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1. ADMINISTRATIVE AND CONSTITUTIONAL LAW

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I. Introduction

1.1 In 2021, the major public law cases related to challenges in relation to the scope of judicial power and whether this was interfered with through alternative sentencing regimes, as well as challenges to the Art 12 equal protection clause of the Constitution of the Republic of Singapore[1] ("Singapore Constitution" or "the Constitution"). The Court of Appeal in *The Online Citizen Pte Ltd v Attorney-General*[2] considered the constitutionality of the Protection from Online Falsehoods and Manipulation Act 2019[3] ("POFMA"), which has implications not only in terms of the POFMA regime but, more generally, for the scope and nature of free speech which enjoys Art 14 protection. Exceptionally, the Court of Appeal granted a mandatory order in specific terms, which required the decision-maker not to merely reconsider the exercise of discretion but to also exercise it in a particular manner in *CBB v Law Society of Singapore*.[4]

1.2 Some matters were cursorily dealt with, since they "[did] not make any sense".[5] In *Kanesan s/o Ramasamy v Public Prosecutor*,[6] it was argued that because the appellant was a former informant, he would be deprived of his life and liberty under Art 9 as he was not awarded "extra protection".[7] Article 9(1) provides that the appellant, who had been convicted for possessing and consuming drugs, cannot be deprived of his personal liberty "arbitrarily" and must be "afforded due process", which was not in question here. Further, to argue for special treatment on the basis that the appellant was a former informer would be an "abuse" of the Art 12 equality guarantee. Further, the appellant could not identify any legislative provision showing he was unfairly treated when the Public Prosecutor decided to proceed with prosecuting him for the relevant

1 2020 Rev Ed.
2 [2021] 2 SLR 1358.
3 2020 Rev Ed.
4 [2021] 1 SLR 977.
5 *Kanesan s/o Ramasamy v Public Prosecutor* [2021] SGHC 269 at [23].
6 [2021] SGHC 269.
7 *Kanesan s/o Ramasamy v Public Prosecutor* [2021] SGHC 269 at [23].

drug offences. The High Court also noted in *Lee Hsien Loong v Leong Sze Hian*[8] that POFMA had no bearing on the law of defamation in Singapore: while POFMA imposes criminal liability in public law, the tort of defamation operates in the private sphere; as such, the argument that one should not be able to bypass POFMA to sue in defamation was not accepted.[9]

1.3 Other points of law were affirmed in various cases. In *Tan Hon Leong Eddie v Attorney-General*,[10] Aedit Abdullah J noted that there was no general duty for the Attorney-General to disclose reasons for making a particular prosecutorial decision in the absence of *prima facie* evidence that a relevant standard, such as bad faith or unconstitutionality, had been breached, as the Court of Appeal had observed in *Muhammad Ridzuan v Attorney-General*[11] ("*Ridzuan*").

1.4 Established tests were applied to the facts of various cases. The definitive test for apparent bias laid down in *BOI v BOJ*[12] ("*BOI*") was applied in *Soh Rui Yong v Liew Wei Yen Ashley*[13] ("*Soh Rui Yong*") and is to be made out in the context of the entirety of proceedings.[14] The guidelines for excessive judicial interference from *BOI* were also applied in *Soh Rui Yong*, this being both a "quantitative and qualitative" test[15] arising in egregious situations. The court will consider whether the court below has in fact acted in a manner causing actual prejudice to the relevant party, such as preventing that party from presenting its case. Interference may be qualitatively excessive, as gleaned from the focus and effect of the interference, and the tone and demeanour of the judge. It may be quantitatively excessive depending on factors like the frequency and length of intervention. The doctrine against judicial interference seeks to address "two main mischiefs": that of the judge overstepping his role; and that of a party being prevented from presenting his case.[16]

8 [2021] 4 SLR 1128 at [49]–[50].
9 *Lee Hsien Loong v Leong Sze Hian* [2021] 4 SLR 1128 at [48].
10 [2022] 3 SLR 639 at [42].
11 [2015] 5 SLR 1222 at [36].
12 [2018] 2 SLR 1156.
13 [2021] SGHC 96.
14 *Soh Rui Yong v Liew Wei Yen Ashley* [2021] SGHC 96 at [43].
15 *Soh Rui Yong v Liew Wei Yen Ashley* [2021] SGHC 96 at [10].
16 *Soh Rui Yong v Liew Wei Yen Ashley* [2021] SGHC 96 at [10].

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II. Exhaustion of alternative remedies

1.5 A procedural issue arising in *Re The Online Citizen Pte Ltd*[17] related to whether The Online Citizen Pte Ltd ("TOCPL") had exhausted all its alternative remedies, in the form of ss 12(2) and/or 59(1)(*b*) of the Broadcasting Act[18] ("BA"), which had not been utilised.[19]

1.6 TOPCL, a local media outlet which carried out its activities on websites and social media channels, had its class licence required for providing licensable broadcasting service under s 9 of the BA suspended and cancelled by the Info-communications Media Development Authority ("IMDA"). This stemmed from its failure in 2020 to comply with the requirement to make an annual declaration of its funding sources. These platforms included its main English websites, Chinese website, and Facebook and Twitter accounts. Operating a licensable broadcasting service without a valid licence would constitute a criminal offence under s 46 of the BA.

1.7 TOCPL sought leave for judicial review to apply for four quashing orders and ten declarations in relation to the IMDA's orders against its Chinese website and social media platforms and the IMDA's prohibition against TOCPL providing any new broadcasting services.[20] This failed on both procedural and substantive grounds to furnish a *prima facie* case of reasonable suspicion in favour of granting the remedies sought.

1.8 In relation to the procedural ground, the general principle is that a judicial review applicant must first exhaust all alternative remedies, as the Court of Appeal affirmed in *Comptroller of Income Tax v ACC*.[21] Only exceptionally will this rule be departed from where a statutory remedy avails.[22]

1.9 Section 12(1) of the BA empowers the IMDA to cancel or suspend a class licence and to require the payment of a fine, while s 12(2) provides that any person aggrieved by the decision of the IMDA may within 14 days of receiving a s 12(1) notice appeal to the Minister, whose

17 [2021] SGHC 285.
18 Cap 28, 2012 Rev Ed.
19 *Re The Online Citizen Pte Ltd* [2021] SGHC 285 at [27].
20 *Re The Online Citizen Pte Ltd* [2021] SGHC 285 at [5].
21 [2010] 2 SLR 1189 at [13].
22 *R v Secretary of State for the Home Department, ex parte Swati* [1986] 1 WLR 477 at 485D, [33] and [35].

decision shall be final. Valerie Thean J held that what was at stake here was the cancellation of TOCPL's class licence as communicated to TOCPL by the letter from the IMDA – TOCPL would have to appeal against suspension and cancellation of its class licence in order to challenge "the legal effect of this cancellation" – and whether this affected its Chinese website and social media platforms.[23] Thus, s 12(2) was an applicable alternative remedy which should have been exhausted.

1.10 Under the more broadly worded ss 59(1)(*a*) and 59(1)(*b*) of the BA, a licensee aggrieved by a decision of the authority in the exercise of statutory discretion or anything contained in any code of practice or direction issued by the authority may appeal to the Minister whose decision will be final. Thean J held that s 59 applied, as well as s 12, with its "breadth" serving "to reiterate that all decisions made by the IMDA should first be appealed to and reviewed by the Minister".[24] Whether a finality clause might oust judicial review was not in itself a reason for failing to utilise a statutory appeal procedure, under which the relevant Minister was required to accord an applicant a "fair hearing", as in relation to s 22(7) of the Planning Act[25] in *Borissik Svetlana v Urban Redevelopment Authority*[26] ("*Borissik*"). As in *Borissik*, which dealt with planning permission, the regulation of broadcasting services also involved "wider issues of policy in its implementation and administration" and all matters, substantive or procedure, raised in a statutory appeal before the Minister "would be fully and fairly considered" on the "full merits".[27] As this was the leave stage, it was not necessary to consider the scope of judicial review in relation to ss 12(2) and 59(4) of the BA.[28]

1.11 Thus, by not utilising the statutory appeal procedure under s 12(2) or 59(1)(*b*) of the BA, and by not "adducing any exceptional circumstances to justify its omission to do so", the TOCPL had failed to exhaust its alternative remedies before applying for judicial review.[29]

23 *Re The Online Citizen Pte Ltd* [2021] SGHC 285 at [30].
24 *Re The Online Citizen Pte Ltd* [2021] SGHC 285 at [32].
25 Cap 232 1998 Rev Ed.
26 [2009] 4 SLR(R) 92 at [30].
27 *Re The Online Citizen Pte Ltd* [2021] SGHC 285 at [35].
28 *Re The Online Citizen Pte Ltd* [2021] SGHC 285 at [35].
29 *Re The Online Citizen Pte Ltd* [2021] SGHC 285 at [36].

III. Illegality and irrationality

1.12 The applicant in *Tan Hon Leong Eddie v Attorney-General*[30] was charged with five offences under the Misuse of Drugs Act[31] ("MDA") and sought leave to bring judicial review against the decision of the Director of the Central Narcotics Bureau ("CNB") ("the Director") not to subject him to a treatment and rehabilitation order, as permitted by the 2019 amendments to the MDA, and against the Attorney-General, for bringing the five charges.

