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1. ADMINISTRATIVE AND CONSTITUTIONAL LAW

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I. Introduction

1.1 In 2022, a significant number of the cases decided under the Constitution of the Republic of Singapore[1] ("Singapore Constitution" or "Constitution") related to different approaches towards the reasonable classification test under Art 12, the content of Art 9 and the limited recognition of the substantive legitimate expectations doctrine as a protected interest, in the unique circumstances set out in *Tan Seng Kee v Attorney-General*.[2]

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II. Susceptibility to judicial review

1.2 The issue of whether policies and advisories are amenable to judicial review arose in *Han Hui Hui v Attorney-General*[3] ("*Han Hui Hui*"). The government policy announced on 8 November 2021 that COVID-19 patients who were unvaccinated by choice would be charged their medical bills from 8 December 2021 was held to be susceptible to judicial review. However, an updated advisory issued in October 2021 to employers ("the October Advisory") by the Ministry of Manpower ("MOM"), Singapore National Employers Federation and National Trade Unions Congress, pertaining to unvaccinated employees unable to be physically present at their workplace with the coming into force of the workforce vaccination measures ("WVM") on 1 January 2022, was not. The policy constituted a return to the usual healthcare financing model, under which patients who received medical treatment in Singapore were expected to foot their own medical bills, although various government subsidies might be available.[4]

1 2020 Rev Ed.
2 [2022] 1 SLR 1347.
3 [2022] 5 SLR 1023.
4 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [5].

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1.3 Dedar Singh Gill J held that the Unvaccinated Medical Bills Policy was adopted pursuant to the exercise of ministerial powers, specifically, by the Minister for Health who was charged with "Health Care Financing" under the Ministerial Responsibility Notification (Art 23 read with Art 30, and the First and Ninth Schedules).[5] Applying the source of power test, this was an action "undertaken pursuant to statutorily conferred powers" and, further, was "public in nature", in relation to the healthcare financing framework, which involves a public law function. The latter presumably relates to the "nature of the decision" test.[6]

1.4 Gill J did not consider the October Advisory susceptible to judicial review because it was not a policy directive, "nor does it carry legal effect".[7] For context, under the WVM, only fully vaccinated employees (or those who had recovered from COVID-19 within the past 270 days), could return to the workplace. Unvaccinated employees were not allowed to return to their workplace unless they tested negative for COVID-19 on a pre-event test ("PET"), costs of which they had to bear. Exemptions under the WVM applied to those employees who were medically ineligible for vaccination. The October Advisory provided guidelines to employers on how to manage their unvaccinated employees who by dint of the WVM were unable to be physically present at their workplace. If work could not be performed at home, para 7(c) of the October Advisory provided that, as a last resort, employers could terminate their employment in accordance with the employment contract, with notice, and that such termination of employment would not be considered wrongful dismissal. This advisory was updated in December, after the Multi-Ministry Taskforce ("MMT") and MOM announced on 26 December 2021 that the negative PET concession would be removed from 15 January 2022.

1.5 Paragraph 7(c) did not direct employers to terminate the employment of unvaccinated employees. It was thus "not the source of any legal obligations" to comply with the WVMs as it "merely reiterated the Government's announcement of the WVMs", which drew their legal force from subsidiary legislation, namely, the Workplace Safety and Health (COVID-19 Safe Workplace) Regulations 2021.[8]

1.6 The advisory could not be subject to a quashing order as it was not a determination or decision which had some form of actual or ostensible legal effect, whether direct or indirect.[9] The applicants had argued that

5 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [54].
6 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [52] and [55].
7 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [58].
8 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [58].
9 See *Comptroller of Income Tax v ACC* [2010] 2 SLR 1189 at [16].

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the October Advisory was a directive which directed or permitted employers to lay off unvaccinated individuals but Gill J held that para 7(c) did not compel or mandate this. He stated that the proposition that an advisory can be "cloaked with the force of law because of its supposed misinterpretation by some employers has just to be stated for it to self-destruct".[10] However, the October Advisory may be seen to have some legal effect as a form of quasi-law; if it did not proceed directly from a statutory source of power, it may be seen to have emanated indirectly from public officials wielding statutory power and may thus be seen as having a sufficient public law element. This is because it provides that terminating an employee in the stipulated circumstances would not be considered an unfair dismissal, which seems to indicate a change in legal obligations, that is, to have some kind of legal effect or impact. This point was not canvassed before the court.

A. Judicial review: Irrationality and relevancy

1.7 In *Han Hui Hui*, the legality of the Unvaccinated Medical Bills Policy was challenged on three grounds. This policy provided that those unvaccinated by choice would from 8 December 2021 have to bear the full medical costs of their treatment if they caught COVID-19. This decision was challenged on grounds that (a) the decision-makers, the MMT or MOH, had considered irrelevant considerations, basing the decision on "incorrect factual bases"; (b) the decision-makers had acted with irrationality; and (c) the policy was in breach of the Art 12 equality clause.[11]

1.8 The applicants sought firstly to impugn the factual basis the Unvaccinated Medical Bills Policy rested upon and which the MOM/MMT relied on by arguing that the death and critically ill ("CI") statistics undermined the rationale for the Policy. This was with the intent of demonstrating the falsity of two views relied upon by the decision-makers: first, that a fully vaccinated person had less chance of dying from COVID-19 or falling ill than an unvaccinated person (efficacy of vaccination rationale); and second, that unvaccinated people disproportionately took up healthcare resources because they made up a sizeable majority of those needing intensive inpatient care (resources rationale).

1.9 As the efficacy rationale was a scientific question, the High Court noted that such questions were "generally not amenable to judicial

10 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [60].
11 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [67].

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resolution".[12] The applicants supported their claim by providing the death and CI statistics and statistics on 10 April 2022 which showed there was no one in the intensive care unit aged 70 and above who was not fully vaccinated; that is, the fully vaccinated above 70 accounted for all the CI cases[13] ("the 10 April 2022 Statistics") (collectively "the Statistics"). However, at most, these statistics if incongruent with the efficacy rationale could not support a general scientific proposition that fully vaccinated persons did not enjoy a reduced propensity of death or CI due to COVID-19, but only that fully vaccinated persons in Singapore did not experience a lower chance of death or CI from COVID-19 on specific dates.[14] The applicants also argued that, in relation to the resource rationale, the statistics did not bear out the claim that unvaccinated persons consumed a disproportionate share of healthcare resources, and that in fact fully vaccinated persons made up the majority of CI cases and contributed disproportionately to the strain on resources.

1.10 The learned judge examined the statistics in granular detail and found that the death and CI statistics could not rebut either the efficacy or resource rationale as they were only a raw count and did not show a "full picture"[15] such that only "limited inferences" could be drawn from them.[16] Gill J was inclined to agree with the statistics presented by Dr Heng from MOH, which supported the efficacy and resource rationales, as these were "well-explained and with cogent basis", as distinct from the "shaky assumptions" underlying the death and CI statistics which, even if true, "do not convincingly subvert" the efficacy and resource rationales, given the extent of contrary evidence.[17] Thus, Gill J concluded that the death and CI statistics did not stand for the proposition that the probability of death or CI due to COVID-19 for fully vaccinated persons was lower compared to non-fully vaccinated persons.[18]

1.11 In relation to the 10 April 2022 Statistics, this too was of limited assistance as it related to a narrow age group of the unvaccinated population over a limited time period.[19] Thus, the applicant's dissatisfaction with the efficacy and resource rationales based on the Statistics was unfounded, and the applicants failed to show a *prima facie* case of reasonable suspicion for the quashing orders, on grounds of irrationality or illegality.[20] As the

12 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [73].
13 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [15(c)].
14 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [74].
15 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [83].
16 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [93].
17 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [100].
18 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [102].
19 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [110].
20 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [115].

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factual basis for the Unvaccinated Medical Bills Policy was not impugned, the MMT and MOH in coming to their decisions were not acting "outside the realm of possible decisions by the reasonable decision-maker".[21]

1.12 Second, the reasons underlying the policy were challenged as contravening grounds of illegality or unreasonableness, with the High Court acknowledging that findings of fact were usually not within the purview of judicial review;[22] nor were the courts to intervene in substantive policy matters which fell within the province of the Executive.[23]

1.13 The court noted that foreign case law from England, Australia and Canada reflected the judicial recognition of the need for executive discretion and expertise in responding to public health emergency regulatory challenges.[24] The reasons for the policy were to be examined only to the extent it assisted in identifying whether irrelevant considerations were taken into account, or relevant considerations not taken into account. The High Court found that the MMT/MOH had not acted unreasonably, as they had acted in "good faith" and had relied on "proper reasons" backed by objective evidence.[25] They had consulted independent clinical studies which established the efficacy of COVID-19 vaccines in lowering the chances of infection and risk of COVID-19 transmission; the MOH also provided statistics indicating that vaccines conferred substantial protection against severe illness and death from COVID-19 infection.[26] The policy was designed to send a "strong signal" to incentivise the unvaccinated by choice to get vaccinated.[27] This was meant to minimise risks to society at large and help preserve overall healthcare capacity on the basis that the unvaccinated contributed disproportionately to the strain on healthcare resources, as they were apparently at a greater risk of serious illness and consequent need of intensive inpatient care.[28] They were also supposedly more contagious than infected vaccinated persons.

1.14 Gill J thus found that the policy was "assuredly within the reasonable exercise of the [MMT] and MOH's discretion".[29] The decision was grounded in "reliable statistics" on vaccine efficacy.[30] It was further

21 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [116].
22 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [120].
23 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [124] and [131].
24 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [140].
25 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [125].
26 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [122].
27 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [123].
28 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [123].
29 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [125].
30 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [130].

