpose and whether he had considered irrelevant considerations or failed to consider relevant considerations.

53 *CBB v Law Society of Singapore* [2021] 3 SLR 487 at [75].
54 *CBB v Law Society of Singapore* [2021] 3 SLR 487 at [84].
55 *CBB v Law Society of Singapore* [2021] 3 SLR 487 at [31].
56 *CBB v Law Society of Singapore* [2021] 3 SLR 487 at [85].
57 *CBB v Law Society of Singapore* [2021] 3 SLR 487 at [85].
58 *CBB v Law Society of Singapore* [2021] 3 SLR 487 at [86].
59 [2016] 1 SLR 779.
60 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [80].

1.30 The non-issue of a certificate of substantive assistance was at issue in *Pannir Selvam a/l Pranthaman v Attorney-General*[61] ("*Pannir*"), where the Public Prosecutor's decision was challenged on the grounds of irrationality. It was argued that the applicant had provided information about a "Jimmy" leading to the arrest of Zamri, a drug trafficker.[62] Based on the evidence before the court, the judge was satisfied that the Public Prosecutor, in refusing to grant the certificate, acted reasonably; it transpired that the person whom the applicant identified as "Jimmy" from a photograph was not in fact Zamri. This would have been of "scant assistance" to the Central Narcotics Board ("CNB") and indeed have led them down the wrong investigatory path.[63]

C. Bad faith

1.31 The compulsory acquisition by the State of land is permitted under the Land Acquisition Act[64] ("LAA"). In *Ahmad Kasim bin Adam v Singapore Land Authority*,[65] the land in question was a Muslim cemetery which was compulsorily acquired in 1987 by a declaration under s 5 of the LAA. Notices of acquisition were issued to the paper owners, but as they could not be traced, these could not be personally served on them. The 7 January 1988 Notices were posted on the Land Office's noticeboard, calling on the paper owners to appear at the Office of the Collector on 3 March 1988 to state the nature of their interests in the land and any claims for compensation. On 22 January 1988, a Land Office Notice was posted on the land, pursuant to s 8 of the LAA, but no one came forward to stake their claims and the land was vested in the State on 12 September 1988. When Khosni, a land inspector, went to take possession of the cemetery, he saw houses on both sides of the road and, at the road's end, a temporary structure which looked like a wooden house. He posted the Land Office's Notice of taking possession on the temporal structure. The cemetery was exhumed in 2009.

1.32 Ahmad's claim was based on how his grandfather had helped to upkeep the cemetery and built a Malay-style *kampong* house on the land as his new permanent abode by around 1955. His grandfather's family thereafter resided and occupied the land. After his grandfather died, Adam took over the care of the land and, together with Ahmad, continued to reside on the land. Ahmad and his family were unaware of the 22 January 1988 notice and never received any notices, continuing to

61 See para 1.13 above.
62 *Pannir Selvam a/l Pranthaman v Attorney-General* [2020] SGHC 80 at [51].
63 *Pannir Selvam a/l Pranthaman v Attorney-General* [2020] SGHC 80 at [54].
64 Cap 152, 1985 Rev Ed.
65 [2020] 4 SLR 1447.

reside on the land oblivious to the acquisition. Ahmad was the executor of Adam's estate.[66]

1.33 When graves started being exhumed in 2009, Ahmad made inquiries and discovered that the land had been compulsorily acquired in 1988. He was aggrieved and wrote a letter on 5 February 2010 to his Member of Parliament. The Singapore Land Authority ("SLA") later told him to vacate the premises.[67] The SLA informed Ahmad that he was unlawfully occupying the land but offered various *ex gratia* payments on a without-prejudice basis to Ahmad which were rejected.[68] He was given up to early August 2014 to vacate the land.[69] Ahmad continued to reject the offers of *ex gratia* payments but accepted the offer of Temporary Occupation Licences. Ahmad delivered vacant possession of the land to the SLA on 30 June 2016.[70] The Court of Appeal later found that the rights of the paper owners were extinguished in 1967 and that Adam, who was in factual possession of the house from 1955 to 1967, had adversely acquired title to the house and plot.[71] The issue turned on whether the Collector had breached natural justice by failing to give notice of the acquisition and inquiry to Ahmad Adam, and whether the notice could be deemed serviced by posting it on the land.[72] Ahmad continued to reject SLA's offer of compensation.[73]

1.34 Ahmad, on 10 July 2019, filed an originating summons seeking leave for a quashing order/mandatory order. One of the arguments raised was that the 1987 Gazette relating to the plot was issued in bad faith and the use of power for an improper purpose. While the land was acquired for "general development", no such development took place from 1988 to at least 2016.[74] Acquisition was *ultra vires* under s 8 of the LAA, as it was conducted in bad faith.[75] While the court found that he was more than 30 years out of time and failed to satisfactorily account for the delay,[76] and while dismissing his claim, the court also found that Ahmad would not have been able to make out a *prima facie* case of reasonable suspicion

66 *Ahmad Kasim bin Adam v Singapore Land Authority* [2020] 4 SLR 1447 at [10] and [11].
67 *Ahmad Kasim bin Adam v Singapore Land Authority* [2020] 4 SLR 1447 at [13].
68 *Ahmad Kasim bin Adam v Singapore Land Authority* [2020] 4 SLR 1447 at [15].
69 *Ahmad Kasim bin Adam v Singapore Land Authority* [2020] 4 SLR 1447 at [17].
70 *Ahmad Kasim bin Adam v Singapore Land Authority* [2020] 4 SLR 1447 at [21].
71 *Ahmad Kasim bin Adam v Singapore Land Authority* [2020] 4 SLR 1447 at [25].
72 *Ahmad Kasim bin Adam v Singapore Land Authority* [2020] 4 SLR 1447 at [26].
73 *Ahmad Kasim bin Adam v Singapore Land Authority* [2020] 4 SLR 1447 at [28].
74 *Ahmad Kasim bin Adam v Singapore Land Authority* [2020] 4 SLR 1447 at [32].
75 *Ahmad Kasim bin Adam v Singapore Land Authority* [2020] 4 SLR 1447 at [32].
76 *Ahmad Kasim bin Adam v Singapore Land Authority* [2020] 4 SLR 1447 at [42]–[56].

at the leave stage. As it noted, "bare assertions without any credible basis will not satisfy this threshold", which was "relatively low".[77]

1.35 One of the grounds contended for was bad faith and the court made some observations in this respect. It noted that unexplained prolonged inaction could constitute a *prima facie* case of reasonable suspicion that the land was not acquired for the declared purpose.[78] Unlike *Teng Fuh Holdings Pte Ltd v Collector of Land*,[79] where land acquired in 1983 for "general redevelopment" was not redeveloped for the following 22 years, and no explanation for this was offered by the Housing and Development Board, sufficient explanation was provided in the immediate case. First, it had been explained that the land, which was zoned only for cemetery use, had been closed for further burials from August 1973; this was notified by an order published in a subsidiary legislation supplement. In November 1987, the land was compulsorily acquired, pursuant to the government's policy to acquire private cemeteries for development to optimise land use; various newspaper reports of 4 October 1987 reflecting this policy were produced. Development could not take place immediately because time was needed, where cemetery land was concerned, to find new burial sites and to plan for exhumation and redevelopment, "sensitive issues that had to be carefully considered and managed".[80] The introduction of environmental regulations in January 1994 made it difficult to develop the land for residential purposes. The land was rezoned under Master Plans 1998 and 2003 to "reserve site" and later, part of it to "Park", which was completed in 2010, after exhumation was completed in 2009. Given this evidence provided, the court was satisfied with SLA's explanations as to why the land could not be developed much earlier, supported with contemporaneous materials.[81] As such, the powers of acquisition were not found to be exercised in bad faith or for improper purposes.

IV. Collateral purpose, and true and dominant purpose test

1.36 The issue in *Shanmugam Manohar v Attorney-General*[82] related to disciplinary proceedings for lawyers with respect to their possible involvement in a motor insurance fraud scheme; touting practices are contrary to r 39 of the Legal Profession (Professional Conduct) Rules 2015[83] ("PCR").

77 *Ahmad Kasim bin Adam v Singapore Land Authority* [2020] 4 SLR 1447 at [57].
78 *Teng Fuh Holdings Pte Ltd v Collector of Land* [2007] 2 SLR(R) 568 at [38].
79 [2007] 2 SLR(R) 568.
80 *Ahmad Kasim bin Adam v Singapore Land Authority* [2020] 4 SLR 1447 at [61].
81 *Ahmad Kasim bin Adam v Singapore Land Authority* [2020] 4 SLR 1447 at [63].
82 [2021] 3 SLR 600.
83 S 709/2015.

1.37 One Ng would assist potential claimants in filing fraudulent claims and ask them to sign warrants to act, appointing various law firms to act on their behalf. Ng would submit the documents to law firms and receive commissions from them if the injury claims were successful.[84] The applicant, Shanmugam Manohar, had given Ng $800 for six referrals made between 2013 and 2015. On 2 July 2018, the AG referred the information received from the Law Society pursuant to s 5(3) of the LPA where the AG relayed information about the applicant's alleged touting practices and the fact that the applicant had given Ng copies of his firm's warrant for his clients to sign without attending the firm.[85]

1.38 The Law Society, in preparing its case against the applicant, requested from the AG copies of the statements of relevant persons on 13 July 2018.[86] Ng and Krishnamoorthi refused to agree to the request made by the Commercial Affairs Department ("CAD") that the seized warrants be shared with the Law Society, which information was conveyed to the Law Society on 16 October 2018. The Law Society informed the AG that without these statements, it would have no evidence on which to prosecute the matter before a disciplinary tribunal ("DT"), suggesting instead that an inquiry committee be convened under s 85(3)(*a*) of the LPA to consider whether there was sufficient evidence to justify a DT.[87] The CAD later informed the Attorney-General's Chambers ("AGC") that it had no objection to sending the statements to the Law Society, after the AGC contacted them to inform them of the Law Society's position. The AGC later forwarded Ng's statements to the Law Society.[88] The DT members were appointed on 18 July 2019. The applicant sought to have the DT proceedings held in abeyance on 16 August 2019, pending resolution of judicial review proceedings against the AG, at a time where no application for judicial review had yet been filed.[89]

1.39 The applicant argued that the CAD took statements from Ng, Krishnamoorthi and himself for purposes of investigating breaches of the PCR, which was a purpose collateral to the statutory purpose which was confined to investigating criminal offences.[90] He argued that the AG and CAD were subject to a duty of confidence and not entitled to disclose the statements to the Law Society.[91] The AG argued that he was legally entitled to disclose the statements in the public interest, while the Law

84 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [2].
85 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [7].
86 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [8].
87 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [8]–[9].
88 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [9].
89 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [11].
90 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [15].
91 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [15].

Society argued the court did not have jurisdiction to grant declaratory reliefs as s 91A of the LPA ousted the court's jurisdiction.[92]

1.40 The court found that s 91A of the LPA did not apply, as it referred to acts or decisions done or made by the DT, which had yet to take place.[93]

1.41 The court found there was no reason to grant declaratory reliefs as it was appropriate for the DT at first instance to consider evidence which could subsequently be subject to review by the High Court or Court of Three Judges under s 97 or 98 of the LPA. The disclosure of the statements was not in breach of the duty of confidence as it fell within the public interest exception to confidentiality, such that the AG's authority under s 85(3) of the LPA was "correctly exercised because of the exception".[94]

1.42 The purpose of s 91A of the LPA, which only applies to acts of the DT, was relevant as the grant of declarations are discretionary and must be justified by case circumstances.[95] The effect of s 91A is not to oust but to defer judicial review to deal with the delay previously caused by applications for judicial review of DT proceedings while those proceedings were still afoot.[96]

1.43 The applicant argued that the power was exercised for a collateral purpose which was not authorised by s 22(1) of the CPC and thus constituted an "illegality".[97] Section 22(1) provides that a police officer, in conducting an investigation, may orally examine any person acquainted with the facts and circumstances of the case, whether before or after that person or anyone else is charged with an offence in connection with the case, or whether or not that person is called as a witness in any inquiry, trial or other proceeding under the CPC in connection with the case. Here, the relevant power of investigation belongs to a police officer who is answerable to the Commissioner of Police ("Commissioner"), who in turn is answerable to the minister.[98]: and not the AG.[99] Section 22 of the CPC may only be used to investigate a criminal offence. The applicant considered that the police officer, Lie, in exercising his investigatory powers, was doing so for the "true and dominant purpose" of investigating the applicant's potential breach of the PCR.

