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Case Comment

BURDEN OF PROOF AND FALSE STATEMENTS OF FACT UNDER THE PROTECTION FROM ONLINE FALSEHOODS AND MANIPULATION ACT 2019

Singapore Democratic Party v Attorney-General
[2020] SGHC 25

The Online Citizen v Attorney-General
[2020] SGHC 36

The Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) ("POFMA") was passed after heated debates in and out of Parliament. Recent instances in which Pt 3 Directions were issued under the Act led to appeals by affected statement-makers, with the first two High Court decisions concerning POFMA taking opposing positions on a crucial question: on whom does the burden of proving the truth or falsity of a subject statement lie in such appeals? This comment examines this issue in light of the two cases, taking the position that both Art 14 of the Constitution of the Republic of Singapore (1999 Reprint) and a purposive interpretation of the statute favour imposing the burden on the Government.

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I. Introduction

1 The Protection from Online Falsehoods and Manipulation Act 2019[1] ("POFMA") combats the serious threat of online falsehoods. However, as with all complex pieces of legislation, POFMA's devil is in the details. One such detail which has proved controversial concerns the legal burden of proof in an appeal against the issuance of a Pt 3 Direction ("Direction"), under s 17 of the POFMA, on grounds that the statement which it targets ("the subject statement") is a true statement of fact under s 17(5)(*b*). The exact same issue applies in relation to an appeal against a Pt 4 Direction on the grounds of s 29(5)(*b*).

2 The first two s 17 appeals, *Singapore Democratic Party v Attorney-General*[2] ("*SDP*") and *The Online Citizen v Attorney-General*[3] ("*Online Citizen*"), reached diametrically opposed conclusions on who bears the burden of proof. Both cases analysed the problem primarily in terms of Art 14 of the Constitution of the Republic of Singapore[4] ("the Constitution"), and the interpretation of POFMA after taking into account related subsidiary legislation. In this comment, the authors follow the same approach, addressing the arguments made in *SDP* and *Online Citizen* along the way, and ultimately concluding that both Art 14 and POFMA itself, place the burden on the Government in s 17 appeals.

II. Article 14 and burden of proof in section 17 appeals

3 The starting point of the analysis should be how Art 14 affects the burden of proof in s 17 appeals: since the Constitution is supreme, this answer will be dispositive of the burden of proof question. The only exception is where the statement-maker is not a Singaporean, in which case Art 14 does not apply and the burden must be determined by non-constitutional considerations,[5] which are addressed below.[6]

A. Relevance of Art 14 to the burden of proof question

4 Before going into the effect of Art 14, the mechanism by which Art 14 affects the burden should first be explained.

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1 Act 18 of 2019.
2 [2020] SGHC 25.
3 [2020] SGHC 36.
4 1999 Reprint.
5 Article 14(1)(*a*) of the Constitution of the Republic of Singapore (1999 Reprint) grants a right of free speech only to "citizen[s] of Singapore".
6 See paras 26–56 below.

5 In *SDP*, the High Court held that Art 14 of the Constitution placed the burden on the minister to prove the falsity of the subject statement, because:[7]

> Given that it is the Minister who is contending before the Court that the [statement-maker's] constitutional right to free speech should be constrained by the [Direction] because it has made a false statement of fact … it is the Minister who desires this Court to give judgment that the [statement-maker's] rights should be curtailed … [and so] it is for the Minister to prove that facts warranting the curtailment of the [statement-maker's] rights exist.

6 Thus, in *SDP* the Art 14 enquiry concerned whether the specific Direction before it was constitutional, given the constraint it imposed on free speech. In that enquiry, the veracity of the subject statement was a relevant fact.

7 By contrast, in *Online Citizen*, the High Court noted that Art 14 did not place the burden on the minister:[8]

> With respect, I also cannot agree … that the issuance of a [Direction] constrains the freedom of speech under Art 14(1) of the Constitution because the nature of the speech in question is not in the categories of speech covered by Art 14 … the right to free speech pertains to the communication of 'information not misinformation'.

8 Unlike in *SDP*, the court in *Online Citizen* did not focus on the constitutionality of the Direction before it. In particular, it could not have reasoned that the Direction did not contravene Art 14, since that would have been circular: the court could not rationally say that the Direction did not contravene Art 14 because Art 14 protected truth, not falsehoods, when the very question before it was whether the subject statement was true or false. Instead, a better understanding of *Online Citizen* would be that the court found POFMA's legislative provisions empowering ministers to issue Directions constitutionally permissible. The "speech in question" identified by the court referred not to the subject statement behind the Direction before it, but the class of statements which POFMA targets in general.