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reasonable for MMT/MOH to "incentivise vaccination for the greater good of public health".[31]

1.15 Further, the ground of illegality was not made out; it was not shown that the MMT/MOH had considered any irrelevant considerations as the efficacy and resource rationales were "highly relevant" to the decision as to whether to implement the policy.[32] The MMT/MOH had exercised their powers in "good faith" and considered all relevant considerations.[33]

III. Substantive legitimate expectations

1.16 The Court of Appeal in *Tan Seng Kee v Attorney-General*[34] ("*Tan Seng Kee*") considered that the unique circumstances surrounding the policy of non-pro-enforcement of s 377A of the Penal Code 1871,[35] which criminalised acts of gross indecency between male persons, warranted a "limited recognition" of the doctrine of substantive legitimate expectations ("SLE"). This was to give legal force to the representations of the Attorney-General given in a press statement in 2018 ("AG representations"), which was broadly in accordance with the policy underlying Parliament's retention of s 377A during the 2007 Penal Code parliamentary debates.[36] They made clear that the SLE doctrine was not being imported "in any wider context", leaving the matter for future determination, as it was "wholly exceptional".[37]

1.17 Prior to this case, the doctrine of SLE had an uncertain status in Singapore. The High Court had advocated its adoption in *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority*[38] ("*Chiu Teng*"), where a series of criteria were proposed to assess whether a SLE should be recognised. This essentially sought to address instances where a government body makes a representation expressly or by past practice and decides to renege on it, causing substantive unfairness. Safeguards include requiring a clear representation, and detrimental and reasonable reliance on the said representation, subject to overriding national or public interest which justifies frustrating an applicant's expectation. It was discussed with rather more reservation by the Court of Appeal in *Starkstrom v*

31 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [130].
32 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [117].
33 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [129].
34 See para 1.1 above.
35 2020 Rev Ed.
36 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [117].
37 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [140] and [154].
38 [2014] 1 SLR 1047.

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Commissioner for Labour.[39] Chief among the concerns was a fear that a SLE review involved merits review, necessitating a reconsideration of the separation of powers doctrine as well as the scope and limits of judicial reviews. Further, it might entail fettering administrative or executive discretion.

1.18 A reason for fashioning a legal remedy in the form of SLE stemmed from a desire to accord legal significance to the representation that s 377A of the Penal Code would not be proactively enforced, in order to better secure to homosexual men the ability to plan their lives adequately as they did not know, with reasonable certainty, how s 377A would be applied or enforced.[40] The Court of Appeal noted that the retention by Parliament of s 377A in 2007 reflected the delicate balance struck between the need to uphold a stable society with heterosexual family values and allowing space for homosexuals to live their lives and contribute to society.[41] Further, this "political package" was underscored by the press release by the Attorney-General's Chambers on 2 October 2018 to the effect that, where the relevant conduct of gross indecency took place between two consenting adults in a private place, the Public Prosecutor, absent other factors, took the position that prosecution would not be in the public interest.[42] Thus, the motivation was to give effect to the expectations of homosexual men that s 377A will not generally be enforced in relation to private acts done between two consenting males.[43]

1.19 The Court of Appeal recognised that its limited recognition of SLE departed from earlier jurisprudence where a representation was made to a specific individual or individuals, considering that in principle, a representation made to a general class of persons (here, homosexual men) could give rise to a specific individual's legitimate expectation provided that individual was "uncontroversially"[44] a member of the class of persons to whom the representation was made. It is unclear whether bisexual men or experimental heterosexual men would fall within this class of homosexual men, the complication arising because s 377A is concerned with conduct rather than self-identification or sexual orientation.

1.20 The Court of Appeal did not conclusively decide whether detrimental reliance was an element of the SLE doctrine though it would be an "important consideration" in weighing an expectation

39 [2016] 3 SLR 598.
40 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [109].
41 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [76].
42 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [85].
43 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [132].
44 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [132].

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and determining "where the balance of fairness lies".[45] On the facts, the court asserted there would be "no question"[46] that homosexual men engaging consensually in acts of gross indecency in private would have detrimentally relied on the 2018 AG representations. It held that the expectation related to the Attorney-General not prosecuting conduct between two consenting adults in private, that the Attorney-General had the "actual authority" to make such representations, and that these representations were "publicly promulgated".[47] These representations constitute guidelines on how the Public Prosecutor would exercise his discretion in relation to s 377A offences. It did not find any indication of how giving effect to this legitimate expectation would infringe the rights of any member of the public or be outweighed by an overriding national or public interest.[48]

1.21 The intent of the Court of Appeal was to "honour and give legal effect" to the political compromise on s 377A struck in 2007 "as far as practicable"[49] for two key reasons. First, the political package was meant to assure homosexual men that they could live and not be harassed despite the retention of s 377A, such that discarding the package meant discarding the "legally binding assurance" homosexual men could live freely in Singapore without harassment or interference.[50] If the legal effect of the AG's representations were not recognised, this could "expose some individuals to the grave threat of prosecution and the attendant deprivation of liberty".[51] The SLE was then directed towards shielding persons from "the severe repercussions".[52]

1.22 Second, Parliament made a considered choice to retain s 377A such that the court would strive to give legal effect to the intentions of Parliament and the AG's representations, with the finetuning necessary to make it "legally workable".[53] Further, the circumstances surrounding the enforcement policy were "exceptional".[54] Section 377A represented a balance between those supporting pro-traditional family values and homosexual men, and the Court of Appeal asserted that it was within its ambit to determine "the proper contouring" of the "accommodation"

45 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [143].
46 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [144].
47 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [147].
48 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [147].
49 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [110].
50 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [111].
51 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [133].
52 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [133].
53 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [112].
54 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [134].

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extended to homosexual men in terms of their expectations.[55] It thus held that s 377A was "unenforceable in its entirety unless and until the AG of the day provides clear notice"[56] of his intent as Public Prosecutor to reassert his right to enforce s 377A proactively by means of prosecution and that he would no longer abide by the 2018 AG's representations. This would minimise the prevailing legal untidiness, in so far as prosecutions under other overlapping Penal Code provisions should not be instituted if the underlying offence was one under s 377A.[57] This would provide homosexual men with the "full measure" of the accommodation contemplated by the Government during the 2007 debates.[58] Further, the appellants could not now be said to face "any real and credible threat of prosecution" under s 377A at this time and, as such, lacked standing to challenge the constitutionality of s 377A.[59]

1.23 The court thought it would be "upholding the public interest" in maintaining the 2007 legislative status quo, affirmed by the Attorney-General in 2018.[60] Recognising SLE in these limited circumstances would not, in the court's view, involve merits review or offend the separation of powers, as the court would merely be giving effect to the political compromise and would not constrain any future legislative or executive action.[61] Further, if the Attorney-General in future wanted to change the enforcement policy, he was not prevented from so doing, although reasonable notice ought to be given of an intent to resile from the 2018 AG representations.[62]

1.24 The Court of Appeal underscored that it was not adopting a "living tree" approach towards constitutional interpretation, while stressing the need to avoid "arid legal analysis" driven by ascertaining the intentions of the colonial draftsmen, and the need not to ignore the "more current debates and resolutions of our Parliament and our Government".[63] The unique circumstances by which the political package was arrived at necessitated interpreting s 377A "as informed by Parliament's intention to retain the provision".[64] The SLE itself related only to exercises of prosecutorial discretion and not the conduct of police investigations.[65]

55 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [134].
56 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [149].
57 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [150].
58 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [151].
59 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [153].
60 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [134].
61 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [135].
62 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [138].
63 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [112].
64 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [112].
65 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [113].

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1.25 The applicants in *Han Hui Hui*[66] were not eligible for a declaration, which they sought for on claims based on SLE. Here, it was claimed that the applicants enjoyed SLE that their employment status or chances for finding employment would not be affected, and that there was another SLE that, regardless of vaccination status, the Government would bear their medical bills if they contracted COVID-19.

1.26 The High Court in *Han Hui Hui* considered that the instant case did not fall within the extremely narrow extent to which the SLE doctrine received limited recognition in the unique circumstances of *Tan Seng Kee*. Here, the applicants provided no concrete evidence that the Government had made a representation supportive of the SLE claims; this was distinct from *Tan Seng Kee*, where reliance was made on express representations by the Attorney-General and Parliament.[67] Even if there was a government representation, the High Court identified two factors which the Court of Appeal had lain weight on in *Tan Seng Kee*, which were not present in the immediate case.

1.27 First, the High Court said the applicants here would not be exposed to "any severe risks" if the SLE claim was not recognised.[68] Unlike in *Tan Seng Kee* where what was at stake was "the grave threat of prosecution" and deprivation of liberty, here the consequences related to potential changes to employment and the reversion to the position of footing their own medical bills.[69] Loss of employment, however, could be seen to have a grave impact, though it did not entail a violation of a constitutional right in the form of loss of personal liberty, and this determination of risk certainly entailed a value judgment.

1.28 Second, there was no congruence between the policy rationale and the applicants' position that the Government should continue to foot the medical bills of the unvaccinated by choice.[70] In *Tan Seng Kee*, the circumstances were exceptional as Parliament had come to a legislative compromise by retaining the status quo while accommodating the concerns of those directly affected by s 377A which criminalised homosexual male conduct; therefore, by invoking the AG's representations and Government's promise not to proactively enforce s 377A, the court was upholding the public interest by shoring up the legislative status quo.[71] Thus, by upholding the SLE in these circumstances, the court was not

66 See para 1.2 above.
67 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [178].
68 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [180].
69 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [180].
70 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [181].
71 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [181].

