1. ADMINISTRATIVE AND CONSTITUTIONAL LAW

THIO Li-ann
BA (Oxford) (Hons); LLM (Harvard Law School), PhD (Cambridge);
Barrister (Gray's Inn, UK);
Professor, Faculty of Law, National University of Singapore.

Introduction

1.1 Most of the administrative law cases decided in 2006 related to matters of procedural impropriety. Where substantive grounds of review were invoked, as in the case of arguing that the Chief Assessor of Property Tax had acted irrationally in *Aspinden Holdings Ltd v Chief Assessor and Comptroller of Property Tax* [2006] 3 SLR 99 (HC), [2006] 4 SLR 521 (CA), these failed. Most notably, the concept of pre-maturity in relation to early stage applications for judicial review was examined at length, as was the test for apparent bias and the rejection of the approach of the House of Lords in *R v Gough* [1993] AC 646.

1.2 In relation to constitutional law, a number of cases touched upon the scope of constitutionally allocated powers, the nature of constitutional principles like the separation of powers and the rule of law. In terms of fundamental liberties, the cases related to due process rights such as the right to counsel in Art 9(3) of the Constitution of the Republic of Singapore (1999 Rev Ed) ("Singapore Constitution") and the limits to free speech which is safeguarded in Art 14 in the form of defamation and contempt of court laws, which are expressly stipulated grounds of derogation in Art 14(2). An argument was also raised that Art 12 provided a right to a pension.

ADMINISTRATIVE LAW

General principles: Supervisory jurisdiction – over whom?

1.3 The nature of supervisory jurisdiction was affirmed in *Tee Kok Boon v PP* [2006] 4 SLR 398 ("*Tee Kok Boon*"). As observed by G P Selvam JC (as he then was) in *Haron bin Mundir v Singapore Amateur Athletic Association* [1992] 1 SLR 18 at [19], "supervisory jurisdiction" is a "term of art", being the inherent power of superior courts, derived from the common law, to review the decisions of inferior courts and other administrative bodies. It does not extend to co-ordinate bodies. Tay Yong Kwang JC (as he then was) noted in *Poh Soon Kiat v Hotel Ramada Nevada trading as Tropicana Resort & Casino*

[1999] 4 SLR 391 at [30], "No High Court sits in an appellate, revisionary or supervisory jurisdiction over another High Court." As Lord Diplock noted in *Re Racal Communications Ltd* [1981] AC 374 at 384, which Wee Chong Jin CJ approvingly cited in *Wong Hong Toy v PP* [1994] 2 SLR 396 at [47]–[50], the High Court was "not a court of limited jurisdiction" such that mistakes of law made by High Court judges were not subject to review, but corrected only by means of statutory appeal to an appellate court, where provided. Thus, in *Tee Kok Boon,* the High Court did not have power to exercise its power of criminal revision over an inferior court decision which had already been upheld on appeal by the High Court

Prematurity and early-stage applications for judicial review

1.4 Judicial review is a discretionary remedy and it is accepted that leave for judicial review should not be lightly granted where the final decision of a tribunal has yet to be made, and its proceedings are pending.

1.5 A court may decline relief because it does not consider an issue "ripe" or because the claimant has moved prematurely. This usually arises in the context of preliminary and interlocutory decisions, and the difficulty is in identifying when an issue has matured into one that is appropriate for judicial review. Exceptions to the concept of prematurity help guide the exercise of supervisory jurisdiction.

1.6 This issue was canvassed in *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR 934 where the applicant, an advocate and solicitor, was subject to proceedings before a disciplinary committee ("DC") of the Law Society which found that a *prima facie* case against the applicant was established, calling the applicant to enter his defence. The applicant instead brought an application for leave to seek judicial review of the DC's findings and sought, *inter alia*, for an order to quash the DC's decision not to exclude certain evidence on the basis that this had been illegally obtained. The DC had not yet ruled that the evidence established "sufficient cause of sufficient gravity for disciplinary action", nor had it indeed decided what weight to assign the evidence.

1.7 In considering the issue, reference was made primarily to English authorities. The policy reasons behind the concept of prematurity were set out by McCullough J in *R v Association of Futures Brokers and Dealers Ltd ex parte Mordens Ltd* (1991) 3 Admin LR 254 at 263–264, as observed by V K Rajah J (as he then was) at [17]. Granting judicial review during the

course of a hearing by a body amenable to supervisory jurisdiction could disrupt the proceedings in inferior courts and tribunals, cause delays, waste resources and strain the relationships between the applicant and the decision-making body. Rajah J added an additional reason to the effect that if the inferior tribunal determination was unsatisfactory, this would raise the question "whether the applicant can still seek redress for the grievance before a superior court. The issue is almost invariably one of timing and not of irretrievable damage to an applicant": at [17]. Further, policy-related reasons undergirding ripeness concerns may be that an error may be corrected during the decision-making process or may not substantially affect the final decision; furthermore, appeals procedures may be circumvented through challenges to preliminary decisions: at [18].

1.8 Rajah J noted at [14] that prematurity as an English administrative law concept was one of "relatively recent origins as the remedy-based approach of the common law has impended its coherent evolution". A premature application was essentially one made before the completion of the decision-making process of the tribunal of first instance, which encompassed disciplinary hearings. Courts would almost invariably view such challenges as premature and decline judicial review.

1.9 Rajah J endorsed Beatson's description of prematurity in his chapter entitled "Pre-maturity and Ripeness for Review" in *The Golden Metwand and the Crooked Cord, Essays on Public Law in Honour of Sir William Wade QC* (Forsyth & Hare eds) (Clarendon Press, 1998) at p 251:

> [A]n application is in danger of being premature if it will deprive a relevant administrative body of the opportunity of applying its expertise to the question at hand, whether that question requires fact-finding, the exercise of discretion or even, although this is more controversial, a conclusion of law.

1.10 He accepted that in exceptional circumstances, it would be remiss to deny the applicant the option of judicial review, as where "irreparable harm" could be done to the applicant: at [19]. The English Court of Appeal in *R v Chief Constable of Merseyside Police ex p Merrill* [1989] 1 WLR 1077 at 1088 had noted that there could be rare cases where "the evidence is so substantial that it is sensible to give separate consideration to a preliminary objection". Rajah J at [20] cited Beatson who suggested that an exception to the prematurity concept could arise where an interlocutory decision had a "substantial effect", for example, where this would preclude a real opportunity to challenge the interlocutory decision at a later stage.

Furthermore, judicial review might be apt where this would bring savings in costs by immediately dealing with the matter rather than exposing the applicant to the entire decision-making process.

1.11 The present case posed no exceptional circumstance which brought it within the exception to the concept of prematurity and the application for judicial review was dismissed. Rajah J examined four arguments in this respect. First, he rejected the argument that by excluding certain evidence, which formed the basis of the Law Society's case, judicial review was justified. He applied *R v Secretary of State for the Environment ex p Royal Borough of Kensington and Chelsea* (1987) 19 HLR 161 ("*Chelsea*") as authority for the proposition that judicial review would be granted even though a challenge to a decision was brought at any early phase of the proceedings if this was "made on entire areas of evidence affecting the conduct and utility of the inferior proceedings": at [22]. In *Chelsea,* a housing inspector was investigating a decision to compulsorily purchase the property of a landlord on the basis of his tenants' complaints that he was intimidating and gravely mistreating them. The inspector excluded evidence put forward by the housing authority in relation to such harassment and intimidation, despite the fact that this formed the basis of its compulsory purchase decision. Taylor J stressed that this was a "most unusual case". To exclude such evidence would render the housing inspector's inquiry a "barren exercise" and "stultify" the presentation of the applicant's real case; if the inquiry had to be repeated, witness memories would "be stale and faulty." While the inspector had discretion under the relevant rules to admit evidence, this discretion had to be "exercised in accordance with the law". The inspector effectively declined jurisdiction by marking out "no-go areas, whole issues upon which it would hear no evidence, whatever its cogency or weight". It was not the exclusion of evidence *per se* that was objectionable but rather the fact that the exclusion "was not a conscientious exercise of discretion". Furthermore, the court in *Chelsea* considered that the excluded evidence was "relevant to the determination of the core issues". On the facts, the applicant sought to have excluded evidence that was the result of entrapment. However, the applicant did not precisely identify how the DC had failed to exercise its discretion property in allowing such evidence; in fact, the DC had considered the case law and applicant's argument with care and correctly concluded that the "current jurisprudence on entrapment" did not allow it discretion to exclude the relevant evidence": at [25].

1.12 Second, Rajah J rejected the argument that judicial review was apt because "a clear and important question of law" had arisen as a consequence of the DC's admission of the relevant evidence. The nature of the challenge

lacked "hefty constitutional implications" (at [34]) and did not go to the jurisdiction of the DC. It was merely a "clean question of law" challenging a decision to admit evidence, which did not by itself constitute sufficient reason to grant leave. If each clean question of law by a tribunal of first instance was challenged, this might throw open the floodgates: at [32]. Thus, where questions of public law importance or jurisdictional errors are concerned, judicial review is more likely to be granted.

1.13 Third, Rajah J rejected the assertion that a real risk of irreparable damage would ensue from the DC's order. This harm was not precisely articulated and the fact that the applicant might have to face the court of three judges, as provided by s 98(7) of the Legal Profession Act (Cap 161, 2001 Rev Ed) would not constitute permanent prejudice to him. While the DC's function is investigatory, its findings are not conclusive and the court of three judges may review the merits of such findings. Indeed, the availability of this appeal process provided a reason for not granting judicial review at this stage: at [35]. The applicant could also seek judicial review at the conclusion of the disciplinary proceedings, rendering "reversible" (at [43]) any prejudice arising from allowing the DC proceedings to continue.

1.14 Lastly, a relevant factor for allowing early-stage judicial review, thereby averting an appeal, was whether this brought about costs savings, by avoiding "the inconvenience, procedural tedium as well as additional costs of having to appeal a final decision": at [39]. This was to be assessed not in isolation but against the costs involved in initiating judicial review proceedings. The court was to consider the "opportunity cost" of granting or not granting an application. For example, if the proceedings below were complex and lengthy, the case for early-stage judicial intervention was more compelling as failure to grant this might bring about "significant and negative consequence": at [39]. This was a facet of "judicial commonsense", in allowing early-stage judicial review where the final determination of the proceedings below was likely "to be very long in coming", and would involve the parties incurring additional time and expense in waiting for a final determination: at [41].