92 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [16]–[17].
93 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [25]–[27].
94 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [20].
95 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [28].
96 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [29].
97 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [41].
98 Police Force Act (Cap 235, 2006 Rev Ed) s 5.
99 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [44].

1.44 In general, where a statutory provision confers power to obtain information for a specific purpose, that authority may only be exercised for that specific purpose.[100] Valerie Thean J borrowed the English "true and dominant purpose" test, which applies when there is a plurality of purposes for which the public authority exercised its power to obtain the information. Provided the permitted purpose is the true and dominant purpose behind an act, rather than a pretext, this is permissible, even if some secondary purpose is also served.[101] As officials are presumed to act lawfully, the burden is on the party seeking to challenge the lawfulness of such actions to prove their case.[102]

1.45 It is not necessary to prove bad faith in order for a claim of collateral purpose to succeed; bad faith is distinct from taking irrelevant considerations into account as the "touchstone" of bad faith which in administrative law "is the idea of dishonesty".[103] The court noted that bad faith was not a synonym for "an honest though mistaken taking into consideration of a factor which is in law irrelevant".[104]

1.46 Contentions of dishonesty are "serious allegations" which must not be made on "mere suspicions".[105] This is significant as an argument that a statement was recorded for a purpose not statutorily authorised, while not requiring proof of bad faith, may "effectively require proof of bad faith to succeed in certain circumstances".[106] For example, an authority may admit it acted motivated by multiple purposes, even acknowledge some purposes would be unlawful if taken alone, but may attempt to justify its actions by asserting these unlawful purposes were "entirely secondary and incidental to the lawful ones".[107] In such cases, challenging the authority's account "may effectively be an allegation of dishonesty" as the authority would have known it was doing something unlawful but sought to establish a pretext in so exercising its power by dishonestly claiming a lawful purpose was its dominant purpose. The contention that the statement was recorded for an ulterior purpose here

100 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [46].
101 *R v Southwark Crown Court, Ex parte Bowles* [1998] 1 AC 641 at 651, reaffirmed by the English Court of Appeal in *R (Miranda) v Secretary of State for the Home Department* [2016] 1 WLR 1505 at [26].
102 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [53].
103 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [55], citing *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 at [70].
104 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [55], citing *Cannock Chase District Council v Kelly* [1978] 1 WLR 1 at 6D–6F, *per* Megaw LJ.
105 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [57].
106 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [57].
107 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [57].

would effectively be an allegation that the CAD's stated lawful purpose was a cover-up.[108]

1.47 On the facts of the case, Thean J found that the police officer Lie, in conducting the taking of the statements, did so on the understanding that if the applicant was in knowing breach of PCR rules, this "could ground a suspicion of and link to a larger breach of criminal law".[109] The references to the PCR should be read to indicate that the questions asked by Lie sought to identify possible connections between the firm and Ng's offence in relation to motor insurance fraud.[110] If, as the applicant asserted, the investigations were conducted as a pretext for inquiring into PCR breaches, then Lie's administered warning to the applicant that what was being conducted was "a police investigation into an offence of Cheating (Motor Insurance Fraud)",[111] for example, was "not entirely truthful" but indeed, "dishonest misrepresentations".[112] It would follow the CAD's consideration of the criminal case and recommendations to the AGC would have been "fabricated" and Lie's affidavit "an *ex post facto* rationalisation premised on the same sham".[113] There was no evidence to support these assertions and Thean J held that Lie had a "rational explanation" of how he read the AGC's request and how he proceeded to take statements to investigate motor insurance fraud, which was the true and dominant purpose of recording the applicant's statement.[114]

V. Procedural impropriety

A. Stage of proceedings

1.48 The High Court in *CBB*[115] affirmed that the highest standards of natural justice would apply in processes by a court of law or arbitral tribunal, where the parties' rights were determined or affected at the end of the processes; on the facts of the case, the Law Society's Council decision was simply a "preliminary inquiry into whether disciplinary proceedings should be commenced" against the subject of the complaint, and that this decision did not affect the complainant's rights in any way. Thus, the

108 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [57].
109 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [64].
110 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [73].
111 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [69].
112 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [75].
113 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [75].
114 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [75].
115 See para 1.21 above.

failure of the Council not to hold a hearing to which the complainant was invited did not entail procedural impropriety.[116]

B. Absence of compulsory statutory procedure

1.49 In *Pannir Selvam*,[117] the failure to read a Mandatory Death Penalty ("MDP") Notice to the object was not a matter of procedural impropriety as this was not a compulsory procedural prerequisite with a statutory basis.[118] While Parliament had explicitly codified other notices, such as that which must be read to an accused under s 23(1) of the Criminal Procedure Code[119] ("CPC"), it is "telling" that Parliament did not choose to do so here.[120] Parliament could have adopted legislation to make the service of the MDP Notice compulsory, for example, rather than indirectly incorporating a reference to the MDP Notice under Explanation 2(*aa*) to s 258 of the CPC.[121] Though it is open to the courts to supply any legislative deficiency in terms of procedural safeguards by recourse to the "justice of the common law",[122] the court did not consider it was necessary to do so here.

C. Non-compliance with directory statutory process

1.50 The medical profession is subject to a self-regulated disciplinary process, under the auspices of the Medical Registration Act[123] ("MRA"). Section 42(1) provides that a Complaints Committee ("CC") shall complete its inquiry not later than three months after receiving the relevant complaint. It is possible under s 42(2) to apply for an extension of time to complete its inquiry which the Chairman of the Complaints Panel may grant "as he thinks fit".

1.51 The question of whether s 42(2) was directory or mandatory arose in *Lee Pheng Lip Ian v Chen Fun Gee*;[124] the appellant argued that s 42(2) of the MRA was mandatory such that non-compliance with it would invalidate a CC application for an extension of time ("EoT"), as some of these applications were applied for and granted out of time.[125]

116 *CBB v Law Society of Singapore* [2021] 3 SLR 487 at [89] and [90].
117 See para 1.30 above.
118 *Pannir Selvam a/l Pranthaman v Attorney-General* [2020] SGHC 80 at [43] and [48].
119 Cap 68, 2012 Rev Ed.
120 *Pannir Selvam a/l Pranthaman v Attorney-General* [2020] SGHC 80 at [45].
121 *Pannir Selvam a/l Pranthaman v Attorney-General* [2020] SGHC 80 at [45].
122 See *Cooper v Wandsworth Board of Works* (1863) 143 ER 414.
123 Cap 184, 2014 Rev Ed.
124 [2020] 1 SLR 586.
125 *Lee Pheng Lip Ian v Chen Fun Gee* [2020] 1 SLR 586 at [19].

1.52 Where the process set out by law is not complied with, this raises the prospect of procedural illegality;[126] the inquiry here often concerns where the breached procedure was mandatory or directory, and if the latter, whether the party suffered prejudice.[127] The appellant contended that the binary mandatory-directory distinction adopted by the judge in analysing s 42(2) led the judge to conclude that the applications for extension of time under s 42(2) could not be reviewed.

1.53 The Court of Appeal held that the mandatory-directory distinction was "merely a manifestation of the broader question of whether non-compliance affects the validity of an act or decision", leading to the ultimate question of what Parliament intended the consequences of non-compliance would be, whether this would invalidate an act of decision.[128] This is a question of statutory interpretation, where the court considers where there has been "substantial compliance" or "egregious breach".[129]

1.54 Section 42(2) of the MRA is "silent on the consequences of non-compliance"; the Court of Appeal considered it would serve no purpose to read s 42(2) as meaning that non-compliance would invalidate the CC's application for EoT, as a similar complaint could be placed before a newly constituted CC, causing delay.[130] On the facts, the Court of Appeal did not find s 42(2) was not complied with;[131] both ss 42(1) and 42(2) sought to ensure the expeditious processing of complaints and serve the public interest in various ways, such as the swift dealing of valid complaints against errant medical practitioners.[132] Nothing on the face of s 42(2) suggested that the CC had to apply for an EoT before the expiry of the stipulated or extended period.[133] Parliament did not specify a definite time frame by which the CC had to complete its inquiry.[134]

1.55 Thus, the three-month period stipulated in s 42(1) when read alongside s 42(2) was not to be read as a "strict imperative" for which non-compliance would result in invalid proceedings; instead, the timelines were "directory" and expressed "Parliament's general expectation that complaints will be processed expeditiously".[135] Thus applications made

126 *Lee Pheng Lip Ian v Chen Fun Gee* [2020] 1 SLR 586 at [32].
127 *Lee Pheng Lip Ian v Chen Fun Gee* [2020] 1 SLR 586 at [32].
128 *Lee Pheng Lip Ian v Chen Fun Gee* [2020] 1 SLR 586 at [35].
129 *Lee Pheng Lip Ian v Chen Fun Gee* [2020] 1 SLR 586 at [38].
130 *Lee Pheng Lip Ian v Chen Fun Gee* [2020] 1 SLR 586 at [39].
131 *Lee Pheng Lip Ian v Chen Fun Gee* [2020] 1 SLR 586 at [39].
132 *Lee Pheng Lip Ian v Chen Fun Gee* [2020] 1 SLR 586 at [40].
133 *Lee Pheng Lip Ian v Chen Fun Gee* [2020] 1 SLR 586 at [42].
134 *Lee Pheng Lip Ian v Chen Fun Gee* [2020] 1 SLR 586 at [44].
135 *Lee Pheng Lip Ian v Chen Fun Gee* [2020] 1 SLR 586 at [45].

after the expiry of the initial or extended period were permissible and did not invalidate disciplinary proceedings.[136] Thus, non-compliance with s 42(2) did not provide any ground for judicial review.[137]

CONSTITUTIONAL LAW

VI. Article 9(1) – Right to life and personal liberty and meaning of law

1.56 The High Court in *Ong Ming Johnson v Attorney-General*[138] ("*Ong Ming Johnson*") rejected the argument that s 377A of the Penal Code[139] violated Art 9(1) in attaching criminal liability to male homosexuals on grounds of their sexual orientation. It pointed out that there was "no conclusive scientific evidence" to show that homosexuality was immutable or solely caused by biological factors. Further, s 377A was not predicated on a person's identity or status[140] – sexual orientation in itself was completely irrelevant as a heterosexual male could be prosecuted under s 377A if he committed the relevant sexual conduct.[141]

1.57 What was being asked for was special constitutional protection for homosexuals on grounds of their homosexual identity and asking for an unqualified right to personal liberty in the form of erotic identity, which the court rejected.[142]

VII. Article 9(3) – Right to counsel

1.58 The Court of Appeal in *Gobi*[143] clarified the scope of the Art 9(3) constitutional right to counsel in noting that it arose only at the time a person was arrested,[144] and applied only to criminal and not civil proceedings – the application of judicial review was a civil matter, notwithstanding the fact the appellants were then in prison awaiting sentence.[145] On the case facts, there was also no indication that the appellants, who were Malaysian citizens convicted for drug offences and

136 *Lee Pheng Lip Ian v Chen Fun Gee* [2020] 1 SLR 586 at [45].
137 *Lee Pheng Lip Ian v Chen Fun Gee* [2020] 1 SLR 586 at [47].
138 [2020] SGHC 63.
139 Cap 224, 2008 Rev Ed.
140 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [281].
141 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [282].
142 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [283].
143 See para 1.19 above.
144 *Gobi a/l Avedian v Attorney-General* [2020] 2 SLR 883 at [19].
145 *Gobi a/l Avedian v Attorney-General* [2020] 2 SLR 883 at [82].

sentenced to the death penalty, were deprived of the assistance of counsel, despite the issuing by the government lawyer of a statement that the AGC would be "expressly reserving all our rights against Mr Ravi [counsel for the appellants]".[146]

VIII. Article 12 – Executive action

1.59 The approach in *Ramalingam Ravinthran v Attorney-General*[147] was affirmed as settled in relation to governing the principles of prosecutorial discretion, such as whether Art 12(1) of the Penal Code was violated where two people involved in the same criminal activity were charged with different offences. In *Daniel De Costa Augustin v Public Prosecutor*,[148] the question raised was whether the AG's decision to prosecute the respondent but not the Prime Minister's siblings who made similar or more severe allegations violated Art 12(1).