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reviewing the merits of the case nor violating the separation of powers.[72] In the immediate case, the High Court considered that the Government had not made any representation in relation to employment or paying for medical expenses,[73] such that there was no basis for finding a SLE, based on the criteria identified by the High Court in *Chiu Teng*.[74]

IV. Natural justice before tribunals and the admission of hearsay evidence

1.29 The issue in *Wee Teong Boo v Singapore Medical Council*[75] concerned the admissibility of evidence in the disciplinary proceedings against Wee commenced by the Singapore Medical Council ("SMC"). The issue was whether the decision made by the disciplinary tribunal ("DT") on the admissibility of evidence ("the Admissibility Decision") was amenable to judicial review, prior to a determination being made on charges of professional misconduct. Under s 51(4) of the Medical Registration Act[76] ("MRA"), the DT may admit all relevant evidence, including hearsay evidence. The application to quash the Admissibility Decision was to exclude material evidence in the SMC's case which the applicant deemed inadmissible.

1.30 Where there are grounds for judicial review, an application for leave to commence judicial review will be brought at the close of DT proceedings after a determination has been made.[77] SMC counsel argued that the application for leave to commence judicial review of the Admissibility Decision was "analogous to bringing an interlocutory appeal in the midst of a criminal trial", with which the High Court agreed.[78]

1.31 Sundaresh Menon CJ had noted that applications to "admit or exclude evidence or to permit lines of cross-examination" would almost invariably interfere with the proper conduct of a trial.[79] In *Wong Keng Leong Rayney v Law Society of Singapore*,[80] the High Court described the premature application for leave to seek judicial review as one made "before the actual decision-making process of the tribunal at first instance

72 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [181].
73 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [182].
74 See para 1.17 above.
75 [2022] SGHC 169.
76 Cap 174, 2004 Rev Ed.
77 *Wee Teong Boo v Singapore Medical Council* [2022] SGHC 169 at [22].
78 *Wee Teong Boo v Singapore Medical Council* [2022] SGHC 169 at [32].
79 *Xu Yuanchen v Public Prosecutor* [2021] 4 SLR 719 at [16].
80 [2006] 4 SLR(R) 934.

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is completed".[81] In the instant case, the High Court noted the exceptional case circumstances and declined to pronounce on whether the application was premature, given the earlier agreement between the parties and DT that these were novel questions of law which would materially affect the outcome of the DT proceedings.[82]

1.32 It is clear that rules of natural justice apply to DTs.[83] The High Court discussed how, in the context of DT proceedings, the rules of evidence (hearsay rule in particular) should interact with the rules of natural justice in relation to the fair hearing rule.[84]

1.33 In reviewing foreign authorities, the High Court noted that in English practice, none of the conceptions of natural justice, which is seen as a manifestation of fairness, "lends support to the view that strict compliance with the rules of evidence is necessary to avoid a breach of the rules of natural justice".[85] The English authorities seem to indicate that the admission of hearsay evidence in itself does not constitute a breach of natural justice if the evidence is relevant and probative.

1.34 This is provided there are sufficient safeguards "to ensure that the other party is given a fair opportunity of commenting on the evidence and contradicting it".[86] In some instances, depending on all the circumstances where hearsay evidence is admitted, cross-examination may be necessary to safeguard the applicant's right to a fair hearing.[87] This is necessarily a "fact-specific inquiry".[88] Where hearsay evidence is relevant, it may not be admissible when it is in breach of the right to a fair hearing.[89]

1.35 The judge found the English position to be a "reasonable" one, subjecting the admission of hearsay evidence to the right to a fair hearing, based on procedural fairness.[90] So too, Australian cases allow for the admission of hearsay evidence before tribunal hearings, the policy rationale for excluding the usual rules of evidence being "to preserve the tribunal model as an efficient and informal forum".[91] This approach

81 *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR(R) 934 at [14].
82 *Wee Teong Boo v Singapore Medical Council* [2022] SGHC 169 at [37].
83 *Lim Mey Lee Susan v Singapore Medical Council* [2011] 4 SLR 156 at [80]–[81]; *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR (R) 85.
84 *Wee Teong Boo v Singapore Medical Council* [2022] SGHC 169 at [89].
85 *Wee Teong Boo v Singapore Medical Council* [2022] SGHC 169 at [93].
86 *Wee Teong Boo v Singapore Medical Council* [2022] SGHC 169 at [96].
87 *Wee Teong Boo v Singapore Medical Council* [2022] SGHC 169 at [98].
88 *Wee Teong Boo v Singapore Medical Council* [2022] SGHC 169 at [109].
89 *Wee Teong Boo v Singapore Medical Council* [2022] SGHC 169 at [109].
90 *Wee Teong Boo v Singapore Medical Council* [2022] SGHC 169 at [109].
91 *Wee Teong Boo v Singapore Medical Council* [2022] SGHC 169 at [111].

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towards evidence is subject to the rules of natural justice,[92] such that while a right to cross-examination is not an absolute one, the applicant must not be deprived of the opportunity to "respond or rebut the hearsay evidence presented against him".[93]

1.36 The respondent needs to have the opportunity to "comment and contradict" the hearsay evidence, and the content of such opportunity is "fact dependent".[94] Cross-examination is but one of the ways the practitioner can deal with adverse evidence; it can also be addressed by giving the practitioner an opportunity to comment on or contradict the evidence at the close of the Prosecution's case. At this point, the DT will then rule on whether the Prosecution has discharged its burden of proof and whether the Defence should be called.[95]

1.37 Drawing from these authorities, the High Court concluded that the discretion to admit evidence under s 51(4) of the MRA was "limited by the rules of natural justice",[96] such that the DT should exercise "due caution" to ensure the fair hearing rule is not breached.[97] The DT should distinguish between questions of admissibility and how much weight to attribute to the evidence. Thus, the DT did not err in exercising its discretion under s 51(4) of the MRA to admit the evidence at the present stage of the DT proceedings. The applicant failed to show a *prima facie* case of reasonable suspicion in favour of granting the quashing orders and declarations sought to the effect that the Admissibility Decision was contrary to natural justice.

CONSTITUTIONAL LAW

V. International law and constitutional adjudication

1.38 The appellant in *Nagaenthran a/l K Dharmalingam v Attorney-General*[98] received the mandatory death sentence for drug trafficking offences. He sought leave to commence judicial review proceedings with respect to his impending execution, arguing that his mental age had deteriorated to below 18 after committing the offence, such that international law prohibited his execution.

92 *Wee Teong Boo v Singapore Medical Council* [2022] SGHC 169 at [112].
93 *Wee Teong Boo v Singapore Medical Council* [2022] SGHC 169 at [119].
94 *Wee Teong Boo v Singapore Medical Council* [2022] SGHC 169 at [122].
95 *Wee Teong Boo v Singapore Medical Council* [2022] SGHC 169 at [124].
96 *Wee Teong Boo v Singapore Medical Council* [2022] SGHC 169 at [121].
97 *Wee Teong Boo v Singapore Medical Council* [2022] SGHC 169 at [122].
98 [2022] 2 SLR 211.

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1.39 The Court of Appeal noted that even if there was a supposed international law rule prohibiting the execution of intellectually disabled persons, the plain language of Arts 9(1) and 12(1) of the Singapore Constitution cannot be ignored or rewritten by the court to accommodate the putative international law rule. As Singapore is a dualist country, neither treaty nor a customary international law norm can trump inconsistent domestic law, which is clear on its terms.

1.40 A similar argument was run in *Roslan bin Bakar v Attorney-General*[99] where it was argued that it would be unlawful to execute a person with an intelligence quotient ("IQ") of less than 70. There was no evidence that the appellants had any abnormality of mind that would impair their responsibility for the offences committed.[100]

1.41 Counsel referred to Art 15 of the United Nations Convention on the Rights of Persons with Disabilities[101] ("CRPD") and two United Nations resolutions on the rights of mentally retarded persons, but the CRPD was silent on the death penalty; no material was put forward to explain how Art 15, which refers to "cruel, inhuman or degrading treatment or punishment", covered the imposition of the death penalty. The international instruments invoked did not contain a rule prohibiting the execution of persons with IQs of less than 70. Even if the treaty created such a norm, one of the appellants had an IQ of 74 and such norm, to be an applicable domestic law, first had to be incorporated by specific legislation passed by Parliament for that purpose.[102]

VI. Article 9

A. Article 9 general – Personal liberty

1.42 The Court of Appeal in *Tan Seng Kee*[103] made *obiter* observations to the effect that s 377A of the Penal Code, which criminalises gross indecency between male persons, did not violate the right to life and personal liberty safeguarded under Art 9(1). This is because the "right to express one's sexual identity", even in private, is not an express constitutional right, as it is impermissible to construe unenumerated substantive rights into the Constitution.[104] The words "life or personal liberty" under Art 9(1) refer to "freedom from unlawful deprivation

99 [2022] SGCA 20.
100 *Roslan bin Bakar v Attorney-General* [2022] SGCA 20 at [20].
101 30 March 2007; effective 3 May 2008.
102 *Roslan bin Bakar v Attorney-General* [2022] SGCA 20 at [22].
103 See para 1.1 above.
104 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [246].

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of life and unlawful detention or incarceration" [emphasis in original omitted], this restrictive reading of Art 9(1) being supported by the text, structure and history of the provision.[105] In short, Art 9 refers only to a person's freedom "from an unlawful deprivation of life and unlawful detention or incarceration".[106] Section 377A thus did not deprive a person of his personal liberty under Art 9(1).

B. Absurdity

1.43 Further, s 377A was not so absurd and did not constitute invalid law under Art 9(1). The Court of Appeal in *Tan Seng Kee* held that the test of absurdity is procedural in nature, intended to "secure the right to a fair process" where there is a possible deprivation of life or personal liberty.[107] An absurd statute would be "one that cannot be understood or so complied with".[108] The court held that it was thus not permitted to examine the substantive content of s 377A,[109] rejecting counsel's argument that the test could be framed in terms of legislation "so abhorrent no reasonable person can contemplate it as being morally justified"[110] which would involve a "moral or value judgment".[111]

1.44 Even if the test of what was absurd was substantive, and even if sexual orientation was immutable, this alone did not render s 377A absurd as one cannot sustain the argument that the Government can never regulate against immutable characteristics.[112] Further, many reasonable people do see s 377A as morally justified, as where numerous parliamentarians spoke up in favour of retaining s 377A in 2007,[113] which undermined the assertion of absurdity.