1.15 The immediate case, however, was a "textbook example" of the "very real drawbacks" of an inappropriate application for early stage judicial review. Had the DC proceedings continued, it was likely there would be a final determination "by now", that is, the proceedings would not have been unduly protracted. The applicant would have recourse to the court of three judges. By applying for leave to seek judicial review, the case was "likely to drag on for a significant period of time" and not much in terms of costs

would have been saved even if DC proceedings (it took two days for the Law Society's case to be presented) had been "short-circuited". The facts indicated that had review been granted, this would not have translated into "a net saving in time or resources": at [42]. While acknowledging that judicial review was part of the judicial armoury in ensuring that decisions made by public and administrative bodies "hew to the rule of law", which was "concerned with substance", it was also important to have regard to the "processual component of the rule of law". This requires establishing and observing "fair and reasonable procedures" to "ensure substantive justice", in the normal course of events: at [45].

Conclusive evidence clause as limit on judicial review?

1.16 A decision to acquire land "for a public purpose" by the relevant government authority under s 5 of the Land Acquisition Act (Cap 152, 1985 Rev Ed) was challenged in *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue* [2006] 3 SLR 507. The plaintiff had received market value for its land which was subject to a 1983 declaration that it was acquired for a public purpose. The plaintiff claimed that a "terrible injustice" flowed from the fact that nothing had ostensibly been done with the property for 22 years; while acquired for public purpose, the land was later re-zoned for residential purposes. The plaintiff was willing to return the compensation received for this land in return for the land.

1.17 The issue concerned an application for leave to apply for various prerogative writs, which was held to be out of time according to the terms of O 53 r 1 (6) Rules of Court: at [11], [21].

1.18 Assuming that the application was not out of time, Andrew Phang Boon Leong J (as he then was) found that the applicant had not satisfied the "relatively low" standard of proof at the application for leave stage. He applied the test adopted by the Court of Appeal in *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR 609 at 615–616, which required the showing of a "*prima facie* case of reasonable suspicion" or an "arguable case". Phang J said that this test did not mean that the arguments placed before the court should be "either skimpy or vague" as the "fullest evidence and strongest arguments" ought to be presented. Nevertheless, following Lord Diplock's observation in *IRC v National Federation of Self-Employed* [1981] 2 All ER 93 at 106, the court at this stage was just to undertake "a quick perusal" of the available material rather than to examine the issues at depth: at [24].

1.19 Despite the clarity of the language in s 5(3) of the Land Acquisition Act which provided that notification was conclusive evidence that the land was needed for the specified purpose, the High Court held that the courts could interfere. This did not detract from the legislative recognition that the government authority was best positioned to determine if the land concerned was required for a s 5(1) purpose (at [30]) or the broad definition given to public purpose, as was Parliament's intent as evident from the parliamentary proceedings: at [51]–[53]; [62]–[67].

1.20 Phang J held that such decision could be reviewed on substantive grounds such as bad faith or whether it served the purpose of the Act; bad faith would allow the court to go behind the notification, notwithstanding s 5(3), following the Malaysian Privy Council decision of *Syed Omar bin Abdul Rahman Taha Alsagoff v The Government of the State of Johore* [1979] 1 MLJ 49, discussed at [37]–[38]. The Indian decisions also indicated that the court could set aside an acquisition tainted by bad faith: at [40]. As Phang J aptly stated at [5]:

> Any abuse of government power cannot – indeed, must not – be tolerated; it must be ferreted out and eradicated forthwith if the very idea as well as ideal of the rule of law is not to be undermined.

Such abuses were "inherently repugnant to the very concept as well as (more importantly) practice of justice and morality itself" and would have inimical national and international effects: at [5]. Thus, despite the words of the Act, he observed that "bad faith particularly in the governmental context, does not sit easily in any context": at [36]. Thus, a "balance" had to be found between ensuring the purpose of the Act and the public benefit it sought to achieve and ensuring against abuses of power, with Phang J noting that the scarcity of land made it a very valuable resource in the Singapore context: at [36]. He underscored that it fell beyond the tasks of the courts "to sit as makers of policy" as this was "the very antithesis of what the courts ought to do". However, he noted that the "latitude and flexibility" afforded government authorities "stops where abuse of power begins" (at [37]) although this was not to be lightly assumed or found "at the slightest drop of a hat"; as bad faith was a "serious allegation" (at [36]), there needed to be proof. At the application for leave stage, a "*prima facie* case of reasonable suspicion" of bad faith had to be shown.

Bad faith: Substantive ground of review

1.21 In relation to the plaintiff's arguments, the court found that there was "no proof" (at [43]) that the defendant acquired the land in an arbitrary fashion for resale purposes; thus, the plaintiff failed the threshold leave requirement to show a *prima facie* case of reasonable suspicion of bad faith existed.

1.22 Further, the change in land use was "clearly above board" (at [47]) as the change in an initially legitimate purpose to another legitimate purpose over time did not evidence bad faith, so long as the original purpose "was not itself tainted by bad faith": at [47]. Rather than being zoned for residential purposes, Phang J noted it was part of a "comprehensive development area" and that the original declaration had stated that the land was required for the public purpose of "General Development": at [45]. As the Act stipulated that the land could be acquired for "any" purpose, which confers wide discretion on the government authority, Phang J said "no reasonable person" would argue these plans were not for public purpose, foreclosing any claims based on *Wednesbury* unreasonableness: at [45]. Indeed, the term "any" was not confined to the singular but could mean the plural, following the Malaysian decision of *Yew Lean Finance Development (M) Sdn Bdh v Director of Lands & Mines, Penang* [1977] 2 MLJ 45 in relation to the Malaysian equivalent of s 5 of the Act.

1.23 The change in land use was not done in bad faith in the sense that someone in the authority bore a grudge against the plaintiff and had initiated the acquisition "out of malice or revenge": at [47]. Nor was the acquisition to benefit a private individual, as where there were a covert, corrupt deal between the said individual and a government official. Indian authorities supported the proposition that a change in purpose was "neither illegal nor bad" (at [48]), citing *Gulam Mustafa v The State of Maharashtra* AIR 1977 Supreme Court 448 (at [47]). This was because community requirements were not static and thus public authorities must creatively respond to this to vary a public scheme to meet changing public needs: *State of Maharashtra v Mahadeo Deoman Rai* [1990] 2 SCR 533 at 538.

1.24 The learned judge considered that the plaintiff, a "shrewd commercial entity" (at [59]), engaged in a "speculative attempt" at "private profiteering in total disregard for the wider public benefit" (at [25]), discounting the Act's underlying policy which was to prevent "economic windfalls" (at [61], [66]). This was to Phang J "rather worrying" given the important socio-economic purpose of the Act as part of the "socio-economic

fabric" which had contributed to Singapore's economic prosperity. Phang J hastened to add that the court was not engaged in "mere 'policymaking'" but was recognising the intention of Parliament in promulgating this Act: at [25].

1.25 He noted that allegations of bad faith "may in fact cut both ways" (at [58]) and that the plaintiff had failed to raise the "immense economic advantage" of having the land returned to it, given the tremendous rise in land prices (at [59]). The court was not to be blind to "practical reality" in disregarding the Act's social-economic purpose and was to discharge its duty to administer justice according to the law: at [25]. The application for judicial review was thus dismissed.

Natural justice

1.26 There were a series of cases on natural justice in relation to the principle against bias, both actual and apparent, which undermines the fairness of a hearing.

Actual bias

1.27 An assertion of actual bias, which must be proved on a balance of probabilities, must be supported by evidence rather than being merely a bald assertion. It is difficult to prove because of its insidious and unconscious nature.

1.28 In *Hennedige Oliver v Singapore Dental Council* [2007] 1 SLR 556, a dentist appealed against the findings of the Disciplinary Committee ("DC") of the Singapore Dental Council that he was guilty of professional misconduct in failing to obtain the informed consent of a patient before performing a mini-implant procedure on her teeth. The appellant put forth two grounds to substantiate his claim that the DC members were biased and prejudiced against him. Firstly, the DC members considered him a delinquent for specialising in and making money from mini-implants rather than conventional treatment. Secondly, the DC had treated the complainant kindly while he had been robustly challenged such that his questioning "went far beyond clarification and became inquisitorial": at [22].

1.29 The High Court found no evidence to support the charge of actual bias that the DC considered the appellant a delinquent; further, the issue at hand was whether the patient's consent to the procedure had been obtained. In addition, the number of interjections by the DC committee members and

differing treatment of complainant and appellant was "neither here nor there" as the members were entitled to seek clarification from the person charged. The appellant's evidence covered a "much wider ground" than the complainant's and part of the appellant's oral evidence at the inquiry did not feature in the written Explanation; as such Tan Lee Meng J held that "the appellant must have expected his peers in the DC to question him thoroughly on his many assertions": at [24]. Further, the appellant's answers at the inquiry indicated that the additional questions came from the nature of his answers and as such, this ground of bias had "no foundation": at [24].

1.30 In *Chee Siok Chin v AG* [2006] 4 SLR 541, the judge was asked to recuse herself because of actual bias, on the basis that during a hearing in chambers, there had been a short outburst between the respective counsel for the plaintiffs and defendants after which the plaintiffs' counsel had been directed to continue with his submissions. The plaintiffs applied to stay the originating summons proceedings for summary judgment in relation to defamation cases pending an appeal of the judge's decision not to recuse herself. The High Court held that judges had to be careful not to accede too readily to requests to recuse themselves by litigants who did not want a particular judge to hear their case. The "insidious nature" of judge-shopping should not be condoned as it "undermined and weakened the administration of justice": at [10].