9 Thus, while *SDP* and *Online Citizen* both discussed Art 14, the subject of the enquiry was different: *SDP* focused on a specific Direction, whereas *Online Citizen* focused on the legislation.

10 Both these enquiries were legitimately entertained: courts have always entertained challenges to the constitutionality of legislative or

7 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [37].
8 *The Online Citizen v Attorney-General* [2020] SGHC 36 at [35]–[37].

executive acts when the question of constitutionality "arises as a collateral issue" in the determination of rights and liabilities in non-judicial review proceedings.[9] But how was either enquiry relevant to the burden of proof in s 17 appeals?

11 The answer is that if common factual issues arise in the Art 14 challenge and the POFMA s 17(5)(*b*) assessment, the burden in relation to that issue under Art 14 can be conclusive. This is because any Art 14 challenge made in a s 17 appeal will become the court's first concern, given that questions about the constitutionality of a Direction are logically anterior to questions about its justifiability under statute. Consequently, where the same issues arise, the burden under Art 14 is conclusive of the point if it is placed on the Government. Either the Government can discharge the Art 14 burden, in which case the same finding of fact will be made regardless of who bears the burden under s 17(5)(*b*); or the Government cannot discharge the Art 14 burden, in which case the Direction will likely be unconstitutional and satisfaction of s 17(5)(*b*) of POFMA unnecessary.

12 It also follows that, in determining the burden of proof in s 17 appeals, the only relevant Art 14 enquiry is that concerning the constitutionality of a Direction (an executive act), not POFMA itself (a legislative act). This is because there is no overlap between the issues relevant to POFMA's constitutionality, and the issues relevant to s 17(5)(*b*). The former concerns whether measures taken against a class of statements are permissible under the Constitution; the latter concerns whether a specific statement falls within that class at all.

13 By contrast, there is a common issue between the constitutionality of a Direction under Art 14, and its justifiability under s 17(5)(*b*): the veracity of the statement. This issue is relevant to constitutionality under Art 14 because the dominant theory of free speech in Singapore prizes a search for truth, and thus values speech to the extent that it contributes to the marketplace of ideas from which truth could emerge.[10] In particular, as Sundaresh Menon CJ noted in *Attorney-General v Ting Choon Meng*[11] ("*Ting Choon Meng*"), Singapore's version of this theory entails that, "false speech … can contribute little to the marketplace of *ideas*" [emphasis in

9 See *Chan Hiang Leng Colin v Public Prosecutor* [1994] 3 SLR(R) 209 at [22]–[23] and [33]. See, *eg*, *Ong Ah Chuan v Public Prosecutor* [1979–1980] SLR(R) 710 and *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012, where the constitutionality of legislation and executive acts, respectively, were considered in non-judicial review proceedings.

10 See *Lee Hsien Loong v Ngerng Yi Ling Roy* [2016] 1 SLR 1321 at [98]–[99] for a description of this theory.

11 [2017] 1 SLR 373.

original].[12] Thus, in assessing a Direction's constitutionality under Art 14, the veracity of a statement can be a relevant fact, since a statement's truth will be a significant (if not determinative) factor militating against the Direction's constitutionality. Indeed, in Art 14 challenges to Directions, it can be assumed that the veracity of a statement *will* be a relevant fact – after all, the entire purpose of POFMA is to deal with falsehoods.[13]

14 For the above reasons, the answer to who bears the burden of proving that a statement is either true or false under an Art 14 challenge to a Direction is also practically relevant to the burden under s 17(5)(*b*). If the court finds that the burden for proving a subject statement's falsity lies on the Government for the Art 14 challenge, it matters not where it will lie for the subsequent s 17(5)(*b*) enquiry: if the burden is discharged in the challenge, the finding of fact will simply be used to answer the s 17(5)(*b*) enquiry; if it is not, the Direction will likely be unconstitutional.

B. Burden of proof in an Article 14 dispute

15 The question then is: where does the burden in an Art 14 challenge lie? The burden of proving that there has been "speech" for the purposes of Art 14(1)(*a*) lies on the individual. However, as V K Rajah J noted in *Chee Siok Chin v Minister for Home Affairs*,[14] "the *Government* must satisfy the court that there is a factual basis on which Parliament has considered it 'necessary or expedient' to" further a public interest listed as an exception to free speech under Art 14(2)(*a*) [emphasis added].[15]

16 Thus, the critical question here is whether the subject statement's veracity is a relevant enquiry to Art 14(1)(*a*) or 14(2)(*a*). If it pertains to Art 14(1)(*a*), the burden lies on the statement-maker. If it pertains to Art 14(2)(*a*), the burden lies on the Government.

