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1. ADMINISTRATIVE AND CONSTITUTIONAL LAW

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I. Introduction

1.1 In 2023, a modest number of administrative and constitutional law cases were decided. The administrative law cases considered whether a warning was a decision for the purposes of being susceptible to judicial review, whether minor errors of law invalidated a decision-making process, exceptions to the fair hearing rule and how judicial copying of counsel's submissions in a judgment can raise questions of bias. It was also held that other rules in the Rules of Court[1] may apply to judicial review proceedings, such as joinder under O 15 r 6(2)(*b*).[2]

1.2 The constitutional law cases shed some insight in terms of what Art 9 of the Constitution of the Republic of Singapore[3] (the "Constitution") required in terms of a fair trial, with other cases being relatively straightforward applications of Art 12 jurisprudence. The issue of whether the constitutional rights of a person could be engaged by an Act not yet in operation was examined. There were cases implicating Art 14, which relates to freedom of speech and expression, involving the application of the risk test for scandalising the court offences under the Administration of Justice (Protection) Act 2016[4] ("AJPA"). A challenge to the constitutionality of ss 499 and 500 of the Penal Code[5] was also made in relation to criminal defamation provisions.

II. Administrative law

A. Susceptibility to judicial review

1.3 The issue of whether a police warning was susceptible to judicial review was raised in *Han Li Ying Kirsten v Attorney-General.*[6]

1 2014 Rev Ed.
2 *Arif Rahim Valibhoy v Majlis Ugama Islam Singapura* [2024] 4 SLR 726.
3 2020 Rev Ed.
4 2020 Rev Ed.
5 Cap 224, 2008 Rev Ed.
6 [2023] SGHC 137.

The Attorney-General's Chambers ("AGC") found that a Facebook post of 10 May 2022 by Kirsten Han ("Han") amounted to contempt of court under s 3(1)(*a*) of the AJPA.[7] The post had asserted that high costs orders would intimidate lawyers from representing death row prisoners, creating the prospect of wrongful executions and miscarriages of justice.

1.4 The AGC decided to issue a conditional warning ("Warning") rather than to prosecute Han and informed the Singapore Police Force ("SPF") of its decision on 14 July 2022, requesting that the SPF convey the conditional warning to Han. Deputy Superintendent of Police Seet ("DSP Seet") then contacted Han via a phone call on 11 October 2022 and requested a meeting at the Ang Mo Kio Police Division Headquarters ("AMK Div HQ"). DSP Seet later acceded to Han's request for a written letter which was sent by e-mail dated 19 October 2022, referring to the earlier phone calls and police request for Han's attendance at AMK Div HQ on 21 October 2022, regarding the Facebook post. At the meeting, DSP Seet handed Han the Warning on the SPF letterhead, signed by DSP Seet.

1.5 Later that evening, Han applied online for a copy of the First Information Report ("FIR"). This was followed up by subsequent e-mails with Han stating she would commence legal proceedings if she did not receive the FIR by a stipulated time on 10 November 2022, which the police did not respond to. Han filed an originating application for permission to commence judicial review on 11 November 2022 and on 14 November 2022, the SPF informed Han by e-mail that they were unable to supply her with the requested document. The AGC sent a letter to Han's lawyers on 11 January 2023 indicating that no FIR had been filed with the police in relation to the conditional warning.

1.6 Han filed a new application seeking a quashing and mandatory order, effectively to commence judicial review proceedings under O 24 r 5(1) of the Rules of Court, to quash the Warning and to compel the police to furnish her with the FIR in relation to the Warning. She also sought permission to apply for a declaration that the SPF had no power to require her physical attendance at the police station to issue her the Warning.

1.7 To apply for a quashing order which the High Court may issue under para 1 of the First Schedule to the Supreme Court of Judicature Act 1969,[8] three requirements must be satisfied, as identified in *Gobi a/l*

7 2020 Rev Ed.
8 2020 Rev Ed.

Avedian v Attorney-General:[9] first, the Warning must have been susceptible to judicial review; second, Han must have had a sufficient interest in the matter; and third, the materials before the court should have disclosed a *prima facie* case of reasonable suspicion in favour of granting the quashing order.[10] Following *Wham Kwok Han Jolovan v Attorney-General*,[11] Kwek Mean Luck J held that a warning was not susceptible to judicial review as it had no legal effect, which entailed altering the legal rights, interests or liabilities of an individual.[12] A warning was merely an expression of the relevant authority's opinion that the recipient had committed an offence and a statement of intent that if the recipient was to engage in any criminal conduct, he may not enjoy leniency and could be prosecuted. It was confirmed in *GCO v Public Prosecutor*[13] that both stern warnings and conditional warnings lacked legal effect.[14]

1.8 Kwek J rejected the submission that the decision to issue the Warning here rather than to proceed with criminal prosecution constituted an "assurance" not to prosecute the conduct which was the subject of the Warning, provided Han complied with the conditions in the Warning, to remain crime-free for 12 months.[15] Han argued that such assurance amounted to an "estoppel" which prevented the Public Prosecutor from initiating legal proceedings against her, such that the Warning affected her legal rights and was subject to judicial review. Kwek J found that there was nothing in the Warning which had the characteristic of an assurance of non-prosecution for past conduct; instead, warnings were prospective in relation to possible future misconduct.[16] The terms of the Warning expressly stated that if any offence was committed within the 12-month period, she could be prosecuted for that offence and proceedings against her for the contempt of court relating to the Facebook post could be commenced. There was also nothing to indicate that the AGC might not subsequently revisit the non-prosecution decision, if, *eg*, further information about the misconduct surfaced.[17] The Warning note also expressly indicated that the conditional warning "[did] not affect [her] legal rights, interests or liabilities".[18]

9 [2020] 2 SLR 883.
10 *Gobi a/l Avedian v Attorney-General* [2020] 2 SLR 883 at [18].
11 [2016] 1 SLR 1370.
12 *Wham Kwok Han Jolovan v Attorney-General* [2016] 1 SLR 1370 at [25].
13 [2019] 3 SLR 1402.
14 *GCO v Public Prosecutor* [2019] 3 SLR 1402 at [22].
15 *Han Li Ying Kirsten v Attorney-General* [2023] SGHC 137 at [24].
16 *Han Li Ying Kirsten v Attorney-General* [2023] SGHC 137 at [28].
17 *Han Li Ying Kirsten v Attorney-General* [2023] SGHC 137 at [31].
18 *Han Li Ying Kirsten v Attorney-General* [2023] SGHC 137 at [32].

1.9 Foreign cases from Malaysia and England were of no assistance, as they dealt with facts where the Prosecution had in fact made assurances it would not prosecute, as this could be binding.[19] Where such an unequivocal assurance not to prosecute is given, and there is detrimental reliance on it by the defendant, it could in principle be an abuse of process to proceed with a prosecution. However, it may also be justifiable to proceed with the prosecution where, *eg*, relevant facts come to light which were not known at the time the representation was made. The English Court of Appeal had distinguished between legitimate expectation in respect of administrative discretion; it had underscored that the duty to prosecute offenders could not be treated as an administrative discretion as the public interest was implicated in so far as this would normally be served by bringing to trial those reasonably suspected of criminal conduct.[20]

1.10 Han sought to argue that the Warning contained an indirect assurance that she would not be prosecuted for the Facebook post, but this fell short of the "unequivocal representation"[21] required in *R v Abu Hamza*.[22] As the Warning did not contain a decision for the court to quash, it failed to satisfy the requirement that an application for a quashing order should relate to a decision with legal effect. As the declaration was an order ancillary to the quashing order, no permission was granted for the declaration, though Kwek J noted that Han lacked standing as there was no "real controversy" between the parties to the action for the courts to resolve, as the police had not compelled Han's attendance at the AMK Div HQ.[23] Indeed, Han's e-mail communication with the SPF indicated that she was aware that her attendance was not mandatory, though she asserted that, because of the "power imbalance" between herself and DSP Seet, she "felt compelled" to attend the police station.[24] This did not amount to legal compulsion. As no FIR had been made in respect of the Warning, there was no FIR that could be the subject of a Mandatory Order.