1.60 No novel constitutional issue was found to arise such that no reference of the case from the State Courts to the High Court under s 395(2)(*a*) of the CPC should be permitted. The High Court affirmed that in such a case, the presumption of constitutionality applied such that the applicant had to discharge the burden of proof of showing the AG was biased or took into account irrelevant considerations in deciding to prosecute the applicant and not the PM's siblings.[149] What is a "relevant factor" or "unbiased consideration" is a question of fact, depending on the specific case circumstances.[150]

1.61 Further, even if the applicant was as culpable as the PM's siblings, Aedit Abdullah J noted that there were "clear differentiating factors" between the applicant and the PM's siblings: for example, the applicant had used another person's e-mail account without consent to sign an e-mail, which made allegations in relation to Cabinet members. The PM's siblings' statements focused on the family displeasure between them and the PM.[151] These could be relevant considerations in the exercise of prosecutorial discretion, such that no *prima facie* violation of Art 12 was made out.[152]

146 *Gobi a/l Avedian v Attorney-General* [2020] 2 SLR 883 at [7] and [71].
147 [2012] 2 SLR 49.
148 [2020] 5 SLR 609.
149 *Daniel De Costa Augustin v Attorney-General* [2020] 5 SLR 609 at [23].
150 *Daniel De Costa Augustin v Attorney-General* [2020] 5 SLR 609 at [60].
151 *Daniel De Costa Augustin v Attorney-General* [2020] 5 SLR 609 at [24].
152 *Daniel De Costa Augustin v Attorney-General* [2020] 5 SLR 609 at [84].

A. Article 12 – Scheduling order of execution of prisoners on death row

1.62 The test to be applied in relation to Art 12(1) and execution action was clarified in *Syed Suhail*,[153] where the Court of Appeal rejected the test that there be "deliberate and arbitrary discrimination", with arbitrary implying the lack of any rationality.[154] The Court of Appeal granted the appellant, who had not been granted clemency and who had exhausted all his rights of appeal, leave to commence judicial review proceedings on the issue of scheduling the order of execution.

1.63 The unique case facts arose out of a situation where the scheduling of executions for prisoners convicted of offences with capital punishment was suspended from February to August 2020, pending a judgment in a case where it was alleged that the Singapore Prison Service ("SPS") was prepared to use unlawful methods of execution, which application was rejected by the Court of Appeal in the 13 August 2020 judgment of *Gobi*.[155] After this judgment was delivered, the scheduling of executions resumed. The state needed to decide the sequence in which the executions were to be carried out with respect to a significant number of prisoners, whose executions arose for scheduling at the same time, as these had all been put on hold. The Court of Appeal had accepted as a "rational baseline" the AG's position that "all else being equal, prisoners should be executed in the order that they were first sentenced to death".[156]

1.64 The appellant was convicted of a drug trafficking offence and sentenced to the mandatory death penalty on 2 December 2015; he was told his execution was scheduled on 18 September 2020. This was ahead of other prisoners who were also awaiting execution, including one Datchinamurthy, a Malaysian national, who had been sentenced to death on 15 April 2015. Both the appellant and Datchinamurthy were informed that their petition for clemency was rejected on 5 July 2019. On the face of the record, both Datchinamurthy and the appellant's executions arose for scheduling at the same time after the delivery of the *Gobi* judgment.[157] While a new order of execution was made by the president in relation to the appellant who was placed first in line,[158] no new order was made in respect of Datchinamurthy.

153 See para 1.12 above.
154 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [52].
155 See para 1.19 above.
156 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [70].
157 *Gobi a/l Avedian v Attorney-General* [2020] 2 SLR 883.
158 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [20].

1.65 The appellant applied for a prohibiting order against the SPS in order to stay his execution, accompanied by an affidavit filed by the appellant's counsel, Ravi s/o Madasamy on the appellant's behalf.[159]

1.66 The appellant contended that the fixing of his date of execution violated Art 12 of the Constitution; the supporting affidavit claimed that no executions had been carried out to date in 2020 and there were other prisoners sentenced to death prior to the appellant. It was further alleged that the appellant had been scheduled ahead of the other prisoners because of a state decision not to execute foreigners while border restrictions in relation to the coronavirus disease were in place, as this prevented their family members from entering Singapore to visit their relatives and deal with the repatriation of their remains.[160] It was further argued that the order of execution of prisoners should follow the order they were sentenced to death, as otherwise, the appellant would be deprived of his right to fair trial, being deprived of the time during which he may have been able to adduce further evidence to seek to have the court reopen his conviction.

1.67 While the appellant accepted that the order of scheduled executions need not be strictly sequential, any differential treatment needed a legitimate justification.[161] He argued that scheduling the execution of Singaporeans ahead of those of foreigners was "an act of discrimination based on expediency" that violated his right to equal protection under Art 12(1);[162] in addition, discrimination based on nationality was expressly prohibited by Art 12(2).[163]

1.68 The Court of Appeal, in the course of the judgment, examined the existing "deliberate and arbitrary discrimination" test which had been applied in cases alleging that execution action had breached Art 12(1). This test had been pronounced in *Public Prosecutor v Ang Soon Huat*[164] by Chan Sek Keong J, relying solely on the Privy Council decision in *Howe Yoon Chong v Chief Assessor*[165] ("*Howe Yoon Chong (1990)*"). As it was practically impossible to annually update the valuation of every property for tax purposes, there would at any given point of time be properties whose valuation would be more recent than those of others. Where property prices were rising, this meant that those more recently valued properties would face higher taxes. Nonetheless, the Privy Council held that these

159 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [5].
160 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [7].
161 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [23].
162 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [7].
163 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [7].
164 [1990] 2 SLR(R) 246 at [23].
165 [1990] 1 SLR(R) 78.

shortcomings did not violate Art 12(1). It noted that, as American authorities recognised, it was not possible to attain "absolute equality in the field of valuation for property tax purposes",[166] those inequalities that arose from "the application of a reasonable administrative policy", rather than any intentional violation of the essential principle of practical uniformity, did not amount to deliberate and arbitrary discrimination.[167]

1.69 In the earlier case of *Howe Yoon Chong v Chief Assessor*,[168] the Privy Council had stated that the Art 12(1) equal protection clause could not be breached "by proving the existence of inequalities due to inadvertence or inefficiency unless they were on a very substantial scale".[169] Their Lordships saw no reason to doubt that "intentional systematic under-valuation"[170] in relation to the valuation list would breach Art 12(1) but also noted that "something less might perhaps suffice".[171] They noted that where the defects rising to "the necessary scale" flowed from inadvertence or inefficiency, "the test of unconstitutionality would not be substantially different from the test of validity of the list".[172]

1.70 The Court of Appeal observed that the Privy Council did not suggest that "intentional systematic under-valuation" was the threshold for establishing a breach of Art 12, underscoring that it was prepared to accept that "something less might perhaps suffice".[173] Further, it confined the reasoning in *Howe Yoon Chong (1990)* to the "specific context" at hand, which related to "efficient public administration" and the "practical impossibility" of achieving a more equal outcome in relation to compiling the valuation list. The Privy Council in holding that the test of unconstitutionality would not be substantially different from the test for the validity of the valuation list, which would be that of irrationality, should not be understood as setting out "a general principle for the application of Art 12 in every context".[174]

166 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [53].
167 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [53], citing *Howe Yoon Chong v Chief Assessor* [1990] 1 SLR(R) 78 at [17].
168 [1979–1980] SLR(R) 594.
169 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [54], citing *Howe Yoon Chong v Chief Assessor* [1979–1980] SLR(R) 594 at [13].
170 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [54], citing *Howe Yoon Chong v Chief Assessor* [1979–1980] SLR(R) 594 at [13].
171 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [54], citing *Howe Yoon Chong v Chief Assessor* [1979–1980] SLR(R) 594 at [13].
172 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [54], citing *Howe Yoon Chong v Chief Assessor* [1979–1980] SLR(R) 594 at [13].
173 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [54], citing *Howe Yoon Chong v Chief Assessor* [1979–1980] SLR(R) 594 at [13].
174 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [55].

1.71 The Court of Appeal agreed with the concern raised by M Karthigesu JA in *Taw Cheng Kong v Public Prosecution*[175] that setting the test to that of arbitrariness would be "to pitch the threshold too low", given the judicial duty to uphold fundamental liberties.[176] It was important not to conflate administrative and constitutional law: should the Executive treat individuals in a manner lacking rationality, this would contravene ordinary principles of judicial review on grounds of irrationality or for failing to consider relevant considerations. This was distinct from acts which were "impermissibly discriminatory in nature" which would be captured by Art 12(1). If this were not the case, all executive action challenged under Art 12(1) would only be subject to challenge under "ordinary grounds of judicial review", which would "render Art 12(1) nugatory so far as it related to executive action".[177]

1.72 Further, the formulation of the "deliberate and arbitrary" test actually had the effect of setting the bar "higher" as "deliberate" suggests that irrational discrimination which was "merely reckless and negligent" would not contravene Art 12(1); applying "such a low standard of protection" under Art 12(1) where "life and liberty were at stake" would not "live up to its promise of securing for every person the equal protection of the law".[178] In other words, where recognised fundamental rights to life and liberty were concerned, a more rigorous level of scrutiny was required.

1.73 In justifying a stronger approach towards protecting rights under Art 12(1) in relation to restrictive execution action, the Court of Appeal pointed to cases which applied "a significantly more robust approach", particularly where the matter concerned "the determination of an individual case" rather than a broad, general administrative policy.[179] Although the "deliberate and arbitrary" test was approvingly cited in *Eng Foong Ho v Attorney-General*,[180] it was not applied as the court in considering the reasons given by officers overseeing the land acquisition found it "plain" that it was justified by "valid planning considerations".[181]

175 [1998] 1 SLR(R) 78.
176 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [57], citing *Taw Cheng Kong v Public Prosecution* [1998] 1 SLR(R) 78 at [67].
177 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [57].
178 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [57].
179 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [58].
180 [2009] 2 SLR(R) 542.
181 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [59], citing *Eng Foong Ho v Attorney-General* [2009] 2 SLR(R) 542 at [32]–[37].

1.74 Similarly, the Court of Appeal in *Ridzuan*[182] reiterated the "deliberate and arbitrary" test in a case which involved an Art 12(1) challenge against the Public Prosecutor's decision not to issue a certificate of substantive assistance under s 33B of the Misuse of Drugs Act[183] ("MDA") to the offender, although his co-offender received one. Instructive guidance was provided in *Ridzuan*,[184] in relation to how the offender could make good his case under Art 12(1), that is, to satisfy the evidentiary burden he bears, by showing two things.

1.75 First, that his level of involvement in the offence and the consequent knowledge he acquired of the drug syndicate he was dealing with was "practically identical" to that of his co-offender.[185]

1.76 Second, that he and his co-offender provided "practically the same information" to the CNB, but only his co-offender received the certificate. The offender does not have to produce evidence directly impugning the process by which the Public Prosecutor reached his decision; instead his evidentiary burden can be discharged by highlighting circumstances which raise a "*prima facie* case of reasonable suspicion" of breach of the relevant standard.[186] In this situation, where only one of two persons similarly involved in the same crime, both of whom conveyed similar information to the CNB, receives a certificate, this suffices to raise a *prima facie* case of reasonable suspicion that the Public Prosecutor acted arbitrarily.

1.77 When the evidentiary burden is discharged, the burden than shifts to the Public Prosecutor to justify his decision, and the Public Prosecutor may provide legitimate reasons for treating the co-offenders differently.

1.78 The applicant in *Ridzuan* could thus have discharged his evidential burden "by showing that he could be considered to be equally situated with his co-offender",[187] as like should be treated alike. This could be considered the first limb of the test, while the second limb, when the evidential burden has shifted, would be whether there were legitimate reasons to justify differential treatment.

182 See para 1.13 above.
183 Cap 185, 2008 Rev Ed.
184 *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 at [51].
185 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [60], citing *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 at [51].
186 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [60], citing *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 at [51].
187 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [61].