17 The issue is one of construction and must be resolved by reference to the Constitution's text and context.[16] The text of Art 14 suggests that a statement's veracity is an enquiry relevant only to Art 14(2)(*a*). Art 14(1)(*a*)'s unqualified use of the term "speech" indicates that all communications, true or false, are covered. Such a literal interpretation is supported by the approach of local courts towards other fundamental

12 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [115].
13 It is possible to justify restricting true speech under Art 14(2)(*a*) of the Constitution of the Republic of Singapore (1999 Reprint). However, the Government would presumably rely on other statutes in such scenarios.
14 [2006] 1 SLR(R) 582.
15 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [49].
16 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [54].

liberties: they have consistently read terms such as "religion", "life" and "liberty" in a literal manner – to mean supernatural beliefs,[17] biological life[18] and non-incarceration,[19] respectively – and then accommodated the various applicable theories of religion, life and liberty in the exceptions to those rights. There is thus no good reason why courts should not also read "speech" literally, and to accommodate the truth-based theory of speech in the Art 14(2)(*a*) exceptions.

18 Moreover, the context of Art 14(1)(*a*) when read with Art 14(2)(*a*), and judicial practice in defamation cases, also suggests that "speech" in Art 14(1)(*a*) refers to all communications, not just true communications. Otherwise, the provision in Art 14(2)(*a*) allowing "speech" to be limited "to provide against … defamation" would be rendered otiose. After all, no claim in defamation could ever be sustained against a true statement. Thus, in defamation claims, courts always begin by noting that the defendant has a right to free speech under Art 14(1)(*a*), but then note that the right may be limited through the tort of defamation under Art 14(2)(*a*).[20] Courts do not say that the defendant must first show that his statement is true before he can even claim a right of free speech under Art 14(1)(*a*), after which the plaintiff's claim in defamation is necessarily defeated.

19 Thus, on a proper interpretation of Art 14, a statement-maker establishes his Art 14(1)(*a*) right by proving that a communication was made, after which the Government must prove that the communication implicates one of the legitimate restrictions on speech under Art 14(2)(*a*).

20 In the context of s 17 appeals, the statement-maker must necessarily have communicated something, satisfying the requirement under Art 14(1)(*a*). It follows that it is the *Government* who must bear the burden of proving that the speech is false and therefore capable of being restricted under Art 14(2)(*a*).

C. Presumption of constitutionality

21 Notwithstanding the above, it may be argued that there is a presumption of constitutionality which operates to impose on the party challenging the constitutionality of an executive act the burden

17 *Nappalli Peter Williams v Institute of Technical Education* [1999] 2 SLR(R) 529 at [26]–[28].
18 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [45].
19 *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR(R) 754 at [6].
20 See, *eg*, *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1990] 1 SLR(R) 337 at [5] and *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 1 SLR(R) 791 at [56] and [60].

of proof on all questions of constitutionality – even questions relating to the exceptions to fundamental liberties, like those in Art 14(2)(*a*).[21] Although the presumption has come under heavy criticism,[22] it is still invoked today,[23] and so one operates here on the assumption that it exists.

22 Nevertheless, courts should not invoke the presumption when assessing a subject statement's veracity to determine a Direction's constitutionality under Art 14, since that enquiry's nature removes the justification for invoking the presumption.

23 As Chan Sek Keong and Jaclyn Neo have noted, the presumption of constitutionality is a doctrine of deference, intimately tied to the separation of powers doctrine as undergirded by the ideas of relative institutional competence.[24] Generally, constitutional challenges to executive acts tend to involve controversial political, moral or technical questions. Courts should defer to the Government on these matters because of the Government's institutional competence (for example, its democratic credentials and/or technical subject-matter expertise), thereby justifying the presumption.[25]

24 However, some constitutional challenges raise only questions which fall squarely within the court's institutional competence. And as Menon CJ noted in *Tan Seet Eng v Attorney-General*,[26] when courts assess executive acts through enquiries within their institutional competence, "the question of deference to the Executive's discretion simply does not arise".[27] Thus, in constitutional challenges raising such questions, relying on the presumption would be indefensible. The challenge one may bring against a Direction under Art 14 is the perfect example: it raises only the question of whether a statement of fact is true or false. That question is one

21 See, *eg*, *Chan Hiang Leng Colin v Public Prosecutor* [1994] 3 SLR(R) 209 at [56].

22 See Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code" (2019) 31 SAcLJ 773 at 830–840, paras 108–125; and Jack Tsen-Ta Lee, "Rethinking the Presumption of Constitutionality" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (New York: Routledge, 2017) ch 6.