(1) Effect of minor error

1.11 In *Koh Shu Cii Iris v Attorney-General*,[25] the applicant ("Koh") had made a Magistrate's Complaint on 18 November 2022 under s 152(1)

19 *Harun bin Abdullah v Public Prosecutor* [2009] 3 MLJ 337; *R v Abu Hamza* [2007] 2 WLR 226.
20 *R v Abu Hamza* [2007] 2 WLR 226 at [50].
21 *Han Li Ying Kirsten v Attorney-General* [2023] SGHC 137 at [38].
22 [2007] 2 WLR 226.
23 *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [72(b)].
24 *Han Li Ying Kirsten v Attorney-General* [2023] SGHC 137 at [46].
25 [2023] 5 SLR 1774.

of the Criminal Procedure Code 2010[26] ("CPC") in relation to a claim of legal professional privilege. This was with respect to the police's seizure of her electronic devices like her laptop and handphone and the material in these devices. She argued that the police officers had breached the legal professional privilege review protocol she had agreed to, regulating the identification of privileged material contained in the electronic devices.

1.12 A senior magistrate dismissed Koh's complaint after examining her on oath, because he found no credible evidence that the police officers had committed an offence under ss 182 or 187(1) of the Penal Code, by remaining silent when she asked a member of the AGC team a question about the review.

1.13 Koh appealed against the dismissal of her complaint on 6 December 2022. The Public Prosecutor as respondent later intervened to discontinue the appeal (the "Decision"), which was the subject of the present application filed on 14 April 2023, where Koh sought permission to proceed with judicial review for a quashing order in relation to the Public Prosecutor's Decision.

1.14 See Kee Oon J considered whether there was an arguable case of reasonable suspicion that the Public Prosecutor's Decision fell foul of *GCHQ*[27] grounds, which turned on the interpretation of ss 152(1) and 374(1) of the CPC, and found there was not.

1.15 The Decision was not found to be *illegal,* as the CPC procedures did not mandate the adoption of certain courses of action before dismissing a complaint which had apparently not been followed, nor was there a statutory right of appeal against the dismissal of a Magistrate's Complaint. While s 151(2)(*b*) of the CPC did require that the magistrate examine the complainant, it listed out a set of courses of action after this examination to guide further enquiry, which were not mandatory, such as compelling the attendance of a person to help him determine whether there was sufficient ground for proceeding with the complaint. The word "may" rather than "must" was used in s 151(2)(*b*).[28] Section 152(1) of the CPC thus only required a magistrate to examine a complainant before dismissing a complaint.

1.16 While there was a "procedural irregularity" in so far as the applicant had not signed off on a written summary of her examination as required under s 151(2)(*a*) of the CPC, this had not prejudiced

26 2020 Rev Ed.
27 See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.
28 *Koh Shu Cii Iris v Attorney-General* [2023] 5 SLR 1774 at [29].

Koh or caused any failure of justice which might otherwise render the proceedings invalid.[29] This is because s 432 of the CPC addresses when errors or irregularities make a proceeding invalid, which is consonant with the view expressed by the House of Lords in *R v Hull University Visitor ex parte Page*[30] that a mistake of law in itself does not vitiate the actual decisions made; what must be shown is a "relevant error of law", *ie*, an error "in the actual making of the decision which affected the decision itself".[31] In this case, there was statutory guidance as to whether an error was minor or material.

1.17 The Decision was not found to be *irrational,* even if there was a public interest in bringing errant police officers to task, especially where they intentionally breached procedure. This alone did not suffice to satisfy the high threshold of irrationality even at the level of showing an arguable case of reasonable suspicion.[32] The Decision was reasonable for various reasons, including that the facts Koh presented to the senior magistrate did not disclose a ss 182 or 187(1) CPC offence.[33]

1.18 The Decision was also found to be procedurally proper, as the respondent had given the applicant notice of his intention to intervene and discontinue the appeal, and a fair chance to be heard.[34] Thus, the application for leave to commence judicial review for a quashing order of the Decision was dismissed, as was the declaratory relief sought, as this was contingent on the grant of permission to apply for a prerogative order.

(2) Natural justice and unincorporated associations: exception to fair hearing rule

1.19 Following the approaches articulated *in Kay Swee Pin v Singapore Island Country Club*[35] *("Kay Swee Pin"), Khong Kin Hoong Lawrence v Singapore Polo Club*[36] and *Sim Yong Teng v Singapore Swimming Club,*[37] the General Division of the High Court ("General Division") in *Li See Kit Lawrence v Debate Association (Singapore)*[38] held that natural justice rules were implied terms in contracts. In principle, one could be entitled to a claim for damages where natural justice rules, as implied terms of

29 *Koh Shu Cii Iris v Attorney-General* [2023] 5 SLR 1774 at [32].
30 [1993] AC 682.
31 *R v Hull University Visitor ex parte Page* [1993] AC 682 at 701–702.
32 *Koh Shu Cii Iris v Attorney-General* [2023] 5 SLR 1774 at [38].
33 *Koh Shu Cii Iris v Attorney-General* [2023] 5 SLR 1774 at [39].
34 *Koh Shu Cii Iris v Attorney-General* [2023] 5 SLR 1774 at [42].
35 [2008] SGHC 143.
36 [2014] 3 SLR 241.
37 [2015] 3 SLR 541.
38 [2023] SGHC 154.

the Constitution of the Debate Association (Singapore) ("CDA(S)"), were breached. The CDA(S) constituted the membership contract of the Debate Association, a non-profit, unincorporated association with no membership fees, which is a registered society under the Societies Act.[39]

1.20 In this case, the plaintiff was the father and personal representative of the estate of Lucas Li, an ordinary member at the relevant time of the defendant, the Debate Association (Singapore). The plaintiff alleged that the grossly negligent and reckless actions of the defendant had caused the deceased to suffer an acute stress reaction, leading to his suicide on 8 August 2018. The claims brought lay in tort and contract law.

1.21 The deceased was an active member of the Debate Association and, at the time of his passing, a government scholar who was open about his homosexuality and mental health issues which he discussed on his Facebook posts and in private communications with friends.[40] The deceased was the creator and moderation of a WhatsApp group ("Darkness Chat Group") whose members included minor students. The deceased, the sole adult in the group, initiated discussions of a provocative sexual nature, objectifying student members by sharing photographs for participants "to comment on their physical characteristics, (including genitalia)".[41]

1.22 Consequently, on 7 August 2018, the Executive Committee ("ExCo") of the defendant issued a public statement concerning the deceased, published on the defendant's website, Facebook page and the "Singapore Debaters" Facebook group managed by the defendant. The statement referred to the "inappropriate behaviour" of the deceased.

1.23 Pursuant to an Audit Report made by senior members of the debating community in relation to auditing the Debate Development Initiative ("DDI") programme run by the defendant which was designed to expose secondary school students to debate, the ExCo decided to ban the deceased from all events of the defendant (the "Ban"). The Audit Report disclosed that the deceased had acted inappropriately towards members of the Darkness Chat Group, whose members were students he had selected because he identified them as being part of the "lesbian, gay, bisexual, transgender and queer (LGBTQ) community".[42] The ExCo also informed the defendant's partner organisations ("Notice to Partners") to prevent the deceased from entering any competitions

39 Cap 311, 1985 Rev Ed.
40 *Li See Kit Lawrence v Debate Association (Singapore)* [2023] SGHC 154 at [5].
41 *Li See Kit Lawrence v Debate Association (Singapore)* [2023] SGHC 154 at [7].
42 *Li See Kit Lawrence v Debate Association (Singapore)* [2023] SGHC 154 at [10].

or camps co-organised by the defendant. It also filed a police report against the deceased (the "Police Report"). The ExCo did not convene a general meeting of the members of the defendant to decide whether action should be taken against the deceased in light of the Audit Report. The deceased was notified of the Ban on 7 August 2018 and committed suicide by jumping to his death on 8 August 2018.[43]

1.24 The General Division found that the Ban and Notice to Partners fell to be governed by the contract of membership between the deceased and defendant. The CDA(S) did not provide for disciplinary or penal powers. The General Division found that the Ban and Notice to Partners could not be neatly characterised as either an expulsion or suspension of membership rights. See J found that the permanence of the Ban distinguished it from a suspension; however, as the termination of membership did not take place on the facts, it was not an expulsion either.[44] See J described this as an "exclusion" from the activities of the defendant.