1.79 As to how to assess "reasonableness", the Court of Appeal identified various "readily available standards": whether the rationale for differential treatment bear a rational relation to the object for which the power is conferred; otherwise, a lack of legitimate reasons may be found if the differential treatment was based on "plainly irrelevant considerations" or as the result of "applying inconsistent standards or policies without good reason".[188]

1.80 Under this two-step test, the notion of being "equally situated" serve as "an analytical tool used to isolate the purported rationale for differential treatment", to enable its legitimacy to be properly assessed.[189] It appears that variable degrees of scrutiny are applicable and in the instant case, given that the decision was taken "on an individual rather than a broad-brush base", and given that it affected fundamental rights of life and liberty "to the gravest degree", the court had to be "searching in its scrutiny".[190] The presumption of constitutionality operated as a "starting point" where the acts in question were "not presumptively treated as suspect";[191] that is, it "merely reflected the incidence of the evidentiary burden of proof on the appellant".[192]

1.81 On the facts of the case, prisoners were considered "equally situated" after clemency has been denied, where there are no further pending proceedings, and before their executions have been scheduled.[193] Prior to this, there is no basis for meaningful comparison between prisoners as the time required for a full and fair presentation and consideration of case merits turns on individual case circumstances. There were no suggestions that prisoners be executed in the order they were sentenced to death, "no matter the stage at which their respective cases were".[194] The appellant's legal expectation to fair treatment under Art 12(1) and the scheduling of executions derives from the concrete interest of not having his death sentence carried out "on a date which was decided without due regard to his constitutional rights",[195] as opposed to the hope that new evidence might emerge which may justify reopening his conviction, such that an earlier execution date might compromise his right to a fair trial, as opposed to another prisoned slated for a later execution date.[196]

188 *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 at [61].
189 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [62].
190 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [63].
191 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [154].
192 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [63].
193 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [66].
194 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [65].
195 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [68].
196 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [68].

1.82 In discussing what it would mean to be treated differently from other equally situated prisoners, the rationale for the AG's position that prisoners be executed in the order they were first sentenced to death was to minimise the period of time each prisoner spent on death row, after the trial court pronounced their death sentence. The Court of Appeal accepted that this was a "rational baseline for equal treatment in the present context".[197] It was "only reasonable" for the state to seek to minimise "any further anguish" a prisoner waiting for execution may face, which it was reasonable to assume "would begin to mount" from the date the prisoner was sentenced. The Court of Appeal clarified it was not making a ruling as to whether there were a fixed set of considerations that may apply in this context or on what might constitute a departure from the "rational baseline"; as the scheduling of executions was an executive and not a judicial function under the statutory scheme, the court recognised that "some flexibility" in scheduling was desirable, albeit, this "must be exercised lawfully".[198]

1.83 The appellant and Datchinamurthy were equally situated as their executions would have arisen for scheduling upon the delivery of the *Gobi* judgment.[199] However, the president made no new order of execution in respect of Datchinamurthy.[200] On the known facts, there appeared to be a discrepancy between the facts and Ministry of Home Affairs' assertion that the scheduling of the order of execution was done the basis of factors such as the date of pronouncement of the death sentence. No other differentiating factors were available to justify the differential treatment of the appellant and Datchinamurthy. This "apparent inconsistency" was sufficient to satisfy the *prima facie* case of reasonable suspicion to grant leave to commence judicial review proceedings.[201]

B. Article 12 and legislative validity

(1) Sentencing under the Misuse of Drugs Act

1.84 In *Saravanan Chandaram v Public Prosecutor*[202] ("*Saravanan*"), the appellant, Saravanan Chandaram, was subject to two separate charges under s 7 of the Misuse of Drugs Act in relation to importing cannabis and cannabis mixture, with respect to a single block of cannabis-related plant material. Trafficking in more than 1000g of cannabis mixture

197 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [71].
198 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [72].
199 See para 1.19 above.
200 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [75]–[76].
201 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [76]–[77].
202 [2020] 2 SLR 95.

attracts the death penalty. "Cannabis mixture" was anything that failed to qualify as cannabis, but which contained tetrahydrocannabinol ("THC") and cannabinol ("CBN").[203]

1.85 The offence of importing or trafficking in "cannabis mixture" as a drug was created by a 1993 statutory amendment of the MDA, for the general purpose of deterring cases where cannabis was trafficked in mixed form, where the plant was broken up and mixed with other vegetable matter such as tobacco.[204] This has enabled the trafficking of large quantities of cannabis and by adulterating it, perpetrators may evade the death penalty. The amendment specifically targeted the trafficking, importation and exportation of a mixture of cannabis and non-cannabis plant material, where the latter was not easily separable from the former.[205] The Court of Appeal affirmed that "cannabis mixture" would not be found where the plant matter consists solely of cannabis.[206]

1.86 The question was whether the sentencing framework under the Second Schedule of the MDA raised constitutional issues with respect to Art 12 of the Constitution, as the sentencing bands it sets out for the offence of trafficking and importing in cannabis mixture is not contingent on the amount of THC and CBN in the mixture. As such, two persons trafficking in cannabis mixture of the same gross weight but with different amounts of THC and CBN are liable to be subject to the same sentencing band, while two persons trafficking cannabis mixture of different gross weights but the same amount of THC and CBN may be treated differently under the Second Schedule.[207] In other words, cannabis mixtures containing the same amount of pure cannabis could attract different sentences if they had different gross weights.[208]

1.87 As a preliminary point before applying the reasonable classification test, the Court of Appeal stated that in relation to the validity of legislation, a presumption of constitutionality:[209]

> … can be no more than a starting point that legislation will not presumptively be treated as suspect or unconstitutional; otherwise, relying on a presumption of constitutionality to meet an objection of unconstitutionality would entail presuming the very issue which is being challenged.

203 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [77].
204 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [100].
205 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [103] and [118].
206 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [104].
207 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [42].
208 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [152].
209 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [154].

While it falls to Parliament to enact laws, whether a challenged law is constitutional or not falls within the competence of the courts.[210]

1.88 The Court of Appeal found that the first limb of the reasonable classification test was satisfied, as the gross weight of cannabis mixture "is objective, clear and understandable" and was thus an intelligible differentia.[211] The second limb was also satisfied, as the differentia of the gross weight of cannabis mixture was found to bear a rational relation to the MDA object and purpose, which was to prevent and deter the distribution and consumption of illicit drugs. The social evil of trafficking addictive drugs was "broadly proportional" to the quantity of drugs brought on the illegal market.[212]

1.89 The concern was raised that two cannabis mixtures of the same gross weight, whose components could not be quantified, and which would result in differing harmful consequence, could yet attract the imposition of the same sentence.[213] The Court of Appeal noted that this was a largely "theoretical exercise"[214] as the definition of "cannabis mixture" endorsed was a commingling of cannabis plant matter with vegetable matter of indeterminate origin where the components could not be easily distinguished or separable from each other; in reality, the components could not be separated, much less quantified.[215] Indeed, the quantification of the amount of THC and CBN in cannabis mixture was "neither precise nor accurate" according to the Health Sciences Authority.[216] It noted that a sentencing framework based on the gross weight of cannabis mixture reflected the reality of cannabis product transactions in Singapore.[217] Thus the "prevailing market practice" supported the proposition that the gross weight of cannabis mixture was "a reliable independent indicator" of the harm done through the trafficking of cannabis mixture; calibrating the sentencing regime according to the gross weight, which was "proportionate to the harm done to society", thus bore a rational relation to the MDA object and purpose.[218] Given the practical difficulties and limitations of scientific testing methods in relation to ascertaining the quantity of THC and CBN in cannabis mixture, one is "left to rely" on the

210 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [154].
211 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [154].
212 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [157].
213 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [160].
214 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [163].
215 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [164].
216 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [167].
217 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [165].
218 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [165].

gross weight of cannabis mixture "as the proxy indicator for sentencing".[219] Thus, Art 12(1) was not breached.

C. Article 12 and section 377A of the Penal Code

1.90 In *Ong Ming Johnson*,[220] it was argued that s 377A of the Penal Code was unconstitutional on the basis that it violated, *inter alia*, Art 12 of the Constitution. Section 377A criminalises acts of gross indecency between male persons, whether in public or private.

1.91 In light of the fact that prior challenges had been dismissed by the High Court and affirmed by the Court of Appeal in *Lim Meng Suang v Attorney-General*[221] ("*Lim Meng Suang*"), the plaintiffs argued that their applications involved "new arguments" on issues not previously canvassed. Ultimately, this challenge also failed and is currently on appeal.

(1) Purpose of section 377A

1.92 One of the arguments raised in relation to Art 12 involved the purpose of s 377A which was introduced into Singapore in 1938. The argument asserted that s 377A was introduced to target male prostitution and thus did not apply to private, non-commercial consensual homosexual conduct. If this was so, then the accepted "reasonable classification" test would have been misapplied.

1.93 The High Court, in examining the purpose of s 377A, considered legislative materials as well as "new evidence".[222] The legislative materials, although vague in parts, provided "reasonably clear indicators" of the legislative purpose and scope of s 377A.[223] In introducing s 377A, the intent was to import existing English criminal law, based on s 11 of the Criminal Law Amendment Act 1885[224] ("1885 UK Act").[225]

219 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [170].
220 See para 1.56 above.
221 [2015] 1 SLR 26.
222 See Attorney-General C G Howell's Amendment Bill speech and the Explanatory Note to the 1938 Penal Code (Amendment) Bill 1938 (Act 12 of 1938) in the Proceedings of the Legislative Council of the Straits Settlements (13 June 1938), which the Court of Appeal had canvassed in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26.
223 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [44].
224 c 69.
225 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [48] and [49].

1.94 The High Court found that the "new evidence",[226] such as books, crime reports and prosecution memos, did not indicate that the sole purpose of s 377A was to combat prostitution. Many of the items were not legislative materials and failed to meet the standard of "relevancy and reliability" to permit reference to be made to them as interpretative aids, and could not be considered "relevant extraneous materials"[227] under the *Tan Cheng Bock v Attorney-General*[228] statutory interpretation framework. Nonetheless, the judge examined these materials on the assumption they could be taken into account.[229]

1.95 Following the framework, extraneous materials may be considered only to confirm the clear meaning of a provision.

1.96 In interpreting the text and context of s 377A, See Kee Oon J, in discerning the ordinary meaning of "gross indecency" between males, found it "wide enough" to cover penetrative and non-penetrative sexual activity between male persons.[230] Further, he noted that s 377A was paired with s 377 in the sexual offences chapter of the Penal Code; as s 377 imposed no requirement that unnatural offences must be limited to commercial male homosexual activity, there was "no reason why a special limitation should be introduced to s377A".[231] Thus, s 377A was intended to be "of general application".[232]

1.97 See J concluded that s 377A covered both penetrative and non-penetrative sex acts and was not confined to male prostitution; instead, s 377A was of general application and was introduced to safeguard public or societal morality.

1.98 The introduction of s 377A was meant to alleviate the difficulty in detecting and proving offences of gross indecency between male persons, as in the Moses Report[233] where a civil servant was found in bed with two boys in a hotel room but no sexual intercourse had taken place.[234] It was also meant to address the inadequacy of punishment for indecent behaviour in public under s 23 of the Minor Offences Ordinance[235]

226 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [50].
227 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [52].
228 [2017] 2 SLR 850.
229 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [52] and [181].
230 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [94].
231 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [95].
232 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [96].
233 Report concerning the resignation of H Moses (24 March 1938).
234 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [78].
235 Ordinance 13 of 1906.

("MOO").[236] Section 377A offences did not require proof of sexual penetration.[237] Further, it would "aid detection and investigation" and promote co-operation, enabling "strong enforcement and prosecution" since it would "foreseeably make it easier" to secure confessions for a s 377A offence, which carried a lower sentence.[238] Section 377A was introduced in 1938 to cover the gap in existing criminal legislation as "some unnatural offences" fell outside both the copes of s 377 of the Penal Code and s 23 of the MOO; s 377A covered "non-penetrative sexual activity in private involving male persons" but this does not "inexorably" lead to the conclusion this is all s 377A covered, or that it was intended only to deal with male prostitution.[239] Reading s 377A to at minimum cover "all forms of non-penetrative sexual activity regardless of whether they involve male prostitutes or whether the acts were done in public or in private"[240] was consistent with the ordinary meaning of "gross indecency" in s 377A. Neither did AG Howell's speech or the Objects and Reasons of the 1938 Penal Code amendment contain any "specific exclusionary intent" or statement that s 377A only addressed the sole mischief of male prostitution. Nothing was said about there being no overlap between ss 377A and 377 of the Penal Code, and s 23 of the MOO.[241] It was not reasonable to adopt a strained interpretation to narrow the scope of s 377A. It would have been easy enough for the British colonial administration to craft "a more precise legislative solution" to deal with male prostitution.[242]

1.99 It was further argued that there should be no overlap between s 377 (which covered unnatural sexual offences including penetrative sexual acts between two male persons) and s 377A.[243] Homosexual penetrative sex was already covered by s 377 and it was asserted that it would serve "no purpose" for s 377A also to cover penetrative sex acts which under s 377A would result in a lighter sentence (two years maximum), as opposed to imprisonment for up to ten years under s 377.