23 Most recently in *Wham Kwok Han Jolovan v Public Prosecutor* [2020] 3 SLR 1180 at [29].

24 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code" (2019) 31 SAcLJ 773 at 831–833 and 835, paras 110–111 and 115; and Jaclyn L Neo, "Autonomy, Deference and Control: Judicial Doctrine of Separation of Powers in Singapore" (2018) 5(2) JICL 461 at 465–467 and 475–476.

25 See also *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [105], where the Court of Appeal found a similar justification for the basis and breadth judicial review in administrative law.

26 [2016] 1 SLR 779.

27 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [106].

which courts frequently answer in trial, and one which even Parliament thought should be answered by "the law of evidence … [on] how truth or falsity should be established … [and] the body of principles that form part of case law".[28] The Judiciary is thus institutionally competent to answer it, and no presumption of constitutionality should be accorded to the Government on this point.

25 Thus, properly understood, the burden of proving the falsity of a subject statement to establish the Direction's constitutionality under Art 14 lies on the Government. Moreover, the presumption of constitutionality should not apply to displace this conclusion. So regardless of where the burden under s 17(5)(*b*) would otherwise fall, courts must always require the Government to prove the falsity of subject statements in s 17 appeals.

III. Statutory interpretation and burden of proof in s 17 appeals

26 If constitutional considerations do not determine the issue, then the burden of proof for a POFMA appeal must necessarily be determined by interpreting POFMA's provisions so that Parliament's intention can be discerned.[29] It is trite that a statute must be interpreted purposively, taking into account the possible meanings of the text, given the context of the enactment as a whole, before comparing each possible interpretation with the purpose of the statute.[30] The purpose of the statute is to be derived from the text itself, and in limited circumstances, from extraneous materials.[31]

27 This approach was correctly emphasised by *Online Citizen*.[32] However, the court gave too much weight to the literal meaning of s 17(5) *in vacuo*, and therefore came to the wrong conclusion. The purpose of the appeal process is better advanced by imposing the burden on the minister, and this meaning can reasonably be borne by the text.

28 *Parliamentary Debates, Official Report* (7 May 2019) vol 94 "Second Reading Bills: Protection from Online Falsehoods and Manipulation Bill" (K Shanmugam, Minister for Home Affairs and Law).
29 *Sheagar s/o TM Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 at [54].
30 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [54].
31 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [54].
32 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [20].

A. Text of section 17(5)

28 The most convincing point made by *Online Citizen* on the text is that the grounds of appeal under s 17(5) "characterise the legal elements in terms of the positive case that the statement-maker has to meet",[33] a point earlier considered and rejected by *SDP*.[34] As neither decision fully explained the point, it is necessary to elaborate. The text of s 17(5)(*b*) provides that an appeal can succeed if the subject statement "is a true statement of fact". This must refer to the statement-maker's positive case, because it benefits him; whereas the minister's positive case would be that the statement is false.[35]

29 A court can make three possible findings on this issue:[36]

(a) The statement is proved to be true.

(b) The statement is proved to be false.

(c) The statement is neither proved to be true nor false, with the court being unable to make a finding of fact on the evidence. It is only in this scenario that the burden of proof is relevant, with the party having the burden losing on this issue.

30 It follows that framing the grounds of appeal as the statement-maker's positive case suggests that the burden of proof is placed on him. Since a "true statement" is required, the truth of the statement must be proved. A statement which is neither proved to be true nor false is not a true statement, and the requirement is not satisfied. It follows that if neither the minister nor the statement-maker adduces evidence, such that the court cannot make a finding of fact either way, the Direction will be confirmed. Thus, it can be said that the burden lies on the statement-maker.[37]

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33 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [27].

34 See para 31 below.

35 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [29].

36 These three possibilities are a necessary consequence of the burden of proof. See ss 3(3)–3(5) of the Evidence Act (Cap 97, 1997 Rev Ed); *Loo Chay Sit v Estate of Loo Chay Loo* [2010] 1 SLR 286 at [18]–[22]; and Jonathan Auburn, "Burden and Standard of Proof" in *Phipson on Evidence* (Hodge M Malek QC gen ed) (London: Sweet & Maxwell, 19th Ed, 2017) ch 6 at para 6-07.