1.25 In seeking to ascertain whether the Ban or Notice to Partners constituted disciplinary or punitive measures, which should be framed in clear language, the General Division reviewed various decisions and concluded that whether the suspension of a person from a position in an association or membership was penal or not depended on the case circumstances.[45] This would include what the purpose of the suspension was, or whether the suspending authority was charged with protecting third-party interests, as noted by Judith Prakash J in *The Stansfield Group Pte Ltd v Consumers' Association of Singapore*[46] ("*The Stansfield Group*"). A suspension was tantamount to an expulsion where it deprived a concerned person of the enjoyment of his membership rights, which was by nature punitive, as in *John v Rees*.[47] However, Prakash J noted that in *Paul Wallis Furnell v Whangarei High Schools Board*[48] ("*Furnell*") the suspension of a teacher without giving him an opportunity to be heard did not breach natural justice, as the school had to also consider the interests of the pupils, their parents and the public; as such, the suspension was protective rather than punitive. The suspension was not an end in itself but "intended to provide a period in which something else can be accomplished".[49]

43 *Li See Kit Lawrence v Debate Association (Singapore)* [2023] SGHC 154 at [11].
44 *Li See Kit Lawrence v Debate Association (Singapore)* [2023] SGHC 154 at [53].
45 *Li See Kit Lawrence v Debate Association (Singapore)* [2023] SGHC 154 at [58].
46 [2011] 4 SLR 130.
47 [1970] Ch 345.
48 [1973] AC 660.
49 *The Stansfield Group Pte Ltd v Consumers' Association of Singapore* [2011] 4 SLR 130 at [90].

1.26 Applied to the immediate case, the Ban and Notice to Partners were swift measures taken to ensure the safety of the students under the charge of the defendant, particularly minor students. Against this, the exclusion through the Ban and Notice to Partners was not of a temporary nature, as in *Furnell* where the suspension operated as an interim measure to allow for full investigations leading to the exoneration or punishment of Furnell.[50] There was evidence that the defendant contemplated an appeal or review and anticipated the deceased would appeal against the Ban and Notice to Partners; this was never communicated to the deceased, and the fact of such contemplation "points towards the finality of the Ban and the Notice to Partners".[51] See J concluded that the exclusion effected by the Ban and Notice was "of a penal nature"[52] and found that the CDA(S) did not provide for specific disciplinary powers, and that provisions relating to matters of daily administration did not encompass disciplinary actions with penal consequences.[53] Thus, the defendant was found to have acted *ultra vires* in imposing the Ban and communicating the Notice to Partners.[54]

1.27 The claim for breach of natural justice, rules of fair hearing and bias was rooted in a claim for breach of contract. Singapore courts, moved by the gravity of the interest at stake, have found that natural justice rules are implied as contractual terms where a body such as a club has disciplinary powers. Rules of procedural fairness and the duty to act fairly includes a fair hearing and the rule against bias, although the content of this duty varies with case circumstances.[55] Natural justice rules will be applied more rigorously where the exercise of disciplinary powers "may deprive a person of his property rights or impose a penalty on him".[56] The Court of Appeal also noted in *Kay Swee Pin* that all "disciplinary bodies have a duty to act fairly as expulsion, suspension or other punishment or the casting of a stigma may be involved".[57]

1.28 On the facts of the case, the fair hearing rule was breached because the deceased was not given the opportunity to address the allegations made against him, nor was he informed of the investigations that took place prior to the ExCo's public statement, the Ban and Notice to Partners.[58] See J noted there was authority supporting the permissibility

50 *Li See Kit Lawrence v Debate Association (Singapore)* [2023] SGHC 154 at [61].
51 *Li See Kit Lawrence v Debate Association (Singapore)* [2023] SGHC 154 at [61].
52 *Li See Kit Lawrence v Debate Association (Singapore)* [2023] SGHC 154 at [62].
53 *Li See Kit Lawrence v Debate Association (Singapore)* [2023] SGHC 154 at [69].
54 *Li See Kit Lawrence v Debate Association (Singapore)* [2023] SGHC 154 at [74].
55 *Li See Kit Lawrence v Debate Association (Singapore)* [2023] SGHC 154 at [78].
56 *Kay Swee Pin v Singapore Island Country Club* [2008] SGHC 143 at [6].
57 *Kay Swee Pin v Singapore Island Country Club* [2008] SGHC 143 at [6].
58 *Li See Kit Lawrence v Debate Association (Singapore)* [2023] SGHC 154 at [80].

of excluding a right to be heard where there was "an urgent need to protect the interests of third parties".[59] Citing *De Smith's Judicial Review*,[60] it was noted that procedural propriety at common law could be excluded in circumstances such as emergency situations where the safety and welfare of children were concerned, the suspension of a flight permit without an opportunity to be heard where there was an immediate threat to air safety, for example. Whether the need for urgent action outweighed the importance of following fair procedure depended upon an assessment of case circumstances, "on which opinions can differ".[61] This passage was cited with approval by Prakash J in *The Stansfield Group*, where she also observed that fair hearing rules may not need to be followed "if the circumstances require urgent action for the protection of third parties and there is the possibility of representations being received subsequently".[62] On the facts of the instant case, swift action was taken in the interests of the students and See J accepted that "a degree of urgency" in imposing the Ban and communicating the Notice to Partners "was required to ensure the safety of the participants in the defendant's programmes"[63] given the "objectively serious allegations" and the fact the deceased was still involved and in close contact with minors involved in these programmes.[64]

1.29 However, the exception to the fair hearing rule required the possibility of representations being heard subsequently. The availability of making representations through some form of appeal or review was not expressly communicated to the deceased and the facts showed that the deceased did not contemplate making an appeal against the decision at the time, although he had considered the option of seeking legal advice.[65] Thus, the rules of natural justice still applied in the present case and the fair hearing rule was breached with respect to "fundamental features" of fair hearing.

1.30 The defendant had also prejudged the deceased, amounting to apparent bias under the test articulated by the Court of Appeal in *BOI v BOJ*[66] where the rule of pre-judgment "prohibits the decision-maker from reaching a final, conclusive decision before being made aware

59 *Li See Kit Lawrence v Debate Association (Singapore)* [2023] SGHC 154 at [84].
60 Harry Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 8th Ed, 2018).
61 Harry Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 8th Ed, 2018) at para 8-019.
62 *The Stansfield Group Pte Ltd v Consumers' Association of Singapore* [2011] 4 SLR 130 at [118].
63 *Li See Kit Lawrence v Debate Association (Singapore)* [2023] SGHC 154 at [87].
64 *Li See Kit Lawrence v Debate Association (Singapore)* [2023] SGHC 154 at [88].
65 *Li See Kit Lawrence v Debate Association (Singapore)* [2023] SGHC 154 at [89].
66 [2018] 2 SLR 1156.

of all relevant evidence and arguments which the parties wish to put before him or her",[67] such that the decision is approached "with a closed mind".[68] This was inferred from the fact the defendant did not ask to receive or consider any evidence from the deceased before making the Police Report.[69] Declaratory relief was given on the basis that the Police Report was unlawful for breaching the rules of natural justice.[70] See J also recommended that, given the finding that the defendant had breached natural justice rules, "it would not be out of order for the defendant to consider extending an apology to the plaintiff and his family in the spirit of reconciliation".[71] This however was not mandated as the defendant did not acknowledge any wrongdoing on its part in contesting the entirety of the plaintiff's claim.