1.45 In *Attorney-General v Datchinamurthy a/l Kataiah*[114] ("*Datchinamurthy*"), the Court of Appeal affirmed that "fundamental rules of natural justice" were directed at securing a fair trial, but which did not have anything to say about the punishment of criminals after they had been convicted pursuant to a fair trial.[115] A situation where

105 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [247].
106 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [248] and [252].
107 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [259].
108 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [259].
109 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [265].
110 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [262].
111 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [257].
112 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [267].
113 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [268].
114 [2022] SGCA 46.
115 *Attorney-General v Datchinamurthy a/l Kataiah* [2022] SGCA 46 at [22], following *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [64].

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a prisoner who might not have the opportunity to present his case in judicial review proceedings against the Attorney-General because his scheduled execution date was before that of the civil hearing raised questions concerning the propriety of scheduling the execution. Despite the pendency of the civil suit, this did not engage what fell within the ambit of what Art 9 protected.[116]

C. Right to a fair trial

1.46 In *Iskandar bin Rahmat v Attorney-General*,[117] it was argued that the Art 9(1) right to a fair trial and access to justice may be breached by the Criminal Procedure Code 2010[118] ("CPC") cost provisions, which allow the court to order costs against defence counsel personally. It was argued that this had a "chilling" effect on lawyers in Singapore who could be deterred, to the disadvantage of accused persons, from taking late-stage death row appeals or applications to avoid adverse cost consequences. This made it even more likely that lawyers would not represent them out of fear of costs consequences.[119]

1.47 The Court of Appeal held that the case law dealing with CPC cost provisions where understood by any reasonable person, especially lawyers, could not reasonably deter lawyers from acting in *bona fide* applications or appeals for death row inmates.[120] Lawyers did not face personal costs orders in running cases which could turn out to be weak on the merits; costs orders would apply only in cases which were "plainly unmeritorious," such that any "reasonable counsel" would have to consider whether he ought to be mounting the argument.[121] Lawyers should provide accurate, measured advice that serves the interest of justice, which serves the public interest of maintaining standards at the Bar.

1.48 Access to justice or a right to fair trial cannot be said to be compromised when a criminal motion is filed which is frivolous, vexatious or otherwise an abuse of the court process. Thus, the true scope of the CPC costs provisions does not violate the right of access to justice or the right to counsel at all, as there is "no right to advance a position in court improperly".[122] Reference was made in this respect to *Roslan bin Baker v*

116 *Attorney-General v Datchinamurthy a/l Kataiah* [2022] SGCA 46 at [27].
117 [2022] 2 SLR 1018.
118 2020 Rev Ed.
119 *Iskandar bin Rahmat v Attorney-General* [2022] 2 SLR 1018 at [22].
120 *Iskandar bin Rahmat v Attorney-General* [2022] 2 SLR 1018 at [34].
121 *Iskandar bin Rahmat v Attorney-General* [2022] 2 SLR 1018 at [37].
122 *Iskandar bin Rahmat v Attorney-General* [2022] 2 SLR 1018 at [40].

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Public Prosecutor[123] where the Court of Appeal noted that the argument that various CPC provisions (ss 356, 357 and 409) impeded access to justice or infringed the right to a plain trial "ignores the applicable test" to be satisfied before the court makes an adverse cost order against the applicant or defence counsel.[124] Thus, an accused person's access to justice "is not unlimited to the extent one could infinitely take out applications that are frivolous, vexatious or otherwise an abuse of process in order to effectively delay the punishment that has been pronounced and upheld on appeal".[125]

D. Article 9(3)

1.49 In *Munusamy Ramarmurth v Public Prosecutor*,[126] the appellant, who was convicted of drug trafficking offences under the Misuse of Drugs Act[127] ("MDA"), was not given a certificate of substantive assistance and so was sentenced to the mandatory death penalty. During investigations, the appellant voluntarily gave nine statements to the Central Narcotics Bureau, such as not seeing the red bag retrieved from his motorcycle before and not knowing what its contents were. He later argued that he thought the red bag contained stolen handphones rather than drugs, which was a defence not supported by the details given in his statement.

1.50 The appellant invoked Art 9(3), which guarantees the right to counsel to argue that less weight should be given to his statements, as he had not been advised on the MDA presumptions and how these would operate against him, and did not have access to counsel when he made these statements.

1.51 Drawing on precedent, Judith Prakash JCA pointed out that Art 9(3) guarantees an accused person the right to consult counsel "after a reasonable amount of time has passed since his arrest",[128] following *Jasbir Singh v Public Prosecutor*[129] ("*Jasbir Singh*"). This balances the accused person's interests and that of law enforcement personnel who need time to complete investigations. Most of the appellant's statements had been taken on the day of arrest itself, which "must be regarded as having been taken within a reasonable time, and even eight days would not appear to be unreasonably long".[130]

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123 [2022] 2 SLR 998 at [24].
124 *Iskandar bin Rahmat v Attorney-General* [2022] 2 SLR 1018 at [39].
125 *Roslan bin Baker v Public Prosecutor* [2022] 2 SLR 998 at [24].
126 [2022] SGCA 70.
127 Cap 185, 2008 Rev Ed.
128 *Munusamy Ramarmurth v Public Prosecutor* [2022] SGCA 70 at [25].
129 [1994] 1 SLR(R) 782.
130 *Munusamy Ramarmurth v Public Prosecutor* [2022] SGCA 70 at [25].

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1.52 Prakash JCA disagreed with the argument that one of the appellant's statements was a cautioned one such that when the cautioned statement was administered, the police had completed their investigations such that counsel should be present when the accused gave their cautioned statement. *Jasbir Singh* does not stand for the proposition that the right to counsel starts "once investigations are complete", the test being that the right accrues after a "reasonable time".[131] On the case facts, the cautioned statement was recorded one day after the appellant's arrest, such that Art 9(3) was not infringed.

E. Article 9 and fundamental rules of natural justice

1.53 One of the arguments raised in *Panchalai a/p Supermaniam v Public Prosecutor*[132] was that the fundamental rules of natural justice, protected under Art 9(1), were violated for apparent bias. This was because Sundaresh Menon CJ's tenure as Attorney-General overlapped with the period in which the applicant was convicted for a drug trafficking offence that attracted the mandatory death penalty and his appeal against conviction and sentence dismissed.

1.54 During Criminal Motion No 2 of 2016 ("CM 2/2016") to the Court of Appeal seeking a declaration that s 33B of the MDA was unconstitutional and contrary to the rule of law, counsel for the applicant was asked if there were any objections if certain judges, including Menon CJ, were part of the *coram* hearing CM 2/2016. None was expressed. The applicant filed a motion seeking to stay the execution two days before it was scheduled, pending the filing and disposal of certain applications he intended to file, to set aside various Court of Appeal decisions over which Menon CJ was presiding judge.

1.55 It was argued that Menon CJ was the Attorney-General who had control, supervision and authority over the applicant's prosecution, which was incompatible with his judicial functions in hearing the Court of Appeal decisions.[133] This gave rise to a reasonable apprehension of bias, such that the applicant's right to a fair trial under Art 9(1) was violated.

1.56 The Court of Appeal stated that the court would "assiduously scrutinise" any motion filed in a case involving the life of an individual, but that the court would also not countenance any vexatious motions

131 *Munusamy Ramarmurth v Public Prosecutor* [2022] SGCA 70 at [27].
132 [2022] 2 SLR 507.
133 *Panchalai a/p Supermaniam v Public Prosecutor* [2022] 2 SLR 507 at [3].

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which were bound to fail, as this would be contrary to the principle of finality in the criminal process.[134]

1.57 The Court of Appeal affirmed that the two limbs of the fundamental rules of natural justice were the right against bias and the right to be heard. The former encompasses a right to an unbiased tribunal, encompassing both actual and apparent bias. In applying the constitutional norm of fundamental rules of natural justice, the Court of Appeal adopted the common law test of apparent bias, which is "whether a reasonable and fair-minded person sitting in the court and knowing all the relevant facts would have had a reasonable suspicion that a fair trial was not possible".[135]

1.58 The assertion that it was not possible to have a fair trial simply on the basis that Menon CJ's tenure as Attorney-General overlapped with the period when the applicant was convicted and had his appeal dismissed was a "bare assertion" failing to make out a case of apparent bias.[136] As such, the court found the motion "patently devoid of factual and legal merit" as Menon CJ was not personally involved in the applicant's matter and did not make any decisions pertaining to him while he was Attorney-General.[137]

1.59 Further, the legal issues in the Court of Appeal decisions were quite far removed from the applicant's guilt, such as an order for the applicant to be assessed by a panel of psychiatrists, and the judicial review of the constitutionality of the execution of his death sentence. Given the judicial oath of office, Menon CJ as an appellate judge would be able to consider such issues impartially, even if the applicant was convicted when Menon CJ was Attorney-General, as "[n]o fair-minded and reasonable person would suspect that a fair trial would not be possible in the circumstances".[138]

1.60 Nothing in Art 9(1) of the Constitution imposed a duty on the courts to reconstitute the *coram* such that Menon CJ was not on the *e*. This was particularly so, since the litigant did not make any objections during conflict checks regarding the propriety of the constitution of the coram.[139] Indeed, the court declared that the choice to keep this application "in the pocket until the second day before his scheduled execution" was

134 *Panchalai a/p Supermaniam v Public Prosecutor* [2022] 2 SLR 507 at [15].
135 *Panchalai a/p Supermaniam v Public Prosecutor* [2022] 2 SLR 507 at [22].
136 *Panchalai a/p Supermaniam v Public Prosecutor* [2022] 2 SLR 507 at [23].
137 *Panchalai a/p Supermaniam v Public Prosecutor* [2022] 2 SLR 507 at [16] and [23].
138 *Panchalai a/p Supermaniam v Public Prosecutor* [2022] 2 SLR 507 at [24].
139 *Panchalai a/p Supermaniam v Public Prosecutor* [2022] 2 SLR 507 at [17] and [25].