1.13 The ministerial speech at the second reading of the amendment was referenced; this indicated the intent to distinguish "pure abusers" who only consume drugs and do not face any other offences such as trafficking. For "pure abusers", the general approach, if they admit to their drug abuse, would be to channel them to the rehabilitation regime.[32]

1.14 The High Court clarified that the standard of irrationality applied to the person performing the function in question.[33] Parliamentary speeches by ministers cannot introduce irrelevant considerations or preclude the consideration of relevant ones by the decision-maker in exercising that function. This is because the second reading speech "serves to open the debate at the second stage by setting out and explaining the clauses in the bill".[34] While such speeches may influence statutory interpretation or give rise to a claim of breach of legitimate expectation, in and of itself, these speeches create "no legal rights or obligations between the State and the individual".[35]

1.15 A particular office holder is conferred discretion by statute and, absent specific statutory language, must be permitted to "examine relevant factors", regardless of what is or is not contained in the second reading speech.[36] Relevancy and irrelevancy is "ultimately" defined by the terms of the statute, which can prescribe what may and may not be considered. A parliamentary speech can only "suggest considerations".[37]

1.16 In ascertaining relevant considerations to determine whether the ground of illegality could be made, the *Tan Cheng Bock v Attorney-*

30 See para 1.3 above.
31 Cap 185, 2008 Rev Ed.
32 *Tan Hon Leong Eddie v Attorney-General* [2022] 3 SLR 639 at [4].
33 *Tan Hon Leong Eddie v Attorney-General* [2022] 3 SLR 639 at [21].
34 *Tan Hon Leong Eddie v Attorney-General* [2022] 3 SLR 639 at [22].
35 *Tan Hon Leong Eddie v Attorney-General* [2022] 3 SLR 639 at [22].
36 *Tan Hon Leong Eddie v Attorney-General* [2022] 3 SLR 639 at [23].
37 *Tan Hon Leong Eddie v Attorney-General* [2022] 3 SLR 639 at [23].

General[38] approach towards purposive interpretation was to be applied, as mandated by s 9A(1) of the Interpretation Act.[39] In this context, a ministerial speech, when s 34(2) of the MDA is clear, could only serve to confirm the ordinary meaning of the text. Section 34(2) provides that after the conduct of certain medical tests, if "it appears to the Director" that the examined person should be subject to supervision or rehabilitation, the appropriate order could be made. There was no basis to read the text in a manner that confined the Director to only consider the two requirements identified by the applicant, that is, whether the person admitted to consuming drugs or had committed offences distinct from drug consumption. Further, the ministerial speech did not actually support this interpretation, in that the Minister had acknowledged that the quantity of drugs possessed was a relevant consideration.[40] The Director in deciding not to issue a supervision or rehabilitation order under s 34(2) of the MDA could thus take into consideration the fact that the applicant possessed a large quantity of controlled drugs, which constituted a serious drug offence, because of the risk of the drugs entering circulation.[41]

IV. Substantive legitimate expectations

1.17 Although the doctrine of substantive legitimate expectations ("SLE") has not been recognised in Singapore and has raised concerns about how it might entail the realignment of the prevalent understanding of separation of powers,[42] it continues to be invoked and the court continues to "apply" the doctrine, as formulated in *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority*[43] ("*Chiu Teng*"), which includes the element of detrimental reliance.[44]

1.18 Here, the issue of whether a ministerial statement made during the second reading of the amendments to the MDA in 2019 constituted a "representation" to the applicant that the CNB, with the Attorney-General's concurrence, "will generally not charge abusers" who meet certain criteria which the applicant claimed he satisfied, that is, being a pure abuser not charged with any other offence.[45]

38 [2017] 2 SLR 850.
39 Cap 1, 2002 Rev Ed. See *Tan Hon Leong Eddie v Attorney-General* [2022] 3 SLR 639 at [32].
40 *Tan Hon Leong Eddie v Attorney-General* [2022] 3 SLR 639 at [37].
41 *Tan Hon Leong Eddie v Attorney-General* [2022] 3 SLR 639 at [34].
42 See *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598 at [59].
43 [2014] 1 SLR 1047.
44 See *Tan Hon Leong Eddie v Attorney-General* [2022] 3 SLR 639 at [25].
45 *Tan Hon Leong Eddie v Attorney-General* [2022] 3 SLR 639 at [4].

1.19 Abdullah J highlighted that two of the criteria articulated in *Chiu Teng* were not satisfied on the facts. First, he noted that the Court of Appeal in *Adri Anton Kelangie v Public Prosecutor*[46] had expressed doubts as to whether an individual could have a legitimate expectation as to the sentence he would receive if he committed an offence.[47] He stated that where the expectation was that there would be no prosecution for committing an offence and the reliance was the commission of said offence, the offender should not be permitted to invoke the doctrine of SLE.

1.20 Second, the requirement that the representation be made by someone with actual or ostensible authority was not satisfied as a statement by the Minister cannot form the basis of an expectation that an independent officer, such as the Attorney-General or Director here, will act in a particular way.[48] The Minister's speech could not give rise to a legitimate expectation as to how the Attorney-General would make a decision, since prosecutorial power is independently exercised by the Attorney-General.[49]

1.21 Notably, Abdullah J echoed the doubts of the Court of Appeal in *SGB Starkstrom Pte Ltd v Commissioner for Labour*[50] ("*Starkstrom*"), as substantive matters lay within executive and legislative purview. Thus, to tie down their "ability to change positions" would seem "to encroach on the bailiwick of others".[51] He opined that the doctrine of estoppel, which had its origins in equity rather than the common law, could be "a sufficient instrument of control if appropriately developed", in so far as "any restraint is necessary" in relation to the legal effect to be given the representations of public authorities.[52]

1.22 In *Re The Online Citizen Pte Ltd*,[53] the question of SLE was also raised unsuccessfully. TOCPL had raised the argument that its class licence only covered the two main English websites of TOCPL, and that it excluded the Chinese and Malay language websites and TOCPL activities conducted on social media channels.

1.23 Under the terms of the BA, if an Internet content provider ("ICP") provides "computer on-line services", which are a subset of

46 [2018] 2 SLR 557.
47 *Tan Hon Leong Eddie v Attorney-General* [2022] 3 SLR 639 at [27].
48 *Tan Hon Leong Eddie v Attorney-General* [2022] 3 SLR 639 at [29].
49 *Tan Hon Leong Eddie v Attorney-General* [2022] 3 SLR 639 at [29].
50 [2016] 3 SLR 598.
51 *Tan Hon Leong Eddie v Attorney-General* [2022] 3 SLR 639 at [24].
52 *Tan Hon Leong Eddie v Attorney-General* [2022] 3 SLR 639 at [24].
53 See para 1.5 above.

licensable "broadcasting services" under s 2(1) of the BA, it is subject to a class licence.

1.24 There is no statutory definition of "computer on-line services" but in construing this, the statutory definitions of "broadcasting service" and "programme" under s 2(1) of the BA have to be taken into account. This requires that the services were to be provided "via electronic devices" with the "primary purpose" being to "entertain, educate or inform all or part of the public".[54] Alternatively, the "computer on-line services" must comprise "advertising or sponsorship matters", commercial or otherwise. Private communications fall without the scope of the term.[55]

1.25 Thean J held that the services provided on social media platforms and TOCPL's Chinese website fell within the meaning of the term as its primary purpose was to "entertain, educate or inform" the public.[56] Thean J rejected the argument that "computer on-line services" was limited to the description in the IMDA Registration Form C for Class Licensable Broadcasting Services ("Form C") as relating only to websites, as Form C was a form that a relevant existing class licensee was to use for the *registration* of class licensable broadcasting services by individuals, groups or organisations who provided political or religious content. In other words, all ICPs providing "computer on-line services" are automatically class licensees under para 3(f) of the Broadcasting (Class Licence) Notification[57] ("the Notification"). In addition, where the IMDA determines that the relevant ICP is engaged in discussing political or religious issues relating to Singapore through the Internet, the ICP is subject to the additional requirement of registration with the IMDA under condition 4 of the Schedule to the Notification, which sets out the conditions of class licences.[58]

1.26 That Form C only requires the particulars of a website and not other channels should not in itself be read as confining the definition of "computer on-line services" to websites. The IMDA is entitled to decide on the form and manner of registration, as the relevant regulatory authority under condition 6 of the Schedule to the Notification, as distinct from the class licensing regime under s 9(1) of the BA.[59]

1.27 TOCPL argued that it had a substantive legitimate expectation that the class licence covered only licensable broadcasting services on

54 *Re The Online Citizen Pte Ltd* [2021] SGHC 285 at [25].
55 *Re The Online Citizen Pte Ltd* [2021] SGHC 285 at [25].
56 *Re The Online Citizen Pte Ltd* [2021] SGHC 285 at [39].
57 2004 Rev Ed.
58 *Re The Online Citizen Pte Ltd* [2021] SGHC 285 at [19].
59 *Re The Online Citizen Pte Ltd* [2021] SGHC 285 at [43].

its main English websites, not the Chinese or Malay websites or social media platforms.[60] While the High Court in *Chiu Teng*[61] had stated that SLE be accepted as a standalone head of judicial review,[62] Thean J noted that the legal status of the SLE doctrine remained "an open question", following the Court of Appeal's decision in *Starkstrom*.[63] While it was not appropriate in an application for leave to commence judicial review proceedings to discuss SLE in any detailed fashion, even if it was applied as articulated in *Chiu Teng*, TOCPL would have to prove the IMDA made an "unequivocal and unqualified" statement of representation.[64]

1.28 TOCPL had not provided any evidence of such representation by the IMDA to the effect that only the services provided on its two main English websites were "computer on-line services" subject to the class licence.[65] The correspondence between the TOC chief editor and the IMDA as well as Form C did not provide evidence of an unequivocal representation that the class licence only covered its registered websites. Thus, no SLE was made out on the facts.