1.31 On the facts, there was "no basis whatsoever" (at [10]) justifying the recusal application on actual bias as the cited circumstances were "entirely frivolous and ludicrous". This included the court choosing to "tick off" the plaintiffs' counsel when he was interrupted by the defendants' counsel and had appealed to the court to stop the latter and that the court had prejudged the Notice of Appeal as the judge was seen to shake her head when the plaintiffs' counsel handed her the Notice, which to the plaintiffs evidenced "a prejudicial judicial temperament": at [7]. The judge's direction to the plaintiffs' counsel to continue submissions was "a polite way of stopping the bickering and a signal for the proceedings to resume". In relation to the head-shaking which neither counsel had observed, but which plaintiffs had told their counsel, Belinda Ang Saw Ean J set forth the context by observing that had she prejudged the Notice of Appeal as alleged, she would have proceeded to hear it at once rather than allowing the plaintiffs' counsel to make his application for an adjournment: at [8]. She noted that on the facts of the case, a "fair-minded and reasonable observer" would "hardly on those flimsy grounds" (at [10]) cited by counsel for the plaintiffs conclude that she was unable to make an objective, impartial decision of the matters before her. No

judge could be expected to withdraw on such "ill-founded accusations": at [10].

1.32 Ang J observed that "actual bias" cases were "very rare as proof is often very difficult". This was because the law "does not countenance the questioning of a judge about extraneous influences affecting his mind": at [9]. Common law policy was "to protect litigants who can discharge the lesser burden of showing a real danger of bias rather than to show that actual bias existed": at [9]. She underscored that counsel bore a duty to the court and the wider interests of justice not to make allegations of bias or apparent bias unless "conscientiously satisfied that there is material upon which he can properly do so", citing at [68] the English Court of Appeal in *Arab Monetary Fund v Hashim* (*The Times*, 4 May 1993). She also found apt L P Thean JA's observations in *Tang Liang Hong v Lee Kuan Yew* [1998] 1 SLR 97 at [51] on the need for judicial vigilance whenever recusal applications based on actual or apparent bias were made:

> A claim that there is apparent bias on the part of a judge must be based on facts that are substantially true and accurate. The fact that an allegation of bias has been made against a judge is not enough; otherwise a party could secure a judge of his choice by merely alleging bias or apparent bias on the part of another or other judges. A judge is not obliged to withdraw based on facts which are inaccurate, false or devoid of substantiation.

Apparent bias

1.33 While actual bias cases are primarily concerned with proving a state of mind, at least to the requisite balance of probabilities, the underlying basis for the category of "apparent bias" differs. This is anchored in the need to demonstrate that justice not only is done but is manifestly seen to be done, which serves the public interest. Not only actual, but perceptual justice counts. Thus, focusing on public perception rather than the truth in an allegation of actual bias, Woo Bih Li J recused himself in *Chee Siok Chin v AG* [2006] 4 SLR 92.

1.34 On the clients' instructions, counsel in the recusal application offered the ground that the existence of a suspicion or likelihood of bias, but not actual bias, existed because of an acrimonious exchange between counsel and judge in a prior, unrelated case which the press had widely reported in September 2003: at [5]. Following from this, Woo J had in September 2003 made a complaint to the Law Society of Singapore about the conduct of said counsel. He noted in the present case (at [8]) that "criticism, reprimand or a complaint from a judge does not *per se* disqualify the judge from hearing the

same counsel in a separate case, or even the same case, unless there is personal animosity on the part of the judge towards counsel". No such animosity had been suggested on the facts and, in addition, Woo J had also assured counsel that he considered the past incident "as closed": at [8].

1.35 While not accepting that the public necessarily had the impression that the judge was prejudiced against counsel, Woo J said that nevertheless, the concerns of the applicant had to be taken into account to ensure justice was seen to be done, whether the fear of prejudice was against the litigant or his counsel. It was "true" that the press had from time to time mentioned the September 2003 incident and thus "in the interest of justice" (at [10]), the recusal application was successful.

1.36 However, where a recusal application on the basis of apparent bias is "without basis" (at [16]), judges will not recuse themselves as in *Wee Soon Kim Anthony v UBS AG* [2006] SGHC 18. Here, the plaintiff did not want the judge to review the taxation of five solicitor and client bills. Kan Ting Chiu J, after examining the verbatim notes of evidence, rejected the claim that "excessive intervention" had given rise to "a reasonable suspicion of a personal animosity to the extent that there exists a real danger of apparent bias resulting in a fair and balanced judgment not being possible": at [10]. Kan J was trying to get a "clearer picture" of the situation where the plaintiff's credibility was called into question, given the inconsistency between the evidence and his pleaded case.

Apparent bias: Perception and standard of proof

1.37 It is settled law that a supervising court may quash the decision of a tribunal which is tainted with apparent bias. The difficulty in this regard has been identifying which formulation of the appropriate test was law in Singapore, since various formulations have been used inter-changeably in previous cases. This matter was extensively treated in *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR 85 ("*Shankar Alan*"). This concerned a Law Society disciplinary hearing the conduct of which the applicant argued gave rise to apparent bias by dint of its excessive questioning marking a lack of detachment necessary for the conduct of a fair trial.

1.38 In a lucid and well-reasoned judgment, Sundaresh Menon JC clarified the confusion surrounding the test to be applied in relation to apparent bias cases, which had arisen as a result of the cloudy reasoning in previous cases. In particular, in *Tang Liang Hong v Lee Kuan Yew* [1998] 1 SLR 97, the Singapore Court of Appeal had adopted the test of apparent

bias as being "whether a reasonable and fair-minded person sitting in court and knowing all the relevant facts have a reasonable suspicion that a fair trial for the litigant concerned was not possible": at [46]. The Court of Appeal noted (at [47]) the more stringent test of apparent bias propounded by Lord Goff of Chieveley in *R v Gough* [1993] AC 646 to the effect that on ascertaining the relevant circumstances, the court should ask itself whether there was a "real danger of bias" that the relevant tribunal member might unfairly regard with favour or disfavour the case of a party to the issue under consideration by him. Lord Goff preferred this formulation to ensure the court "is thinking in terms of possibility rather than probability of bias". The Singapore Court of Appeal did not consider "material" which test was applied, whether the "reasonable suspicion" or "real danger" test (at [48]), but required that an allegation of apparent bias could not be based on facts that were "inaccurate, false or devoid of substantiation", that is, the factual basis must be "substantially true and accurate" (at [51]). The Singapore Court of Appeal approvingly quoted the observation by Mahoney JA in *Bainton v Rajski* (1992) 29 NSWLR 539 at 541 that a judge is not required to withdraw merely "if a party alleges or even believes in the disqualifying facts alleged". Otherwise, "the administration of justice and the rights of other parties would be governed by the allegation of or the belief in facts, however dishonest, paranoiac, unbalanced or honestly wrong". The court in *Tang Liang Hong* went through a point-by-point rebuttal of the facts raised at [49] to ascertain whether there was a factual basis for the allegations made and concluded this was not the case. In applying the "reasonable suspicion" test which is more concerned with perceptual justice than the "real danger" test which is more closely aligned with proof of bias rather than perception and public confidence, the Court of Appeal appeared to be applying a more stringent test of bias from the court's perspective. This is because a "reasonable suspicion" test exacts more demanding standards from the court which is required not to act in a manner giving rise to a reasonable suspicion of bias. Conversely, a "real danger" approach gives a court more leeway as this is a more fact-oriented inquiry. However, it may be said that the Court of Appeal itself appeared more concerned with the "fact" of the bias rather than the impression the factual allegations conveyed, despite applying the impression-oriented "reasonable suspicion" test.

1.39 In *Shankar Alan*, Menon JC departed from the *obiter* and tentative views of Andrew Phang Boon Leong JC (as he then was) in *Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board* [2005] 4 SLR 604; where he cautioned that "no precise or mathematical formula can be applied in situations of alleged apparent bias" (at [42]) and against the dangers of "semantic hairsplitting" (at [43]). Phang JC noted that his views as to the

correct test in Singapore had not yet been decided and that the Singapore Court of Appeal should express a "definitive view": at [45].

1.40 Phang JC considered that there was no conceptual difference between the two tests which were both premised on an "objective basis": at [36]. In examining the case law at [34]–[45], he found that the tests shared a "common substance", which was "whether or not there was a perception on the part of a reasonable person that there would be a real likelihood of bias". He noted that "likelihood" as a concept entailed "possibility" rather than the higher proof standard of "probability". Thus, one should "guard against gratuitous semantic confusion" as practically, pegging the "real likelihood" test to "possibility" rather than "probability" effectively rendered it approximate to the "less stringent" test of "reasonable suspicion" which also spoke to the possibility of bias. Phang JC also stated he did not think that the contrast between the two tests turned on a "contrast between perspectives" (at [40]) as he considered that a sharp distinction should not be drawn between the perspectives of the court and of the public as "both are *integral parts of a holistic process*. It is undoubtedly the case that the court will in fact have to ascertain what the perspective of the public is and, to that extent, "personifies" the reasonable man. This is a practical reality that cannot be ignored, even though it might not be perceived to be ideal": at [40].

1.41 However, Menon JC clearly disagreed with Phang JC's analysis on two main points: the standard of proof to be adopted and the perspective of the relevant observer; that is, the substance of the test and its reference point. He rejected the view that there was "no practical difference" between the two tests (at [74]), stating that the approach in *R v Gough* "is not the law in Singapore" (at [53]) and "that is so for good reasons" (at [91]).

1.42 In relation to the appropriate formulation, Menon JC stated that a judge in evaluating the evidence in a given case arrives at a certain "impression" which could be expressed in various terms. This could range from "doubt" to "suspicion" to "reasonable suspicion". While doubt suggested "a state of uncertainty" (at [48]), "suspicion" related to "something which might be possible without yet being able to prove it" and "reasonable suspicion" meant the belief could not be fanciful (at [49]). This relates to the person who suspects something in the circumstances, even if the suspicious behavior is in fact innocent, that is, the perspective of the observer.

1.43 Further along the spectrum was "likelihood" which suggested that something was "likely or probable, or for that matter possible." A "real" likelihood was one which was "substantial rather than imagined": at [50].

This inquiry "is directed more to the actor than to the observer" and whether a particular event "is or is not likely or possible": at [50]. At the other end of the spectrum is "proof on a balance of probabilities": at [51].