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"reprehensible and improper",[140] an eleventh-hour attempt to further obstruct the imposition of the death sentence on the applicant. It was, thus, baseless to now claim he had been denied a right to a fair trial, as this was not done in good faith, being an afterthought expressed two days before his scheduled execution.[141]

1.61 In *Jumaat bin Mohamed Sayed v Attorney-General*,[142] the High Court affirmed that the presumption of innocence ("POI") as recognised in *Ong Ah Chuan v Public Prosecutor*[143] ("*Ong Ah Chuan*") was part of the fundamental rules of natural justice, which is incorporated into the term "law" under Art 9(1) of the Constitution. What was at issue in this case was whether the statutory presumptions in ss 18(1) and 18(2) of the MDA violated the POI.

1.62 As such, it was allegedly violated by ss 18(1) and 18(2) of the MDA in so far as the POI requires the Prosecution to "prove each and every element of the offence beyond a reasonable doubt".[144] Section 18(1) deals with instances when a person is presumed to have a drug in his possession, such as having under his control the keys to any premise where a controlled drug is found. Section 18(2) provides that a person proved or presumed to have a drug in his possession is presumed to have known of the nature of that drug. Both provisions operate to shift the legal burden of proof to the accused person to rebut the presumptions on a balance of probabilities with respect to key elements of the relevant offence.

1.63 It was argued that the s 18(1) presumption operates to shift the burden of proof regarding possession to an accused person, which triggers the presumption of knowledge under s 18(2)[145] such that both presumptions are stacked or may operate together. It was argued too that the severity of the drug trafficking offence was such that "added weight" should be given to the POI in interpreting ss 18(1) and 18(2), with the proposal being that the presumptions be rebutted if the accused raised a reasonable doubt.[146] In other words, it was argued that the POI requires the Prosecution to prove beyond reasonable doubt each element of an offence.[147]

140 *Panchalai a/p Supermaniam v Public Prosecutor* [2022] 2 SLR 507 at [27].
141 *Panchalai a/p Supermaniam v Public Prosecutor* [2022] 2 SLR 507 at [18].
142 [2022] SGHC 291.
143 [1979–1980] SLR(R) 710.
144 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [6].
145 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [6].
146 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [10].
147 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [49].

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1.64 The judge held that it did not suffice for the accused to raise a reasonable doubt, since the burden of proof was statutorily reversed.[148] Given the difficulty of proving a negative, the court has clarified that the burden to rebutting the presumption should not be so onerous that it becomes impossible to discharge. The s 18(1) presumption could be rebutted by the accused (a) showing he did not know the premises contained the drug; or (b) proving he genuinely believed he was carrying something innocuous.[149] The issue arose as to whether the presumptions in ss 18(1) and 18(2) were contrary to Art 9 or 12 of the Constitution, in the sense of violating any fundamental rule of natural justice, which are standards imputed to the word "law" which appears in Arts 9 and 12.

1.65 Valerie Thean J noted that the test for the Art 12 equal protection clause was that of the reasonable classification test, and that it was incorrect to import into the word "law" in Art 12(1) the further requirement of fundamental rules of natural justice, as held in *Tan Eng Hong v Attorney-General*.[150]

1.66 Thean J noted that the Privy Council decision of *Ong Ah Chuan*[151] was on point, given that it dealt with a statutory presumption under the MDA which, upon proof of certain facts, would shift the burden of proof to the accused, which could be rebutted by a balance of probabilities. This was not inconsistent with Art 9(1).

1.67 What was constitutionally required was that:[152]

> … a person should not be punished for an offence until it has been established to the satisfaction of an independent and unbiased tribunal that he committed an offence, and that there is material before the tribunal that is logically probative of facts sufficient to constitute the offence …

1.68 Thus, the ss 18(1) and 18(2) presumptions:[153]

> … operate when there is material logically probative of either possession or knowledge before the court. This material would be the evidence produced by the prosecution to prove, beyond reasonable doubt, the fact giving rise to the presumption, such as the fact that the accused was in possession of a container which contained controlled drugs.

148 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [31].
149 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [32].
150 [2013] 4 SLR 1059 at [28]. See *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [40].
151 See para 1.61 above.
152 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [46].
153 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [47].

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As such, ss 18(1) and 18(2) were valid and complied with the rule stated in *Ong Ah Chuan*.

1.69 It was acknowledged that the POI is foundational to the Singapore criminal justice system. In examining various cases in granular detail, Thean J characterised the POI as "an encapsulation of guiding principle" which the Court of Appeal has shown to be consistent with the use of statutory presumptions.[154] Thus, the POI "defines an approach" which does not require the literal application of the legal burden to all elements of the offence.[155] Such guiding principles in common law jurisdictions are "treasured directional markers".[156] In common law systems, the Prosecution is to prove each element of an offence; nonetheless, Parliament in defining an offence can expect an accused person in specified circumstances to explain his assertion of not having knowledge of what is found in his possession.[157]

1.70 Thean J noted that while the POI is present in every known human rights document, its scope and meaning remain "eminently contestable".[158] Ashworth argued that the POI was not a factual presumption but a moral and political principle "based on a widely shared conception of how a free society … should exercise the power to punish".[159] Thus, "each free society would choose the specific way to implement and protect the principle in keeping with its own social mores".[160]

1.71 Thean J considered foreign cases cited by the claimants from England, Hong Kong and Canada, which were to be best appreciated within their specific statutory framework, and which usefully illustrated that the POI was not considered absolute in any legal system.[161] In the English context, statutory presumptions similar to s 18 of the MDA were assessed against Art 6(2) of the European Convention for the Protection

154 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [62].
155 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [62].
156 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [62].
157 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [62].
158 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [65], citing Andrew Ashworth, "Four Threats to the Presumption of Innocence" (2006) 10(4) IJEP 241 at p 2.
159 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [65], citing Andrew Ashworth, "Four Threats to the Presumption of Innocence" (2006) 10(4) IJEP 241 at p 5.
160 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [65], citing Andrew Ashworth, "Four Threats to the Presumption of Innocence" (2006) 10(4) IJEP 241 at p 5.
161 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [66].

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of Human Rights and Fundamental Freedoms[162] ("the Convention"), imported into England by way of the UK Human Rights Act 1998.[163] Article 6(2) states: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." Presumptions of fact or of law have to be confined "within reasonable limits" which consider the importance of what is at stake and maintain the right of the defence.[164]

1.72 In relation to the statutory provision of the UK Misuse of Drugs Act 1971[165] ("UK Act"), which was similar to s 18 of Singapore's MDA, the majority in *R v Lambert*[166] held that the interference with the POI had to be "justified and proportionate" such that the UK Act had to be read as only imposing an evidential burden on the accused, to be compatible with the Convention.[167]

1.73 Lord Hutton, in his dissenting judgment, stated that the imposition of a legal burden was a proportionate means to an end and did not violate Art 6(2) of the Convention.[168] But for the obligation under s 3(1) of the Human Rights Act 1998 to read English law in a matter compatible with Convention standards, the majority would not have embarked on the inquiry.[169]

1.74 Thean J reasoned that where the POI is entrenched in a relevant constitutional statute, this furnishes a "balancing counterpoint within the remit of the courts".[170] This counterpoint was provided in the same statute guaranteeing the presumption in Canada and England. Thus, the POI could not be "applied in an unfiltered literal-minded method" as the Legislature had granted the courts specific powers to "articulate the balance".[171] In Hong Kong, the courts have read into the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China,[172] which entrenches the POI, a balancing measure. In contrast, Art 9 did not operate against a statutory framework which charged the

162 Eur TS No 5, 213 UNTS 221, 1953 UKTS No 71 (4 November 1950; entry into force 3 September 1953).
163 c 42. See *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [69].
164 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [71], citing *Salabiaku v France* (1988) 13 EHRR 379 at [28].
165 c 38.
166 [2002] 2 AC 545.
167 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [72].
168 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [73].
169 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [74].
170 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [76].
171 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [76].
172 Promulgated by Order No 26 of the President of the People's Republic of China on 4 April 1990; effective 1 July 1997.

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courts to maintain a balance, nor was it a provision so wide, as in Hong Kong, that judicial intervention was required.[173] Thean J affirmed that the POI is "a hallowed thread" woven "into the fabric of our laws", being a "fundamental guiding principle that finds expression through technical rules".[174] These technical rules "are the rules pertaining to the legal and evidential burdens and the manner in which the prosecution proves a case beyond reasonable doubt".[175]

1.75 The Court of Appeal in *Public Prosecutor v GCK*[176] had explained how the POI is interpreted through the concept of reasonable doubt, while the decisions in *Muhammad Nabill bin Mohd Fuad v Public Prosecutor*[177] and *Roshdi bin Abdullah Altway v Public Prosecutor*[178] illustrated how the legal burdens imposed on the accused by ss 18(1) and 18(2) of the MDA "are rationalised within the context of reasonable doubt".[179] As such, the reversal of the legal burden of proof on specific factual elements of an offence "sits appropriately within the Art 9 concept and system of 'law' set out in *Ong Ah Chuan*".[180] That the Prosecution bears the burden of proving its case beyond reasonable doubt "provides concrete substance for the presumption of innocence".[181]

F. Article 9 and non-legal questions

1.76 It was argued in *Tan Seng Kee*[182] that sexual orientation was immutable such that s 377A effectively criminalises a class of persons for their sexual identity. As such, it was argued that this was "absurd" and not "law" within Art 9(1). The court noted that this was a scientific question which was extra-legal in nature, and that it fell without the ambit of the court to make "sweeping pronouncements of scientific fact".[183]

1.77 The Court of Appeal noted that even if a trait was immutable, this did not automatically mean that the Government could not regulate against immutable characteristics such as paedophilia.[184] If so, ss 375(1)(*b*)

173 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [76].
174 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [77].
175 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [77].
176 [2020] 1 SLR 486.
177 [2020] 1 SLR 984.
178 [2022] 1 SLR 535.
179 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [77].
180 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [77].
181 *Jumaat bin Mohamed Sayed v Attorney-General* [2022] SGHC 291 at [77], citing *In re Winship* 397 US 358 at 363.
182 See para 1.1 above.
183 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [158].
184 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [159].