(3) Apparent bias and judicial copying of counsel's written submissions

1.31 The issue of apparent bias arose in the case of *Newton, David Christopher v Public Prosecutor*[72] ("*Newton*") involving a conspiracy to deceive the Health Promotion Board that Newton had been fully vaccinated against COVID-19, and to cause this to be reflected in the National Immunisation Registry. Newton had in fact received saline injections from one of his two co-conspirators.

1.32 It was argued that District Judge Soh Tze Bian (the "DJ") was biased or had a closed mind towards the case at hand, in so far as the DJ had substantially reproduced the Prosecutor's written submissions in his grounds of decision. This was clarified to entail apparent bias. The test for this, as set out in *BOI v BOJ*, was "whether the circumstances would give rise to a reasonable suspicion or apprehension of bias in the mind of a fair-minded and informed observer".[73]

1.33 Sundaresh Menon CJ stated that reproducing large chunks of the Prosecution's written submissions in the DJ's Grounds of Decision ("GD") with "minimal changes" was "wholly unsatisfactory" as a matter of judicial practice, but not in itself a basis for setting aside the DJ's decision. There were other relevant considerations other than the GD;

67 *BOI v BOJ* [2018] 2 SLR 1156 at [107].
68 *Li See Kit Lawrence v Debate Association (Singapore)* [2023] SGHC 154 at [91] citing *BOI v BOJ* [2018] 2 SLR 1156 at [197].
69 *Li See Kit Lawrence v Debate Association (Singapore)* [2023] SGHC 154 at [92].
70 *Li See Kit Lawrence v Debate Association (Singapore)* [2023] SGHC 154 at [115].
71 *Li See Kit Lawrence v Debate Association (Singapore)* [2023] SGHC 154 at [126].
72 [2024] 3 SLR 1370.
73 *Newton, David Christopher v Public Prosecutor* [2024] 3 SLR 1370 at [3] citing *BOI v BOJ* [2018] 2 SLR 1156 at [103].

although the DJ did not seem to anticipate oral arguments and had come with a draft judgment based on the GD, and was apparently intending to pronounce the sentence he intended to impose without more. However, the DJ did allow an oral exchange to take place between himself and Newton's counsel. Further, the exchange "demonstrated … that the DJ had in fact read and digested all the materials before he came to a view",[74] even if ultimately the DJ made clear the oral submissions had not caused him to change his mind.[75]

1.34 Apparent bias could arise where there is appearance of "a predisposition in favour of one side or against the other" or of a judge "having a closed mind that was not open to fairly considering the merits of the submission made by the parties".[76] Following *BOI v BOJ*, Menon CJ underscored that the test for apparent bias was "objective" and was applied from "the perspective of an observer who is apprised of all relevant facts that are capable of being known by members of the public generally".[77] This would include "interactions between the court and counsel, and such facts of the case as could be gleaned from those interactions and/or known to the general public".[78]

1.35 It was emphasised that it was "not a satisfactory situation" where a judge "simply copied or reproduced" the submissions of counsel.[79] This was because such practice could leave the parties or other readers with the impression that the judge did not apply his mind to the facts, issues and argument, and therefore failed to adjudicate in an impartial and independent manner. The High Court in *Lim Chee Huat v Public Prosecutor*[80] denounced the practice of judicial copying as it raised concerns of judicial bias towards the party whose submissions were copied, raising substantial doubt as to a judge's independent exercise of judgment and potentially undermining public confidence in the administration of justice.[81] In other jurisdictions, judicial copying has raised concerns that the impression may be conveyed that the judge was applying someone else's reasons for judgment, or that the judge had abdicated his functions.[82] Judicial copying by adopting one party's

74 *Newton, David Christopher v Public Prosecutor* [2024] 3 SLR 1370 at [3].
75 *Newton, David Christopher v Public Prosecutor* [2024] 3 SLR 1370 at [15].
76 *Newton, David Christopher v Public Prosecutor* [2024] 3 SLR 1370 at [31].
77 *Newton, David Christopher v Public Prosecutor* [2024] 3 SLR 1370 at [33] citing *BOI v BOJ* [2018] 2 SLR 1156 at [103].
78 *BOI v BOJ* [2018] 2 SLR 1156 at [103(e)].
79 *Newton, David Christopher v Public Prosecutor* [2024] 3 SLR 1370 at [34].
80 [2019] 5 SLR 433.
81 *Newton, David Christopher v Public Prosecutor* [2024] 3 SLR 1370 at [36] citing *Lim Chee Huat v Public Prosecutor* [2019] 5 SLR 433 at [49].
82 *Cojocaru v British Columbia Women's Hospital and Health Centre* [2013] 2 SCR 357; *Nina Kung v Wong Din Shin* [2005] 8 HKCFAR 387.

submissions overlooked what Sir Stephen Sedley considered to be "the principal function of a reasoned judgment, which is to explain to the unsuccessful party why they have lost".[83] In extracting principles from these cases, about how the reproduction of substantial portions of counsel's submissions may open the door to charges of actual or apparent bias, Menon CJ underscored the "particular importance" of "directing the reasons behind their decision to the losing party".[84] Such practice also "invites the criticism of a lack of diligence", given that submissions represent the advocacy of a particular viewpoint, while a judgment "is an expression of a considered resolution of the controversy at hand".[85]

1.36 Thus, with respect to "the totality of the circumstances" which would be what "the fair-minded and informed observer would have considered", the grounds of apparent bias were not made out. The oral exchange between the DJ and counsel was "especially significant" as it showed the DJ had "read and digested the case materials" and had considered the merits of the parties' cases and come to a view; in this, there was nothing to show the DJ had not applied an independent judicial mind to bear on the materials and dispute before him.[86] The fact that the DJ was willing to hear oral submissions demonstrated an openness to any new points the defence might wish to make.[87] While a judge must keep an open mind until the moment a decision is pronounced, even if he has a provisional view, "this does not mean he must come with an empty mind".[88] The greater the complexity of a case, the "less likely a sensible judge will have formed strong provisional views".[89]

1.37 While critical of the unsatisfactory nature of the judicial practice, Menon CJ found on "an objective consideration of all the material" that "the reasonable and fair-minded observer" would have concluded that the DJ's strong views on the matter by the time of the hearing came from his study and assessment of extensive written submissions, as evident in the oral exchange.[90] The manner in which the DJ had engaged with counsel's oral submissions would not lead the observer to conclude that the DJ had a closed mind.[91] The DJ had demonstrated a synthesis of the arguments in re-organising the Prosecution's submissions in his oral and written

83 *IG Markets Ltd v Declan Crinion* [2013] EWCA Civ 587 at [38].
84 *Newton, David Christopher v Public Prosecutor* [2024] 3 SLR 1370 at [40(c)].
85 *Newton, David Christopher v Public Prosecutor* [2024] 3 SLR 1370 at [40(d)(ii)].
86 *Newton, David Christopher v Public Prosecutor* [2024] 3 SLR 1370 at [45].
87 *Newton, David Christopher v Public Prosecutor* [2024] 3 SLR 1370 at [46].
88 *Newton, David Christopher v Public Prosecutor* [2024] 3 SLR 1370 at [50] citing *Prometheus Marine Pte Ltd v King, Ann Rita* [2018] 1 SLR 1 at [39].
89 *Newton, David Christopher v Public Prosecutor* [2024] 3 SLR 1370 at [50].
90 *Newton, David Christopher v Public Prosecutor* [2024] 3 SLR 1370 at [47].
91 *Newton, David Christopher v Public Prosecutor* [2024] 3 SLR 1370 at [47].

grounds in a manner best able to substantiate his position on sentencing, even if he had not supplemented the Prosecution's written submission "with his own thoughts".[92] In terms of ensuring that justice must be seen to be done, it would often "be necessary to go beyond first impressions".[93]

III. Constitutional law

A. Article 14 of the Constitution and constitutionality of criminal defamation provisions in Penal Code

1.38 In *Xu Yuanchen v Public Prosecutor*[94] ("*Xu Yuanchen*") the appellants were convicted under ss 499 and 500 of the Penal Code[95] for criminally defaming members of the Singapore Cabinet. Unlike civil defamation, the burden of proof for criminal proceedings is beyond reasonable doubt, rather than the balance of probabilities. Further, while damages are typically granted for civil defamation, under s 500, a criminal defamer may be punished with a fine and/or a term of imprisonment of up to two years. Criminal defamation may involve imputations directed at individuals or a collection of persons, like a company or association, under s 11 of the Penal Code and Explanation 2 to s 499.[96] This would include "members of the Cabinet" as a "sufficiently specific collection or body of persons".[97]

1.39 On appeal, the constitutionality of ss 499 and 500 of the Penal Code (the "criminal defamation provisions") was challenged. The appellant, Xu Yuanchen, was the director of The Online Citizen Pte Ltd ("TOC") which runs a socio-political website (the "TOC Website") of which Xu was the Chief Editor. On 4 September 2018, the second appellant, Daniel da Costa, sent an e-mail entitled "PAP MP apologises to SDP" to a TOC e-mail account, with the intention that the e-mail be published on the TOC website. That same day, Xu approved the publication of the e-mail on the TOC website as an article (the "Article").