1.44 Menon JC analysed the test in *R v Gough* in detail, noting that the "reasonable suspicion" test could be traced back to *R v Sussex Justices ex p McCarthy* [1924] 1 KB 256 where Lord Hewart stated that nothing was to be done which created "even a suspicion" that justice was improperly interfered with. Lord Goff concluded that the principle that justice should not only be done but be manifestly seen to be done could adequately be served by a "real possibility of bias" test (at [55]), such that it was "unnecessary", in the words of Lord Goff at 668, "to have a test based on mere suspicion, or even reasonable suspicion, for that purpose".

1.45 Menon JC considered it an over-simplification to conclude that all these tests were "for all practical purposes identical": at [56]. He pointed out that just because these tests eventuated in the same outcome in a certain case "merely means" that the degree of evidence there presented "leaves a sufficient impression that whichever test was applied", the same result would ensue. This did not mean there was no difference between the tests: at [56]. Indeed, Menon JC in considering English and Australian case law noted that the relevant perspective varied with the standard of proof adopted. When it came to a real likelihood of bias, the court did not look at the mind of the person sitting in the judicial capacity to see if there was a real likelihood that he did in fact favour or disfavour one side. Rather, the court looked at "the impression which would be given to other people", citing at [60] Lord Denning MR in *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at 599 ("*Lannon*"). Thus, even if a judge was in fact impartial, right-minded persons could still consider that in the circumstances, there was a real likelihood of bias and that he should not sit. The court would not inquire whether a judge in fact unfairly favoured one side as it was sufficient "that reasonable people might think he did" since justice had to be rooted in public confidence. Menon JC noted that although Lord Denning referred to a "real likelihood of bias" test, the discussion in *Lannon* highlighted that the inquiry should not be limited to whether a court thinks there is sufficient possibility a tribunal might be biased but that the inquiry "should be directed at whether a reasonable man might think it so": at [61].

1.46 Menon JC rejected the view of Lord Goff in *Gough,* shared by Phang JC in *Tang Kin Hwa,* that this was a "distinction without a difference" in so far as the court personified the reasonable man. Menon JC underscored that this approach shifted the focus from how something might appear to a

reasonable man to whether a judge thinks there is a sufficient possibility of bias. This was, in Menon JC's view, a "point of some importance" which was "glossed over" by Lord Goff.

1.47 Menon JC considered the shift from the perspective of the reasonable man to that of the court (personifying the reasonable man) to be "a very significant point of departure": at [62]. Borrowing from the observation of Simon Brown LJ in *R v Inner West London Coroner ex p Dallaglio* [1994] 4 All ER 139 at 152, in applying the real danger of bias test, "the court is no longer concerned strictly with the appearance of bias but rather with establishing the possibility that there was actual although unconscious bias": at [62]. This was also underscored by Kirby J in the Australian High Court case of *Johnson v Johnson* (2000) 201 CLR 488 at 506–508 where he observed that interposing a fictitious bystander and adopting a disqualification criteria based on "possibilities" rather than "high probability" was designed to serve "an important social interest". Both these considerations sought to emphasise the need to consider the complaint not from "what adjudicators and lawyers know, but by how matters might reasonably appear to the parties and to the public", noting that the public "includes groups of people who are sensitive to the possibility of judicial bias". From this, Menon JC stressed the "vital public interest" in subjecting those engaged in judicial or quasi-judicial work to the "most exacting scrutiny". Not only must their decisions be "beyond reproach in fact" from a lawyer and judge's perspective, it must be so "from the perspective of a reasonable member of the public". The focus should be whether the events complained of provided a "reasonable basis" for a reasonable member of the public to apprehend that the tribunal might have been biased": at [64].

1.48 Thus, the difference between the two tests was that the reasonable suspicion of bias test was "the most appropriate for protecting the appearance of impartiality" while the "real danger" test emphasised the "court's view of the facts", in the words of Mason CJ and McHugh J in *Webb v The Queen* (1993–1994) 181 CLR 41 ("*Webb*") at 50–51. Indeed, this was the basis upon which Lord Goff differentiated the test, when he at 665 quoted from the decision of Devlin LJ in *Barnsley*. He thought that Devlin LJ wanted to get away from any test pegged at mere suspicion, "the sort of impression that might reasonably get abroad," by focusing on the actual case circumstances and whether this gave rise to a real likelihood the justices might be biased. Goff LJ thought that Devlin LJ was thinking of likelihood in terms of "possibility" rather than "probability" which in his view made the real likelihood test very similar to the real danger of bias test. Nevertheless, Menon JC thought that even with the "rider" that equated likelihood with

"possibility", a distinction of "significance difference" (at [69]) lay between whether the court thinks there was a real possibility of bias as opposed to whether a lay person might reasonably suspect this, even if the court was satisfied that there was in fact no danger. Where the concern was not with just the fact but the appearance of justice being done, Menon JC observed it was irrelevant "to consider the degree of the risk or possibility of the tribunal in fact being biased".

1.49 In expressing his concern with the "real likelihood" test, Menon JC cited at [72] the observations of Deane J in *Webb* at 70–71 that this test, from the vantage point of the appellate court rather than the fair-minded lay observer, would "go a long way towards substituting for the doctrine of disqualification by reason of an appearance of bias, a doctrine of disqualification for actual bias modified by the adoption of a new standard of proof". That is, that the test for apparent bias which was concerned with public perception, would be too closely linked with the test for actual bias. The actual bias test is concerned with facts to be proved on a balance of probabilities, while the real likelihood test entailed a lower standard of proof. However, Menon JC observed that this lower test for apparent bias on the basis of "real likelihood" was "directed at mitigating the sheer difficulty of proving actual bias, especially given its insidious and often subconscious nature": at [74]. This differed from the "reasonable suspicion" test which was whether a court was satisfied "that a reasonable number of the public could harbour a reasonable suspicion of bias even though the court itself thought there was no real danger of bias on the fact": at [75]. The latter test was affirmed to be the law in Singapore, as applied in *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310 at 338 and *Tang Liang Hong v Lee Kuan Yew* [1998] 1 SLR 97 at [46]. Notably even post-*Gough,* Menon JC observed that the applicable test was still seen as the "reasonable suspicion test" (at [78]), as was applied in cases such as *De Souza Lionel Jerome v AG* [1993] 1 SLR 882 and *Re Singh Kalpanath* [1992] 2 SLR 639 at 666, [82] where Chan Sek Keong J (as he then was) said that the concern was with "whether a reasonable man without any inside knowledge might conclude" there was an appearance of bias. Without making a definitive conclusion, Menon JC considered there was merit to the view raised by Chan J where he pointed out the suggestion in *Steeples v Derbyshire County Council* [1985] 1 WLR 256 that the "real likelihood" test ought to apply to administrative decisions and the "reasonable suspicion" test to judicial decisions. This distinction recognised that a higher standard of conduct was required of judges and incorporates into the test of bias the need to take due regard of the context in which it is being applied: at [79]–[80].

1.50 In relation to the "reasonable suspicion" test, Menon JC set out at [81] certain key points raised by Deane J in *Webb* concerning the wisdom of retaining this test post-*Gough*. This included the point that the "reasonable likelihood" test too closely approximated the test for disqualification for actual bias, which could in turn cause public disquiet as the *Gough* test pays insufficient attention to the rationale underlying the doctrine of disqualification for apparent bias, *viz*, that members of the public must see justice as being done. Further, the "reasonable suspicion" test also made clear that the court was not making an adverse finding on whether the tribunal was in fact biased. To these reasons, Menon JC added two further observations to support the view against recognising the two tests as being substantially similar. First, in terms of focus, by adopting the correct "reasonable suspicion" test, the reviewing court retains focus on the real inquiry: "Whether on the facts presented a fair-minded member of the public could reasonably entertain a suspicion or apprehension of bias regardless of whether the court thought it likely or possible or not": at [83]. Second, the "real likelihood" test was "utterly imprecise": at [84]. Since the court was not looking for a proof of bias on a balance of probabilities, in pegging the test at a sufficient degree of possibility of bias, the test becomes "inherently, indeed impossibly, subjective". This inherent difficulty was avoided by the reasonable suspicion test as it directs focus not towards the degree of possibility of bias a court thinks there may be but towards the suspicions the court thinks a fair minded member of the public could reasonably entertain on the presented facts: at [84].

1.51 On the facts on the case, the DC went "well beyond the highest case put forward by the Law Society" (at [101]) which was essentially that Shankar had unwittingly put himself in service of what was an illegal money-lending transaction. The DC's findings concluded that the applicant had deliberately turned a blind eye to the true nature of the transaction and acted in a deliberate, calculating fashion. Clearly, the case advanced by the Law Society was more circumspect than the DC's findings and hence a quashing order was given.

1.52 Menon JC, in underscoring the danger of obscuring the distinction between the two bias tests, observed that once a court found matters to establish a reasonable suspicion of bias, it was inappropriate to then consider whether such matters should be isolated and treated as immaterial. This was evident in so far as the "reasonable suspicion" test seeks to ensure justice is perceived to have been done, in contra-distinction to the "real likelihood" test which was concerned with "the degree of risk that the process has been infected": at [103].

CONSTITUTIONAL LAW

Article 9(3): Right to counsel

1.53 The courts continued to apply the established jurisprudence in relation to the rights of the accused under Art 9(3) of the Singapore Constitution which provides: "Where a person is arrested, he … shall be allowed to consult and be defended by a legal practitioner of his choice." In *PP v Leong Siew Chor* [2006] 3 SLR 290 ("*Leong*"), the High Court grappled with the issue of when an accused should be allowed access to counsel. In this case, widely known as the "Kallang body parts murder trial" (at [1]), the accused was charged with murder, which is punishable with the mandatory death sentence under s 302 of the Penal Code (Cap 224, 1985 Rev Ed). The deceased was a Chinese national and the accused's lover.

1.54 The accused and the deceased had allegedly entered into a suicide pact. However, a statement made by the accused on 26 June 2005 contradicted this in that the accused admitted that he did not intend to kill himself; rather, he killed the deceased to prevent her from discovering and reporting his theft of money from her bank account. This statement, made to the police under s 121 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed), was given before the accused had access to counsel.