1.100 The High Court found there was nothing anomalous with having two offence provisions which proscribed similar conduct and imposed different punishments as penal laws commonly overlap as is evident from the "numerous examples of overlapping offences" in the

236 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [104].
237 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [105].
238 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [106].
239 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [108].
240 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [109].
241 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [110].
242 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [112].
243 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [25].

Penal Code.[244] Further, as s 377A was meant to ensure a consistent and harmonious set of laws governing all acts of gross indecency in the UK and Singapore, the interpretation of s 377A could not be "conveniently detached" from how its English equivalent was applied.[245] There were cases where sodomy was involved in prosecutions conducted under s 11 of the 1885 UK Act.[246] Section 11 was also used to prosecute Oscar Wilde for 25 offences involving gross indecencies, including alleged acts of sodomy.[247] See J noted[248] that former Chief Justice Chan Sek Keong had adopted the false premise that s 11 was only used to prosecute grossly indecent acts short of sodomy in his article.[249] It was clear s 11 was used in cases involving penetrative sexual acts and which did not invariably involve male prostitutes.[250] Various Singapore cases indicate that prior to 2007, s 377A was used to prosecute acts of fellatio, which is a form of penetrative sexual activity within s 377.[251]

1.101 Thus, the rationale underlying s 377A was to uphold societal morality over "taboo" acts that were not publicly or directly discussed for fear of the corruptive impact of such acts of "beastliness".[252] It was thus not limited to commercial sex between males.[253] Even with the additional material, See J noted there was "every justification" to accept the Court of Appeal's determination in *Lim Meng Suang*[254] on the purpose of object of s 377A, which was to enforce public morality.[255] Further, the non-proactive enforcement policy did not repudiate the legitimacy of the purpose of s 377A, to enforce public morality, as the court appreciated law's important function of reflecting public sentiment and beliefs; the effectiveness of a law goes beyond enforcement; law has an educative and symbolic function and efficacy is also gauged by what a law might prevent beyond a criminalised act.[256]

244 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [130].
245 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [121].
246 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [123].
247 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [126].
248 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [127].
249 Chan Sek Keong SC, "Equal Justice under the Constitution and Section 377A of the Penal Code – The Roads Not Taken" (2019) 31 SAcLJ 773 at 782, fn 34.
250 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [128].
251 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [129].
252 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [139].
253 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [141]–[142].
254 See para 1.91 above.
255 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [145].
256 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [296]–[298].

(2) Presumption of constitutionality

1.102 See J noted that the Court of Appeal in *Lim Meng Suang*[257] opined that the presumption of constitutionality that accompanies the reasonable classification test might not operate as strongly for pre-Independence law as it does for laws after 1965, as post-Independence laws would be promulgated by an elected legislature rather than a colonial legislative assembly.[258] The presumption is predicated on the premise that "Parliament knows best" and legislates to meet the needs of the people and Parliament as such did not come into existence until after a colony gains independence.

1.103 With specific respect to how the presumption of constitutionality might operate in the context of s 377A, which was adopted in 1938 when Singapore was part of the Straits Settlement, See J considered that it applied "with equal (if not greater) force to s 377A as it does to post-Independence laws", given that it was "extensively debated and comprehensively considered" in Parliament in 2007. Thus, it was unlike many pre-Constitution provisions that "simply remained on the statute books without subsequent consideration and debate in Parliament as part of a petition rather than a bill, although the decision was taken to retain it.[259] Parliament in the post-Independence era effectively ratified a colonial era law through a process of deliberation and retention.

(3) Reasonable classification test

1.104 In applying limb one of the reasonable classification test, See J held, as the Court of Appeal in *Lim Meng Suang*[260] had, that s 377A provided a "clear differentia", being targeted at homosexual acts between males, as opposed to sexual acts between females or between males and females.[261]

1.105 Thus, the question arose under limb two, as to whether this targeting was "so unreasonable as to be illogical and/or incoherent". In other words, whether "there is no reasonable dispute" as to the "unreasonableness of the differentia concerned from a moral, political and/or ethical point of view".[262] See J considered the differentia was "not so patently unreasonable." Other Singapore laws drew distinctions between men and women, such as the exemption of women from caning

257 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26.
258 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [149].
259 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [152]–[154].
260 [2015] 1 SLR 26.
261 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [171].
262 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [171].

under s 325(1)(*a*) of the CPC. In relation to this provision, the Court of Appeal in *Yong Vui Kong v Public Prosecutor*[263] ("*Yong Vui Kong*") held there were "obvious physiological differences" between the sexes which Parliament could legitimately consider, and that it was not for the courts to "pass judgement on the soundness of rationality" of the "gendered social attitudes" that shaped the exemption, given the moral sense of the community or considerations of decency.[264] Indeed, s 325(1)(*a*) was re-enacted when the CPC was amended in 2010 which showed that the exemption of women from caning was not a "colonial relic" and continued to represent prevailing opinion. Section 69 of the Women's Charter[265] also embodied differential treatment on grounds of gender with respect to spousal maintenance.[266] Thus, the s 377A differentia was logical and coherent and had an intelligible differentia.

(4) Over and under inclusiveness

1.106 Section 377A was also challenged for being over/under inclusive which relates to the "rational relation" requirement whereby the prescribed classification has to "broadly fit" the legislative object. If the classification is too broad or too narrow, the "strength of the relation between the differentia and the objective of that legislation may not be sufficiently strong to justify making that classification".[267] In ascertaining whether a statute was over or under inclusive, it bears remembering that a perfect classification is not required and that the court should focus on the legislative purpose and its connection to the differentia underlying the challenged legislation, rather than "an exercise of dismantling various categories and classes", to avoid tautological reasoning.[268] Section 377A was found to be neither under or over inclusive.

1.107 The argument that s 377A was under-inclusive was based on the fact that s 377A only dealt with male homosexual conduct and not "other purportedly immoral conduct such as female homosexual conduct or adultery".[269] The assertion was that the rubric of "like should be treated alike" would purportedly be breached "due to the differing treatment of persons who engage in different types of immoral conduct".[270] The hidden

263 [2015] 2 SLR 1129.
264 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [172], citing *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [110]–[111].
265 Cap 353, 2009 Rev Ed.
266 *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [173].
267 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [184], citing *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 HC at [96]–[97].
268 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [186]–[187].
269 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [188].
270 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [188].

assumption is that Parliament should treat all forms of immoral conduct as morally equivalent.

1.108 However, the purpose of s 377A is the criminalisation of male homosexual conduct to safeguard public morals and reflect societal morality, producing a "complete coincidence" in the differentia and legislative object.[271] Its purpose was "not to discriminate against male homosexual conduct" but through criminalising it, to safeguard public morals, and under limb one, the courts could consider whether this differentia was illogical and/or incoherent.[272] On matters of public morality, it was not for the courts but Parliament to make determinations, and in so doing, it did not have to assume adultery or female homosexual conduct was "subject to the same degree of societal disapproval" as male homosexual conduct,[273] In approaching a problem, Parliament is entitled to evaluate the degrees of harm any particular instance of conduct entails and craft a legislative regime accordingly.

1.109 The argument that s 377A was over-inclusive was based on the assumption that private conduct did not harm public morals; the court held that the former could not be divorced from the latter. Offences like incest or bestiality are criminalised under ss 376G and 377B of the Penal Code, regardless of whether this takes place in public or private.[274] This rejects the liberal assumption that what takes place in "private" has no bearing in "public".

1.110 The High Court considered arguments that a test of proportionality review should be adopted, reviewing the approaches in Malaysia, India, Hong Kong and the US. These arguments flowed out of frustrations that Art 12(1) and its reference to "general law" was considered to be more aspirational and declaratory in nature, and unable to furnish "any specific legal criteria" to decide whether Art 12(2) was violated by a statute. Further, while any prohibition against gender discrimination had to stem from Art 12(1), given the exhaustiveness of the enumerated grounds in Art 12(2), Art 12(1) only protected against gender classifications that failed the reasonable classification test.[275] Article 12(1) did not accord "free-standing substantive rights".[276] The wording of Art 12(1) did not "lend itself to the creation of categories

271 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [189].
272 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [191].
273 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [192].
274 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [193].
275 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [198]–[205].
276 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [205].

for substantive protection" independent of Art 12(2) (such interpretation would render Art 12(2) otiose.[277]

1.111 See J noted that reasonable classification, being a threshold test, had limitations and, as the Court of Appeal in *Lim Meng Suang* noted, "does not really aid the court in ascertaining whether or not the concept of equality under Art 12(1) has been violated".[278] This did not justify the addition of a proportionality limb to the reasonable classification test, which requires that the "least restrictive measure" be adopted and involved the court in reassessing the balance and relative weights according to the competing interests, as distinct from whether a legislative choice falls within the range of reasonable decisions.[279]

1.112 This test, which involves an intrusive standard of review distinct from traditional judicial review principles, assesses the legitimacy of a statute, as well as its implications and effects which are extra-legal in nature, and entails the risk of excessive judicial legislation. So too the American "rational basis standard of review" and the judicial willingness to engage in a determination of the legitimacy of a statute and its implications under the Fourteenth Amendment stands at odds "with the reluctance of the Singapore judiciary to address extra-legal arguments".[280] Ultimately, See J found that foreign jurisprudence adduced was of limited assistance in arguments seeking to apply a proportionality based approach in Singapore law, which he declined to endorse.[281]

IX. Article 14 and free speech

A. Scope of free speech and freedom of expression

1.113 In *Ong Ming Johnson*, the High Court rejected the argument that the right to expression under Art 14(1)(*a*) encompasses "the right of all adult Singaporeans to engage in private, consensual acts of sexual intimacy with whomsoever they desire" such that s 377A of the Penal Code was incompatible with Art 14.[282]

1.114 While the "plain and ordinary" meaning of the term "expression" might include sexual intercourse as "a form of expression", the meaning

277 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [207] and [208].
278 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [71].
279 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [212]–[223] and [229]–[237].
280 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [228].
281 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [237].
282 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [240].

of expression in Art 14 had to be taken in context, including marginal notes in a statutory provision as an interpretative aid, with primacy given to the actual statutory language.[283]

1.115 In relation to Art 14, the marginal note states "Freedom of speech, assembly and association" and does not mention freedom of expression as a free-standing right.[284] It appears from the marginal note that freedom of expression "was contemplated as something relating to or falling within the right to freedom of speech", which is, "the verbal communication of an idea, opinion or belief".[285] In the context of Art 14, the term "expression" is thus to be read together with the term "speech".[286] Thus, expression in the form of male homosexual acts did not qualify for protection under Art 14(1)(*a*).[287]

1.116 See J noted that an expansive interpretation of a term like freedom of expression, as reflected in Canadian and Indian approaches, "can potentially lead to absurd outcomes". Arguably, sexual offences like incest, paedophilia, necrophilia or bestiality could be covered by the Art 14(1)(*a*) umbrella as protected forms of "sexual expression" on the premise that such acts could be characterised as "mere expressions of sexual preference" according to individual idiosyncrasies, which cannot be correct where these acts remain criminalised.[288]

B. Scandalising the court

1.117 *Wham Kwok Han Jolovan v Attorney-General*[289] is the first case to be decided under s 3(1)(*a*) of the Administration of Justice (Protection) Act 2016[290] ("AJPA"). This was introduced in 2016 to replace the judicially developed test of "real risk" that contemptuous speech would undermine public confidence in the administration of justice, with the more abstract "risk" test.

1.118 The appeals against conviction for scandalising the court arose out of statements made on Facebook posts and the case indicates how the Judiciary is coming to terms with the modalities of communications technology in the form of online speech. What is of especial pertinence is the potential reach of online communication, the ease of republication

283 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [245].
284 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [246].
285 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [246].
286 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [249].
287 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [255].
288 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [263].
289 [2020] 1 SLR 804.
290 Act 19 of 2016.

(for example, sharing a post), and the longevity of a post where available online and how this poses a continuing harm, where found to be contemptuous or otherwise false. This is significant as the test of a "risk" speaks more of the potential effect, as distinct from a "real risk" test where "real" requires a more contextual, evidential basis for assessing a risk.

1.119 Wham Kwok Han Jolovan ("Wham") published a Facebook post on 27 April 2018, 6.30pm, which 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."[291] The post included a link to an online article titled "Malaysiakini Mounts Constitutional Challenge against Anti-Fake News Act".[292] On 6 May 2018 at 11.05am, Tan Liang Joo John ("Tan") posted on his Facebook profile the statement: "By charging *Jolovan* for scandalising the judiciary, the AGC only confirms what he said to be true" [emphasis in original].[293] Tan's post contained a link to Wham's Facebook profile. Both posts were published under the "Public" setting of Facebook's audience selector[294] which meant that anyone with access to cyberspace could potentially view it.