V. Remedies: Mandatory order

1.29 The grant of a mandatory order is always discretionary and, in general, requires the decision-maker to reconsider its decision in general terms. Exceptionally, the court may grant a mandatory order for the performance of a public duty in a specific manner. This issue arose in *CBB v Law Society of Singapore*.[66]

1.30 The Council of the Law Society ("the Council") declined to seek the requisite leave of the court under s 85(4A) of the Legal Profession Act[67] ("LPA") which was needed to hear a complaint made by the appellant against a lawyer, in relation to matters that arose more than six years prior to the date of complaint. This pertained to the conduct of the lawyer in assisting the appellant's mother in setting up a trust, which became the subject of mental capacity proceedings, culminating in *Re BKR*.[68]

60 *Re The Online Citizen Pte Ltd* [2021] SGHC 285 at [10].
61 See para 1.17 above.
62 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [119].
63 *Re The Online Citizen Pte Ltd* [2021] SGHC 285 at [47]. See para 1.21 above.
64 *Re The Online Citizen Pte Ltd* [2021] SGHC 285 at [48].
65 *Re The Online Citizen Pte Ltd* [2021] SGHC 285 at [49].
66 See para 1.1 above.
67 Cap 161, 2009 Rev Ed.
68 [2015] 4 SLR 81.

1.31 Aside from the question of the delay, the Council refused to seek leave because the appellant had made his complaint in his personal capacity, rather than as a client, which the court below held was an irrelevant consideration. In addition, the delay should not have been the sole consideration to the neglect of other relevant considerations, like the merits of the complaint. The judge issued a mandatory order requiring the Council to reconsider its decision, which the appellant appealed against, in seeking a mandatory order to compel the Council to take the specific action of applying for leave under s 85(4C) of the LPA. As the Court of Appeal noted, after almost 11 months since the judge issued his decision, the Council apparently had yet to take steps to reconsider its initial decision.[69]

1.32 The general rule is that the court does not issue mandatory orders to require a public body charged with a public duty to discharge this in a specific way; the order goes only to mandating that a decision be reconsidered.[70] However, the rule is "not inflexible", and the court cited various cases where *mandamus* was issued directing various parties to discharge their duties in particular ways.[71] Authorities from other common law jurisdictions like England and Australia were also reviewed.[72]

1.33 The court accepted that in exceptional circumstances, the performance of a public duty could shade into "its performance in a particular way or by a particular course of action".[73] A specific mandatory order would then "necessarily and inevitably entail performance of a particular act" in those rare circumstances where performing a public duty "will result only in one reasonable outcome", displacing the general presumption that the position in *R v Justices of Kingston*[74] should apply.[75]

1.34 The court identified five factors which would warrant issuing a mandatory order for the performance of a specific act, which it found satisfied on the facts:

> (a) public domain availability of objective evidence relevant to the merits of the decision. Where this is available, as in the

69 *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [4].
70 *R v Justices of Kingston* 86 LTR 589, referenced in *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [7] and applied in *Re San Development Co's Application* [1971–1973] SLR(R) 203 at [15] and *Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 150 at [21].
71 *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [11]–[14].
72 *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [14]–[18].
73 *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [19].
74 86 LTR 589.
75 *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [19].

instant case, as determined by an independent tribunal or court of law, the court will "be concerned not to act in disregard of what is already commonly known" and does not want to appear to condone "any apparent iniquity".[76] The involvement of the lawyer in question in setting up a trust for the appellant's mother was set out in *Re BKR*;[77]

(b) the institutional competence of the court, where the policy content of a decision, or the involvement of polycentric political considerations might warrant judicial deference to another government branch.[78] Since the issue dealt squarely with the discipline of lawyers, this was an aspect of public interest "entirely within the aegis and expertise of the court", such that there was little weight to the consideration of deferring to executive discretion here, as the discipline of lawyers "is ultimately under the control of the court";[79]

(c) the conduct of the decision-maker, such as where the decision-maker indicates an intention not to reconsider its decision or brings about an undue delay; such factors will make the court more disposed to mandate performance of a specific action.[80] Here, the Council had not considered the High Court's decision some 11 months after it was delivered;[81]

(d) the absence of reasons militating against granting a mandatory order, such as the need for constant supervision or the impossibility of carrying out a duty;[82] and

(e) identifying the relevant considerations from statutory construction and considering the decision-maker's view, and then ascertaining if there are alternative ways by which the decision-maker can carry out its duty. If none exists, this factor leans towards granting a mandatory order in specific terms.[83] Here, the purpose of s 85(4C)(*a*) of the LPA was to permit the making of complaints well after the relevant conduct in question and to permit investigation in appropriate cases, with the overall

76 *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [20].
77 *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [28]. See para 1.30 above.
78 *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [21].
79 *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [29].
80 *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [22].
81 *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [30].
82 *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [23].
83 *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [24].

purpose being "to maintain and improve the standards of conduct … of the legal profession in Singapore".[84]

1.35 The court identified four factors as being the relevant considerations to take into account when exercising discretion under s 85(4C) of the LPA, that is, length of the delay, prejudice caused by delay, explanation for the delay and the prospects of the complaint. The court stated that bearing this in mind it was "unable to see how the Council could arrive at any other decision apart from bringing the relevant application for permission to move the complaint forward".[85]

1.36 Even where dealing with discretionary power rather than duties, as duties may inhere within discretionary powers,[86] granting a mandatory order in specific terms was thought both to be consistent with the underlying rationale and principles of administrative law, as well as something which would "further the purpose of sound public administration" by ensuring the responsible exercise of executive action, after the intent of Parliament.[87] The Court of Appeal noted that if errors were allowed to "fester", this would undermine public confidence in public institutions; further, as decision-makers were not subject usually to a duty to furnish reasons, issuing a mandatory order in specific terms might have the beneficial effect of deterring a decision-maker who refused to act but who sought to "insulate his non-performance of a duty by also refusing to disclose reasons".[88] Ultimately, the court will consider the needs of sound public administration in determining the appropriate remedy to grant, which includes considering substance rather than form, the speed of the decision, a proper consideration of the public interest and the legitimate interests of individual citizens.[89]

CONSTITUTIONAL LAW

VI. Scope of judicial power

1.37 The issue of the extent to which Parliament could prescribe that the Executive rather than the courts should find certain facts, with

84 Legal Profession Act (Cap 161, 2009 Rev Ed) s 38(1)(*a*). See *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [32].
85 *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [33].
86 *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [25].
87 *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [26].
88 *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [26].
89 *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [26], citing *R v Monopolies and Mergers Commission, ex parte Argyll Group plc* [1986] 1 WLR 763 at 774, *per* Sir John Donaldson MR.

the consequence that this would constrain sentencing discretion, was canvassed in *Koh Rong Gui v Public Prosecutor*.[90]

1.38 Under s 339 of the Criminal Procedure Code[91] ("CPC"), courts may only make a Mandatory Treatment Orders ("MTOs") if a psychiatrist certifies that certain requirements are met, and the findings of the psychiatrist are final and conclusive under s 339(9) of the CPC.

1.39 The appellant was convicted of four charges of intruding upon the privacy of three women under s 509 of the Penal Code.[92] The appointed psychiatrist at the Institute of Mental Health ("IMH") had found that the appellant was not suited to an MTO. As the requirement under s 339(3)(*c*) of the CPC was unsatisfied, the court was precluded from making such an order under s 339(4) of the CPC.

1.40 Based on two psychiatric reports, the appellant appealed his sentence and argued that he should have been sentenced to an MTO instead. He argued that ss 339(3), 339(4) and 339(9) of the CPC ("MTO provisions") were unconstitutional for breaching Arts 12(1) and 93 of the Singapore Constitution.

1.41 What was at issue was whether the determination by the psychiatrist, who is appointed by the Director of Medical Services of the Ministry of Health ("MOH"), as to whether a MTO is suitable for an offender, is "final and conclusive," as s 339(9) provides. In purporting to oust the court's jurisdiction to review the psychiatrist's opinion, was Art 93 violated?

1.42 Under the MTO provisions, the court before ordering an MTO must call for a report by an appointed psychiatrist who must be satisfied of certain matters enunciated in ss 339(3)(*a*)–339(3)(*c*), such as suitability of the offender for the treatment. An MTO suitability report is final with respect to whether the offender meets the s 339(3) conditions.[93] The rationale for this is that since IMH is the institution that administers treatment under the MTO, it should not be asked to treat a person if it believes the mental condition is not treatable.[94]

1.43 The appointed psychiatrist must under s 339(8) take into consideration the report made by the psychiatrist engaged by the offender.

90 [2021] SGHC 259.
91 Cap 68, 2012 Rev Ed.
92 Cap 224, 2008 Rev Ed.
93 *Koh Rong Gui v Public Prosecutor* [2021] SGHC 259 at [15].
94 *Koh Rong Gui v Public Prosecutor* [2021] SGHC 259 at [16].

Even if the appointed psychiatrist is so satisfied, the courts retain the discretion whether to order an MTO.

1.44 The Legislature may designate a fact-finder with the requisite expertise over certain matters, such as an appointed psychiatrist who is "best placed to determine" matters under s 339(3) of the CPC.[95] Three arguments to the effect that Art 93 was breached were rejected.

1.45 First, the High Court found it was not a breach of Art 93 for the Legislature to designate a fact-finder other than the courts.[96] Section 339 of the CPC does not confer discretion upon the court to decide a question of fact as the ultimate issue rule, under which expert opinion is not determinative, did not apply here.[97] In clear terms, s 339 leaves the psychiatric assessment of s 339(3) matters to the sole professional judgment of the appointed psychiatrist, who has "the appropriate institutional competence", such that the court has no role in weighing the assessment.[98]

1.46 Second, the argument that the finality clause breached Art 93 was also rejected as courts have upheld conclusive evidence clauses, subject to review for bad faith.[99] Here, s 339(9) on its face does not preclude general judicial review.[100] Therefore, judicial review will be available, such as where a clerical error results in a wrong report or if the report draws erroneous conclusions which are internally inconsistent with the rest of the report. The court observed that See Kee Oon JC in *Low Gek Hong v Public Prosecutor*[101] had stated that he did not see "why there must be a blanket prohibition on any form of enquiry or clarification if the report is unclear, and particularly where it draws manifestly wrong illogical or absurd conclusions".[102] In other words, the court may question "apparent issues of accuracy with the conclusions in the report".[103]

1.47 Third, Art 93 was not breached because the appointed psychiatrist rather than the court decides whether an MTO is available as a sentencing option.[104] Citing the precedent of *Mohammad Faizal v*

95 *Koh Rong Gui v Public Prosecutor* [2021] SGHC 259 at [24].
96 *Koh Rong Gui v Public Prosecutor* [2021] SGHC 259 at [23].
97 *Koh Rong Gui v Public Prosecutor* [2021] SGHC 259 at [32].
98 *Koh Rong Gui v Public Prosecutor* [2021] SGHC 259 at [33].
99 *Teng Fuh Holdings v Collector of Land Revenue* [2006] 3 SLR(R) 57 at [36].
100 *Koh Rong Gui v Public Prosecutor* [2021] SGHC 259 at [39].
101 [2016] SGHC 69.
102 *Koh Rong Gui v Public Prosecutor* [2021] SGHC 259 at [40], citing *Low Gek Hong v Public Prosecutor* [2016] SGHC 69 at [11].
103 *Koh Rong Gui v Public Prosecutor* [2021] SGHC 259 at [40].
104 *Koh Rong Gui v Public Prosecutor* [2021] SGHC 259 at [41].