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and 376A(1) of the revised Penal Code might be unconstitutional for criminalising paedophiles for their identity, assuming this conflation between identity and conduct was accepted. The Court of Appeal was not impressed by expert evidence where this conflated "sexual attraction with sexual behaviour".[185]

VII. Article 12

A. Article 12 and legislative provisions

1.78 The Art 12 challenges related both to exercises in executive action, as well as challenges to the constitutionality of the Criminal Procedure Code cost provisions and ss 299 and 300(*a*) of the Penal Code.

1.79 In *Iskandar bin Rahmat v Attorney-General*,[186] the Criminal Procedure Code cost provisions were challenged on the grounds that counsel in post-appeal applications were subject to personal cost sanctions for improper applications, as distinct from appeal cases. The Court of Appeal found the scheme "entirely rational", given the difference between an appeal, which is a process available to an accused person as a right, and post-appeal review processes, which are discretionary processes designed to avoid miscarriages of justice in rare cases.[187]

1.80 In *Teo Ghim Heng v Public Prosecutor*,[188] the constitutionality of ss 299 and 300(*a*) of the Penal Code was challenged on grounds of offending the separation of powers doctrine or Art 12(1). This argument was premised on the basis that the first limbs of ss 299 (culpable homicide) and 300(*a*) (murder) were identical.

1.81 However, this was not the case – although the act and intention to be established are identical for ss 299 and 300(*a*), liability under s 300(*a*) is subject to the additional qualification that the accused did not satisfy any of the specific exceptions to murder.[189] As such, the legal requirements for liability under ss 299 and 300(*a*) are not identical, bearing in mind that s 300 relates to a more serious crime.[190] If an exception like provocation or diminished responsibility applies, the accused person ought to be convicted under s 299 which does not carry the mandatory death penalty.

185 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [160].
186 See para 1.45 above.
187 *Iskandar bin Rahmat v Attorney-General* [2022] 2 SLR 1018 at [45].
188 [2022] 1 SLR 1240.
189 *Teo Ghim Heng v Public Prosecutor* [2022] 1 SLR 1240 at [117]–[118].
190 *Teo Ghim Heng v Public Prosecutor* [2022] 1 SLR 1240 at [119].

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1.82 The separation of powers is not breached as the provisions do not allow the Prosecution to determine the sentence to be imposed on the offender, which would allegedly encroach into the sentencing powers of the Judiciary.[191] Overlapping provisions in themselves do not violate the separation of powers, and it is the Legislature which has the power to determine punishment for offences.[192]

1.83 It was argued that ss 299 and 300(*a*) violated Art 12(1) in not satisfying the reasonable classification test endorsed in *Lim Meng Suang v Attorney-General*[193] ("*Lim Meng Suang*"). However, Art 12(1) does not apply as ss 299 and 300(*a*) are not identical, such that persons charged under ss 299 and 300(*a*) are not similarly situated. The potential availability of a special exception under s 300(*a*) is a "material factor" differentiating the two classes of persons, there being "no basis at all" for suggesting they are materially alike.[194] Article 12 only applies where persons who are similarly situated in all material respects are differently treated.

1.84 The Court of Appeal in *Tan Seng Kee*[195] made important *obiter* statements on the reasonable classification test as applied in *Lim Meng Suang*, which relates to the constitutionality of legislation, and that adopted in *Syed Suhail bin Syed Zin v Attorney-General*[196] ("*Syed Suhail*"), which applies to executive policy. It remains unclear whether there is a singular reasonable classification test or whether a different Art 12 test exists for legislation and administrative action.

1.85 The court noted that the maxim of treating like cases alike "does not inform us of the level of abstraction at which individuals should be grouped into classes so that the legitimacy of the differential treatment in question may be properly assessed".[197] The judicial approach towards the reasonable classification test in *Lim Meng Suang* and *Syed Suhail* was then examined.

1.86 A two-step approach is adopted in *Lim Meng Suang*: first, the need for an intelligible differentia ("limb one"); and second, that the differentia bears a rational relation to the legislative object ("limb two"), a perfect relation or complete coincidence not being required.[198] Under limb one, which is considered to discharge a threshold function, a differentia

191 *Teo Ghim Heng v Public Prosecutor* [2022] 1 SLR 1240 at [122].
192 *Teo Ghim Heng v Public Prosecutor* [2022] 1 SLR 1240 at [131]–[132].
193 [2015] 1 SLR 26.
194 *Teo Ghim Heng v Public Prosecutor* [2022] 1 SLR 1240 at [138].
195 See para 1.1 above.
196 [2021] 1 SLR 809.
197 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [138].
198 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [311].

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might be unintelligible if it is "so unreasonable as to be illogical and/or incoherent".[199] Thus, a reasonable person would not consider the differentia as being functional as an intelligible differentia.

1.87 Both the tests in *Lim Meng Suang* and *Syed Suhail* have some commonalities. This is found in the first limb of *Lim Meng Suang*, as it serves the purpose of "ensuring that there is a differentia that is capable of being assessed for legality under the second limb of the test".[200] It requires that the differentia be capable of being understood or apprehended by the intellect or understanding. Under the *Syed Suhail* test, the first limb is to identify "the purported criterion for the differential treatment in question".[201]

1.88 The two approaches diverge in relation to which limb allows for a normative consideration based on the test of reasonableness. In the *Lim Meng Suang* test, under limb one, the courts examine whether in extreme cases, the differentia is "so unreasonable as to be illogical and/or incoherent", with the Court of Appeal in *Tan Seng Kee* noting that the Court of Appeal in *Lim Meng Suang* was "ultimately concerned with the reasonableness (or lack thereof) of a differentia" in extreme cases.[202] This goes beyond whether it is possible to apprehend a differentia by intellect as the test "inherently entails a judgment on the reasonableness … of that differentia";[203] that is, there is a "substantive evaluation" of the reasonableness of the differentia in question.[204]

1.89 In contrast, limb one of the *Syed Suhail* test is only concerned with identifying the purported criterion for the differential treatment in question. It is never concerned with the reasonableness of the differentia in question, which only comes into play under limb two – whether the differential treatment is reasonable, whether it bears "a sufficient rational relation" to the legislative object – if it does not, it fails the second limb of the test.[205]

1.90 The importance of pitching the appropriate level of generality is evident in the High Court and Court of Appeal decisions in *Taw Cheng Kong v Public Prosecutor*.[206] In relation to s 377A, if the legal object is to express social disapproval of homosexual conduct, as distinct from

199 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [310].
200 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [314].
201 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [314].
202 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [315].
203 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [317].
204 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [321].
205 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [318].
206 [1998] 1 SLR(R) 78. See *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [323].

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male-male sex acts, s 377A would be under-inclusive in not criminalising female-female homosexual conduct. If it had been successfully argued that s 377A was only directed at male prostitutes, one could argue s 377A in applying to categories outside male prostitutes would be over-inclusive.[207] Under limb two of the *Syed Suhail* test, the emphasis is on ensuring the relationship between differentia and legislative object, which "need not be perfect", was "not so tenuous as to be incapable of withstanding scrutiny";[208] this flows from the nature of the rights at stake, such that they are to be given their full measure, as well as the constitutional role of the court to safeguard individual rights.

1.91 A second point of divergence is the stricter level of scrutiny under limb two of the *Syed Suhail* test in certain cases, as distinct from under limb one of the *Lim Meng Suang* test, which requires only "the minimum threshold function of requiring logic and coherence" that the statutory provision not be "patently illogical and/or incoherent".[209] Context affects stringency of scrutiny, and where a decision involves an individual rather than being taken on a broad-brush basis addressing people or a group of people in general, and where the life and liberty of a person is involved to the gravest degree, the court will be searching in its scrutiny.[210] However, this does not extend to giving the court "an open-ended mandate to evaluate legislation on the basis of its policy preferences", which would transgress its constitutional role.[211]

1.92 In applying the hypothetical "no women drivers" law, this might fail limb one of the *Lim Meng Suang* test if it is "so patently illogical and/ or incoherent" that "no reasonable person" would contemplate that it could function as an intelligible differentia.[212] The law would probably fail limb two of the *Syed Suhail* test as the gender-based differentia "bears no rational relation to any conceivable object of that law".[213] However, if the object of the law is to ban all women from driving, there would be a complete coincidence between the gender-based differentia and object of the law. It would be circular to say that framing a ban on all women drivers is the very object of the law as this "would be tantamount to saying that the object of that law is to introduce the differentia that it embodies".[214] To avoid a "purely formalistic" approach, it would be impermissible to

207 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [324].
208 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [325].
209 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [327] and [328].
210 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [327].
211 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [328].
212 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [319].
213 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [319].
214 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [320].

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frame the object of a law banning women drivers as a ban on all women drivers.[215]

B. Article 12 and executive action

1.93 The two-stage test articulated in *Syed Suhail*[216] was applied in various cases involving drug trafficking offences which attract the mandatory death penalty, as well as administrative decisions not involving the death penalty (in *Han Hui Hui*,[217] for example).