1.55 The High Court held that there was "no legal requirement" that an accused person should have access to counsel before giving such a statement: at [87]. In so doing, it applied the approach adopted by the then Court of Criminal Appeal in *Jasbir Singh v PP* [1994] 2 SLR 18 ("*Jasbir Singh*") where a formalistic distinction was drawn between the moment the right to counsel accrued and the point in time in which it could be enjoyed. The point of commencement was immediate; however, following the approach adopted by Malaysian cases such as *Hashim bin Saud v Yahaya bin Hashim* [1977] 2 MLJ 116, the exercise of the right was contingent upon the need to strike "a balance between the arrested person's legal right to advice and the duty of the police to protect the public by carrying out effective investigations": *Jasbir Singh* at 32, [45]–[49]. The Court of Criminal Appeal, adverting to *Lee Mau Seng v Minister for Home Affairs, Singapore* [1969-1971] SLR 508, noted that the right to be able to consult a legal practitioner of one's choice was to be granted by the relevant authority "within a reasonable time after his arrest", unless a statutory enactment, which is not *ultra vires* the Singapore Constitution, deprived the accused of the said right. It considered that Wee Chong Jin CJ in *Lee Mau Seng* while not defining "reasonable time" conceived of this as building in "the element of allowance for police

investigations and procedure". In *Jasbir Singh*, two weeks was considered to be a reasonable period of time.

1.56 In *Leong,* the accused was not allowed access to counsel for 19 days after his arrest. This was considered "justifiable in the circumstances" considering "the duty of the police to follow up on new leads quickly and to gather swiftly whatever evidence was available lest it disappears or is destroyed": at [87]. Tay Yong Kwang J added that this was "not an indictment against the integrity of counsel" in general or specific terms but was "a question of balancing an accused person's rights against the public interest that crime be effectively investigated".

1.57 This case does not cast further light on the time-frame within which the exercise of an Art 9(3) right must be exercised, as restrictions on this right are considered legitimate in so far as the restrictions serve the need to conduct a proper and thorough police investigation into the crime. It appears that the right to counsel is not a trump in the Dworkinian sense but qualified by reference to executive considerations of efficiency, as determined by the police. This flows from the communitarian prioritisation of public order considerations in shaping the balance between the rights of the criminal accused against the community interest in the effective prosecution of crime as a social good. This was affirmed by the Court of Appeal in *Leong Siew Chor v PP* [2006] SGCA 38 at [9] where it held that the mere fact that the accused had fully co-operated with police investigations was not in itself a basis for granting access to counsel. While *Jasbir Singh* was concerned with the recording of a cautioned statement and the present case concerned the recording of a further investigation statement, the Court of Appeal did not see any "crucial distinction" between these two cases. It affirmed that a court had a duty to protect the rights of the accused and "an equally strong duty to protect the rights of the public and the state": at [9].

Alleged breaches of constitutional principle: Rule of law and separation of powers

1.58 Various judicial statements in relation to the content of the rule of law were made in relation to the conduct of a trial. In *Yap Keng Ho v PP* [2007] 1 SLR 259 ("*Yap*"), the applicant was charged with two others before a District Court for conducting public entertainment without a licence, contrary to the Public Entertainments and Meetings Act (Cap 257, 2001 Rev Ed). Two days after the trial had commenced, the applicant filed a criminal motion for an order declaring a "mistrial", on the basis that the investigating officer was present in court while the oral evidence of three witnesses was

being recorded. The applicant made three further claims, alleging the violation of various constitutional rights, that is, Arts 9(1) to 9(3), 12 and 14 of the Singapore Constitution. These relate, respectively, to criminal due process rights, the prohibition against unequal treatment, and free speech. In addition, the applicant claimed that the Attorney-General had misled the court and violated Arts 12 and 14 and that the "State Council" should be directed to advise the President to "convene a Constitutional Court under Article 100 of the Constitution": at [1]. This application, brought before the High Court, was dismissed. The applicant alleged that the charges brought against him and the other accused persons were "politically motivated", calling for the need for adherence to the rule of law: at [4]. The only arguments relevant to the application by way of criminal motion pertained to allegations that the trial judge was biased and that the prosecution witnesses' testimonies were untruthful.

1.59 Choo Han Teck J noted that the applicant, without the assistance of counsel, was unable to "articulate the grand ideals" of justice and the rule of law to the immediate case: at [5]. Choo J deduced from the application, supporting affidavit and oral arguments that the allegations concerning the breach of the rule of law and miscarriage of justice related to the presence of the investigating officer and the refusal of the trial judge to abort the case and that, "that being all there was", such allegation was "misconceived": at [5]. He noted that the applicant had not indicated in his affidavit or argument how the presence of the investigating officer during the witnesses' testimonies prejudiced the defence.

1.60 Choo J declared that the term "justice" variously connoted "desert, … fairness, … and some vague intuitive notion of what was right in the circumstances": at [6]. He did not find that an injustice had been done because the trial judge had refused to "abort" the trial as the proper remedy would be for the relevant party to bring an appeal against the judge's final decision. It would be "inappropriate" before the final judgment had been delivered to seek recourse to a higher court; further, at this "inchoate" stage of the proceedings, there was no basis upon which a judge could ascertain "what the nature and extent of the injustice was"; further, if the judge eventually decided in the applicant's favour, the presence of the investigating officer in the court room would not have caused injustice to the applicant: at [6].

1.61 In elaborating upon the rule of law in relation to this case, Choo J noted that "uniformity" and "predictability" were merits of the rule of law as they were "essential for people to know what it is that they can or cannot do

in that society". In this respect, trial procedure and rules of evidence were matters under the "full control" of the trial judge: at [7]. A judge had to make numerous rulings during the course of a trial which would adversely affect one or the other party; if each ruling could be interrupted prior to the conclusion of the trial, the "flow and dignity of a trial" would be disrupted, which "tarnishes the image of the rule of law": at [7]. There was nothing on the facts of the case to justify an exception. A party dissatisfied with a verdict had resort to an appeal process or possibly the High Court's revisionary jurisdiction over subordinate court proceedings. Further, Choo J noted at [8] that "justice and the rule of law require that only relevant issues are addressed" and that the issue of the refusal of the trial judge to "abort" the case lacked legal merit despite the applicant's allegation that the case brought against him was "politically motivated"; this was irrelevant as the court's sole concern was with "the legal issues and no more".

1.62 The importance of not judging any of a judge's ruling until the trial is over as an important principle of fairness was also underscored by Choo J in *Chee Soon Juan v PP* [2006] SGHC 202 at [4], which involved one of the accused persons in *Yap*. Choo J dealt with the allegation made by Chee in his application by criminal motion that his application had been dismissed "without being heard" by pointing out that Chee had made "clear and loud oral submission" before him as well as all the applicant's political grievances (at [4]) which bore no relevance to the legal issues. Choo J underscored that "extraneous matters" should not be brought before a court but "addressed in a different forum and to a different audience".

The constitutional allocation of powers

Prosecutorial discretion

1.63 In *PP v Goh Son Im Esther* [2006] SGMC 14, it was argued that s 53A(4)(*b*) of the Trade Marks Act (Cap 332, 2005 Rev Ed)) was *ultra vires* the Singapore Constitution. This provides that seized goods shall be returned to the person in whose possession it was when it was seized if no proceedings were instituted within six months of seizure. It was argued that an order for the return of goods would "undermine and derogate from the constitutionally entrenched discretion of the Public Prosecutor": at [14].

1.64 The trial judge considered such argument "misconceived": at [15]. While the Singapore Constitution under Art 35(8) conferred upon the Public Prosecutor "the absolute discretion to institute, conduct and discontinue proceedings for offences", this was not removed by the express terms of

s 53A(4)(*b*). Further, as to deciding whether there is sufficient evidence upon which to institute proceedings, this power remained within the Public Prosecutor's discretion as the "availability of evidence is but one of the factors in the exercise of the Public Prosecutor's discretion": at [15].

Beyond reasonable doubt: A constitutional principle?

1.65 The constitutional duty of an appellate court to ensure that a conviction was warranted was referenced in *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR 45. This was to be appropriately balanced against "the advantages admittedly available to the trial court" (at [43]) in seeing and hearing witness evidence. Rajah J (as he then was), while noting the need for judicial restraint when an appellate court overturned or modified the factual findings of a trial court, affirmed that it was open for the former to do so where inferences drawn by the trial court were unsupported by the primary or objective evidence on record: at [35], [38] and [40]. A verdict would be unreasonable where the trial judge's decision is against the weight of the evidence or wrong in law. Furthermore, a conviction would be wrong in law if the Prosecution failed to prove its case beyond reasonable doubt.

1.66 This requirement was "firmly embedded and entrenched in the Evidence Act (Cap 97, 1997 Rev Ed)" and "in the conscience of the common law": at [46]. Rajah J noted that this "hallowed principle is so honoured as a principle of fundamental justice that it has been accorded constitutional status in the United States (*In re Winship*, 397 US 358 (1970) ("*Winship*") and in Canada (*R v Vaillancourt* [1987] 2 SCR 636)". It was a principle consistently applied by Singapore courts as a pre-requisite for a legitimate and sustained conviction, most recently in *Took Leng How v PP* [2006] 2 SLR 70. This principle might conceivably have constitutional status in Singapore in so far as it constitutes one of those fundamental rules of natural justice which the reference to "law" in Arts 9 and 12 of the Singapore Constitution incorporated, as recognised by the Privy Council in *Ong Ah Chuan v PP* [1980–1981] SLR 48.

Judicial power and sentencing considerations

Law on judicial mercy

1.67 The prerogative of mercy, an executive power, is constitutionally entrenched in Art 22P of the Singapore Constitution. In addition to this, it falls within the scope of judicial power for a court to exercise mercy, as

affirmed by V K Rajah J (as he then was) in *Chng Yew Chin v PP* [2006] 4 SLR 124. Here, the accused was charged and convicted before a District Court with the offence of outraging the modesty of a maid under ss 73(1)(*c*), 73(2), and 354 of the Penal Code (Cap 224, 1985 Rev Ed). As the appellant was suffering from nasopharyngeal cancer and as medical evidence indicated that incarceration could exacerbate this condition and "accelerate his demise", the sentence of imprisonment imposed by the District Court was set aside and replaced with a fine as incarceration would have "very much harsher consequences" for the appellant "than what is intended for the ordinary offender": at [64].