Public Prosecutor,[105] the court stated that it has been held that prescribing punishment for offences is a legislative rather than judicial power, while it falls to the court to select the appropriate punishment as a function of statutory discretion conferred upon the courts.[106]

1.48 In this context, judicial power is "the courts' exercise of discretion within the parameters conferred by the law enacted by the Legislature".[107] Parliament may specify that a particular act is an offence, and that the punishment will only be a specific sentence for all cases, as in cases involving the mandatory death penalty. Article 93 is also not infringed when Parliament prescribes minimum sentences for an offence.[108] It also falls within the ambit of legislative power for Parliament to statutorily provide for punishment or programmes in lieu of punishment for reasons of age or other qualifications, as in the age limits for the punishment of caning.

1.49 While this may limit the power of the Judiciary to impose such sentences, it does not infringe Art 93 as they do not "purport to decide the matter in a specific case, or a particular controversy between the State and a specific individual".[109] A distinction is to be drawn between a fixed penalty and selecting a penalty for a particular case. In the immediate case, the MTO under s 339 of the CPC provided an additional sentencing option for the court, provided certain conditions are met. Indeed, it is the court that initiates and determines the inquiry into whether an MTO is to be ordered.[110]

1.50 Even if the conditions are unmet under s 339 of the CPC, the court remains free to impose other sentences, such that its discretion is "not circumscribed in any event".[111] While the court ordinarily has the discretion to determine the extent of punishment, the Legislature could decide whether to give such discretion to the court in relation to a statutory offence without infringing Art 93.[112] The MTO under s 339(3) of the CPC may be a sentencing option in service of the legislatively prescribed object of rehabilitation where apt, but the court is not compelled to impose an MTO. The inquiry by the appointed psychiatrist is here limited to considering whether the criteria under s 339(3) of the CPC has been satisfied, which does not extend to the power to decide

105 [2012] 4 SLR 947 at [45].
106 *Koh Rong Gui v Public Prosecutor* [2021] SGHC 259 at [42].
107 *Koh Rong Gui v Public Prosecutor* [2021] SGHC 259 at [43].
108 *Koh Rong Gui v Public Prosecutor* [2021] SGHC 259 at [44].
109 *Koh Rong Gui v Public Prosecutor* [2021] SGHC 259 at [45].
110 *Koh Rong Gui v Public Prosecutor* [2021] SGHC 259 at [54].
111 *Koh Rong Gui v Public Prosecutor* [2021] SGHC 259 at [47].
112 *Koh Rong Gui v Public Prosecutor* [2021] SGHC 259 at [48].

what the appropriate punishment for the offender should be; it is the court that determines the guilt of the offender and convicts him. Conditioning the availability of an MTO on the appointed psychiatrist's decision thus does not contravene Art 93.[113]

VII. Article 11

1.51 It has been the practice, when a person may be charged for capital and non-capital charges, to stand down the non-capital charges so the accused can focus on his capital charge defence. However, difficulties arise where the facts underpinning the various charges are intertwined and should be dealt with in a single trial. Such a situation arose in *Beh Chew Boo v Public Prosecutor*,[114] where Beh was charged with five charges of unauthorised import of controlled drugs under s 7 of the MDA.

1.52 The Prosecution proceeded with one charge which carried the death penalty, concerning 499.97g of methamphetamine or "the Ice", found in a blue plastic bag in the storage compartment of a motorcycle, which Beh had ridden into Singapore ("the Capital Charge"). The drugs were detected at Woodlands Checkpoint. Beh was eventually acquitted of the Capital Charge, whereupon the Prosecution wanted to prosecute Beh with the dropped non-capital charges. The issue was whether proceeding with the non-capital charges would offend the rule against double jeopardy under Art 11(2) of the Singapore Constitution, s 244(1) of the CPC and/or the common law doctrine of *autrefois acquit*.

1.53 The Court of Appeal found that the doctrine of double jeopardy did not preclude a reinstatement of withdrawn charges following the acquittal of a distinct charge.[115] They held that Beh was not charged with the "same offence" under Art 11(2) and the first limb of s 244(1) of the CPC as the particulars of the capital and non-capital charges were not identical, given the differences in relation to drug type and weight. A "same offence" would need to be an offence identical in fact and law, based on the ordinary natural meaning of "same" as meaning identical.[116] While the Capital Charge related to importing a certain quantity of methamphetamine, the non-capital charges related to quantities of other drugs. The Court of Appeal was uncertain on whether Art 11(2) had completely repealed the common law doctrines of *autrefois convict* and *acquit*;[117] nonetheless, as the common law offence had developed, it

113 *Koh Rong Gui v Public Prosecutor* [2021] SGHC 259 at [56].
114 [2021] 2 SLR 180.
115 *Beh Chew Boo v Public Prosecutor* [2021] 2 SLR 180 at [16].
116 *Beh Chew Boo v Public Prosecutor* [2021] 2 SLR 180 at [24].
117 *Beh Chew Boo v Public Prosecutor* [2021] 2 SLR 180 at [34].

was clear that the scope of *autrefois* was narrow and that the plea would succeed only where the later proceedings were for an offence which was the same as an earlier offence, both in fact and law. It would therefore not preclude the Prosecution from proceeding with the non-capital charges in the instant case.

1.54 The Court of Appeal left open the question whether the common law doctrine of *autrefois acquit* should be expanded to include a broader test of substantial similarity.[118]

VIII. Article 12

A. Overlapping penal provisions and separation of powers

1.55 The novel issue of whether ss 299 and 300(*a*) of the Penal Code were constitutional was challenged in *Public Prosecutor v Teo Ghim Heng*.[119] These provisions relate to homicide crimes.

1.56 The accused was charged with the murder of his wife and daughter under s 300(*a*). Although the ingredients of the offence under the first limb of ss 299 and 300(*a*) were the same and overlapped, they prescribed different sentences. A person charged for culpable homicide under s 299 faced a maximum 20-year imprisonment term, whereas a s 300(*a*) charge attracted the mandatory death penalty.

1.57 It was argued that the Public Prosecutor, in choosing between ss 299 and 300(*a*) in relation to causing death with the intention of causing death, effectively determined the penalty to be imposed. This breached the separation of powers principles in so far as the Public Prosecutor was exercising a judicial power.[120]

1.58 Kannan Ramesh J noted that overlapping penal provisions were "commonplace" and not objectionable *per se*, as discussed in *Ong Ming Johnson v Attorney-General*.[121] The fact that there was an overlap between the two sections did not render both obsolete or unconstitutional as s 299 was meant to be invoked in less heinous cases of intentional murder. Referencing parliamentary debates, Ramesh J noted that the "relative lack of heinousness in such cases warranted a lower punishment", which

118 *Beh Chew Boo v Public Prosecutor* [2021] 2 SLR 180 at [36].
119 [2021] SGHC 13.
120 *Public Prosecutor v Teo Ghim Heng* [2021] SGHC 13 at [210].
121 [2021] SGHC 13.

justified the exercise of prosecutorial discretion to bring a s 299 charge.[122] It was "patently incorrect" to assert that in all cases where there were overlapping provisions with different sentencing regimes, the exercise of prosecutorial discretion was unconstitutional.[123]

1.59 The constitutional source of prosecutorial discretion in Art 35(8) provides that there is no constitutional objection to a decision to prosecute someone for a more serious rather than a less serious offence, provided Art 12 is not breached.[124] In exercising this discretion, the Public Prosecutor is exercising executive power in enforcing legislation, rather than delegated judicial power. It falls to the Legislature ultimately to determine the content of a criminal offence and its corresponding sentence,[125] and to the courts to convict and sentence a person under enacted laws.[126] The immediate situation was distinct from that in *Mohammed Muktar Ali v The Queen*,[127] which involved a single offence potentially being tried in two different courts as determined by the prosecutor's discretion, as it concerned two distinct penal provisions, which does not give the Public Prosecutor the ability to select the forum in which an offender is to be tried.[128]

1.60 Ramesh J rejected the alternative argument that the co-existence of ss 299 and 300(*a*) violated Art 12, as the mere existence of fully overlapping penal provisions does not even constitute an act of discrimination.[129] Article 12 would only be engaged in relation to the exercise of executive power in the form of prosecutorial discretion.[130] The established law was that, all things being equal, where *A* and *B* have committed murder, if the former is charged with murder, so should the latter. The reasonable classification test did not apply, in the absence of legislation which purported to discriminate between different individuals or groups by criminalising the acts of one group and not another. This required the "individual legislation" to differentiate between classes of individuals based on the traits a class possessed. Sections 299 and 300(*a*) did not discriminate against any individual or group but only classified individuals for purposes of punishment based on their state of mind and conduct. This was "part and parcel of the ordinary operation of penal

122 *Public Prosecutor v Teo Ghim Heng* [2021] SGHC 13 at [213].
123 *Public Prosecutor v Teo Ghim Heng* [2021] SGHC 13 at [214]–[215].
124 *Public Prosecutor v Teo Ghim Heng* [2021] SGHC 13 at [215], citing *Dinesh Pillai a/l K Raja Retnam v Public Prosecutor* [2012] SGCA 49 at [20].
125 *Public Prosecutor v Teo Ghim Heng* [2021] SGHC 13 at [216].
126 *Public Prosecutor v Teo Ghim Heng* [2021] SGHC 13 at [218].
127 [1992] 2 AC 93.
128 *Public Prosecutor v Teo Ghim Heng* [2021] SGHC 13 at [220].
129 *Public Prosecutor v Teo Ghim Heng* [2021] SGHC 13 at [223].
130 *Public Prosecutor v Teo Ghim Heng* [2021] SGHC 13 at [224].

provisions" and since the relevant sections were "individually non-discriminatory", there was "no room" for the reasonable classification test to operate.[131]

B. Test for executive action

1.61 The High Court in *Syed Suhail bin Syed Zin v Attorney-General*[132] ("*Syed Suhail (HC)*") dismissed an application for judicial review in relation to the sequencing of the execution of prisoners awaiting capital punishment. The applicant's date of execution had been scheduled ostensibly ahead of other prisoners on death row.