37 Evidence Act (Cap 97, 1997 Rev Ed) s 104. See also *R v Richmond Upon Thames London Borough Council, ex parte JC* [2001] LGR 146, where a similar reasoning was adopted, leading to the comment that "it is plain that the only party before the appeal committee contending for either (a) or (b) will be the dissatisfied parent on whom the burden plainly lies". Similarly, the only party contending for the s 17(5) grounds will be the statement-maker.

31 *SDP* rejected this argument on the basis that clearer words could have been used to state that s 17(5) imposes the burden on the statement-maker.[38] By itself, this comment is neither here nor there. The converse is also true; clearer words could have been used if Parliament intended to impose the burden on the minister.

32 However, *SDP*'s reasoning does show that s 17(5)'s text itself is equivocal; indeed, it did not expressly touch on the burden at all. Imposing the burden on the minister would not "do violence to the express wording",[39] and so an alternative meaning remains possible.

B. Purpose of appeal process

33 Given the equivocal nature of the text in s 17(5)(*b*), the general purpose of the statute and the specific purpose of the appeal provision should both be considered.[40]

34 POFMA's general purpose is expressly laid out under s 5. Critically, the Act is concerned with preventing "the communication of false statements of fact in Singapore" under s 5(*a*). Thus, if a statement of fact cannot be proven to be false, its communication should not be affected by the Act, even if its truth also cannot be proven. Imposing the burden on the statement-maker would contradict POFMA's general purpose by affecting the communication of such statements.[41]

35 That the burden should be imposed on the minister is also supported by an understanding of the appeal's purpose by reference to s 10(1). That section provides:

> Any Minister may instruct the Competent Authority to issue a Part 3 Direction if all of the following conditions are satisfied:
>
> (*a*) a false statement of fact … has been or is being communicated in Singapore;
>
> (*b*) the Minister is of the opinion that it is in the public interest …

36 This wording indicates that the condition under s 10(1)(*a*) is intended to be strictly satisfied in relation to a Direction. This is evident from how the condition under s 10(1)(*b*) is satisfied when the minister

38 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [40].
39 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [58].
40 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [40]–[41].
41 Contrast the assertion in *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [34].

has a particular "opinion" on the issue, but s 10(1)(*a*) can only be satisfied when the actual situation reflects the stated conditions. This would also explain why the grounds under ss 17(5)(*a*) and 17(5)(*b*) mirror the condition under s 10(1)(*a*), but do not relate to the condition under s 10(1)(*b*). The appeal process helps to ensure that s 10(1)(*a*) is satisfied, whereas the same concern doesn't apply to s 10(1)(*b*).

37 For that reason, the burden of proof under s 17(5)(*b*) ought to be placed on the minister, such that he proves the falsity of the statement. Were it otherwise, an appeal under s 17(5)(*b*) will fail even where s 10(1)(*a*) was not met because the statement cannot be proven to be true or false. This would undermine the intention to ensure that s 10(1)(*a*) is met through the appeals procedure.

38 This analysis indicates that there is a close link between the s 17 appeal and the s 10(1)(*a*) condition, contrary to *Online Citizen*'s view that ss 10(1) and 17(5) "represent two distinct regimes".[42] In view of the fact that the whole point of the s 17 appeal is for the High Court to "either confirm" the Direction issued under s 10 "or set it aside",[43] and that the grounds of appeal also reflect the s 10(1)(*a*) condition, it seems unreal to suggest that the two provisions are to be read separately. Indeed, it is difficult to see how the High Court can "confirm" the Direction in an appeal without concerning itself with whether the conditions for its issuance under s 10 have been met.

39 Similarly, while it was also suggested in *Online Citizen* that the s 17(5) appeal cannot be linked to s 10(1) because s 10(1)(*b*) is not covered by the appeal,[44] this reasoning is equally flawed. The above analysis shows that there is nothing surprising about s 17 being linked to s 10(1)(*a*) only, given a clear intention to treat the two sub-sections differently.

40 This view, that an s 17(5)(*b*) appeal concerns whether s 10(1)(*a*) has been satisfied, is further reinforced by the absurdity that would occur otherwise: a s 17(5)(*b*) appeal could fail even where a judicial review application on s 10(1)(*a*) would succeed.