1.94 The High Court found that the unvaccinated were not unequally situated with the vaccinated such that there were valid grounds for differentiation, in relation to the latter's elevated risks of COVID-19 related illness and death, their heightened prospect of infection and transmission, and the greater burden imposed upon the healthcare system.[218]

1.95 The statistics presented and a Singaporean study were found to make it "abundantly clear" that (a) unvaccinated persons experienced heightened risk of severe illness or death;[219] onward rates of transmissions were higher for the unvaccinated; and (c) that the viral loads decreased faster in the vaccinated.[220] These three differentiating factors were "legitimate" and "sufficiently" distinguished the vaccinated and unvaccinated by choice.[221]

1.96 The Court of Appeal in *Datchinamurthy*[222] expounded on the application of this test. This case involved the exercise of state discretion in scheduling Datchinamurthy's execution date, which allegedly violated Art 12. Datchinamurthy was one of 13 plaintiffs in relation to the hearing of a civil matter, all 13 being convicted of capital offences.

1.97 The date for his execution was scheduled before the hearing and the issue arose concerning whether by this scheduling the respondent was subjected to unequal treatment, compared to the other equally situated prisoners. The Court of Appeal upheld the High Court judge, who found a *prima facie* case of unequal treatment to allow the application for leave to commence judicial review proceedings ("OS 188"). This was

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215 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [320].
216 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [67].
217 See para 1.2 above.
218 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [150].
219 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [153].
220 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [157]–[158].
221 *Han Hui Hui v Attorney-General* [2022] 5 SLR 1023 at [164].
222 See para 1.44 above.

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in relation to seeking a declaration that the Attorney-General had acted unlawfully in requesting the unauthorised disclosure of the personal correspondence of the 13 prisoners and that the Singapore Prison Service had acted unlawfully in disclosing this. The date for the civil suit was to be fixed sometime in May 2022. On 12 April 2022, the President made a new order to schedule the respondent's execution for 29 April 2022 and a notice was sent to the respondent's mother on 21 April 2022.

1.98 The High Court applied the approach in *Syed Suhail*[223] that where prisoners facing a death sentence were involved in "pending recourse or other relevant pending proceedings in which the prisoner's involvement was required", they would not be regarded as being equally situated with other prisoners awaiting capital punishment who had been denied clemency.[224] Otherwise, they would be scheduled to be executed in the order in which they received their death sentences. Relevant proceedings would not be confined to those that bore directly on the conviction and sentencing of prisoners, but also included "disposal or forfeiture proceedings" following the convictions of the accused.[225]

1.99 In ascertaining whether executive action breached Art 12(1), a two-step test was to be applied, as set out in *Syed Suhail*. First, the applicant had to discharge his evidential burden of showing he had been treated differently from other equally situated persons. Second, the evidential burden would then shift to the decision-maker to show the reasonableness of the differential treatment, in that this was based on legitimate reasons which made the differential treatment proper. Searching scrutiny would be applied, where the decision was individual rather than general in nature, and where the respondent's life and liberty was affected to the gravest degree. While prisoners denied clemency who were awaiting capital punishment might be considered equally situated, prisoners for whom there was "pending recourse or other relevant pending proceedings in which their involvement was required" would be placed in a different position in relation to prisoners who were not involved in such relevant proceedings.[226]

1.100 The court, in considering the nature of the executive action in question, was to consider whether the persons being compared "are so situated that it is reasonable to consider that they should be similarly treated"; this test was a factual one of "whether a prudent person would objectively think the persons concerned are roughly equivalent or

223 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [67].
224 *Attorney-General v Datchinamurthy a/l Kataiah* [2022] SGCA 46 at [13].
225 *Attorney-General v Datchinamurthy a/l Kataiah* [2022] SGCA 46 at [14].
226 *Attorney-General v Datchinamurthy a/l Kataiah* [2022] SGCA 46 at [29].

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similarly situated in all material respects".[227] The first limb of the two-part test was to identify the "purported criterion for the differential treatment in question".[228] The second limb was to ascertain whether the differential treatment was reasonable.

1.101 The Court of Appeal held that the respondent's involvement in OS 188 would be required as his personal knowledge of the events would be important, especially since specific references had been made to the respondent's correspondence and/or rights. Thus, without the respondent's participation, his claim in OS 188 may be "hampered, whatever the merits, in a manner not dissimilar to an accused person's participation in disposal or forfeiture proceedings".[229] It could not be said that the correspondence that was the subject of OS 188 "was completely irrelevant to the respondent's conviction and sentence of death".[230] Thus, the determination of the respondent's claim in OS 188 "could well require further evidence from him", and such evidence might have a bearing on his argument that his Art 12(1) rights were breached.[231] The respondent could therefore establish a *prima facie* case that OS 188 was a relevant pending proceeding requiring his involvement – the respondent cleared the first hurdle, given that the other 12 plaintiffs in OS 188 had not yet been scheduled for execution, certainly not for 29 April 2022. The evidential burden, thus, shifted to the appellant to provide justification for treating the respondent differently from the other 12 plaintiffs.

1.102 Thus, at the leave stage, it appeared that the respondent had been "singled out" by scheduling his execution on 29 April 2022, establishing a *prima facie* breach of Art 12(1). OS 188 was, thus, a "relevant proceeding" on the precise facts and circumstances of this case, such that it was inappropriate to proceed with scheduling the respondent's execution.[232] The Court of Appeal here noted that "every application is fact-centric",[233] and that in most cases, relevant pending proceedings would be disposal or forfeiture proceedings, as the Ministry of Home Affairs affidavit in *Syed Suhail* contemplated.[234]

227 *Attorney-General v Datchinamurthy a/l Kataiah* [2022] SGCA 46 at [30].
228 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [62]; *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [314] and [318].
229 *Attorney-General v Datchinamurthy a/l Kataiah* [2022] SGCA 46 at [36].
230 *Attorney-General v Datchinamurthy a/l Kataiah* [2022] SGCA 46 at [38].
231 *Attorney-General v Datchinamurthy a/l Kataiah* [2022] SGCA 46 at [38].
232 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [67].
233 *Attorney-General v Datchinamurthy a/l Kataiah* [2022] SGCA 46 at [40].
234 *Attorney-General v Datchinamurthy a/l Kataiah* [2022] SGCA 46 at [41].

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1.103 This approach was applied in *Xu Yuan Chen v Attorney-General*,[235] where the appellant, Xu, failed to prove he was equally situated with the author of the blog post which he in his capacity as Chief Editor of *The Online Citizen* ("TOC") republished as an article on TOC's website and as a Facebook post.

1.104 The appellant was subject to an order of committal for contempt of court, for republishing, with permission, an open letter to the Chief Justice published by an Australian citizen, Julie Mary O'Connor, residing in Australia on her blog ("BOTT"). O'Connor had publicly accepted responsibility for authoring the open letter.[236] The Attorney-General's Chambers, after investigations, was satisfied that the letter contents and, therefore, the article and Facebook post amounted to contempt of court under s 3(1)(*a*) of the Administration of Justice (Protection) Act 2016.[237] Before the order of committal against the appellant was applied for, the Attorney-General sent a letter inviting Xu to take certain steps, including deleting the article and Facebook post, as well as apologising to the Judiciary. No similar letter was sent to O'Connor. Xu sought to challenge the Attorney-General's decision, on the basis of Art 12(1), seeking a prohibiting order. The sole issue was whether the appellant had raised a *prima facie* case of reasonable suspicion that the alleged breach of Art 12(1) had been made out.

1.105 The appellant's case failed at the first step of the two-step test applied to Art 12(1) challenges, as set out in *Syed Suhail*.[238] The first step required demonstrating that the Attorney-General's action had to have resulted in the appellant being treated differently from someone equally situated – in this case, O'Connor. In other words, the applicant had to show "a relevant and appropriate comparator who is equally situated";[239] here, it would be by showing that O'Connor was, like the appellant, amenable to Singapore's contempt jurisdiction.[240] This would then shift the burden onto the Attorney-General to provide justification by showing the differentiated treatment was reasonable, that is, based on legitimate reasons making the differential treatment proper.[241] The court noted it would have regard to the nature of the executive action applying a factual test of whether a prudent person would objectively think the persons

235 [2022] 2 SLR 1131.
236 *Xu Yuan Chen v Attorney-General* [2022] 2 SLR 1131 at [17].
237 Act 19 of 2016.
238 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [61]–[62].
239 *Xu Yuan Chen v Attorney-General* [2022] 2 SLR 1131 at [1].
240 *Xu Yuan Chen v Attorney-General* [2022] 2 SLR 1131 at [43].
241 *Xu Yuan Chen v Attorney-General* [2022] 2 SLR 1131 at [23].