1.62 The Court of Appeal in *Syed Suhail bin Syed Zin v Attorney-General*[133] ("*Syed Suhail (Leave)*") had clarified that the test to be applied in determining the permissibility of differential treatment under Art 12 was "not as high as deliberate and arbitrary discretion" which connoted a lack of rationality, which "set too high a bar".[134] Instead, the applicant had first to discharge the evidential burden of showing he was equally situated as the person with whom comparisons were being made such that differential treatment would require justification.[135] Thereafter, it fell to the respondent to justify the differential treatment, showing there were "legitimate reasons" which would make the differential treatment "proper". Prisoners were considered equally situated once their clemency petitions were rejected and before their executions were scheduled, at which stage they had the "legitimate legal expectation" under Art 12(1) that they be treated equally in the scheduling of their executions, and that any departure for equal treatment "ought to be justified by legitimate reasons".[136] Under the first limb, the court accepted that *ceteris paribus*, prisoners should be scheduled for execution in the order which they were sentenced to death. This was rooted in their interest not to have their death sentence carried out on a date without due regard of their constitutional rights. Under the second limb, the court recognised some flexibility in scheduling executions, which had to be lawfully exercised.[137]

1.63 There were apparently two prisoners, one Datchinamurthy and one Masoud, who were equally situated to Syed Suhail, but their executions had not been scheduled when Syed Suhail's was.[138] However, there was

131 *Public Prosecutor v Teo Ghim Heng* [2021] SGHC 13 at [227].
132 [2021] 5 SLR 452.
133 [2021] 1 SLR 809 at [60]–[61].
134 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 5 SLR 452 at [32].
135 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 5 SLR 452 at [10].
136 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 5 SLR 452 at [12].
137 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 5 SLR 452 at [12].
138 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 5 SLR 452 at [15] and [23].

a "clear differentiating factor" between the applicant's case and that of Datchinamurthy and Masoud; both of them had a "realistic expectation" their cases would be reviewed and potentially reopened on the merits.[139] This was because their cases involved the application of the presumption under s 18(2) of the MDA, which was pending a determination of the Court of Appeal in *Gobi a/l Avedian v Public Prosecutor*.[140] As such, they had "pending further recourse" that did not arise out of a "mere or fanciful hope",[141] which Syed Suhail did not have.

1.64 The time taken for the legal process to run its course, were further proceedings to commence, would depend on individual case circumstances; as such, Syed Suhail was not similarly situated with Datchinamurthy and Masoud as the legal process "was still at the forefront of their cases", whereas for Syed Suhail "the legal process must recede into the background", away from preventing error towards the principle of finality.[142] Thus, in the Art 12(1) context, this was not a case of like being treated alike, a principle that applied equally to legislation and executive action.[143]

C. Discrimination on grounds of nationality: Article 12(2)

1.65 The applicant in *Syed Suhail (HC)*[144] argued that the sequencing of his execution before other prisoners on death row who had been sentenced to death earlier than him constituted discrimination on grounds of nationality. He asserted that the execution of non-Singaporeans had been halted during the COVID-19 pandemic for reasons of expediency, such as difficulties in arranging access with family members or with the repatriation of mortal remains. He argued this discriminated against him as a Singaporean.

1.66 The applicant bore the evidential burden which, following the approach in *Ridzuan*,[145] could have been discharged if he had adduced evidence demonstrating there was an equally situated non-Singaporean who was sentenced earlier than him and whose date of execution had not yet been fixed.[146] Masoud was a Singaporean but not Datchinamurthy, but Datchinamurthy was not equally situated with the applicant as they were "not in the same boat" though they all belonged "to a generic group

139 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 5 SLR 452 at [35].
140 [2021] 1 SLR 180.
141 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 5 SLR 452 at [38].
142 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 5 SLR 452 at [39]–[40].
143 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 5 SLR 452 at [32] and [43].
144 See para 1.61 above.
145 See para 1.6 above.
146 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 5 SLR 452 at [56].

of prisoners awaiting capital punishment".[147] Had the evidential burden been discharged, the burden would then shift to the State to justify any differential treatment.

1.67 See Kee Oon J observed, *obiter*, that COVID-19-related restrictions, in relation to operational and administrative constraints, may not amount to a legitimate reason to justify Singaporeans and non-Singaporeans in the scheduling of executions. This was because the Ministry of Home Affairs ("MHA") affidavit did not contain sufficient details to enable the court to conclude on the impact of COVID-19 on scheduling executions.[148] The MHA stated that nationality was not a factor leading to the halting of executions for non-Singaporeans, but did not explicitly state whether COVID-19 restrictions had any effect on execution scheduling.[149] See J observed that if COVID-19 restrictions did impact scheduling, this would bring about a situation where most or all Singaporeans on death row would be executed first as their families would be in Singapore, whereas the executions of foreigners would be put on hold given travel restrictions. While nationality may not have been taken into consideration *per se*, this situation would "in effect" amount to discrimination on the basis of nationality.[150]

1.68 In considering this brand of indirect discrimination, See J noted that nationality would have no rational relation to scheduling executions, such that COVID-19 restrictions would not be a legitimate reason to justify differential treatment.[151]

1.69 See J considered that Art 12(2), which prohibits discrimination on four express grounds of religion, race, descent or place of birth, did not apply on the facts. Since Art 12(2) only applies to Singapore citizens, the reference to "place of birth" could not be interpreted to mean "nationality".[152] Article 12(2) only applies to certain categories relating to administering specific laws, employment under a public authority or the carrying on of a trade or business.[153]

147 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 5 SLR 452 at [58].
148 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 5 SLR 452 at [62].
149 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 5 SLR 452 at [64].
150 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 5 SLR 452 at [66].
151 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 5 SLR 452 at [66].
152 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 5 SLR 452 at [70].
153 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 5 SLR 452 at [70].

E. Statistics and alleged discrimination against Malays

1.70 In *Syed Suhail bin Syed Zin v Attorney-General*,[154] 17 plaintiffs, all persons of Malay ethnicity and all but one being Singaporean, were convicted drug traffickers sentenced to death. They sought declarations against the Attorney-General in respect of his prosecuting the plaintiffs for drug trafficking offences under the MDA: that the Attorney-General had (a) discriminated against the plaintiffs contrary to Art 12(1) when prosecuting them; (b) acted arbitrarily in prosecuting them contrary to Art 9; and (c) exceeded his prosecutorial powers under Art 35(8) by acting unlawfully, through bias or considering irrelevant factors. Their argument hinged on the use of statistical disparities to establish a *prima facie* case of direct or indirect discrimination on grounds of Malay ethnicity so as to breach the constitutional guarantee of equal protection.

1.71 Valerie Thean J noted that the applicable test was no longer that of "intentional and arbitrary discrimination" but rather the two-stage test in *Syed Suhail (Leave)*[155] where the first step was to establish one was equally situated with other persons and treated differently from them, and the second step was the need to show legitimate reasons for this differentiated treatment.

1.72 The plaintiffs relied on three police reports made by one Zuhairi, who was in the employ of the CNB. This spoke to discriminatory practices against Malay CNB officers rather than against Malay capital drug offenders.[156] The affidavit of Ravi, who was acting for the plaintiffs, stated that Zuhairi had evidence of how CNB management had discriminated against Malay persons in general. This evidence included the disproportionate numbers of Malays arrested for capital drug-trafficking offences compared to other races like the Chinese, and the assertion that as most CNB officers were Malay and more comfortable in operating in the Malay language, their informers were largely Malays providing information about Malay drug trafficking suspects.[157] Zuhairi denied making these statements in an eighth police report he filed, which was introduced as affidavit evidence filed on behalf of the Attorney-General.[158] Ravi argued that if the CNB discriminated against Malay officers, they must also discriminate against Malay drug trafficking suspects as a matter of "common sense and logic" which Thean J noted were not "causally linked".[159]

154 [2021] SGHC 274.
155 See para 1.62 above.
156 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [11].
157 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [12].
158 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [8].
159 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [14].

1.73 The case of the plaintiffs rested entirely on statistical evidence which had shortcomings; they provided no evidence that they, in their individual cases, were treated differently because of their ethnicity. Instead, the court was urged to infer, from the "statistical effect" of the Attorney-General's or CNB's decisions, that the investigatory and prosecutorial processes "must have been influenced by discrimination on the ground of ethnicity", flowing from "unconscious bias" rather than an express discriminatory policy.[160] This was apparently evident from "the statistical over-representation of Malay drug offenders among drug offender sentenced to death".[161]

1.74 The statistics were gleaned from various reported judgments, from which the plaintiffs derived calculations showing the statistical likelihood of Malay persons being convicted and sentenced for capital drug offences, prosecuted for capital drug offences and charged with non-capital drug offences. These statistics had to show a *prima facie* case having regard to "logic and common sense".[162] The Attorney-General was not required by the mere filing of the plaintiff's suit to adduce all the statistics the plaintiffs wished to see if no *prima facie* case is made out.