41 The conditions under s 10(1)(*a*) are "jurisdictional facts" to the minister's power to issue a Direction. Where a power under legislation can only be exercised if an objective fact exists, as a matter of construing the legislation, "the burden must be on the Executive to prove the

42 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [39] and [41]–[42].
43 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 17(4).
44 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [40].

existence of the fact" in judicial review proceedings.[45] In general, "limiting conditions stated in objective terms" will be treated as jurisdictional facts.[46] In contrast, where the relevant decision is entrusted to a particular executive, no jurisdictional facts are involved.[47]

42 The existence of a "false statement of fact" under s 10(1)(*a*) is a jurisdictional fact: this requirement is literally referred to as a "condition" in s 10(1), and is framed in an objective way. This can be contrasted with s 10(1)(*b*), where the "opinion" of the minister is what matters.

43 Thus, the minister has the burden of proving that the conditions under s 10(1)(*a*) are met in a judicial review application.[48] The same must therefore be true in an appeal on the grounds under s 17(5)(*b*). Were it otherwise, parties relying on the s 17 appeal would have a lower chance of succeeding than if they applied for judicial review. That would be a manifestly absurd outcome, rendering the appeal process superfluous.[49]

44 For the above reasons, the purpose of an s 17 appeal – to ensure that s 10(1)(*a*) conditions are satisfied – is more consistent with the burden of proof being placed on the minister.

C. Extrinsic materials

45 The above analysis has shown that the purpose of the s 17 appeal, and the text by itself, favours opposing outcomes. The purpose is, of course, more important than the literal meaning,[50] but given this ambiguity, reference to extrinsic materials is justified. In this case, they are also more consistent with imposing the burden on the minister.

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45 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [124] and [139]. See also *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [82]–[83] and *Re Fong Thin Choo* [1991] 1 SLR(R) 774 at [33].

46 *R (on the application of A) v Croydon London Borough Council* [2009] 1 WLR 2557 at [31], citing William Wade & Christopher Forsyth, *Administrative Law* (Oxford: Oxford University Press, 9th Ed, 2004).

47 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [83].

48 The submissions by the respondent in *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [19] takes a different position, but their reasoning for this was not given.

49 Especially when one considers that the appeal process was meant to provide "greater judicial oversight" and to make the "test lower" relative to judicial review. See *Parliamentary Debates, Official Report* (7 May 2019) vol 94 (K Shanmugam, Minister for Law); *Parliamentary Debates, Official Report* (8 May 2019) vol 94 (K Shanmugam, Minister for Law).

50 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [71(a)].

46 The second reading of the POFMA bill provides some guidance in this regard.[51] The issue of the legal burden of proof was explicitly mentioned by several members. Opposition Members of Parliament Dennis Tan,[52] Leon Perera[53] and Sylvia Lim[54] all expressed concerns that POFMA may place the burden on the statement-maker, and took the view that this should not be so. In contrast, Murali Pillai disagreed, taking the view that "[t]he legal burden always is rested with the Executive to prove that the Part 3 Directions comply with the criteria for falsehood as well as public interest".[55] Likewise, the Minister for Law K Shanmugam noted that the minister "ha[s] got to prove the falsehoods in the first place".[56] Thus, it appears that all the members agreed that the burden ought to fall on the minister; the difference lies in whether the wording of the statute achieved this. Consequently, while the discussion on this point is not entirely clear, it points towards an intention for the burden to be placed on the minister.

47 The general purpose of POFMA as revealed by the second reading should also be considered. As K Shanmugam noted, the Act is an attempt to combat the spread of "falsehoods", so as to "support the

51 Contrast *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [33].

52 *Parliamentary Debates, Official Report* (8 May 2019) vol 94 "Second Reading Bills: Protection from Online Falsehoods and Manipulation Bill" (Dennis Tan Lip Fong), stating that "[t]he burden of proof in an appeal under clause 17 or 29 of POFMA appears to be on the person who is the subject of a Minister's Directions under POFMA. This should not be the case".

53 *Parliamentary Debates, Official Report* (8 May 2019) vol 94 "Second Reading Bills: Protection from Online Falsehoods and Manipulation Bill" (Leon Perera), stating that "[u]nder POFMA, the burden of proof falls on the person saying something … Many will choose not to take up that burden and simply not speak up."

54 *Parliamentary Debates, Official Report* (8 May 2019) vol 94 "Second Reading Bills: Protection from Online Falsehoods and Manipulation Bill" (Sylvia Lim), stating that "[t]he burden of proof falls to the individuals the proof that his statement was true. This is potentially very onerous due to information asymmetry between the Government and individuals".