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concerned were roughly equivalent or similarly situated in all material respects, following the guidance laid down in *Datchinamurthy*.[242]

1.106 In relation to the exercise of prosecutorial discretion under Art 35(8), which is "highly fact-sensitive",[243] where two individuals commit similar actions, the fact that only one is subject to prosecution does not by itself indicate a breach of Art 12(1), given the myriad of factors the Prosecution is entitled to consider, as identified in *Ramalingam Ravinthran v Attorney-General*.[244] This includes legal guilt, moral blameworthiness, whether the offender co-operated with the investigating authorities and who the main offender was.[245] The degree of co-operation with the police authorities and previous criminal conduct were affirmed to be relevant factors in distinguishing between two persons involved in the same criminal activities.[246] Thus, the court in *Datchinamurthy* observed it would be "relatively challenging"[247] for a person to establish he was "equally situated" to another person or "so situated that it is reasonable to consider that they should be similarly treated" in this scenario, as only "one material difference" had to be shown to differentiate both parties.[248]

1.107 Of the three differentiating factors identified by the High Court in *Re Xu Yuan Chen*,[249] weight was given to two as "legitimate considerations" for the Attorney-General to consider.[250] The Court of Appeal concluded that Xu and O'Connor were not equally situated given the differentiating factors between them, "key" to which was the difficulty the authorities would encounter in investigating, prosecuting and enforcing the case against O'Connor, who resided overseas, as distinct from Xu, who lived in Singapore and was within Singapore's contempt jurisdiction at all material times.[251] O'Connor, who had filed an affidavit on Xu's behalf, had not evinced any intention to come to Singapore to be investigated although she could have done so.[252]

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242 *Attorney-General v Datchinamurthy a/l Kataiah* [2022] SGCA 46 at [30]. *Xu Yuan Chen v Attorney-General* [2022] 2 SLR 1131 at [24].
243 *Xu Yuan Chen v Attorney-General* [2022] 2 SLR 1131 at [28].
244 [2012] 2 SLR 49 at [24], [53] and [63].
245 *Xu Yuan Chen v Attorney-General* [2022] 2 SLR 1131 at [31]. For instance, see *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012 and *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222, which the Court of Appeal rationalised within the framework of the two-step *Syed Suhail* test.
246 *Mohammad Farid bin Batra v Attorney-General* [2022] SGHC 132 at [29].
247 *Xu Yuan Chen v Attorney-General* [2022] 2 SLR 1131 at [27].
248 *Xu Yuan Chen v Attorney-General* [2022] 2 SLR 1131 at [35] and [61]–[62].
249 [2021] SGHC 294.
250 *Xu Yuan Chen v Attorney-General* [2022] 2 SLR 1131 at [17].
251 *Xu Yuan Chen v Attorney-General* [2022] 2 SLR 1131 at [39].
252 *Xu Yuan Chen v Attorney-General* [2022] 2 SLR 1131 at [36].

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1.108 Thus, the Attorney-General was entitled, in acting in the public interest, to consider the difficulties of investigating/prosecuting O'Connor, and also to evaluate whether it was sufficient to take action against Xu.[253] The background surrounding the Attorney-General's decision to prosecute Li Shengwu[254] indicates that in times past, the Attorney-General has taken decisions not to prosecute someone outside jurisdiction for contempt, such that this practice was not unique to O'Connor; Li's Facebook page contained a link to a *New York Times* article which could be read as contemptuous, but no proceedings were brought against the *New York Times*.[255]

1.109 While the level of culpability was not considered a material difference,[256] the greater degree of harm which the article and Facebook post on TOC's platforms was likely to cause, as distinct from the BOTT post, was. Quantitatively, the republication of O'Connor's article on TOC platforms likely gave O'Connor's allegations a much wider circulation than she would have otherwise enjoyed if it was only on BOTT, with the court taking note of the degree of online traffic the TOC enjoyed, indicating the respective reach of TOC and BOTT.[257] It was a "common sense inference", given BOTT's "relatively low usual viewership levels compared to TOC", that the trial judge was entitled to infer that "a substantial part of the number of views of the Letter on BOTT was attributable to the secondary traffic generated by readers who had clicked the hyperlink in the Article on TOC's website and were thereby redirected to the Letter on BOTT".[258] A granular assessment of the low "likes" and "shares" in O'Connor's other social media platform supported the inference that "a substantial part of the views attracted by the Letter came from secondary publicity generated by its republication on TOC's platforms".[259]

1.110 The Court of Appeal considered the nature of each platform, and therefore its reach and online presence, as salient material considerations in qualitatively "assessing the degree of harm".[260] While BOTT appeared to be a personal blog, TOC was an "established alternative news platform in Singapore with a substantial audience and reach", as well as a team of editors, writers and reporters.[261] There was no evidence that O'Connor was a public figure whose personal views would be particularly influential;

253 *Xu Yuan Chen v Attorney-General* [2022] 2 SLR 1131 at [36], [39], [42] and [43].
254 *Xu Yuan Chen v Attorney-General* [2022] 2 SLR 1131 at [46].
255 *Xu Yuan Chen v Attorney-General* [2022] 2 SLR 1131 at [47].
256 *Xu Yuan Chen v Attorney-General* [2022] 2 SLR 1131 at [61].
257 *Xu Yuan Chen v Attorney-General* [2022] 2 SLR 1131 at [53].
258 *Xu Yuan Chen v Attorney-General* [2022] 2 SLR 1131 at [55].
259 *Xu Yuan Chen v Attorney-General* [2022] 2 SLR 1131 at [56].
260 *Xu Yuan Chen v Attorney-General* [2022] 2 SLR 1131 at [58].
261 *Xu Yuan Chen v Attorney-General* [2022] 2 SLR 1131 at [58].

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thus, by publishing the article on TOC's website and the Facebook post on TOC's Facebook page, the appellant conferred a greater degree of journalistic and editorial legitimacy than if the allegations were only on BOTT alone. As such, it could be reasonably concluded that the impact of the republication by TOC would be to amplify the risk of undermining public confidence in the administration of justice.[262] This differentiating factor contributed to the court's conclusion that the appellant and O'Connor were not "so situated that it is reasonable to consider that they should be similarly treated" and that a prudent person "would not objectively think they were 'roughly equivalent or similarly situated in all material respects'".[263]

1.111 In *Nazeri bin Lajim v Attorney-General*,[264] the appellant challenged the decision of the Attorney-General to impose a capital charge on him for drug trafficking offences, whereas his co-offender involved in the same operation and same subject matter was convicted for trafficking but qualified for the alternative sentencing regime under s 33B of the MDA, receiving life imprisonment and 15 strokes of the cane.[265] The appellant argued that the Attorney-General in maintaining a capital charge against him while reducing the charges of other equally situated accused persons from a capital to non-capital charge breached his Art 12(1) rights.[266] His case was compared not against that of his co-offender but against other unrelated cases.[267]

1.112 It is settled case law that in exercising prosecutorial discretion, the Attorney-General as Public Prosecutor is only required to give his unbiased consideration to every offender and to avoid considering irrelevant considerations.[268] Further, the Attorney-General can consider a "myriad of factors" in deciding whether to change a person and if so, what charges to prefer.[269] Relevant considerations include the sufficiency of evidence against the offender, their personal circumstances, willingness to testify against co-offenders and other policy factors, which may justify imposing different charges against persons involved in the same criminal enterprise.

262 *Xu Yuan Chen v Attorney-General* [2022] 2 SLR 1131 at [58]–[59].
263 *Xu Yuan Chen v Attorney-General* [2022] 2 SLR 1131 at [63], following *Attorney-General v Datchinamurthy a/l Kataiah* [2022] SGCA 46 at [30].
264 [2022] 2 SLR 964.
265 *Nazeri bin Lajim v Attorney-General* [2022] 2 SLR 964 at [4].
266 *Nazeri bin Lajim v Attorney-General* [2022] 2 SLR 964 at [12].
267 *Nazeri bin Lajim v Attorney-General* [2022] 2 SLR 964 at [21].
268 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [51].
269 *Nazeri bin Lajim v Attorney-General* [2022] 2 SLR 964 at [29].

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1.113 The Court of Appeal held that the appellant had failed to discharge the burden of producing *prima facie* evidence that Art 12(1) was breached. Just because other persons were caught with drugs above the capital threshold did not mean they were in law equally situated with the appellant.[270] It held that the Attorney-General is entitled to consider all the facts of a particular case, beyond the quantity of drugs involved, as "all kinds of people in all kinds of circumstances" commit offences.[271] Even where two persons are involved in the same criminal enterprise, the "mere fact" there is a differentiation of charges between co-offenders, even if they have equal guilt, is not in itself *prima facie* evidence of bias or considering irrelevant considerations.[272] In the immediate case, the orders sought to declare the Attorney-General's actions unlawful and to stay the execution pending disposal of this matter were entirely devoid of factual basis. As such, pursuant to the presumption of constitutionality, the Attorney-General was not required to justify his prosecutorial discretion to the court.

VIII. Article 14

1.114 The argument that s 377A violated Art 14 was rejected in the Court of Appeal's *obiter* explanations in *Tan Seng Kee*.[273] Article 14 did not cover intimate sexual acts. In reading Art 14(1) in context, the primary right protected was freedom of speech, not freedom of expression; the marginal note (freedom of speech, assembly and association) only mentioned "freedom of speech"[274] and such notes can be used as an aid to statutory interpretation, as a brief indication of the content of a statutory provision. The principle of construction, *noscitur a sociis*, provides that words cannot be read in isolation but in context.

1.115 While the term "expression" may ordinarily be seen as broader than "speech", there is "no mention of the right to freedom of expression as a free-standing right" in the Art 14 marginal note.[275] "Expression" adopts an ancillary function of qualifying the right enshrined in Art 14(1)(*a*), that is, freedom of speech, applying the *noscitur a sociis* rule. Article 14(1)(*a*) in protecting the right to free speech relates to "any form of communication that is expressed in words, whether spoken or

270 *Nazeri bin Lajim v Attorney-General* [2022] 2 SLR 964 at [31].
271 *Nazeri bin Lajim v Attorney-General* [2022] 2 SLR 964 at [31].
272 *Nazeri bin Lajim v Attorney-General* [2022] 2 SLR 964 at [32].
273 See para 1.1 above.
274 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [279].
275 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [282].

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written";[276] thus, acts of sexual intimacy are not speech, which is protected under Art 14.[277]

1.116 A restrictive reading of Art 14 is also warranted because an expansive reading of "expression" would encompass "any act that purports to convey meaning", even if such act were a sexual offence like paedophilia or bestiality.[278] This would be a "plainly absurd result", contrary to the "canon of statutory interpretation that Parliament does not legislate with the intention of producing unworkable or impracticable results".[279] Thus, acts of gross indecency do not constitute speech under Art 14(1)(*a*); otherwise, this would "generate an absurd result that could not have been intended by the constitutional draftsman".[280]

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276 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [284].
277 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [284].
278 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [285].
279 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [285].
280 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [294].

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