1.75 Based on statistics related to conviction and sentencing outcomes 2010–1 June 2021, the plaintiffs argued that Malay persons were disproportionately represented in the group of persons sentenced to death for capital drug offences. As such, the likelihood that Malays would receive the death sentence was higher than for other ethnic groups.[163] The plaintiffs did not allege that the courts considered ethnicity in arriving at these decisions; rather, they argued that the disproportionate representation flowed from two factors: first, the lower socio-economic and educational status of Malays in Singapore, which hampered their ability to express themselves or to appear credible while giving evidence; and secondly, the CNB investigation preferences and its assiduous collection of evidence against the suspect.[164] No evidence was provided to support these propositions; thus, the case against the CNB failed.[165]

1.76 With respect to the Attorney-General, taking the case at its highest, the statistics only indicated that Malay persons were disproportionately represented among offenders prosecuted for capital drug offences and statistically less likely than other ethnic offenders to have their charges reduced below the drug penalty threshold. However, no basis

160 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [39].
161 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [39].
162 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [41].
163 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [43].
164 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [44].
165 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [48].

was provided to show that individual prosecutors were influenced by ethnicity in making prosecutorial and charging decisions.[166] In so far as the case was that if the Attorney-General had similarly strong grounds to prosecute two offenders for capital drug offenders, the Attorney-General was more likely to prosecute the Malay rather than offenders of another ethnicity, the data provided did not support this, such as by showing evidence that Chinese offenders were more likely to escape prosecution or to be given reduced charges than their Malay counterparts.[167]

1.77 Thean J agreed with the plaintiff's submission that Art 12(1) was broad enough to prohibit both direct and indirect discrimination as part of the broadly framed constitutional guarantee of equal protection.[168] Borrowing from the approach in *Essop v Home Office (UK Border Agency)*,[169] the court described direct discrimination as "based on the unequal treatment of persons in the same class on the ground of some characteristics shared by those persons".[170] Indirect discrimination is premised on "the equal treatment of persons engendering unequal results because one group of persons suffers a particular disadvantage".[171] In other words, a facially neutral law might in practice have a more disadvantageous impact on a particular group because of a characteristic they possess which the law or policy failed to take into account. If statistical evidence is sufficiently reliable, it could give rise to a "strong presumption of indirect discrimination" whereby the burden of proof would shift to the Government to show that the legislation was the result of objective factors, unrelated to something like ethnic origin.[172]

1.78 Thean J pointed out that while the plaintiffs relied on indirect discrimination, their case was premised on direct discrimination. This rested in the allegation that the statistical disparities between Malay and non-Malay offenders arose from the inadequate policy guiding the exercise of prosecutorial discretion, or the inconsistent application of those policies or unconscious biases of prosecutors "insufficiently neutralised through monitoring, training and review".[173] The allegation that the Attorney-General's policies and practices allowed prosecutors to treat Malay offenders less favourably than offenders of other ethnicities

166 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [51].
167 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [51].
168 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [61].
169 [2017] 1 WLR 1343.
170 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [62].
171 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [62].
172 *DH v Czech Republic* (2007) EHRR 59, discussed in *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [83]–[85].
173 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [63].

was an allegation of direct discrimination.[174] This required a causal link between less favourable treatment and the protected characteristic. The statistical evidence presented by the plaintiffs did not provide a basis on which to infer a causal link existed between the Attorney-General's decision to prosecute Malay suspects and their ethnicity. Many case-specific factors could in fact break the causal connection between ethnicity and unfavourable treatment.

1.79 In applying the two-step *Syed Suhail (Leave)* test, the plaintiffs first had to show they were differently treated from other equally situated persons. Here, the class of persons who were regarded to be equally situated was the entire class of offenders suspected of having committed capital drug offences.[175] It was argued that the fact that Malay offenders within this class were more likely than other ethnic offenders to be sentenced to death constituted differential treatment, which the Attorney-General had to justify.

1.80 The Attorney-General in making prosecutorial decisions is entitled to take into account many factors, referencing those listed in *Ramalingam v Attorney-General*.[176] This includes factors like moral blameworthiness, willingness of the offender to co-operate with law enforcement agencies and to testify against co-offenders, and compassion. This could provide legitimate reasons for prosecutorial decisions that resulted in two accused persons involved in the same criminal enterprise facing divergent consequences, as in *Quek Hock Lye v Public Prosecutor*.[177] In relation to cases not involving the same criminal conduct, "[e]ven more legitimate considerations" could be in play "as the circumstances of the offences and the offenders themselves would differ".[178] Such considerations would operate both at Steps 2 and 1 of the *Syed Suhail (Leave)* test, both as legitimate reasons for differentiated treatment and as factors "illustrating the rich diversity of circumstances" which render it illogical to regard the entire class of offenders suspected of committing capital drug offences as equally situated persons.[179]

1.81 Applying the approach adopted in *Ridzuan*[180] as approved in *Syed Suhail (Leave)*, it would have sufficed for the applicant in *Ridzuan* to discharge his evidential burden by showing he was equally situated with his co-offender, which would require the justification of differentiated

174 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [63].
175 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [66].
176 [2012] 2 SLR 49 at [24] and [63].
177 [2012] 2 SLR 1012 at [24].
178 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [68].
179 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [68].
180 See para 1.6 above.

treatment. Here, the plaintiffs had not drawn comparisons between themselves and the co-offenders in their own cases or had reasons for not doing so. They had not "attempted to identify suitable comparators to whom they are equally situated".[181]

1.82 The judge noted that the Attorney-General pointed out that five of these co-offenders had had their charges reduced below the capital level.[182] A multitude of other variables could have contributed to convictions and sentencing in each case, but the only variables in the statistical data were that of ethnic group and the nationality of each offender. The plaintiffs bore the burden of showing that the sole reason for differentiated treatment was that of ethnicity. The Attorney-General also deposed that ethnicity was not a factor in prosecutorial decisions.[183] The allegation of indirect discrimination was not tenable in this context, that prosecutorial discretion should be applied indiscriminately to all persons, as the Attorney-General may consider a wide range of factors in exercising powers under Art 35(8).[184] There was no evidence to support the assertion that Malay offenders were more inarticulate and less credible in giving evidence in court because of their generally lower socio-economic and educational status in Singapore. There was also no evidence that similarly charged offenders from different ethnicities were not of the same socio-economic and educational status as the plaintiffs. Further, there was no proof of any prosecutorial policy which, while appearing to apply indiscriminately to all, had the effect of disadvantaging Malays by subjecting them to requirements they were less able to meet.[185]

1.83 Thus, the first step of the *Syed Suhail (Leave)* test was not cleared as the plaintiffs failed to show that they, as Malay persons, were accorded differential treatment from other equally situated persons.[186] The statistics alone did not raise the suspicion that the Attorney-General had made prosecutorial decisions because of the fact of Malay ethnicity.[187] The application of the presumption of constitutionality in this instance meant that "general statistical disparities" would not, without more, "be presumed to be attributable to direct discrimination on the ground of ethnicity in *prima facie* breach of Art 12(1)".[188]

181 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [81].
182 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [71].
183 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [72].
184 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [91].
185 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [91].
186 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [72].
187 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [73].
188 *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 274 at [74].

IX. Article 14

1.84 The lack of horizontal effect of Art 14 was confirmed in *Pang Ah San v Singapore Medical Council*[189] where the High Court noted that membership in professions like the medical profession came with many privileges and expectations of the highest level of professional and ethical conduct. As such, a member of such a profession must be taken "to agree to abide by the norms and standards required by the profession".[190]

1.85 A medical doctor argued that disciplinary proceedings brought by the Singapore Medical Council ("SMC") against him for making derogatory remarks against the SMC violated free speech rights under Art 14(1).[191]

1.86 The court stated that "it rings hollow" for that person to claim that "the Constitution prevents the regulatory body from regulating his or her conduct".[192] If the conditions of membership in a professional body are not met, membership, which is a privilege, can be taken away as there is nothing in the Constitution which displaces the rules admitting or barring someone from a profession.[193] As such, Pt IV liberties are "largely directed at regulating the relationship between citizens and the state".[194] Nothing in the Constitution prevents an individual from making private arrangements with other private individuals in a manner which would restrict their rights to free speech. Although some aspects of regulating the medical profession have a statutory grounding, Art 14 did not apply between the SMC and the relevant doctor,[195] although the SMC is still expected to observe administrative law principles in the exercise of its statutory powers.[196]

A. Article 14 and the Protection of Online Falsehoods and Manipulation Act

1.87 The Court of Appeal in *The Online Citizen Pte Ltd v Attorney-General*[197] noted that this was the first case coming before it which dealt with the interpretation and application of POFMA.[198] As such, there

189 [2021] 5 SLR 681.
190 *Pang Ah San v Singapore Medical Council* [2021] 5 SLR 681 at [63].
191 *Pang Ah San v Singapore Medical Council* [2021] 5 SLR 681 at [59]–[66].
192 *Pang Ah San v Singapore Medical Council* [2021] 5 SLR 681 at [63].
193 *Pang Ah San v Singapore Medical Council* [2021] 5 SLR 681 at [64].
194 *Pang Ah San v Singapore Medical Council* [2021] 5 SLR 681 at [65].
195 *Pang Ah San v Singapore Medical Council* [2021] 5 SLR 681 at [65].
196 *Pang Ah San v Singapore Medical Council* [2021] 5 SLR 681 at [66].
197 See para 1.1 above.
198 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [3].

was "considerable public benefit" in assessing the constitutionality of POFMA in relation to the Art 14(1)(*a*) free speech guarantee, despite the case being brought by way of a process under s 17(5) of POFMA, which addresses whether a Correction Direction ("CD") issued under Pt 3 should be confirmed or set aside.