1.120 Wham published subsequent posts on 9 May 2018 and 8 October 2018 discussing his prosecution for contempt, and on 8 January 2020, where he stated he would be "sharing a little on the history of the law" he had been convicted under, "the legal arguments … put forth" and "why this law is unconstitutional".[295] After the hearing of this present appeal, Wham made another post on 20 January 2020 where he insisted his criticisms were "temperate and moderate"; that his post had "attracted fewer than 20 likes and was shared by only one person";[296] and, further, that John Tan had "shared [his] post without repeating its contents".[297] All these posts made reference to the original post of 27 April 2018 ("the original post"). Similar considerations applied to Tan's post, with Tan's criticism of the AG. for undertaking the prosecution being something over and above his criticism on the Singapore courts.[298] The High Court sentenced both Wham and Tan to a $5,000 fine with a week's imprisonment in default.

291 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [6].
292 Hafiz Yatim, "Malaysiakini Mounts Constitutional Challenge against Anti-Fake News Act" *Malaysiakini* (27 April 2018).
293 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [8].
294 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [6].
295 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [15].
296 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [16].
297 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [16].
298 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [21].

1.121 In these later posts, Wham intimated that his views were based, *inter alia*, on his reading of several Malaysian cases.[299]

1.122 The *mens rea* and *actus reus* requirement under s 3(1)(*a*) of the AJPA was found to be satisfied. This provides that:

> 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
>
> (ii) poses a risk that public confidence in the administration of justice would be undermined …

1.123 Wham was found to have intentionally published his Facebook post – there being no requirement that there must be an intention to scandalise. It was irrelevant for sentencing purposes that Wham had protested he did not intend to scandalise the court.[300] Further, the first limb of s 3(1)(*a*) was satisfied as Wham's statement impugned the integrity and impartiality of Singapore judges and courts. The Court of Appeal, in the absence of "any viable alternative interpretation", held that there was "no other reasonable way" to interpret or understand Wham's post other than that Singapore judges, unlike their Malaysian counterparts, would decide a case with political implications "on the basis of something other than the merits of the case".[301] This was its "objective interpretation"[302] and the statement in its nature constituted one of the "most serious attacks" against the courts, impugning "the very heart and essence of the judicial mission and oath".[303] As Wham's post was contemptuous, so was Tan's.[304]

1.124 The focus was on whether the post posed a "risk" as required under s 3(1)(*a*)(*ii*) of the AJPA, and whether the statement constituted "fair criticism" which would not constitute a scandalising contempt under s 3(1)(*a*). As this is not statutorily defined, recourse to case law is still necessary.

1.125 The test to be applied in relation to ascertaining "risk" was that of the perspective of the average reasonable person. The Court of Appeal noted that Parliament's intent in introducing the test was to ensure it

299 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [10].
300 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [51].
301 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [32].
302 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [32].
303 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [33].
304 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [34].

could be applied "more expediently and pragmatically", to avoid make hair-splitting distinctions on the level of risk necessary to satisfy the test. This was a product of a "considered policy choice" favouring the preservation of the "pristine" integrity and standing of the Judiciary.[305] As such, importing terms derived from the elucidation of what the "real risk" test required in *Shadrake Alan v Attorney-General*[306] was not helpful.[307] Risks were either "objectively existent or objectively non-existent", which was an approach pegged to asking whether reasonable people would consider it bore guarding against to avoid undermining public confidence in the administration of justice. In this respect, the content and context of the alleged contemptuous statement was relevant.[308]

1.126 The Court of Appeal considered that a reasonable person reading Wham's (and Tan's) post would conclude that it posed the necessary risk. Various factors were highlighted. First, the content of the statement which was a "direct attack" on judicial independence.[309] Second, the court took careful note of the circumstances of the Wham's communication: that it was on a "public" Facebook setting, that Wham had some 7,200 Facebook followers at the relevant time; that only 33 people had responded to the original post (through "likes") did not in itself "reveal anything about how many people had in fact read the post".[310] Further, the test of "risk" did not requiring a showing that public confidence in the administration of justice "had in fact been undermined".[311] The court clearly rejected the view that the fact it was a Facebook post did not *per se* make it "so fanciful or self-evidently unreliable"[312] that it posed no risk at all. Third, Wham had held himself out as a knowledgeable commentator on social affairs and had intended that his post be taken seriously.[313]

1.127 Fair criticism has two basic components: that of style (temperate speech) and substance (whether there was a reasonable basis for the criticism). There was no immediate issue with style; in finding that fair criticism was not made out for Wham's and Tan's posts, the Court of Appeal pointed out there was "no objective or rational basis".[314] The court noted that Wham claimed his post was informed by his comparison of three Malaysian cases against three Singapore cases, though it suspected

305 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [36]–[37].
306 [2011] 3 SLR 778.
307 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [38].
308 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [38].
309 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [39].
310 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [20].
311 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [20].
312 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [39].
313 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [39].
314 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [41].

this was an afterthought, as one of the cases Wham said he referred to was only released one week after his original post. It was further unclear whether Wham had actually read the cases or read about them.[315] Even assuming he had read them, the Court of Appeal held that Wham had to explain how exactly the case pairs were comparable and had failed to do so, only making "bare and *conclusory* assertions" [emphasis in original].[316] The Court of Appeal agreed with the trial judge that the case pairs were not in fact comparable, on legal and factual grounds,[317] and contained nothing which could support the reasonable conclusion that Singapore judges would decide cases with political implications otherwise than in accordance with their merits. Wham failed to meet the threshold of showing "an objective basis" upon which his criticism could be "reasonably put forward"; thus, his comment did not constitute fair criticism.[318]

1.128 Notably, a cease-publication injunction was ordered requiring Wham not only to refrain from repeating his contemptuous statement, which he had done in subsequent Facebook posts, but also to take down the original post. The court did not accept the argument that the old posts would "fade away", noting that Wham's Facebook post was a "continuing publication" and would continue to be published for the entire time it was available on the Internet.[319] This is because it could be "continually disseminated" and would actively resurface in the news feed of another individual, given how algorithms worked in relation to Facebook friends and followers.[320] The Court of Appeal went into granular detail in noting how many reactions, comments and shares Wham and Tan's posts had garnered.[321] There was no good reason for leaving the contemptuous posts online, because it was technically feasible to remove them and because the posts had yet to fade from public consciousness, as Wham had "repeatedly referred" to them in subsequent posts.[322] This reflects a judicial appreciation of the enduring quality of online posts.

C. Article 14 and Protection from Online Falsehoods and Manipulation Act cases

1.129 The first two cases brought under s 17(1) of the POFMA, involving an appeal to the minister to vary or cancel various Pt 3 correction orders,

315 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [44].
316 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [45].
317 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [51].
318 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [47].
319 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [80].
320 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [80].
321 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [80].
322 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [82].

were heard in 2020. This yielded two High Court decisions – *Singapore Democratic Party v Attorney-General*[323] ("*SDP*") and *The Online Citizen Pte Ltd v Attorney-General*[324] ("*TOC*") – with differing conclusions on which party bore the burden of proof in relation to POFMA appeal proceedings, which has implications for free speech and constitutional interpretation approaches.

1.130 In *SDP*, three Correction Directions ("CDs") were issued in relation to an article entitled "SDP Population Policy: Hire S'poreans First, Retrench S'poreans Last" ("the SDP article") on its online website on 8 June 2019, which was before the POFMA came into effect on 2 October 2019. Two further Facebook posts were published on 30 November 2019 and 2 December 2019, which contained a hyperlink to the SDP article.

1.131 The High Court found that hyperlinking fell within the s 3(1) definition of "communication" which requires that information be made available "to one or more end-users in Singapore, on or through the internet". The hyperlink here "makes the SDP article easily available to readers", constituting an invitation to use the hyperlinks to read the SDP article which "is just one click away".[325] This is similar to defamation law where republication of a libel is a new libel.[326] As it was clear that the appellant had "endorsed" the material in the hyperlinked SDP article, inviting readers to access it, this constituted a republication of the whole article, rejecting the argument that the hyperlinking only applied to parts of the article as being unreasonable and artificial.[327] There was no need to consider in depth the considerations raised in the Canadian case of *Crookes v Newton*[328] as to whether hyperlinking *ipso facto* constituted republication, such as whether material was made readily available to third parties or whether endorsement of the content of the hyperlinked text was required.[329]

1.132 CDs may be issued under s 10(1) of the POFMA provided they contain a false statement of fact, has been communicated in Singapore and the minister considers that it is in the public interest to issue the CD. The CDs were issued at the direction of the Minister of Manpower by the POFMA Office of the Info-Comm Media Development Authority.[330] All three CDs stated that the material referred to contained a false statement

323 [2020] SGHC 25.
324 [2020] SGHC 36.
325 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [52].
326 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [53].
327 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [56].
328 [2011] 3 SCR 269.
329 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [54].
330 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [6].

of fact. The appellant complied with the direction to add correction notices at the top of the SDP article and two Facebook posts.[331]

1.133 To identify the relevant "subject statement", the material and meaning(s) which the material conveys must be identified. The subject statement refers to "a false statement of fact which is reasonably discerned from the material";[332] it is "an interpretation, drawn from the material in question" which the Minister asserts is a false statement of fact.[333] If the subject statement is true, as the appellant asserted, the High Court may set aside a CD under s 17(5) of the POFMA. Section 2(2)(*a*) provides that a statement of fact is a statement which "a reasonable person seeing, hearing, or otherwise perceiving it would consider it to be a representation of fact".

1.134 Drawing guidance for defamation law, it falls to the court to determine on an "objective standard" how the statement would strike the "ordinary reasonable reader" and whether it is a statement of opinion or a statement of fact, which is itself a question of fact.[334] Ang Cheng Hock J concluded that the relevant statement ("The SDP's proposal comes amidst a rising proportion of Singapore PMETs getting retrenched") was a statement of fact as it was unequivocally framed, and there was nothing which "qualifies it"; nor was there indication that the statement was "based on particular data sources", which militated against a finding that a reasonable reader would find it to be a comment.[335] By not referring to any methodology or supporting data source, the statement read as "a straightforward assertion of a factual state of affairs".[336] There was "no basis to construe it as a statement of opinion".[337]

1.135 Ang J considered that the burden of proof fell on the government, noting that POFMA did not specify which party bore this in the present proceedings. His reasoning stems from Art 14 of the Constitution, which was the "starting point", and appears to have proceeded on the basis of a presumption of liberty rather than legality. Article 14 provides that "every citizen of Singapore has the right to freedom of speech and expression", which would include the members and officers of the appellant Singapore Democratic Party. Read with s 103(1) of the Evidence Act,[338] the one asserting a fact is required to prove it. Since it was the minister

331 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [6].
332 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [9].
333 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [10].
334 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [29].
335 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [30].
336 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [32].
337 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [32].
338 Cap 97, 1997 Rev Ed.

who desired the court to give judgment that the appellant's free speech rights should be curtailed, it appeared that it fell on the minister to prove that facts warranting the curtailment of the Art 14 right existed, that is, "a false statement of fact has been made".[339] Ang J also was unsatisfied that Parliament could have intended the appellant to bear the burden of proof given the "clear information asymmetry" between the minister and the maker of a statement being challenged under POFMA.[340] The latter had "far more limited resources" than the minister who could rely on the machinery of state to procure relevant evidence of falsity.[341] Were an individual to bear the burden of proof, this would place him in an "invidious" position.[342] For Ang J, the fact of "information asymmetry" cast doubt on whether Parliament intended to place such an "onerous burden" on the statement-maker.[343] Furthermore, he was fortified in his view in so far as the minister under reg 6 of the POFMA Regulations 2019[344] was not statutorily obliged to provide evidence to show that the issuance of the CD was justified as he is required only to show the "basis" on which the subject statement is determined to be a false statement of fact.[345] Were the appellant to bear the burden of proof, this could mean that hypothetically, in a situation where the minister or respondent "completely fails" to provide "any evidence" of a statement's falsity, the respondent could still succeed in have a s 17(5) appeal dismissed, even if it is the minister seeking to infringe upon the appellant's freedom of speech.[346]

1.136 Belinda Ang Saw Ean J in *TOC* questioned the propriety of "reconstructing legislative intent" on the basis of a concern like informational asymmetry which Parliament did not articulate and which the judge was not prepared to read into legislative intent.[347] Ang J further considered it was not oppressive to place the burden on the statement-maker as once *prima facie* evidence of the statement's truth is found, the evidential burden that shifts aback to the respondent.[348]