1.40 Xu took down the Article from the TOC website on 18 September 2018, after receiving a direction from the Infocomm Media Development Authority ("IMDA") pursuant to s 16(1) of the Broadcasting Act.[98]

92 *Newton, David Christopher v Public Prosecutor* [2024] 3 SLR 1370 at [48].
93 *Newton, David Christopher v Public Prosecutor* [2024] 3 SLR 1370 at [48].
94 [2023] 5 SLR 1210.
95 Cap 224, 2008 Rev Ed.
96 *Xu Yuanchen v Public Prosecutor* [2023] 5 SLR 1210 at [23].
97 *Xu Yuanchen v Public Prosecutor* [2023] 5 SLR 1210 at [27].
98 Cap 28, 2012 Rev Ed.

1.41 The subject of the criminal defamation charge was a phrase in the Article alleging "corruption at the highest echelons", with the appellants charged for making this imputation knowing it would harm the reputation of Cabinet members.[99] Reading the relevant paragraph as a whole, there was an imputation that the members of Cabinet were responsible, because of their incompetence or failures, for the emergence of serious corruption in Singapore.[100]

1.42 On the question of the constitutionality of the criminal defamation provisions, this falls within Art 14(2)(*a*)[101] which permits derogation from the Art 14(1)(*a*)[102] right to freedom of speech on eight grounds, including that of defamation. Article 14(2)(*a*) provides that Parliament may by law impose necessary or expedient restrictions on Art 14(1)(*a*) liberties. As the criminal defamation provisions date back to pre-independence laws, it was argued that this was "not introduced, debated and enacted by Parliament"[103] and thus fell outside the scope of Art 14(2)(*a*). Consequently, it was argued that the criminal defamation provisions were not valid restrictions on free speech.[104] However, this was rejected as pre-independence laws retained by Parliament may also be said to be "imposed" by Parliament, "since their continued operation takes place only with Parliament's approval".[105] Indeed, the criminal defamation provisions have been "continuously retained" by Parliament in the numerous reviews of the Penal Code conducted since independence.[106] Their retention shows that Parliament considers this to be "necessary or expedient" to serve public order interests under Art 14(2)(*a*).

1.43 The mere retention of the law in itself does not show whether Parliament considered it to be "necessary or expedient" in relation to one of the Art 14(2)(*a*) enumerated purposes. This is something for the court to determine. However, since the purpose of the Penal Code is clearly related to public order, the retention of criminal defamation provisions suffices to find "an implicit recognition" that Parliament considers such provisions to be "necessary or expedient" in the interests of public order – there is no need for an explicit recognition of such link.[107]

99 *Xu Yuanchen v Public Prosecutor* [2023] 5 SLR 1210 at [7].
100 *Xu Yuanchen v Public Prosecutor* [2023] 5 SLR 1210 at [41].
101 Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint).
102 Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint).
103 *Xu Yuanchen v Public Prosecutor* [2023] 5 SLR 1210 at [74].
104 *Xu Yuanchen v Public Prosecutor* [2023] 5 SLR 1210 at [74].
105 *Xu Yuanchen v Public Prosecutor* [2023] 5 SLR 1210 at [75].
106 *Xu Yuanchen v Public Prosecutor* [2023] 5 SLR 1210 at [76].
107 *Xu Yuanchen v Public Prosecutor* [2023] 5 SLR 1210 at [78].

1.44 The General Division in *Xu Yuanchen* reaffirmed that proportionality analysis did not apply in Singapore constitutional law; the first appellant had argued that proportionality analysis should apply to determine if the criminal defamation provisions were constitutionally valid.[108]

1.45 Aedit Abdullah J noted that the doctrine of proportionality analysis comprised four sub-tests – that of a proper purpose, rational connection, necessity or minimal impairment test and a balancing test or strict proportionality.[109] While the proportionality analysis had been applied in jurisdictions such as the UK, Canada and the European Court of Human Rights, this did not determine its applicability in Singapore, where the established position is that proportionality analysis has never been part of our constitutional law.[110]

1.46 Abdullah J noted that its adoption would "contradict the principle of separation of powers" which is inherent in the Singapore Constitution.[111] It has consistently been held in Singapore law "that courts cannot create or amend laws in a manner which permits recourse to extra-legal policy factors and considerations".[112] Given the lack of institutional competence when it comes to handling extra-legal issues such as security or polycentric political considerations, and given that the court lacks a democratic mandate to pronounce on matters requiring the making of a value judgment, the evaluation of the substantive merits of laws, and of their normative desirability, should be left to the Legislature.[113] Judicial scrutiny is "defined by the enumerated rights and other provisions of the Constitution".[114] To adopt proportionality analysis would entail a rewriting of the Constitution, "arrogating to the courts a limitation on the breadth of action of the Legislature that is not contemplated by the text of the constitution".[115] This would entail grafting alien concepts to the text. Thus, the "true life of the text lies in its proper interpretation, not in the improper infusion of the subjective wishes of unelected officials, lawyers, or academics".[116] Proper mechanisms should be used to change the constitutional framework, rather than seeking to do so through the courts acting as mini-Legislatures.

108 *Xu Yuanchen v Public Prosecutor* [2023] 5 SLR 1210 at [80].
109 *Xu Yuanchen v Public Prosecutor* [2023] 5 SLR 1210 at [81].
110 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [87].
111 *Xu Yuanchen v Public Prosecutor* [2023] 5 SLR 1210 at [84].
112 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [77].
113 *Xu Yuanchen v Public Prosecutor* [2023] 5 SLR 1210 at [85].
114 *Xu Yuanchen v Public Prosecutor* [2023] 5 SLR 1210 at [88].
115 *Xu Yuanchen v Public Prosecutor* [2023] 5 SLR 1210 at [88].
116 *Xu Yuanchen v Public Prosecutor* [2023] 5 SLR 1210 at [88].

1.47 In determining the validity of a restriction to Art 14 of the Constitution, the three-step framework in *Wham Kwok Han Jolovan v Public Prosecutor*[117] ("*Jolovan Wham*") should be applied,[118] where Abdullah J noted that the reference in this test to balancing, which was not novel to Singapore law, was "quite different from the balancing exercise in proportionality analysis".[119] The Court of Appeal in *Jolovan Wham* had referenced several cases including *Chee Siok Chin v Minister for Home Affairs*[120] in this respect, and here the balance referred to was one required by the terms of Art 14 itself, such that a proposed rights restriction must be "necessary or expedient".[121]

1.48 The criminal defamation provisions satisfied the three-step *Jolovan Wham* test. First, the provisions did restrict freedom of speech under Art 14(1)(*a*). Second, Parliament did consider the provisions "necessary or expedient" in the interests of public order. Third, a clear nexus existed between the provisions and public order which is a ground of derogation enumerated under Art 14(2)(*a*). As such, they were constitutionally valid under Art 14(2)(*a*).