1.88 POFMA came into force on 2 October 2019. The three-step test set out in *Wham Kwok Han Jolovan v Public Prosecutor*[199] ("*Jolovan Wham*") was to be applied in ascertaining whether the legislation impermissibly derogated from Art 14.

1.89 POFMA is concerned with and seeks to minimise the damage done by online falsehoods to Singapore or its people, which may erode public confidence in the Government or public agencies, triggering the public interest. Under s 10, the Minister may instruct the issuance of a Pt 3 direction such as a CD if two conditions are satisfied: first, that a false statement of fact has been communicated in Singapore; and second, the Minister is of the opinion that it is within the "public interest" to do so. "Public interest" is defined in ss 4(*a*)–4(*f*), and includes security, preventing influence upon elections, and preventing diminished confidence in public bodies. A correction notice must state that a publication contains a false statement of fact and contain a link to a government website, which would have the "correct facts".

1.90 The appellants, TOCPL and the Singapore Democratic Party ("SDP"), were issued correction notices under s 11 of POFMA. This required them to insert correction notices at the top of certain online articles and Facebook posts. The question arose as to whether this was a permissible restriction on free speech, guaranteed under Art 14.

1.91 The SDP had published an online article critical of population policy on 8 June 2019 ("the SDP article"), to the effect that its proposal for regulating foreign professionals, managers, executives and technicians ("PMETs") wishing to work in Singapore "comes amidst a rising proportion of Singapore PMETs being retrenched", effectively asserting that local companies were discriminating against local workers in favour of foreign workers willing to accept lower wages. The SDP also published two related Facebook posts in November and December 2019, both of which bore a hyperlink to the SDP article, communicating again to the public the June 2019 article, which was first published before POFMA came into force. The December post also contained a graphical illustration seeking to depict decreasing "local PMET employment" and increasing "foreign PMET employment"; whether "local" referred to only

199 [2021] 1 SLR 476.

Singaporeans or Singapore permanent residents as well became a matter of dispute.

1.92 With respect to the three SDP CDs, the Minister for Manpower identified two false statements of fact ("the subject statements") for Pt 3 purposes. The statement that "Local PMET retrenchment has been increasing" was contained in the SDP article, which both Facebook posts were hyperlinked to. The statement "Local PMET employment has gone down" was the other subject statement contained only in the December Facebook post.[200]

1.93 TOCPL was issued a CD on 22 January 2020 for an article published on 16 January 2020 entitled "M'sian Human Rights Group Alleges 'Brutal, Unlawful' State Execution Process in Changi Prison", repeating the claims made in the press statement of Lawyers for Liberty ("LFL"). This contained specifics claiming that Singapore Prison Service officers were instructed to issue kicks to snap the necks of prisoners if a hanging rope breaks.

1.94 The subject statement identified related to claims made by LFL.[201] TOCPL applied to the Minister for Home Affairs under s 19 of POFMA to cancel the CD on the basis that it did not purport to affirm the authenticity of LFL claims; in other words, it was essentially engaging in a form of neutral reporting in not taking a position on the truth of LFL claims.[202] If a statement was true, this would be grounds for setting aside a CD under s 17(5)(*b*) of POFMA.

1.95 Both TOCPL and the SDP complied with the CDs prior to their application under s 17 of POFMA. On appeal, the SDP challenged Ang Cheng Hock J's finding that the first subject statement arose from the Attorney-General's alternative rather than primary interpretation; further, that the second subject statement had not been shown to be untrue.[203] TOCPL's chief argument was that its subject statement was true with respect to the fact that LFL had made the relevant allegations about contingency execution methods; in other words, the TOC article did not present LFL's allegations as a statement of fact.[204] On the point of constitutionality, it was argued by SDP that portions of Pt 3 of POFMA were unconstitutional in purporting to restrict speech on a ground not set out in the Art 14(2)(*a*) derogation clause. TOCPL went further

200 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [10].
201 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [18].
202 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [30].
203 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [40].
204 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [41].

in arguing that all of Pt 3 of POFMA, and therefore all of POFMA, was unconstitutional.

1.96 The term "public interest" is defined in s 4 of POFMA. At issue was whether this would be covered by "public order", a recognised ground of derogation under Art 14(2). The SDP contended that Pt 3 was unconstitutional in seeking to limit free speech on the basis of public interest as identified in ss 4(*d*) and 4(*f*), which respectively relate to preventing any influence on the outcome of elections and preventing a diminution of public confidence in the Government or state organ in the performance of its duties or functions.[205] This understanding of "public interest" was argued to be wider than "public order".

1.97 Unlike orders under s 15 of the Protection from Harassment Act 2014[206] ("POHA") which are made only when there is a judicial determination of false speech, under POFMA, it is the Minister who determines there to be a false statement of fact in issuing a Pt 3 direction.[207]

1.98 The Court of Appeal rejected the view that a statement is a false statement of fact because the Minister has so identified it, as the Minister may be wrong and matters of "truth and falsehood" fall ultimately for a court to decide based on evidence.[208] Until a statement identified by the Minister as a "false statement of fact" (subject statement) has been judicially determined to be false, it continues to enjoy protection under Art 14(1)(*a*) even where state power has been exercised against it in the form of a Pt 3 direction. This resonates with views expressed in previous cases to the effect that the free speech rationale of the "competition of the marketplace" may not apply to false statements.[209] Where a court of law has shown a speech to be false, such speech had little value and it was argued in *Attorney-General v Ting Choon Meng*,[210] in relation to the POHA, that such speech was not protected under Art 14(1).

1.99 The Minister's action in issuing a Pt 3 direction was more appropriately characterised as a power to identify certain statements as false in his estimation, subject to final judicial determination as to its correctness.[211] Ergo, until final judicial determination, a subject statement under a Pt 3 order continues to enjoy Art 14 protection.[212]

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205 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [51].
206 2020 Rev Ed.
207 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [59].
208 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [60].
209 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [117].
210 [2017] 1 SLR 373.
211 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [117].
212 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [61].

1.100 POFMA leaves it to the Minister to formulate the language and terms of the correction notice.[213] Under Step 1 of the three-step *Jolovan Wham* framework, the enquiry is whether a law impermissibly restricts an Art 14(1) right. This step was not satisfied. The Court of Appeal held that the issuance of a CD did not curtail free speech rights as it did not prevent the continued publication of the subject statement; nor did it prevent the publisher from stating in a factually accurate manner that it was challenging the CD and that whether there were grounds for setting the CD aside was subject to judicial determination.[214]

1.101 This sided with Belinda Ang Saw Ean J's view that Art 14 protected the communication of information but not of misinformation. The concern raised by Ang Cheng Hock J of information asymmetry was not one raised by Parliament.[215] In having the view that the Minister bore the burden of proof under proceedings under s 17 of POFMA that the facts warranted the issuing of the CD, Ang Cheng Hock J regarded an issued CD as an imposed restriction of free speech, whereas Belinda Ang J did not consider the issuance of a CD in and of itself to restrict a statement-maker's free speech rights.[216]

1.102 Belinda Ang J noted that a correction notice could be likened to a general "right to reply" that facilitates the search for truth.[217] Free speech was not restricted as the effect of a CD was merely to constrain how speech proven to be false may be published – it may be published subject to including a notification that it has been proven to be false and/or with a direction as to where to find the truth, as required by s 11(1) of POFMA.[218] The statement-maker is neither compelled nor prohibited from modifying the content of the communicated material. This preserves the positive right to free speech.

1.103 TOCPL argued that free speech also was a negative right in the sense that one must not be required to speak, drawing from the American compelled speech doctrine, from cases like *Wooley v Maynard*[219] ("*Wooley*"). This had also been affirmed in the UK context,[220] with respect to the scope of freedom of expression protected under Art 10 of the European Convention on Human Rights,[221] which includes the freedom

213 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [64].
214 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [67] and [77]–[79].
215 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [32].
216 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [65].
217 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [36]–[37].
218 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [66]–[67].
219 430 US 705 (1977).
220 *Lee v Ashers* [2018] 3 WLR 1294.
221 213 UNTS 221 (4 November 1950; entry into force 3 September 1953).

not to be obliged to hold or manifest beliefs one does not hold. TOCPL argued that having to put up a correction notice effectively compelled it to be engaged in an exercise of self-defamation and therefore restricted free speech.[222]

1.104 The American approach as well as that of the UK Supreme Court were predicated on the individual freedom of mind and belief, which was not at issue in the present case.[223] The Court of Appeal preferred the minority judgment in *Wooley*, to the effect that a distinction could be drawn between communicating a point of view – having a licence plate with a certain disagreeable motto – and asserting it as true, and that one was not barred from using any method of expressing disagreement which would not obscure the licence plate.[224]

1.105 The Court of Appeal noted that an order under s 15 of the POHA did not materially limit free speech as the relevant false statement could continue to be published, subject to the requirement that a qualification "be appended to indicate its falsity and/or where the truth may be found".[225] There was no matter of compelled speech as a person could not be said "to have been inhibited, prevented or materially limited" by having to display that position if one was also free "to qualify it appropriately in an equally visible manner".[226] To show that a CD constituted compelled speech, TOCPL would have to show it was "actually or effectively prevented from communicating, in an equally visible way as the correction notice it was required to put up", by the TOC CD which was under a challenge under s 17 of POFMA; it was not hindered from doing so, provided this was done "in a factually accurate manner".[227] It could, for example, assert that the subject statement was a "true statement of fact" as s 17(5)(*b*) of POFMA provided for. It could not do so on the facts, so the Court of Appeal did not think it necessary in the instant case to form a conclusive view on the applicability of the doctrine of compelled speech in the Singapore context.[228]