55 *Parliamentary Debates, Official Report* (8 May 2019) vol 94 (Murali Pillai).

56 *Parliamentary Debates, Official Report* (8 May 2019) vol 94 (K Shanmugam, Minister for Home Affairs and Law). See also *Parliamentary Debates, Official Report* (7 May 2019) vol 94 "Second Reading Bills: Protection from Online Falsehoods and Manipulation Bill" (K Shanmugam, Minister for Home Affairs and Law) ("These are two different and conjunctive requirements: you have to show it is a false statement of fact, and you have to show it affects public interest"). *Contra The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [42], which suggests that the parliamentary debates only show that the burden attaches to the minister when he issues a Direction under s 10(1) of the Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019). It is, however, difficult to see how it is meaningful to speak of a burden which the minister has to satisfy himself of.

infrastructure of fact and promote honest speech in public discourse".[57] He highlighted that while public discourse is important to good governance, public discourse cannot perform its function unless there is "free and responsible speech",[58] which the Act is meant to promote.

48 With this in mind, and considering that the burden of proof's effect is that the party with the burden loses when the truth of a statement is neither proved nor disproved, the issue boils down to this: is such a statement one which should be part of the public discourse? If the answer is "yes", then the burden should be on the minister, such that Directions against such statements cannot be maintained on appeal, and *vice versa*.

49 It is suggested that these statements do deserve to be part of the public discourse. Public discourse is most useful in the context of controversial issues. As Shanmugam noted, public discourse is important to "help citizens understand complex policy issues. It will guide policy-makers to make optimal decisions. It will shape differing viewpoints and expand common ground".[59] But public discourse would hardly be necessary for issues that are straightforward. Given that controversies can arise in relation to both the appropriate conclusions to undisputed facts, as well as what the facts themselves are, it is difficult to see why public discourse should only be applicable to the former but not the latter. This perhaps explains why Menon CJ in *Ting Choon Meng* stated that only "false speech, *which has been proven as a matter of fact to be false in a court of law*" [emphasis in original] should not form part of public discourse,[60] and not speech which is neither proven to be true or false.

50 Admittedly, public discourse in relation to the disputed fact will not be fully prevented in any event. The speaker can always reframe the point as a statement of opinion. Yet this cannot be a complete answer, for the discourse will no longer be public in that scenario. The statement-maker must either be careful with his language, or set out the "methodology based on certain data" which was used to derive his stated

57 *Parliamentary Debates, Official Report* (7 May 2019) vol 94 "Second Reading Bills: Protection from Online Falsehoods and Manipulation Bill" (K Shanmugam, Minister for Home Affairs and Law).

58 *Parliamentary Debates, Official Report* (7 May 2019) vol 94 "Second Reading Bills: Protection from Online Falsehoods and Manipulation Bill" (K Shanmugam, Minister for Home Affairs and Law).

59 *Parliamentary Debates, Official Report* (7 May 2019) vol 94 "Second Reading Bills: Protection from Online Falsehoods and Manipulation Bill" (K Shanmugam, Minister for Home Affairs and Law).

60 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [115].

conclusion,[61] before his statement can qualify as an opinion. This option may thus be inaccessible to laypersons.

51 In light of the above, the purpose of POFMA in promoting useful public discourse is best served by imposing the burden on the minister, such that a Direction will be set aside if the subject statement cannot be proven to be true or false.

D. Other arguments

52 For the above reasons, if s 17 is interpreted purposively, the burden should be imposed on the minister. For the sake of completeness, other arguments raised by the *Online Citizen* and *SDP* will be addressed here.

53 First, it was suggested by *Online Citizen* that imposing a burden on the minister would amount to inserting a "statutory presumption in favour of [the statement-maker] that is simply not there".[62] This view assumes that the burden is initially imposed on the statement-maker, such that imposing a burden on the minister involves a presumption. But who the burden is imposed on is the very question at hand. This view thus assumes the point that it seeks to prove.