1.68 In setting out the law on judicial mercy, Rajah J noted that this discretion to grant judicial mercy should only be exercised in "exceptional cases" (at [50]) with "the utmost care and circumspection", listing out a number of cases where this plea failed, as the illness complained of was insufficiently severe (at [52]). References were also made to case law from the UK, Australia and Hong Kong where judicial mercy was settled law, from which Rajah J extracted a list of relevant factors for consideration in the exercise of this judicial discretion: at [59]–[60].

1.69 On the facts of the immediate case, the appellant's terminal illness, as evinced by the "incontrovertible medical evidence", "qualified as an exceptional circumstance in the sentencing equation": at [66]. This is consistent with precedent in so far as Yong Pung How CJ remarked in *Lim Teck Chye v PP* [2004] 2 SLR 525 at [82] that judicial mercy could be exercised where the offender suffers a terminal illness. While noting that public confidence could be "sapped" if offenders were not consistently dealt with, Rajah J observed at [65] that justice should be "neither blind nor shackled". He underscored that a "narrow straitjacket approach" in dealing with these "rare and troubling" cases would also undermine public confidence in the judiciary "as a scrupulously fair and sensitive institution, always intent on balancing its functions with appropriate sentencing considerations": at [65]. Thus fairness, in exceptional cases, "must encompass an element of mercy", quoting with approval US Judge Anthony M Kennedy's extra-judicial statement at the 2003 American Bar Association Annual Meeting that "a people confident in its laws and institutions should not be ashamed of mercy": at [65].

1.70 Rajah J rejected the argument raised by the Prosecution that "granting mercy to a convicted offender is an executive rather than a judicial prerogative" (at [55]) such that judicial intervention would violate the separation of powers principle. This contention lacked substance since the

courts possessed "residuary discretion to exercise mercy in appropriate cases": at [51]. Indeed, this power was "neither novel nor unprecedented in Singapore" (at [51]), as evident in the exercise of judicial mercy in *PP v Lim Kim Hock* [1998] SGHC 274. Nevertheless, this aspect of judicial power was not to be considered a mitigating factor and should not be abused, as the "quiddity of judicial mercy lies in the prerogative to depart from what would otherwise be the proper sentence, given the exceptional circumstances the court is faced with": at [62].

Judges and insufficient sentencing powers

1.71 The High Court in *Angliss Singapore Pte Ltd v PP* [2006] 4 SLR 653; noted that it would be "tantamount to an unconstitutional violation of the separation of powers" (at [88]) were a judge to take into account his view that the prescribed maximum sentence for an offence was too low. Where the constitutionality of legislation was challenged, this could be reviewed but "it is entirely another to be disloyal to and to disregard the legislation when no challenge has been mounted against the legislation itself". That is, the courts cannot alter legislatively prescribed sentences through judicial revision.

Constitutionality of presumptions

1.72 Giving a broad berth to Parliament is evident in the upholding of evidential statutory presumptions in relation to drug trafficking offences under the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) ("MDA") in *PP v Tan Kiam Peng* [2007] 1 SLR 522. Rajah J (as he then was) noted that the drug trade was "a major social evil", engendering "a vicious cycle of crime that inexorably ripples through the community" (at [8]), taking judicial notice of "Singapore's uncompromising attitude" towards enforcing a relatively drug free environment (at [9]). Rajah J noted (at [10]) that "extremely high returns" stood to be gained from the successful distribution of drugs. Thus, international drug syndicates often employed apprentice couriers without criminal records to minimise the risk of detection. The MDA in seeking to deter all manner of drug trafficking did not distinguish between veterans and apprentice couriers as this would undermine the statutory punitive regime, rendering it "nothing more than a drug peddlers' charter": at [10].

1.73 The MDA established three core evidential presumptions (at [13]), including a presumption under s 18(2) that the person knew the nature of the drug in his possession. This allows the accused to prove he is morally guiltless: at [15]. Rajah J noted (at [17]) that the constitutionality of such presumptions "has long been regarded as legally unassailable and has

received the imprimatur of the Privy Council", citing *Ong Ah Chuan v PP* (*supra* para 1.66) at 62–63, [28]–[29]. There, Lord Diplock stated that the fundamental rules of natural justice were not offended because the court could infer that certain acts were done for a presumed purpose, upon the prosecution's proving that the accused had done certain acts. This was because such purpose for committing an act "is peculiarly within the knowledge of the accused". Thus, there was "nothing unfair" in requiring the accused "to satisfy the court" that the acts were in fact committed "for some less heinous purpose". Their Lordships considered there was "no constitutional objection" to a rebuttable statutory presumption that the possession of a minimal quantity of drugs was for trafficking purposes.

1.74 The learned judge noted (at [16]) that it was apparent from "common sense" that it was "plainly necessary to alter evidential rules in order to combat pernicious social evils in the interests of the wider community." This is because of the difficulty of proving the mental intent of possession, such that it was "entirely reasonable" to require the accused to "explain persuasively his lack of knowledge". Rajah J observed that the "inadequate comprehension" of the "entirely pragmatic and morally defensible legal reasoning" behind such statutory presumptions has often sparked "intemperate criticisms" by "ill-informed observers and commentators" of the core MDA presumptions.

Sentencing and the constitution

1.75 V K Rajah J (as he then was) alluded to the constitutional dimension of sentencing in *Tan Kay Beng v PP* [2006] 4 SLR 10 at [31]–[33]; in noting that deterrence was always to be "tempered by proportionality in relation to the severity of the offence committed as well as by the moral and legal culpability of the offender". The learned judge stated that there was "an overriding constitutional and public interest imperative warranting that individuals are not unfairly sentenced" (at [33]) and that it was wrong to consider "inimically irreconcilable" the "mandates of law and order" and the offender's right to fair treatment, which the sentencing judge had to appropriately balance. This principle was approved in *PP v Aw Meng Choo Joanna* [2006] SGDC 219 at [179] and *PP v Sustrisno Alkaf* [2006] SGDC 182 at [34].

1.76 No specific constitutional principle was alluded to though one may speculate that the Art 9 safeguard may be relevant. This stipulates that the deprivation of personal liberty has to be "in accordance with law". The word "law" has been interpreted in *Ong Ah Chuan v PP* (*supra* para 1.66) as

relating to a system of law which is consistent with fundamental rules of natural justice or fairness. Alternatively, Art 12 which prohibits unequal treatment may be implicated in so far as arbitrary sentencing might contravene the equal protection principle.

Double jeopardy

1.77 More specifically, sentencing principles are subject to norms in the form of constitutional liberties. In *PP v NF* [2006] 4 SLR 849 at [66], V K Rajah J (as he then was) in determining sentencing for a case of familial rape noted in relation to an offender's past criminal record, that penalising an offender for his past misdeeds, particularly where he had already served his sentence for them, would "be tantamount to a violation of the constitutional safeguard eschewing double jeopardy". Article 11(2) of the Singapore Constitution provides that a convicted or acquitted person "should not be tried again for the same offence" unless this has been quashed and a retrial ordered by a superior court. A criminal record was a relevant factor in the sentencing process but it would be "inappropriate to mechanically enhance" an offender's sentence by virtue of such record.

Equality

1.78 Article 12 of the Singapore Constitution provides: "All persons are equal before the law and entitled to the equal protection of the law." This is relevant in the exercise of the judicial power of sentencing. The accused in *PP v Shaik Raheem s/o Abdul Shaik Shaikh Dawood* [2006] SGDC 86 was convicted on various cheating charges. In considering sentencing, District Judge Kow Keng Siong noted that it would be "unreasonably discriminatory" and constitute a clear violation of Art 12(1) to consider the accused's social status in sentencing, as this should not be conflated with an accused's good character: at [273].

1.79 In so doing, he was applying the approach of the High Court in *Dinesh Singh Bhatia s/o Amarjeet Singh v PP* [2005] 3 SLR 1 where V K Rajah J had noted (at [59]), in passing sentence on the accused for the offence of drug consumption under the Misuse of Drugs Act, that it did not "stand up to scrutiny" that exceptional individuals should receive exceptional treatment by the courts. He stated (at [59]):

> The elite in Singapore cannot legitimately expect to, and in any event, will not, be accorded preferential treatment by the courts. The courts have to

> discharge their duty fairly and dispassionately regardless of an accused's station in life and/or family background.

Similarly, in *PP v Yap Cheng Kwee* [2006] SGDC 279, where a medical practitioner charged with the unauthorised possession of drugs was convicted, District Judge Kow said at [30] that it would be "not only inconsistent with our robust drug laws and constitutional prescription that '[a]ll persons are equal before the law' (Article 12)," were the Accused to receive more lenient treatment "just because he is a medical practitioner".

A constitutional right to a pension?

1.80 In *Tee Soon Kay v AG* [2006] 4 SLR 385, the High Court rejected as "misplaced" (at [31]) an argument that relied on s 9(*d*) of the Pension Act (Cap 225, 2004 Rev Ed) read with Art 112 of the Singapore Constitution to the effect that there was a constitutional right to a pension, as this "lacks substance" (at [33]). Article 112(1) provides:

> The law applicable to any pension, gratuity or other like allowance (referred to in this Article as an award) granted to any public officer or to his widow, children, dependants or personal representatives shall be that in force on the relevant day or any later law not less favourable to the person concerned.

1.81 The plaintiffs had argued that by virtue of such right, the Finance Permanent Secretary had lacked authority in stipulating that their conversion from the pension scheme to the Central Provident Fund ("CPF") with effect from 1 July 1973 was irrevocable. Seeking to revert back to the pension scheme, they sought to argue, *inter alia*, that the purported irrevocability of the 1973 Option was *ultra vires*. The plaintiffs argued that they were entitled to revert back to the scheme after repaying the amount the Government had contributed to their CPF accounts. Section 9(*d*) provides that:

> No pension … shall be granted … to any officer … in respect of any service … during which the officer was a member of any fund mention in the Second Schedule, except upon the condition that there shall be first paid to the Government the total amount paid by the Government to that fund excluding the amount paid on account of the officer.