1.106 The Court of Appeal also made *obiter* statements in relation to how Steps 2 and 3 of the *Jolovan Wham* framework might apply. These steps would relate to asking whether Parliament considered it "necessary or expedient" to impose the restrictions and whether a nexus existed

222 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [68].
223 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [70].
224 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [71].
225 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [72].
226 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [72].
227 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [77].
228 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [79].

between the purpose of the legislation containing the restriction and one of the Art 14(2) grounds.[229]

1.107 In examining the parliamentary debates at the second reading of the the Protection from Online Falsehoods and Manipulation Bill 2019,[230] it was evident from the Minister for Law's speech that the bill constituted the legislative response to the threat posed to honest public discourse and to confidence in public institutions from online falsehoods.[231]

1.108 Thus, even if an issued CD did restrict free speech of the communicator of the subject statement identified in the CD, this would be a justified restriction under Art 14(2)(*a*) where Parliament enacted POFMA on grounds that it was necessary or expedient in the interests of public order and national security, which are two of the permissible grounds for derogation under Art 14(2)(*a*). The Court of Appeal found there was "ample support" that the public interest specifically identified with ss 4(*d*) and 4(*f*) fell within the scope of "public order" under Art 14(2)(*a*).[232]

1.109 The Court of Appeal noted that the types of acts which could affect public order were "not closed" and turned on "the degree of disturbance that may be caused to the life of the community"[233] as distinct from merely affecting an individual. It affirmed that public order does not require disorder to have broken out physically in a public space, such that the swift dissemination of online falsehoods could threaten public order. It held that using falsehoods and lies to undermine a democratically elected government, whatever the merits of that government, "cannot be tolerated and cannot be seen as being compatible with a state of public order".[234] Clearly, online disinformation which impacts national elections or referenda is a matter of national importance; a proliferation of such falsehoods is no mere temporary disturbance but something which "shakes the foundations of a democratic society to its very core and carries the potential for far greater harm".[235] Therefore, public order threats encompass not only physical threats but also threats to intangible values.[236] Thus, a nexus existed between the purpose of POFMA as identified in ss 4(*d*) and 4(*f*) and the Art 14(2)(*a*) public order exception.[237]

229 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [81].
230 Bill 10 of 2019.
231 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [87]–[91].
232 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [101].
233 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [98].
234 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [99].
235 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [100].
236 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [101].
237 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [102].

1.110 Two alternative arguments were advanced.[238] The first argument was that the definition of "false" under s 2(2)(*b*) of POFMA was contrary to the right of free speech and should be struck down. This reads that a statement is false "if it is false or misleading, whether wholly or in part, and whether on its own or in the context in which it appears".

1.111 Further, the Court of Appeal rejected an argument of "neutral reportage", which drove TOCPL's argument that there was a constitutional right to make statements which were true, when read in context, such as its reporting of the LFL allegations.[239] POFMA sought to address the "deleterious effects" of online falsehoods and even statements rendered false when taken out of context may weaken the infrastructure of fact, undermine public confidence in the Government or influence election outcomes, giving rise to public order concerns.[240] As such, the real inquiry was "whether the subject statement" which the Minister identified in a Pt 3 direction was "a reasonable interpretation of the material in respect of which the Direction is issued".[241] This was pegged at the level of an "ordinary reasonable reader" who would construe material as making or containing the subject statement or regard the subject statement as "a reasonable interpretation of that material".[242]

1.112 Second, if the court found POFMA to be constitutional, it should read in a requirement of proportionality in assessing "public interest" under s 4. The Court of Appeal noted that s 4 already incorporates an element of proportionality in requiring that it is in the public interest to do something only if this is "necessary or expedient" for one of the listed purposes in that section. There was nothing in the Minister for Law's second reading comments that suggested reading into s 4 a further and different conception of proportionality, particularly one that required that the Minister only use the "least restrictive means" available in the circumstances.[243]

1.113 In terms of interpreting the POFMA statutory regime, the Court of Appeal held that it was not open to the court to uphold a Pt 3 direction on the basis of a subject statement the Minister had not identified in the direction.[244] For a recipient of a Pt 3 direction to be able to meaningfully challenge the Minister's decision in issuing the direction, it must know

238 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [42].
239 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [107].
240 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [108].
241 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [109].
242 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [109].
243 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [112].
244 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [130].

the case against it and the meaning attributed to the subject matter allegedly communicated by him.[245]

1.114 Where a subject statement is capable of having more than one meaning, the court should on an objective construction lean towards the meaning the recipient of the direction would have reasonably understood the Minister's intended meaning to have, given the tight timelines for mounting a challenge to Pt 3 direction and Parliament's intent that such a challenge be capable of being brought.[246]

1.115 The Court of Appeal also rejected the single meaning rule in relation to striking the correct balance between preventing the circulation of online falsehood and protecting free speech rights. In relation to s 2(2)(*b*) of POFMA, the court should not ignore the potential ways a statement of fact could be false, notwithstanding that it could also have interpretations that may render that same statement true.[247] As such, it had no application in the POFMA context.

1.116 The Court of Appeal also noted that fault, in the sense of knowing a statement was false, was not required before a Pt 3 direction could be issued. As such, the statement-maker's intended meaning was not relevant to the interpretation of the subject material. However, in the possible scenario where the Minister's intended meaning was one which the statement-maker did not bear or believe in, the court thought it would not be "unduly onerous" for the statement-maker to object to the Minister's intended meaning, such as through a clear disavowal or a follow-up comment on the subject material to clarify that the statement-maker did not intend to convey the particular meaning the Minister attributed to the subject statement.[248] The statement-maker in such a case would have every incentive to make this clarification; the Court of Appeal provisionally thought this might be "a possible balance" between an objective interpretation of the subject statement from the perspective of the potential readership in Singapore, and an interpretation based on the statement-maker's subjective intended meaning.[249]

1.117 Thus, in deciding whether a subject statement contains the meaning attributed to it by the Minister, the appropriate approach would be for the court to interpret the subject material objectively in its proper context and ask whether there would be "at least an appreciable

245 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [128].
246 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [133].
247 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [151].
248 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [155].
249 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [156].

segment or a particular class" of potential readers of the subject material in Singapore "who would construe it as making or containing the subject statement, or regard the subject statement as a reasonable interpretation of the subject material".[250] The Court of Appeal thought this would strike a "reasonable balance" between ensuring the legislative intention behind POFMA, to prevent the communication of online falsehoods among the general Singapore public and its deleterious effects, and the need to ensure that statements which only an "insignificant segment" of the public or class or persons would construe in the false sense would not be "culled from the public discourse".[251] The subject matter should be approached "as a matter of impression" rather than fine-grained legal interpretation or "unduly technical analysis".[252] While the court should not accept "nothing more than theoretically possible interpretations", it should also be alive to the possibility that an appreciable segment of the audience may take the subject statement out of context owing to factors such as "clickbait, deceptive headlines or outsized graphic".[253]

1.118 Where the subject material is found to contain the subject statement identified by the Minister, an objective approach should be taken to see if this statement is a "statement of fact", which is defined in s 2(2)(*a*) of POFMA as "a statement which a reasonable person seeing, hearing or otherwise perceiving it would consider to be a representation of fact".[254] The next step is to see whether it is "false" in the sense of being "false or misleading, whether wholly or in part, and whether on its own or in the context in which it appears".[255] Consonant with POFMA's concern with the effect of a statement rather than the subjective intent of the statement-maker, an objective test is to be applied.[256] POFMA would apply where the subject material is published on the Internet and is accessible to at least one end-user in Singapore, whether it is the author of the false statement or those who communicate these statements.

1.119 Where does the burden of proof lie in s 17 proceedings? Section 17 of POFMA is a vehicle for challenging an executive function and is "unique".[257] There was some dispute as to who bore the burden of proof in these proceedings. Ang Cheng Hock J in *Singapore Democratic*

250 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [156].
251 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [156].
252 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [157].
253 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [157].
254 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [158].
255 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 2(2)(*b*).
256 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [159].
257 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [178].

Party v Attorney-General[258] and Belinda Ang J in *The Online Citizen Pte Ltd v Attorney-General*[259] differed on this point.

1.120 The Court of Appeal on a close examination of the legal framework agreed with Belinda Ang J that this rested on the statement-maker to establish a s 17(5) ground as the appeal was related not to the issuance of the CD but the Minister's decision not to cancel or vary the CD under s 19. This flowed from three reasons.

1.121 First, the administrative law presumption of legality of executive action which would be inconsistent with locating the onus on the Minister who issues a Pt 3 direction. The applicant who challenges this order must have some basis for such challenge.[260] Second, were this otherwise, it could pave the way for abuse by allowing unmeritorious s 17 applications to be brought which would require the Minister to prove that the legal requirements for issuing the CD were satisfied. Third, the Minister is required under reg 6(*b*) of the Protection from Online Falsehoods and Manipulation Regulations 2019 to set out in the CD "the basis on which the subject statement … is determined to be a 'false statement of fact'".[261] Hence, the recipient of a CD must explain why it challenged the grounds the Minister provided for issuing the CD[262] and must show a *prima facie* case of reasonable suspicion that one or more of the grounds in favour of setting aside the direction under ss 17(5)(*a*) and 17(5)(*b*) are satisfied, favouring the granting of the sought relief.[263] This is not meant to be a high bar to meet.[264]

1.122 On the facts, the Court of Appeal allowed the SDP's appeal in part, in relation to the first half of the third CD received by the SDP,[265] while dismissing the TOC appeal in its entirety.

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258 [2020] SGHC 25.
259 [2020] SGHC 36.
260 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [180].
261 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [181].
262 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [182].
263 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [183].
264 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [184].
265 *The Online Citizen Pte Ltd v Attorney-General* [2021] 2 SLR 1358 at [234].