*B. Article 14 of the Constitution and contempt of court: section 3(1)(*a*) AJPA*

1.49 In *Attorney-General v Ravi s/o Madasamy*,[122] Ravi s/o Madasamy ("Mr Ravi") was found guilty of contempt of court under s 3(1)(*a*) of the AJPA,[123] among other contempt offences. The offence of scandalising the court under s 3(1)(*a*) poses a restriction to the Art 14 guarantee of freedom of expression and requires the intentional publishing of any matter or doing any act that "(i) imputes improper motives to or impugns the integrity, propriety or impartiality of any court; and (ii) poses a risk that public confidence in the administration of justice would be undermined …".[124] Under s 28 of the AJPA, the Attorney-General ("AG") bears the burden to prove all elements of each alleged instance of contempt beyond reasonable doubt.

1.50 The statutory "risk" test is a departure from the more rigorous "real risk" test articulated by the Court of Appeal in *Shadrake Alan v*

117 [2021] 1 SLR 476.
118 *Wham Kwok Han Jolovan v Public Prosecutor* [2021] 1 SLR 476 at [29]–[32].
119 *Xu Yuanchen v Public Prosecutor* [2023] 5 SLR 1210 at [90].
120 [2006] 1 SLR(R) 582.
121 *Xu Yuanchen v Public Prosecutor* [2023] 5 SLR 1210 at [91] citing *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [2].
122 [2023] SGHC 78.
123 Administration of Justice (Protection) Act 2016 (Act 19 of 2016).
124 Administration of Justice (Protection) Act 2016 (Act 19 of 2016) s 3(1)(*a*).

Attorney-General[125] ("*Shadrake*"). What the "risk" test requires is that the court be guided by the central question as expressed in *Wham Kwok Han Jolovan v Attorney-General*:[126] "Is the risk one that the reasonable person coming across the contemptuous statement would think needs guarding against so as to avoid undermining public confidence in the administration of justice?"[127] Both the content and context of the alleged contemptuous statement may be relevant, in asking this question.[128] For *mens rea* to be satisfied, there must be an intention to publish such materials or to commit such an act, though there is no need for there to have been an intent to scandalise the court, consonant with the common law position. The AJPA has embodied the view of the Court of Appeal in *Shadrake* that the concept of fair criticism relates to liability as distinct from being a separate defence to contempt, so that it falls to the AG to prove the impugned statement does not constitute fair criticism.[129] As the case law indicates, fair criticism would: (a) have some objective or rational basis; (b) be made in good faith and be respectful; and (c) generally be expressed in a temperate and dispassionate manner.[130]

1.51 Mr Ravi's allegation in open court that District Judge Chay Yuen Fatt was biased on 9 November 2021 was made after an exchange with DJ Chay who noted that Mr Ravi was "double fixed at 2 trials". Mr Ravi said that DJ Chay was biased and should discharge himself.[131] Hoo J found that this unwarranted allegation directly impugned the impartiality of the court and fell squarely within s 3(1)(*a*) of the AJPA, as assertions that the court would not decide a case other than in accordance with its merits is "self-evidently among the most serious attacks that one can make against courts and the administration of justice" and "goes to the very heart and essence of the judicial mission".[132] Further, there was "no rational basis" for Mr Ravi to attack DJ Chay's impartiality and his allegations were not made in good faith or in a temperate manner and so did not constitute fair criticism.[133]

1.52 Mr Ravi proceeded to accuse Audrey Lim J on 22 November 2021 of being biased multiple times after Lim J tried to provide directions

125 [2011] 3 SLR 778.
126 [2020] 1 SLR 804.
127 *Attorney-General v Ravi s/o Madasamy* [2023] SGHC 78 at [35] citing *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [36].
128 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [38].
129 *Shadrake Alan v Attorney-General* [2011] 3 SLR 778 at [80].
130 *Wham Kwok Han Jolovan v Public Prosecutor* [2021] 1 SLR 476 at [41]; *Attorney-General v Tan Liang Joo John* [2009] 2 SLR(R) 1132 at [15]–[23].
131 *Attorney-General v Ravi s/o Madasamy* [2023] SGHC 78 at [61].
132 *Attorney-General v Ravi s/o Madasamy* [2023] SGHC 78 at [62] citing *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [33].
133 *Attorney-General v Ravi s/o Madasamy* [2023] SGHC 78 at [67].

for the cross-examination of Chua Qwong Meng (Mr Ravi's plaintiff) by Zoom. He asserted that she favoured opposing counsel Davinder Singh and asked her to discharge herself from the case. This also fell within the meaning of s 3(1)(*a*) of the AJPA.[134] Lim J's cross-examination directions were "common and sensible ones" and did not favour either party, such that there was "absolutely no reason at all" for Mr Ravi to levy accusations of bias, which attacked the impartiality of the court and risked undermining public confidence in the administration of justice. The allegations of bias, made thrice during Mr Ravi's exchange with Lim J, indicated intentionality, in satisfaction of the *mens rea* requirement.[135] It did not constitute fair criticism as there was no rational basis to impugn Lim J's impartiality, "merely because he disagreed with Lim J's directions",[136] neither were such allegations made in a dispassionate and temperate manner. Accordingly, Mr Ravi was found liable under s 3(1)(*a*) of the AJPA for contempt of court for his "baseless allegations" of bias. Mr Ravi's accusations that Lim J's directions were an "illegal law" and "against the International Human Rights Law"[137] were not only unbecoming of a legal practitioner[138] but amounted to an act of contempt under s 3(1)(*a*) as they went beyond registering objections to Lim J's directions but towards impugning the propriety of the court. As such, a "reasonable person" listening to these remarks "would understand them to mean that Lim J's conduct of the proceedings as highly unsatisfactory and even fundamentally contrary to the law",[139] which posed a risk of undermining public confidence in the administration of justice. Mr Ravi's bipolar disorder did not exculpate him from liability.[140]

C. Standing, personal rights and law not in operation: Articles 9 and 12 of the Constitution

1.53 In *Masoud Rahimi bin Mehrzad v Attorney-General*[141] ("*Masoud Rahimi*") 36 prisoners awaiting capital punishment ("PACPs") brought a case seeking declarations that two new provisions introduced by way of s 2(*b*) of the Post-appeal Applications in Capital Cases Act 2022[142] (the "PACC Act") were void as they were inconsistent with the Art 12 equality guarantee and "the right to fair trial and access to justice" contained in Art 9.

134 *Attorney-General v Ravi s/o Madasamy* [2023] SGHC 78 at [91].
135 *Attorney-General v Ravi s/o Madasamy* [2023] SGHC 78 at [92].
136 *Attorney-General v Ravi s/o Madasamy* [2023] SGHC 78 at [94].
137 *Attorney-General v Ravi s/o Madasamy* [2023] SGHC 78 at [103].
138 *Attorney-General v Ravi s/o Madasamy* [2023] SGHC 78 at [104].
139 *Attorney-General v Ravi s/o Madasamy* [2023] SGHC 78 at [105].
140 *Attorney-General v Ravi s/o Madasamy* [2023] SGHC 78 at [65].
141 [2024] 4 SLR 331.
142 Act 41 of 2022.

1.54 The relevant provisions were ss 60G(7)(*d*) and 60G(8) of the Supreme Court of Judicature Act 1969;[143] although the PACC Act had not yet come into force at the time of this judgment. These provisions were to provide a process for making further applications after all avenues of appeal have been exhausted.[144] The Court of Appeal, in deciding whether to grant a Post-appeal Application in a Capital Case ("PACC"), is to consider the four matters set out in ss 60G(7)(*a*)–60G(7)(*d*) of the SJCA. Provision is made for the consideration of the applicant's and respondent's written submissions, if any, and that such applications may be dealt with summarily by a written order of the Court of Appeal.