1.137 It was argued that if a subject statement had more than one reasonable interpretation, a CD could be issued if that reasonable interpretation is false, notwithstanding that other reasonable

339 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [37].
340 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [39].
341 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [39].
342 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [39].
343 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [39].
344 S 662/2019.
345 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [41].
346 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [43].
347 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [43].
348 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [44].

interpretations which are true may exist.[349] Rather than adopting and applying the single meaning rule from defamation law in the POFMA context, it was urged by the Deputy Attorney-General that a multiple meaning rule be adopted whereby a CD could be justified if one of the multiple reasonable meanings is false.[350] This is because the single meaning rule in defamation law served to allow juries to quantify damages.[351]

1.138 In contrast, POFMA had a different underlying policy and a far broader scope than defamation law. Its purpose was to ensure that the public was not misinformed in matters of public interest.[352] Further, s 2(2)(*b*) of the POFMA provides for the many ways a statement may be identified as false, "[w]hether wholly or in part and whether on its own or in the context in which it appears".[353] A multiple meaning rule would better service POFMA policy to discourage mischief-makers from making "ambiguous statements that might mislead some segments of the public, but not others".[354] Section 2(2)(*b*) differed from the "bane and antidote" rule in defamation law, which required a publication to be considered in its entirety as a potentially defamatory statement in one part of an article may be nullified by another part of a publication which has the effect of neutralising the defamatory statement.[355] This does not apply to POFMA as a statement which is false, on its own, would within the ambit of s 2(2)(*b*).[356] Ang J was of the preliminary view that the single meaning rule would not be directly applicable in the POFMA context, as the underlying legislative purpose was different.[357]

1.139 Nonetheless, the test to be applied in determining the meaning of a statement should, like defamation law, be pegged to what a reasonable reader, who was neither "unusually suspicious" nor "unusually naïve",[358] would understand from the relevant materials, which is "an objective assessment".[359] Subjective intentions of the statement-maker are not relevant, particularly as s 11(4) of the POFMA provides that a CD can be issued even if the statement-maker did not know or had not reason to believe the statement as false.[360]. *The Online Citizen* ("TOC") took no position regarding the truth of the subject statement, which is one

349 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [60].
350 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [63].
351 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [62].
352 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [62].
353 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [62].
354 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [63].
355 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [69].
356 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [69].
357 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [89].
358 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [71].
359 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [70].
360 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [70].

ground under which the High Court may set aside a Pt 3 direction under s 17(5)(*b*) of the POFMA.

1.140 Having identified the subject statement, Ang J found that the respondent had adduced sufficient evidence on a balance of probabilities to show that it was false, which in the context of s 2(2)(*b*) of the POFMA, would include "misleading statements". Here, for example, the subject statement was found to be misleading as it failed to mention that recent data (2015–2018) contracted the statement that the retrenchment rate for local professionals, managers, executives and technicians ("PMETs") had increased.[361]

1.141 In contrast, Ang J in *TOC*,[362] in dealing with a s 17(5) appeal held that the burden of proof fell upon the appellant, based on reasoning which drew from the construction of the relevant statutory provisions.[363] Here, a CD was issued by the competent authority under the instruction of the Minister of Home Affairs to TOC which had published an article reporting that a Malaysian non-governmental organisation, Lawyers for Liberty, had issued a press statement alleging inhumane methods of executing the death penalty in Singapore. TOC maintained it was agnostic as to the veracity of the press statement, which is irrelevant in the light of s 11(4) of the POFMA; TOC had not verified the truth of the contents of the press statement and had contacted the Ministry of Home Affairs for comments without eliciting a response.[364] TOC thus had no legal basis for an application to set aside a CD under s 17(5)(*b*) of the POFMA.

1.142 Ang J noted that s 11(4) of the POFMA was intended to stop and prevent the spread of online falsehoods and misleading information where posted online, "without prior verification", whether deliberately or otherwise. The Pt 3 CD was a "countermeasure to debunk stories" which the minister considered was based on false facts and where that minister considers the continued circulation of misinformation to be contrary to the public interest.[365]

1.143 Section 17(5) was to be read as requiring TOC to prove the truth of the statement rather than the respondent to prove its falsehood; Ang J found that recourse should in this respect be had only to the framework under s 17 of the POFMA to ascertain where the onus for the burden of proof lay, as the Evidence Act was a "red herring".[366]

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361 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [98].
362 See para 1.129 above.
363 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [20].
364 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [3] and [46].
365 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [15].
366 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [16].

1.144 From construing the framework under s 17 of the POFMA, which was to be accorded "greater weight" than any common law maxim,[367] Ang J held that the statement-maker, to establish its case for setting aside a Pt 3 CD, had to "prove the truth of a statement" rather than requiring the respondent to prove the statement's untruth.[368]

1.145 Ang J noted that under s 10 of the POFMA, it fell to the minister to prove that two conditions were satisfied: (a) a false statement of fact had been communicated in Singapore; and (b) it was in the public interest to issue a direction. Before the statement-maker could avail himself of the s 17(5) of applying to the High Court to set aside the Pt 3 CD, he had first to apply to the minister to cancel or vary the Pt 3 CD under ss 19(2) and 17(2). As such, an application to the High Court to set aside a Pt 3 CD was not an appeal against the minister's decision under s 10(1) to issue the CD in the first place, but an appeal against the minister's decision under s 19 rejecting an application to cancel or vary the Pt 3 CD.

1.146 Section 17(5) of the POFMA refers to "the person" and the grounds which said person must establish to set aside a Pt 3 CD.[369] The person is the statement-maker who communicated the subject statement in Singapore; s 17(5)(*c*) which relates to the technical impossibility of compliance with the direction is also directed at the statement-maker who is alone able to explain why a Pt 3 CD cannot be complied with. The relevant "person" must under s 17(5)(*b*) show that the statement either is not a statement of fact or is true. Therefore, s 17(5) grounds "characterise the legal elements in terms of the positive case that the statement-maker has to meet".[370] From the statutory language, the onus lies on the statement-maker to establish any of the grounds under s 17(5) to set aside a Pt 3 CD. In contrast, s 10(1) states the positive case which the respondent has to satisfy.[371]

1.147 Ang J considered that if the legal burden was to be on the respondent, Parliament could have worded the legal elements of s 17(5) in a manner akin to the language adopted in s 10(1), in terms of the positive case the respondent would have to make.[372] If the legal burden of proof lay on the respondent, the court would be "forced to read into the provision a statutory presumption" in TOC's favour that was "simply not there".[373] Section 17(5)(*b*) required the statement-maker to prove the

367 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [34].
368 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [20].
369 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [25].
370 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [27].
371 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [28].
372 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [29].
373 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [30].

truth of a statement; this view was also consistent with the POFMA Rules procedure for filing evidence, which requires the statement-maker to present its evidence first, after which a ministerial affidavit is filed.[374]

1.148 Ang J also took the view that a CD did not constrain free speech under Art 14(1) because "the nature of the speech in question is not in the categories of speech covered by Art 14".[375] A categorical approach was adopted in finding that free speech did not pertain to misinformation nor did it include "a wholly unrestricted right to deceive or to maintain a deception by not drawing attention to the falsehood", citing *Attorney-General v Ting Choon Meng*.[376] There is "no public interest in preserving a right to disseminate falsehoods", which would be destructive of a democratic society.[377] It may be preferable to start from the premise that all forms of speech are encompassed by Art 14(1), but in the balancing process, not all speech is of equal weight and value and indeed, falsehoods would have minimal value.

1.149 Like s 15(3) of the Protection from Harassment Act, a Pt 3 CD did not inhibit free speech as the statement-maker was not required to take it down but could maintain the original text of its published material.[378] All a statement-maker is obliged to do is to insert a Correction Notice within its published materials, thereby allowing "viewers to compare the competing accounts of facts and make an individual assessment based on the available evidence".[379] This presumes a reasonable person who would in good faith, access the corrective statement on the Government's Factually.sg website. Indeed, rather than restraining free speech, Ang J stated that a Pt 3 CD actually vindicated a free speech rationale, that of the argument from truth, in so far as it constituted something akin to a general "right to reply".[380] Section 11(4) of the POFMA could be viewed as one method of tackling the unique difficulties associated with refuting false online facts, given that the audience varies, unlike the relatively constant readership of newspapers.[381]

1.150 That TOC had no personal knowledge of the statement's veracity was neither here nor there under s 11(4), such that the statement published could still be a statement fact.[382] Further, Ang J stated that TOC wrongly

374 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [30].
375 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [35].
376 [2017] 1 SLR 373 at [112].
377 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [35].
378 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [36].
379 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [36].
380 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [37].
381 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [38].
382 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [48].

assumed that in determining whether a "statement of fact" falls under s 2(2)(*a*) of the POFMA, what mattered was the outcome of a process of fact-finding or verification.[383] While the question of whether a statement was one of fact or opinion often focused on the semantics of the subject statement rather than evidence supporting that statement; indeed, a statement which can be proved usually is usually a statement of fact, whether true or false.[384] There was no "reporting defence" as s 11(4) does not involve a fault element such that a minister can issue a Pt 3 CD even if a person communicates a statement he believes to be true, when it is in fact false.[385] POFMA provides no "reporting defence" to a person who merely "reported" the subject statement without confirming or knowing its veracity.[386] Indeed, to do so would go against the legislative purpose of prevention under s 5(*a*) of the POFMA. The POFMA seeks to capture both tale-makers and tale-bearers who may receive false information and forward it to others without taking a position on whether it is true or false.[387] This is underscored by s 11(4), which gives no weight "to an individual's honest, innocent or ignorance dissemination of false information".[388] As TOC had not adduced any evidence to demonstrate the truth of the subject statement, it failed to discharge its legal or evidential burden of proving the truth of the subject statement and thus its setting aside application under s 17(5)(*b*) had to fail.[389]

1.151 While the judge in the *SDP*[390] appeared to be reasoning from a presumption of liberty attending Pt IV liberties, the judge in *TOC*[391] was more focused on drawing out Parliament's intent as set out in the POFMA framework.

D. Article 14 and right of peaceable assembly

1.152 Whether s 16(1)(*a*) of the Public Order Act[392] ("POA"), which makes it an offence to organise a public assembly without a permit, was a constitutionally valid derogation from Art 14(1) was at issue before the Court of Appeal in *Wham Kwok Han Jolovan v Public Prosecutor*[393] ("*Wham*"). The default rule under the POA is that public assemblies shall

383 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [49].
384 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [49].
385 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [56].
386 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [57].
387 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [57].
388 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [57].
389 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [60].
390 See para 1.129 above.
391 See para 1.129 above.
392 Cap 257A, 2012 Rev Ed.
393 [2021] 1 SLR 476.

not a take place unless the Commissioner is first notified and a permit is granted in respect of that public assembly.

1.153 Article 14(1) confers on Singapore citizens the right to "assemble peaceably and without arms" while Art 14(2)(*b*) provides that this is subject restriction as Parliament considers "necessary or expedient" in the interest of security or public order.

1.154 Wham was charged with organising a public assembly on 26 November 2016, through an event titled "Civil Disobedience and Social Movements", without obtaining a permit, as required by the POA. One of the invited guests was a Hong Kong politician, Joshua Wong, who was to speak alongside some local activists. Events which do not involve Singaporean non-citizens enjoy exemption under the Public Order (Exempt Assemblies and Processions) Order 2009[394] ("the Order"). The event took place, with Wong speaking via video-link.

1.155 Wham argued that the permit requirement under s 16(1)(*a*) of the POA was unconstitutional on two grounds. First, that the licensing scheme subjects a constitutional right to the Commissioner's act of granting a permit, even if a refusal to do so was *ultra vires*. Further, an applicant had no "real remedy" against such a permit denial. It was contended that the lack of an effective remedy under the legislative scheme would "render those rights nugatory" as there was nothing to prevent an abuse of public power.[395] Second, this state of affairs effectively gave the Commissioner "untrammelled power" to constrain the exercise of Art 14 rights, on pain of "criminal punishment" which was "not the proper purpose of Art 14(2).[396] An additional ground was raised, contending that a difference existed between legislation which restricted the exercise of a constitutional right (a mere restriction) and that which made a constitutional right "exercisable only by permission", which destroyed the character of a constitutional right.