54 Second, *Online Citizen* also took the view that since the statement-maker files his supporting affidavit first as a matter of procedure, the burden should be imposed on him.[63] It is true that it is often sensible for the party who has the burden to go first,[64] but this is not conclusive.[65] After all, "procedure is the handmaiden of justice, not its master".[66] Where procedural and substantive considerations pull in different directions, the conclusion favoured by the latter should be followed. In any event, in practical terms, the minister will normally raise evidence in support of

61 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [30]–[32].
62 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [30].
63 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [30].
64 *R (on the application of Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court* [2009] EWHC 1996 (Admin) at [26] and [44], affirmed in [2011] 3 All ER 579 (CA).
65 *Rickards and Rickards v Kerrier District Council* (1987) 151 JP 625 (holding that for the specific statute in question, "the burden of proof … is upon the authority notwithstanding that, in the case of the civil proceedings, it is for the appellant to call evidence first").
66 *SIC College of Business and Technology Pte Ltd v Yeo Poh Siah* [2016] 2 SLR 118 at [46].

his position first, because he must provide the basis on which the subject statement is determined to be false when issuing the Direction.[67]

55 As for *SDP*, the argument concerning an s 17 appeal being a "rehearing" under the POFMA Rules is difficult to follow.[68] The point appears to be that, since the burden should be on the minister to prove that the statement is false under s 10(1)(*a*),[69] this burden should not shift on a "rehearing" under s 17 where the court is "completely unfettered" by the previous decision. One problem is that this view of a "rehearing" is based on an inappropriate analogy drawn with Registrars' appeals, which are better described as *de novo* hearings.[70] A better analogy is an appeal to the Court of Appeal involving a "rehearing" under O 57 r 3 of the Rules of Court,[71] where a degree of respect is clearly given to the findings of the trial court.[72] In any event, conceptualising the burden of proof problem as an issue of whether deference should be given to the lower tribunal is unhelpful for s 17 appeals. There is simply no relevant tribunal in this context; to treat the minister's decision as one made by a tribunal would make him a judge in his own cause.

56 Finally, *SDP* also suggested that Parliament did not intend for the statement-maker to bear the burden of proof, since there is an "information asymmetry" in favour of the minister.[73] Interestingly, *Online Citizen* did not disagree that the information asymmetry existed, but took the view that this was irrelevant as a matter of construction since Parliament did

67 Protection from Online Falsehoods and Manipulation Regulations 2019 (S 662/2019) reg 6(*b*). Technically, the regulation does not appear to compel the provision of evidence by the minister: *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [41]–[43]. This may be contrasted with what some Members of Parliament thought the regulation would require: see *Parliamentary Debates, Official Report* (8 May 2019) vol 94 (Murali Pillai), who was initially concerned that the statement-maker might be required to state at the outset of the s 17 appeal "why the Executive got it wrong without knowing the Executive's case", but his concern was assuaged because "when a Direction is issued, the Minister would have to nail his or her colours to the mast by stating the reasons why the Direction is being issued". That also appears to have convinced him that the burden is to be placed on the minister.

68 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [38], referring to Supreme Court of Judicature (Protection from Online Falsehoods and Manipulation) Rules 2019 (S 665/2019) r 5(1).

69 This was also the position taken in *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [42].

70 The phrase used in *ARW v Comptroller of Income Tax* [2019] 1 SLR 499 at [95]–[97]. The difference between the two terms is set out in *Senda International Capital Ltd v Kiri Industries Ltd* [2019] 2 SLR 1 at [43]–[44], approving *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194.

71 Cap 322, R 5, 2004 Rev Ed.

72 *Senda International Capital Ltd v Kiri Industries Ltd* [2019] 2 SLR 1 at [45]–[48].

73 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [39].

not expressly articulate this concern.[74] *SDP*'s views on this point is more convincing. Courts have considered which party is in a better position to determine the relevant facts when ascertaining the burden of proof,[75] and this is akin to a canon of statutory construction which can be relied on without Parliament making express reference to it.[76] The point is not conclusive, but in this case, it supports the conclusion reached above.

IV. Conclusion

57 In this article, the authors have argued that the correct view of the law, both as a matter of what the Constitution demands and what Parliament attempted to achieve through POFMA itself, is that the Government bears the burden of proving the falsity of a subject statement. As this matter comes before the Court of Appeal, clarification on where the burden of proof should lie in POFMA appeals would be most welcome.

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74 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [43].

75 See, *eg*, *Nelsovil Ltd v Minister of Housing and Local Government* [1962] 1 WLR 404 at 408–409; *Khan v Customs and Excise Commissioners* [2006] EWCA Civ 89; [2006] STC 1167 at [71] and [74]; *Sheagar s/o TM Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 at [74] (where the court considered if the burden would be "unreasonable" if placed on the borrower for completeness of analysis).

76 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [38].