1.55 This constitutional challenge is predicated on the argument that s 60G(7)(*d*) of the SCJA, in placing a burden on the applicant to show he had a "reasonable prospect of success" in order to get the PACC permission to commence the challenge to conviction, sentence or stay of execution, denied that applicant recourse to court processes on grounds of a predictive exercise at the outset of the proceedings.[145] This violated the right to fair trial and access to justice contained in Art 9 and was inconsistent with Art 12 of the Constitution.[146] By allowing the PACC to be dismissed summarily without being set down for a hearing under s 60G(8), the applicant was prevented from addressing the court or effectively canvassing his arguments before the court on an application on which his life hinged, violating Arts 9 and 12.[147] The AG applied for a striking-out application under O 9 r 16(1)(*a*) of the Rules of Court on the ground that the pleading failed to disclose a reasonable cause of action. The applicable test was whether the action had some chance of success.[148]

1.56 The General Division held that the applicants failed to demonstrate they had *locus standi* to bring an action for declaratory relief with respect to their constitutional challenge, according to the test set out in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd*.[149] Specifically, they were unable to show a violation of a "personal right", such as a constitutional right. They had tried to argue, borrowing from *Tan Eng Hong v Attorney-General*[150] ("*Tan Eng Hong*") that a constitutional right violation may be brought about "by the very existence of an allegedly unconstitutional law in the statute books".[151] As none of the impugned

143 2020 Rev Ed.
144 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [5].
145 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [9(a)].
146 Constitution of the Republic of Singapore (2020 Rev Ed).
147 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [9(b)].
148 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [21].
149 [2006] 1 SLR(R) 112.
150 [2012] 4 SLR 476.
151 *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [115].

provisions in the PACC Act were operational, they did not engage the applicant's constitutional rights or any legal interest.[152] Drawing from *Tan Seng Kee v Attorney-General*,[153] s 377A of the Penal Code[154] was held to be legally unenforceable owing to the AG's representation that it would not be proactively enforced.[155] This would only be so until such time that the government gave clear notice that it intended to reassert the power to enforce s 377A by way of prosecution. Until it did, "there was no controversy and no real threat of prosecution, and the appellants therefore did not have standing to pursue their constitutional challenges".[156]

1.57 Hoo Sheau Peng J noted that:[157]

> … even though a law might be on the books and may gain or regain its legal effect upon some act on the part of the executive, until it did, and so long as it remains legally unenforceable, there can be no real and credible threat of infringement of rights, and consequently no standing to challenge its constitutionality.

Even if the applicant would have *locus standi* once the operative date of the impugned provisions was known, it would not have standing for the immediate application.

1.58 The General Division stated that even if the PACC Act was in force, this would not necessarily mean they would have the standing to challenge it, as the Court of Appeal in *Tan Eng Hong* stated that a violation of a constitutional right, not the mere holding of one, was needed. Such violation would be more easily demonstrated "where the law basically targets a group, and an applicant falls within the group".[158] Assuming the existence of an allegedly unconstitutional law in the statute book, whether this sufficed to show a violation of constitutional rights would depend on the case facts, what the law provided for and the need to ensure that standing rules do not "seriously curtail the efficiency of the executive in practicing good governance".[159] These cases would be "rare".

1.59 The applicants argued that the PACC Act targeted PACPs like the applicants. In examining what the law provided for, Hoo J noted that, unlike s 377A of the Penal Code which criminalised acts of gross indecency between males, the impugned provisions of the PACC Act were "aspects of a new procedure" and did not "lay down substantive

152 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [27].
153 [2021] 1 SLR 1347.
154 Cap 224, 2008 Rev Ed.
155 *Tan Seng Kee v Attorney-General* [2021] 1 SLR 1347 at [148]–[149].
156 *Tan Seng Kee v Attorney-General* [2021] 1 SLR 1347 at [153] and [330].
157 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [29].
158 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [30].
159 *Tan Eng Hong v Attorney-General* [2012] 4 SLR 390 at [109].

law" nor "affect substantive rights".[160] While substantive criminal law could hold would-be violators *in terrorem* such that its effects are felt *sans* actual prosecution,[161] the same did not apply to procedural law. While the courts emphasised that a person should not have to break the law to obtain standing to challenge the constitutionality of that law, "where a procedural law is being challenged, similar concerns do not apply".[162] Therefore the "mere enactment" of the impugned provisions without more did not suffice to show the applicant's constitutional rights were violated. Hoo J thus considered the immediate case did not fall into the category of exceptional and rare cases "where the mere existence of the impugned provisions in the statute books suffices to show a violation of constitutional rights".[163] There was no "real controversy" in respect of the PACC Act, as the challenge to the Act, which did not apply to any application the applicants would wish to make before the court, was a theoretical one.[164] Being unable to show a violation of their constitutional rights, the applicants were also unable to meet the "real interest" requirement.[165]

1.60 In making *obiter* observations, Hoo J considered that the impugned provisions, "*ie,* that the Court of Appeal considers the reasonable prospect of success of a PACC in deciding whether to grant PACC permission, and the power to summarily deal with such an application",[166] were consistent with Art 9 of the Constitution. It disregarded the view of the Canadian Supreme Court in *R v Haevischer*[167] cited by the applicants[168] to the effect that the right to fair trial would be preserved if, in the criminal context, only manifestly frivolous applications should be summarily dismissed.

1.61 Hoo J emphasised that the right to a fair trial and access to justice could not be looked at in isolation but in context "in light of the part which it plays in the complete judicial process.[169] The PACC Act applied to the post-appeal stage, and not the trial stage, and even in death penalty cases the well-established principle of finality would gain prominence the closer the matter was to the "very tail end of the criminal process",[170]

160 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [33].
161 *Tan Eng Hong v Attorney-General* [2012] 4 SLR 390 at [110].
162 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [33].
163 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [34].
164 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [36].
165 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [37].
166 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [41].
167 [2023] SCC 11.
168 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [43].
169 See *Haw Tua Tau v Public Prosecutor* [1981–1982] SLR(R) 133 at [25].
170 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [45] citing *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 at [50].

as held in *Kho Jabing v Public Prosecutor*.[171] Singapore courts have also emphasised that concluded appeals should not be easily susceptible to challenge and, in this context, the PACC Act cannot be said to violate Art 9.[172] Further, the specific features and standards under attack were "not novel ones within the legal system", such as the need to show an arguable case of reasonable suspicion in favour of the grant of remedies under O 24 r 5(3)(*b*)(ii) of the Rules of Court.[173] Article 9 of the Constitution did not proscribe the prescription of tests such as requiring the applicant to demonstrate "a reasonable prospect of success"; it falls to Parliament to determine what formulation to adopt.[174]

1.62 Further, Art 9 did not "dictate that a right to a fair hearing must invariably entail the right to be heard at an oral hearing".[175] This was raised in relation to the argument that the summary procedure under s 60G(8) of the SJCA may entail the denial of the applicant's right to make an oral submission at a hearing.

1.63 Citing *Newton*, the applicants argued that it was the norm that parties would be afforded the opportunity to make oral submissions even where written submissions were filed in advance. Oral submissions were useful to the court where the parties "take the opportunity to highlight or emphasise key points, or to meaningfully respond to the arguments raised by the opposing party. At the same time, any misunderstandings, misconceptions, doubts or questions in the mind of the judge can be cleared up and resolved".[176]

1.64 However, Hoo J noted that the comments in *Newton* had to be contextually understood, as it concerned a first-instance hearing and related to the importance of considering oral submissions made at a plead guilty hearing or the end of a trial. Such considerations did not apply to post-appeal applications as, by then, an applicant would have exhausted trial and appeal processes where they would have enjoyed full hearings at these earlier stages.[177] If there were new materials which could not have been adduced earlier even with reasonable diligence, the Court of Appeal would have to consider this under s 60G(7) of the SCJA in deciding the application for PACC permission.[178]

171 [2016] 3 SLR 135.
172 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [45].
173 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [46].
174 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [48].
175 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [52].
176 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [50].
177 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [51].
178 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [53].