1.82 However, the High Court held that nothing in the statute created a right to a pension. It merely regulated the pre-conditions for the payment of a pension. Article 112 of the Singapore Constitution merely directed the pension-awarding authority to the applicable law should the pension be granted: at [31]. Article 112(3) envisaged that public servants may opt for

different retirement benefits, providing that the law a person opts for, in this case, the Central Provident Fund Act (Cap 36, 2001 Rev Ed), "shall be taken to be more favourable to him than any other law for which he might have opted": at [31]. As Art 2 of the Singapore Constitution includes both statutory and common law within the definition of "law", the reference to "law" in Art 112(3) included the common law and as such, the plaintiffs were estopped from claiming a right to revert back to the pension as they had, without complaint, received regular government contributions to their CPF accounts for more than 30 years: at [33]. Thus, there was no "right" to a pension, though the pensionable officers retiring in pensionable circumstances may be granted a pension: at [7].

Political speech

1.83 In the realm of political free speech, two cases consolidated precedent in applying the established approach towards construing the Art 14 free speech clause in the fields of libel and contempt of court.

Contempt of court

1.84 In *AG v Chee Soon Juan* [2006] 2 SLR 650, the respondent at a bankruptcy hearing before the assistant registrar ("AR"), read a statement which was later released to the media. This stated that the courts were biased and unfair, and acted at the government's behest in cases involving opposition politicians: at [4]. As such he alleged he and other opposition politicians had suffered grave injustice flowing from a dependent Singapore judiciary which "compromised the law in order to gain favour with the Government": at [4]. In the course of the proceedings, the respondent refused to answer any questions posed by the AR.

1.85 The respondent was charged on two counts: that he had committed contempt "in the face of the court" at the hearing and also had acted in contempt of the court by scandalising the Singapore judiciary in the bankruptcy statements. The respondent was found guilty of contempt of court and was sentenced to one day's imprisonment rather than a fine owing to the serious nature of the contemptuous acts and the respondent's lack of contrition. This was meant to deter future such offenders from committing such serious contempt, as in the present case where the contemptuous statements were actually read before the court.

1.86 The High Court held that for purposes of the common law doctrine of "contempt in the face of the court", an AR hearing matters in chambers

was treated as a "court" which possessed the inherent power to punish acts of contempt: at [14]. This was because the interest in the administration of justice was "equally strong in ensuring the expeditious disposal of both categories of hearing" (at [10]), that is, hearings in chambers and open courts. The powers of an AR were derived from and "indistinguishable" from those of a High Court judge in chambers: at [12].

1.87 In interpreting the scope of Art 14, Lai Siu Chiu J reiterated the familiar approach evident from previous cases that Art 14 did not guarantee an absolute right of free speech and that the offence of scandalising a court as a recognised specie of contempt of court fell within one of the eight stipulated grounds of derogation in Art 14(2): at [28]. This was defined in *R v Gray* [1990] 2 QB 36 at 40 by Lord Russell of Killowen as "[a]ny act done or writing published calculated to bring a Court or a judge of the Court into contempt or to lower his authority".

1.88 The learned judge considered that there was no need to recalibrate upward the weight given to free speech in reconciling this liberty against its limit in the form of contempt laws. In the Singapore context, statutory recognition had been accorded the common law offence of contempt of court under s 7(1) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed): at [29]. Like the reasoning in *AG v Wain* [1991] SLR 393 ("*Wain*"), Lai J considered that the balance between free speech and judicial reputation was appropriately struck at common law, despite the fact that the free speech at common law only had the status of residual liberty rather than a constitutional right. In *Wain*, Sinnathuray J had rejected the argument that the common law offence of scandalising the court "is inconsistent with the written constitutional guarantee of freedom of expression", a conclusion reached by Canadian and US courts. He was content to note that the offence was "as old as the common law": at [53]. This issue was not further discussed in *AG v Chee Soon Juan* which indicates that the courts are reluctant to factor in the importance of free speech in the balancing process, not merely as an individual right but a community interest, in service of democracy and accountability. The preference for judicial reputation rather than free speech is evident in the endorsement by Lai J of the test articulated in *Wain* that only an "inherent tendency" rather than a "real risk" of prejudicing the administration of justice was needed for speech to be contemptuous rather than fair comment: at [31]. Furthermore, Lai J (at [31]) adopted the view of the court in *AG v Lingle* [1995] 1 SLR 696 at [13] which did not require intent to impugn judicial integrity as an ingredient of scandalising the court. Were this accepted, it would afford greater leeway to the rights of the speaker.

1.89 On the facts, the bankruptcy statement had alleged that all Singapore judges had improper motives and, as such, treated opposition politicians unfairly. By so doing, the respondent had exceeded his right of "fair criticism" and entered the realm of contempt by impugning the entire Singapore judiciary, which was calculated to prejudice the future administration of law in all Singapore courts. The respondent had before Lai J made "copious reference" to an academic article by Ross Worthington entitled "Between Hermes and Themis: An Empirical Study of the Contemporary Judiciary in Singapore" (2001) 28 Journal of Law and Society 49 to support as truth the allegations in the bankruptcy statement: at [50]. Lai J characterised the article as an expression of an individual's views based on "erroneous assumptions", "inaccurate and/or wrong information", resulting in "speculative conclusions" which she could not accept "as the truth": at [50].

1.90 Lai J did not recalibrate the trade-off between free speech and the institutional reputation of the court in the public perception, which the offence of contempt is designed to protect. The learned judge refused to recognise defences in the form of fair comment and justification which would enlarge the scope of free speech as it was believed that this would "expose the integrity of the courts to unwarranted attacks" (at [46]) as a belief published in good faith, even if unreasonable, could amount to fair comment. In other words, Lai J considered that this would be affording too much weight on the side of free speech interests. She noted that unlike some UK judges, Singapore judges did not "have the habit of issuing public statements to defend themselves", feeling constrained by their office and lacking an official forum for making responses. This "does not mean that they can be attacked with impunity": at [46].

1.91 The prioritisation of judicial reputation is also evident in her rejection of the defence of justification as it was feared this would "give malicious parties an added opportunity to subject the dignity of the courts to more bouts of attacks": at [47]. The court hearing the allegation of contempt would effectively be trying the conduct of the judge, which was considered unacceptable.

1.92 Lai J remarked that case law from other countries in the Commonwealth, particularly the UK, had to be treated with "considerable caution" because of the "differing legislation" in those countries: at [23]. This followed the trend of judicial self-instruction to be wary of UK public law cases which had adopted a rights-expansive approach, weighing individual liberties more heavily against competing interests. This can be traced back to

the 1989 ministerial caution (*Singapore Parliamentary Debates, Official Report* (25 January 1989) vol 52 at col 468) against importing UK law which was increasingly influenced by the jurisprudence of the European Court of Human Rights ("ECtHR"), to which the UK was a party, which V K Rajah J (as he then was) reiterated in *Chee Siok Chin v PP* [2006] 1 SLR 582 at [78], in noting that ECtHR decisions have "significantly altered English judicial attitudes" in relation to freedom of assembly and public order as a limit. He observed (at [86]) that it was:

> ... axiomatic that the terms and tenor of Art 10(2) of the European Convention on Human Rights are very different from Art 14 of the Constitution. In particular, the phrase 'necessary in a democratic society' has been interpreted … very generously.

In like vein, Lai J observed that through its accession to the European Convention on Human Rights, the UK had "directly incorporated the jurisprudence of the ECtHR and pegs the UK position on the offence of scandalising the court to the standard imposed by the European Convention": at [23]. This more generously weighs the right of the individual which a law or executive act seeks to curtail, but this is not dissimilar to the admonition by Lord Diplock in *Ong Ah Chuan v PP* (*supra* para 1.66) at 61, [23] that in interpreting Pt IV (Fundamental Liberties) of the Singapore Constitution, a "generous interpretation" which avoided "the austerity of tabulated legalism" was warranted, to give individuals the "full measure" of fundamental liberties.

1.93 Lai J noted that while the 1981 Contempt of Court Act (c 49) now regulated contempt in the UK, some aspects such as scandalising the court were not addressed by the said Act, and remained regulated by common law: at [23]. As explained by Sinnathuray J in *Wain* (at [30]), English cases "from the beginning of the last decade onwards" were of "no guidance" to the Singapore law of contempt as this was derived from "the common law of England before major changes were affected to this law by statute in England". The effect of the 1981 Act was to modify the contempt of scandalising the court "in a liberal direction", that is a more rights-protective direction: at [30]. So too, Lai J noted at [24] that in the UK case of *Attorney-General v Times Newspapers Ltd* [1974] AC 273, the UK's approach towards protecting free expressions involved "more extensive incursions on the freedom of expression than the European Court felt that the European Convention allowed". Furthermore, this rights-oriented influence on the development of the UK common law, fuelled by ECtHR jurisprudence was

further entrenched by the enactment of the UK Human Rights Act 1998 (c 42): at [24].

1.94 Reiterating the "local conditions" argument raised by Sinnathuray J in *Wain* at [33]–[34], Lai J considered that conditions "unique" to Singapore necessitated "that we deal more firmly" with attacks on judicial impartiality. Two local factors were identified; firstly, the geographical size of Singapore which Lai J said "renders its courts more susceptible to unjustified attacks". Lai J cited a Privy Council case from Mauritius, *Ahnee v Director of Public Prosecutors* [1999] 2 AC 294 at 305–306 where it was observed that while proceedings for scandalising the court were rare in England, it was "permissible to take into account that on a small island such as Mauritius the administration of justice is more vulnerable than in the United Kingdom. The need for the offence of scandalizing the court on a small island is greater": at [25]. With respect, it is difficult to see how size matters unless it is being suggested that a small size is a factor which makes a political environment more susceptible to political instability through criticising a key constitutional institution. Such an argument tends to sideline any consideration of the importance of free speech to a democratic society, which is the key focus of ECtHR jurisprudence. Secondly, Lai J (at [26]) endorsed Sinnathuray J's observation in *Wain* at [34] that the fact that judges in Singapore are triers of fact and law and wield more responsibility than in the UK where questions of facts were committed to a jury, "must weigh heavily" (at [26]) in applying the law of contempt in Singapore as attacks on judicial impartiality had to be dealt with firmly. However, one might easily point out that with greater power comes greater responsibility and thus the need for greater accountability, to ensure against abuse of contempt powers; a partial judge may deploy contempt laws in a self-serving manner, to the detriment of public confidence in the administration of justice.