1.156 The Court of Appeal rejected a "wholly subjective approach"[397] in so far as it would not deem valid any law Parliament enacted which restricted the right of peaceable assembly, as such approach would render the constitutional right "purely symbolic".[398] Article 14(2)(*b*) did not permit a restriction which would "undermine entirely" the right to peaceable assembly as such an approach would effectively mean there

394 S 489/2009.
395 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [10].
396 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [11].
397 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [22].
398 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [22].

was nothing to constrain Parliament's ability to pass restrictive legislation which it might deem "necessary or expedient" in the interests of public order.[399] This subjective approach would be contrary to precedent under which ministerial discretion should be subject to objective review.[400] Nonetheless, the court recognised that the Constitution had vested "the primary decision-making power" regarding whether a derogation from an Art 14 right was necessary or expedient, such that the judicial role was to review legislation and relevant legislative materials "to ascertain whether objectively, the statutory derogation is within the permitted space provided for this purpose in the Constitution".[401] The court would inquire whether the restriction was "objectively something" Parliament thought was necessary or expedient in the interests of public order and whether "Parliament could have objectively arrived at this conclusion".[402] In other words: did Parliament think the restriction was needed and if so, on what basis?

1.157 The Court of Appeal stated its disagreement with the observation in *Chee Siok Chin v Minister for Home Affairs*[403] that a "presumption of legislative constitutionality" was not one to be "lightly displaced" in assessing whether legislation fell within the scope of Art 14(2)(*b*).[404] Reiterating its earlier observation in *Saravanan*,[405] it stated that a presumption of constitutionality was only a starting point and could not in itself meet an objection of unconstitutionality.[406] It fell to the court to determine if legislation derogating from Art 14 right was for "the relevant purpose" permitted under Art 14(2)(*b*).[407]

1.158 It articulated a "three-step framework" to structure the enquiry:[408] First, does the legislation restrict the constitutional right in question? This issue arises as it is possible the court may not find a legislative provision to restrict free speech, but merely to "constrain" it, as was the case with a s 15 order under the Protection from Harassment Act, which constrains speech proven to be false by requiring that its publication be accompanied by a notification that it has been proven false,

399 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [22] and [23].
400 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [23], citing *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 and *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779.
401 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [24].
402 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [24].
403 [2016] 1 SLR(R) 582.
404 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [26].
405 See para 1.84 above.
406 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [154].
407 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [28].
408 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [29].

and/or a direction where the truth may be found.[409] This is in the form of a "warning label" rather than an outright ban. Second, if the legislation is found to restrict the exercise of the Art 14 right, it must be determined whether such restriction was "necessary or expedient" in the interests of one of the enumerated purposes under Art 14(2)(*b*). The legislation and legislative material could be examined to determine whether Parliament considered the restriction "necessary or expedient" or to assess the purpose for passing the legislation.[410] The lack of an explicit reference to the restriction of an Art 14 right did not in itself render the legislation constitutionally suspect as the court could infer "from the general purposes" from which Parliament passed the relevant legislation to ascertain if Parliament considered it "necessary or expedient" to restrict the relevant constitutional right. Third, on an objective basis, whether the restriction "falls within the relevant and permitted purpose" on grounds of which Parliament may derogate from that right". This would be satisfied by showing "a nexus" between the legislative purpose and a permitted purpose under Art 14(2)(*b*).[411] Ultimately a "balance" must be found between the competing interests at stake,[412] though no further guidance is given in relation to how an interest may be weighted, which may differ, for example, depending on whether liberal or communitarian tenets inform a polity's political philosophy.

1.159 Despite some academic opinion that this approach approximates that of "proportionality review", this is clearly inaccurate as the Court of Appeal's "three-step framework" does not endorse the normative orientation of proportionality review which is autonomy-maximising and requires that the "least restrictive" method of restriction be adopted to legitimate legislative restrictions of rights. Indeed, from the approach adopted by the Court of Appeal in eventually finding that the licensing regime under s 16(1)(*a*) of the POA was constitutional, it appears that the court has adopted a "reasonableness" contextual test in assessing the constitutionality of rights restrictive legislation, an approach which is reflected in cases like *Vijaya Kumar v Attorney-General*[413] or *Vellama d/o Marie Muthu v Attorney-General*.[414]

1.160 On the facts of *Wham*,[415] a key factor was that the licensing regime under s 16(1)(*a*) of the POA, which clearly constituted a restriction on an Art 14(2)(*b*) right, did not convey "untrammelled

409 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373.
410 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [31].
411 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [32].
412 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [33].
413 [2015] SGHC 244.
414 [2013] 4 SLR 1.
415 See para 1.151 above.

and arbitrary" discretion on the Commissioner which would render the law a "fundamental deprivation" of the right, as opposed from a mere restriction.[416] A similar approach was adopted in the earlier case of *Jeyaretnam Joshua Benjamin v Public Prosecutor*.[417] The court considered the statutory establishment of a permit scheme and delegating permit-granting power to the Commissioner to be "a wholly reasonable and well-trodden approach by Parliament".[418] The Commissioner was best apprised of the requirements of what the preservation of public order required on a day-to-day basis and the court added that a permit scheme would also provide "the best prospects of preventing disorder", beyond attempt to stop disorder after the fact.[419]

1.161 The discretion was not absolute for various reasons: First, the POA did provide for a category of public assemblies which were exempt from the permit regime.[420] Second, the POA did not prohibit peaceful assembly, but made the right "exercisable with the permission of the Commissioner". The Commissioner, on the basis of statutory guidelines, could decline to grant permission but could also decide to grant the permit depending on the case specificities.[421] In deciding whether to grant a permit, the Commissioner must consider the circumstances set out under s 7(2) of the POA.[422] For example, the Commissioner may refuse to grant the permit if he has "reasonable grounds" for apprehending a proposed assembly may cause public nuisance or public disorder.[423]

1.162 From parliamentary materials, it was clear that the POA and the permit regime had been enacted to "prevent public disorder", which falls within the ambit of Art 14(2)(*b*). The court found that s 7(2) of the POA achieved a "careful balance" between the constitutional right to assembly and the "delineation of the restriction imposed on that right".[424] All the grounds listed in under s 7(2) related to situations impacting public order which "could conceivably arise," which are conditions qualifying the exercise of power.[425] In the immediate case, s 7(2)(*h*) of the POA was pertinent as it related to assemblies with a political end involving the participation of non-citizens or non-Singaporean entities. The Commissioner could still grant a permit if he considered the nature

416 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [36].
417 [1989] 2 SLR(R) 419.
418 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [50].
419 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [52].
420 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [36].
421 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [36].
422 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [45].
423 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [45].
424 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [48].
425 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [48].

of the assembly, its speaker or topic "will not pose any sort of a threat to public order".[426] The court noted that through technology, foreign entities or individuals could interfere in national politics to promote their own agendas.[427] When foreigners were concerned, since they did not enjoy Art 14(1) constitutional rights, which is confined to citizens, the court would adopt "an even more generous standard of review" by the court.[428]

1.163 Aside from the statutory guidelines conditioning the exercise of discretionary power in deciding whether to grant a permit, the discretion of the Commissioner was not untrammelled, given the availability of remedies, such as the right of ministerial appeal under s 11.[429] Judicial review is also available against decisions of the Commissioner or minister, where bad faith is involved, improper purposes are considered or the decision is otherwise unconstitutional.[430] The licensing regime under s 16 of the POA therefore was found to pass constitutional muster.

E. Implied rights – Right to vote and to free and fair elections

1.164 It was argued in *De Costa*[431] that the right to vote and to free and fair elections were implied constitutional rights. Further, that these would be violated by holding general elections during COVID-19, a "highly infectious and potentially life-threatening disease", where mandatory safe distancing measures were in place, including limits on the size of public gatherings.[432]

1.165 To facilitate the holding of general elections while minimising public health risks, the Parliamentary Elections (COVID-19 Special Arrangements) Act 2020[433] ("PE(C19)A"). These set out procedures for voters subject to COVID-19 movement controls, for example.[434] It was argued that these precautions would deprive the electorate of a free and fair election, as, for example, opposition parties were unfairly disadvantaged. Furthermore, overseas voter had limited methods of casting their ballot, which curtailed their right to vote.[435] Concerns were also raised in relation to the safety of polling agents and the infection

426 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [48].
427 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [46].
428 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [49].
429 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [53].
430 *Wham Kwok Han Jolovan v Attorney-General* [2021] 1 SLR 476 at [56].
431 See para 1.16 above.
432 *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 at [2].
433 Act 21 of 2020.
434 *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 at [2].
435 *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 at [3].

risks they would be exposed to. As such, it was argued that the general elections should not be held.

1.166 Parliament was dissolved under Art 65(3) of the Constitution, and pursuant to Art 66, general elections must be held "within 3 months after every dissolution of Parliament" where the President is advised by cabinet to issue a Writ of Election. While no arguments were raised on this score, the court noted that since Art 66 directed the holding of general elections within a specified time "it is not at all evident to us how the court could restrain this from happening".[436]

1.167 As there is no explicit right to vote in the Constitution, the court examined various constitutional provision which gave expression to the Westminster system of government embodied in the Constitution. Aside from Arts 65(3) and 66, the court took note of Art 39(1) which speaks of elected Members of Parliament being "returned at a general *election*" [emphasis in original].[437]

1.168 The Court of Appeal disagreed with the characterisation of the right to vote as an "unenumerated right",[438] which it stated was rejected in *Yong Vui Kong*.[439] This was associated with creating "a right out of whole cloth" and casting this as "part of natural law" to present the appearance of being more principled than declaring rights on the basis of metaphysical abstraction or subjective political preferences. The Court of Appeal preferred to base the right to vote, an implied right, on the textual anchor of the Constitution, either construing it as a whole, or as a matter of necessary implication by way of reference to elections in Arts 66 and 39(1).[440]

1.169 That the right to vote was "found in the Constitution"[441] and "uncontroversial"[442] meant there was "no real controversy" to be ruled on. The Court of Appeal further rejected the characterization of the right to vote as "part of the basic structure" of the Constitution which Parliament could not therefore abrogate, after the Indian basic features doctrine, as this doctrine "has yet to be accepted as part of our law".[443] Certainly, the status of the right to vote as an implied constitutional right

436 *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 at [5].
437 *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 at [7].
438 *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 at [8].
439 *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [68]–[75]. See para 1.105 above.
440 *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 at [9].
441 *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 at [9].
442 *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 at [10].
443 *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 at [11].

was affirmed, such that in accordance with the Art 4 supremacy clause, "any law that is inconsistent with it would be open to challenge".[444] At any rate, the immediate case was not concerned with the validity of any constitutional amendment.

1.170 The Court of Appeal elaborated on what the content of this implied right to vote might be. Counsel argued that the core of this was "the right of Singaporeans to cast their votes at an election" which was "free and fair".[445] The court first noted that an election had been already been called and further agreed that in principle, elections "must be free and fair", although the "precise content" of what this might entail is "contestable". It thus fell on the appellant to demonstrate the specific aspects of the pending elections he considered "constitutionally impermissible". Two main arguments were raised.

1.171 First, it was argued that "substantial body of the electorate" could be disenfranchised as s 8 of the PE(C19)A exempted the Returning Officer and Director of Medical Services from being prosecuted in the event of their breaching the prohibition not to dissuade voters from casting their ballots under s 81(1) of the PE(C19)A. The Court of Appeal pointed out that s 8 merely authorised the two public servants to advise voters exhibiting symptoms like fever or respiratory problems against voting, in which even they would be exempt from prosecution. The voters were not themselves prevented from casting their vote, subject to taking general health precautions. Indeed, the PE(C19)A sought to "facilitate" the conduct of elections, and safeguarding the right to vote while safeguarding community health.[446]

1.172 Second, counsel contended that some 200,000 Singaporeans residing overseas might not be able to cast their vote owing to travel restrictions but the Court of Appeal noted that he was unable to provide a "constitutional basis" which showed that the government was obliged "to provide a means for every Singaporean anywhere in the world to be able to cast their ballots".[447] It was also unclear on what basis the court could direct the government to so provide; counsel pointed to the Art 4 supremacy clause, but this related to the invalidation of legislation rather than empowering the courts to direct other government branches to develop and implement certain policies.[448]

444 *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 at [10].
445 *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 at [13].
446 *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 at [13].
447 *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 at [13(b)].
448 *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 at [13(b)].

1.173 While the right to vote has been judicially affirmed as an implied constitutional right, and the asserted right to free and fair elections was in principle to be accepted, it remains to be demonstrated what the specific content of this might entail, how free and fair elections might be threatened, and how it attains to constitutional status. Not even an "arguable case" was presented.[449]

449 *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 at [14].