1.65 The PACC Act provisions thus did not impede access to justice, in clarifying an avenue for PACC. The importance of striking a balance was underscored, in that access to justice "does not require a criminal system to allow a meritorious applications brought at the tail end of the criminal process to progress to the fullest extent".[179] Access to justice at the tail end of the criminal process had to be balanced against the need to ensure the "proper utilization of judicial resources, and to preserve the integrity of the judicial process".[180]

D. Article 12 of the Constitution: equality and legislation

1.66 The issue of whether the provisions in the PACC Act were inconsistent with Art 12 of the Constitution was raised in *Masoud Rahimi*. The argument was that the PACC Act singles out and prescribes further restrictions on PACPs filing applications over and above the existing law governing post-appeal applications before the PACC Act was enacted, and that apply generally to all post-appeal applications.

1.67 In her *obiter* remarks, Hoo J noted that the Court of Appeal had left it open as to which of two tests in applying the "reasonable classification" test to legislation was to be preferred: whether the threshold approach in *Lim Meng Suang v Attorney-General*[181] ("*Lim Meng Suang*") or the two-step test in *Syed Suhail bin Syed Zin v Attorney-General*[182] ("*Syed Suhail*"). Hoo J noted that while the *Lim Meng Suang* approach only applied to sift out patently illogical or incoherent laws, the *Syed Suhail* approach "contemplates a higher level of scrutiny" in evaluating whether a statutory provision satisfies the reasonable classification test, in particular where an individual's life or liberty is at stake.[183] As the *Syed Suhail* test was "more favourable" to the applicants,[184] Hoo J applied this in considering whether their case disclosed a reasonable cause of action.

1.68 The first stage of the *Syed Suhail* test involves identifying the purported criterion for the differential treatment in question. The differentia the applicants apparently identified was that of prisoners awaiting capital punishment as opposed to all other prisoners, amongst those wishing to take out post-appeal applications.[185] Even if the first limb of the *Lim Meng Suang* approach was applied, between PACPs and other

179 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [54].
180 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [54].
181 [2015] 1 SLR 26.
182 [2021] 1 SLR 809.
183 *Tan Seng Kee v Attorney-General* [2021] 1 SLR 1347 at [328].
184 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [60].
185 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [61].

prisoners, Hoo J considered that the differentia was not unintelligible both in terms of not being capable of being intellectually apprehended or "so unreasonable no reasonable person would ever contemplate the differentia concerned as being functional as an intelligible differentia".[186]

1.69 As for the second limb of the *Syed Suhail* approach, the AG was of the view that the legislative object of the PACC Act was to prevent abuse of process by PACPs when making PACC applications such that there was a "complete coincidence" with the differentia of "PACPs seeking to make a PACC application". Hoo J did not find the PACC object to be tantamount "to introduce the very differentia it embodies", as the applicants had argued in urging the more general framing of the legislative object as being to prevent the abuse of court processes.

1.70 Hoo J took note that PACPs, as a class of prisoners facing grave, final sentences, had "an incentive to file last minute applications to re-litigate matters" already decided, to delay the execution of their scheduled sentences. In fact, there had empirically been recent instances of them doing so, compared to prisoners facing non-capital sentences, as mentioned during the Second Reading debate.[187] Even if the legislative purpose was more broadly cast in terms of preventing the abuse of process generally, it need not enjoy a "perfect relation" with the differentia to satisfy the reasonable classification test. The Art 12 challenge had no chance of success, given the fact that PACPs "have been prone to file the applications within which the PACC Act is concerned", which sufficed "to render the relationship more than capable of withstanding scrutiny".[188]

E. Article 12 of the Constitution: equality and executive action

1.71 In *Kottakki Srinivas Patnaik v Attorney-General*,[189] the applicant, a director and beneficial owner of Neptune Ship Management Pte Ltd, sought judicial review for criminal proceedings initiated against him for involvement in giving bribes in a private sector corruption scheme. He argued that the Public Prosecutor's selective investigation violated Art 12(1) of the Constitution,[190] as the other parties involved in the corruption scheme, forming the basis of the charges, had not been investigated. Further, he alleged that the charges were unlawful

186 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [61].
187 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [63] citing Singapore Parl Debates; Vol 95, Sitting No 77; 29 November 2022 (Rahayu Mahzam, Senior Parliamentary Secretary to the Minister for Law).
188 *Masoud Rahimi bin Mehrzad v Attorney-General* [2024] 4 SLR 331 at [63].
189 [2023] SGHC 174.
190 Constitution of the Republic of Singapore (2020 Rev Ed).

and irrational in singling out the applicant and not being based on any conclusive evidence, contrary to Art 35(8) of the Constitution.

1.72 The issue before the court was whether the materials in question disclosed an arguable or *prima facie* case of reasonable suspicion in favour of granting the prohibiting and quashing orders sought by the applicant, as the exercise of prosecution discretion under Art 35(8) is susceptible to judicial review and the applicant had a sufficient interest in the matter.[191] The burden of proof was on a person challenging an executive decision based on the alleged breach of a constitutionally-guaranteed fundamental liberty or administrative law review ground. While the threshold for proof was "a very low one", it did not mean "that the evidence and arguments placed before the court can be either skimpy or vague and bare assertions will not suffice".[192]

1.73 The General Division affirmed that equality under Art 12(1) required that all persons in like situations be treated alike,[193] citing *Attorney-General v Datchinamurthy a/l Kataiah*.[194] The two-step test set out in *Syed Suhail* was applicable.[195] First, the applicant bears the evidential burden of showing he was treated differently from other equally situated persons. Second, the burden then shifts to the relevant decision-maker to show that the differential treatment was reasonable, in being based on legitimate reasons which made such treatment proper. Further, in considering whether persons being compared are similarly situated, the test is one of whether a prudent person would objectively think the persons compared were similarly situated in all material respects.

1.74 Counsel argued that "if two people could be charged for the same offence arising out of the same facts, they would be equally situated".[196] However, even if correct, this axiom, which did not reflect the law and guidance set out previously by the Court of Appeal in four cases, did not assist the applicant given that he was the sole bribe-giver in the case, and the other parties in the corruption scheme were in the different position of being intermediaries or bribe recipients. The applicant alone was charged under s 6(*b*) of the Prevention of Corruption Act[197] ("PCA") for giving gratification, and did not provide any materials, beyond a bare

191 *Gobi a/l Avedian v Attorney-General* [2020] 2 SLR 883 at [44].
192 *Gobi a/l Avedian v Attorney-General* [2020] 2 SLR 883 at [54].
193 *Kottakki Srinivas Patnaik v Attorney-General* [2023] SGHC 174 at [25] citing *Attorney-General v Datchinamurthy a/l Kataiah* [2022] 2 SLR 421 at [29].
194 [2022] 2 SLR 421.
195 *Syed Suhail bin Syed Zin v Attorney-General* [2015] 1 SLR 26 at [61]–[62].
196 *Kottakki Srinivas Patnaik v Attorney-General* [2023] SGHC 174 at [35].
197 Cap 241, 1993 Rev Ed.

assertion that he was not the sole bribe-giver, to show a *prima facie* case.[198] Charges were brought against other persons with respect to accepting gratification under s 6(*a*) of the PCA. Other possible candidates for being charged identified by the applicant were not similarly situated as they were intermediary parties.[199]

1.75 The AG was not under any general obligation to disclose his reasons for exercising a particular prosecutorial discretion, nor was it necessarily in the public interest to prosecute every offender.[200]

1.76 Thus, the applicant failed to show a *prima facie* case of reasonable suspicion that the exercise of prosecutorial discretion against him was in breach of Art 12(1), failing to displace the presumption of constitutionality of executive action.[201] It followed that there was no case that Art 35(8) was breached, as this argument relied on Art 12(1) being breached.[202]

198 *Kottakki Srinivas Patnaik v Attorney-General* [2023] SGHC 174 at [36].
199 *Kottakki Srinivas Patnaik v Attorney-General* [2023] SGHC 174 at [40]–[41].
200 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [53] and [74].
201 *Kottakki Srinivas Patnaik v Attorney-General* [2023] SGHC 174 at [51] and [56].
202 *Kottakki Srinivas Patnaik v Attorney-General* [2023] SGHC 174 at [60].