1.95 In this regard, Lai J identified "more appropriate channels" for ventilating "genuine concerns" about the judiciary, through Art 98 of the Singapore Constitution which deals with the removal of judges for misconduct: at [48]. Article 98 allows for the convening of a five-member tribunal to assess whether a Supreme Court judge ought to be removed for misbehaviour or incapacity to discharge the office. This procedure is a blunt oversight tool as it requires the Prime Minister or Chief Justice after consulting the Prime Minister to represent to the President that a judge ought to be removed before such tribunal can be appointed. If indeed a judge were serving the will of politicians who wield the reins of government power, it is unlikely that such a tribunal would be established. By construing the

freedom of expression, of speech critical of the judiciary, restrictively, a potential check against judicial partiality is minimised.

Political libel

1.96 The High Court in *Lee Hsien Loong v Singapore Democratic Party* [2007] 1 SLR 675 had occasion to discuss the law of defamation, which limits the Art 14 free speech guarantee. The plaintiffs in this case were the Prime Minister Lee Hsien Loong (LHL) and the Minister Mentor Lee Kuan Yew and they brought these suits against the defendant opposition politicians in respect of articles in the Singapore Democratic Party (SDP) newsletter, *The New Democrat*. The article expressed concern about governance in Singapore and how public bodies like the Housing and Development Board, Central Provident Fund and the Government Investment Corporation were run.

1.97 The plaintiffs applied for summary judgment under O 14 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). Eventually, the court heard the O 14 summonses and granted the plaintiffs' applications. Notably, the High Court rejected the more rights-expansive approach adopted in other common law jurisdictions, specifically, the UK, Australia and New Zealand, as not representing Singapore law. It considered that these decisions were "born of the different constitutional, political and social contexts of other jurisdictions and were inconsistent with the law of defamation in Singapore": at [74]–[82].

1.98 In the course of the proceedings Belinda Ang Saw Ean J clarified that the plaintiffs were not suing in their official capacity but as private citizens concerned by the effect of the relevant publication on their individual reputations. The learned judge (at [33]) distinguished the English case of *Derbyshire County Council v Times Newspaper Ltd* [1993] AC 534 ("*Derbyshire*") which held that a government body could not sue for defamation, adopting the *obiter* observations of V K Rajah J (as he then was) in *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR 582 at [68] where he observed that the *Derbyshire* decision did not preclude individual members of a governing body to sue if the relevant statement was capable of being interpreted as referring to the said individual. He noted that "the ability of the individual to sue seems to be regarded as a reason for denying such a right to the body", quoting from *Gatley on Libel and Slander* (Sweet & Maxwell, 10th Ed, 2004) at para 8.20. Thus, Ang J observed (at [35]) that politicians "like any other ordinary citizens" had the same judicial recourse to protect their reputation, "especially when defamatory statements about the

Government or any political institution are capable of being understood to be referring to them".

1.99 This approach rejects the idea that politicians must be open to criticism as speech critical of politicians served the interests of a democratic society in full and free debate, as followed in *New York Times v Sullivan* (1964) 376 US 254 and *Lingens v Austria* (1986) 8 EHRR 407. Such approach is consonant with the leading Court of Appeal decision of *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310, which rejected the application of these two cases and underscored that defamation law "protects the public reputation of public men as well": at [81]. Not only was it reiterated that Art 14 is not an absolute right, the approach in *Tang Liang Hong v Lee Kuan Yew* [1998] 1 SLR 97 in relation to the quantum of damages for politicians was approved. There, the Court of Appeal rejected as "untenable and wrong" (at [118]) the proposition that damages should be reduced because the successful plaintiff was a politician. To allow broader latitude for persons to defame a politician would in the view of the court violate the Art 12(1) equality clause. This discounts the importance of political speech to a democratic society, in so far as the degree of protection to afford to the reputation of politicians is pegged to that of the private person. One might note that the public standing of politicians has been treated as a factor for higher damages: *Goh Chok Tong v Chee Soon Juan (No 2)* [2005] 1 SLR 573 at [71].

1.100 Ang J noted that the common law defences of justification, qualified privilege and fair comment were raised only as bare assertions, without a substantive basis: at [66]. For example, insufficient particulars were given in relation to justification: at [68]. Further, she rejected the argument that the disputed words attracted qualified privilege because the defendants as electoral process participants or members of the SDP had a duty to publish the words, and that the public had a corresponding interest to receive the words which concerned "matters of public interest": at [72]. She stated that just because a publication related to "political information" did not mean it attracted qualified privilege for it to be disseminated to the world at large. The common law did not recognise a "general media privilege" (at [73]) such that the defendants, to attract qualified privilege, had to plead "special facts", such as danger to the public from contaminated food sources or a terrorist threat, as in *Blackshaw v Lord* [1984] QB 1 at 27. Ang J noted (at [73]) that Singapore courts have not regarded "information on political and government matters" as constituting "special facts" which attracted qualified privilege.

1.101 The learned judge specifically rejected the approaches adopted in foreign cases which were unified in so far as a greater valuation was given to the importance of free speech in relation to a democratic society. In the UK case of *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 ("*Reynolds*"), the House of Lords required that "responsible journalism" be practised in the publications, rejecting the categorical approach which would require the recognition of a new category of privilege for the discussion of "political information": at [75]. Ang J noted that the decision was influenced by Art 10 of the European Convention of Human Rights ("ECHR") and s 12 of the UK Human Rights Act 1998 (c 42) which allows it to be raised before a British court. Consequently, the media was given "more latitude in its reporting" provided "responsible journalism" was practised. Ang J pointed out that Art 10 ECHR was distinguishable from the more qualified Art 14 of the Singapore Constitution. As the Court of Appeal in *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310 had rejected Art 10 ECHR, Ang J opined that it was "fairly clear" that *Reynolds* should not be followed and applied in Singapore: at [76].

1.102 Ang J also rejected the approach adopted in Australia and New Zealand in relation to the recognition of a special privilege for information relating to political and government matters, in *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96 and *Lange v Atkinson* [2000] 3 NZLR 385 respectively. The Australian High Court stated (at 118) that even where there was a special privilege for publications relating to political matters to the public at large, the defendant had to "show that his conduct in making the publication was reasonable". This required that the defendant had to have reasonable grounds for believing the imputation was true, took proper steps to verify the accuracy of the material and did not believe the material to be untrue. The New Zealand Court of Appeal established that in considering whether an occasion of publishing a political statement would attract privilege, the court had to consider the publisher's identity, the publishing context and whether the publisher had acted responsibly or reasonably.

1.103 Ang J noted that the *Lange* decisions were "born of the constitutional, political and social contexts in Australia and New Zealand" (at [81]), while in Singapore, political or government related information did not constitute "special facts" which attracted qualified privilege. Thus, these were inconsistent with Singapore's defamation law: at [82].

1.104 In an associated case, the constitutionality of the repeal of O 14 r 1(2) of the 1970 Rules of the Supreme Court in 1991 was challenged in

Chee Siok Chin v AG [2006] 4 SLR 541; it was also argued that this breached natural justice principles. The sub-rule, O 14 r 1(2) was repealed in 1991 by way of the Rules of the Supreme Court (Amendment No 2) Rules 1991 (S 281/1991). This was promulgated by the Rules Committee, pursuant to s 80 of the Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed).

1.105 The repealed sub-rule had precluded plaintiffs in such matters as defamation actions from obtaining summary judgments. No specific constitutional provision was specified although the Art 14 free speech guarantee was alluded to in chambers.

1.106 The plaintiffs by affidavit referred to "a fundamental right to have a trial in open court in defamation actions." In essence, the plaintiffs were claiming a "constitutional right", as recognised by O 14 r 1(2) RSC 1970, to a full trial for a defamation action. The 1991 Amendments abrogated this right, it was claimed. However, Ang J considered that such arguments, as made out in the written submissions, were "completely devoid of merit": at [18]. The learned judge accepted that "no such right" was "set out anywhere in the Constitution": at [22].

1.107 In chambers, the judge directed the plaintiffs' counsel to continue with his submissions after a short outburst between him and defendants' counsel, whereupon the judge was accused of actual bias and asked to recuse herself. The judge refused and the plaintiffs made an unsuccessful application to stay the originating summons ("OS") pending an appeal of the judge's decision not to recuse herself; this was followed by an application to have the OS heard in open court as it implicated constitutional issues of public interest, as it was connected to the defamation suits of two leading politicians. This was rejected as the "normal practice" was to hear an OS in chambers: at [15]. Thus, the hearing of the OS proceeded in the absence of the plaintiffs as they walked out of the hearing, with the court being invited by the plaintiffs' counsel to consider his written submissions despite the plaintiffs instructing him not to participate in a hearing in chambers as the plaintiffs did not wish to legitimise the process: at [16]. Ang J noted that, to the plaintiffs, the "seriousness" of a "potential constitutional challenge" in the OS "paled into insignificance" when they were denied the publicity of an open court hearing: at [16].

1.108 The tenor of the constitutional argument would appear to be that the right to have an open trial for defamation claims by dint of Art 14 would require a modification of court procedure; it was argued that O 14 as a procedure for the summary disposal of defamation actions was in violation

of Art 14. Ang J noted (at [23]) that Art 14 was qualified by the common law of defamation as modified by the Defamation Act (Cap 75, 1985 Rev Ed), following *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1990] SLR 38 at 39, [5]. The High Court rejected as "simply spurious" the assertion that the O 14 summary procedure was *per se* unconstitutional: at [30].