Muhammad Ridzuan bin Mohd Ali *v* Attorney-General
[2015] SGCA 53

Case Number	: Civil Appeal No 131 of 2014
Decision Date	: 05 October 2015
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s)	: James Bahadur Masih (James Masih & Co), Rajan Supramaniam (Hilborne Law LLC), Dr Chuan Wei Ping (W P Chuang & Co) for the appellant; Francis Ng, Ailene Chou and Caleb Tan (Attorney-General's Chambers) for the respondent.
Parties	: Muhammad Ridzuan bin Mohd Ali — Attorney-General

Administrative Law – Judicial Review

Constitutional Law – Equality before the Law

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2014] 4 SLR 773.]

5 October 2015 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 This appeal arises out of an application for leave to commence judicial review proceedings against the Public Prosecutor's ("the PP") decision not to grant the appellant, Muhammad Ridzuan bin Mohd Ali ("the Appellant"), a certificate of substantive assistance pursuant to s 33B(2)(*b*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA") ("the non-certification decision"). Another person, Abdul Haleem bin Abdul Karim ("Abdul Haleem"), was involved in the same criminal enterprise as the Appellant but he was granted a certificate of substantive assistance under s 33B(2)(*b*) of the MDA. The Appellant wishes to challenge the non-certification decision on account of the disparity in treatment between the Appellant and Abdul Haleem. The High Court judge ("the Judge") declined to grant leave to the Appellant.

2 On appeal, the Appellant argues that leave should be granted to him because he has established a *prima facie* case of reasonable suspicion that the non-certification decision was made in breach of the equal protection clause in Art 12 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution") and/or in bad faith.

Background

Procedural history

3 The Appellant and Abdul Haleem both faced two charges of trafficking in diamorphine under s 5(1)(*a*) of the MDA read with s 34 of the Penal Code (Cap 224, 2008 Rev Ed). The first charge involving not less than 72.05g of diamorphine was a capital charge punishable under s 33, or alternatively, s 33B of the MDA ("the Capital Charge"). The second charge involving not more than 14.99g of diamorphine was a non-capital charge ("the Second Charge"). The criminal trial took place

between February and April 2013 ("the criminal trial"). Both the Appellant and Abdul Haleem were convicted of both charges. Only Abdul Haleem received the certificate of substantive assistance. This resulted in them receiving different sentences. Abdul Haleem was sentenced to life imprisonment and 24 strokes of the cane. The Appellant was given the mandatory death sentence. The grounds of decision for the criminal trial were issued on 20 May 2013. It is reported as *Public Prosecutor v Abdul Haleem bin Abdul Karim and another* [2013] 3 SLR 734 ("*Abdul Haleem – conviction (HC)*").

4 The Appellant appealed against his conviction on the Capital Charge by way of Criminal Appeal No 3 of 2013 ("CCA 3/2013"). He also filed a criminal motion (Criminal Motion No 68 of 2013 ("CM 68/2013")) to challenge the non-certification decision. The Court of Appeal heard CCA 3/2013 and CM 68/2013 on 27 February 2014. The court dismissed CCA 3/2013 and upheld the Appellant's conviction on the Capital Charge. The court dismissed CM 68/2013 on the basis that the Appellant had adopted the wrong procedure. The Appellant was ordered to file a fresh application for a mandatory order, if he wished to do so, within two months. The court's grounds of decision is reported as *Muhammad Ridzuan bin Md Ali v Public Prosecutor and other matters* [2014] 3 SLR 721.

5 In accordance with the Court of Appeal's directions, the Appellant filed Originating Summons No 348 of 2014 ("OS 348/2014") for leave to commence judicial review proceedings against the non-certification decision. The Attorney-General (whom we refer to as "the AG" or "the Respondent") opposed the application. OS 348/2014 was fixed before the Judge, who had also heard the criminal trial. Before the hearing date, the parties were asked whether they had any objections to the same judge hearing OS 348/2014. Both parties indicated that they had no objections. The Judge heard the matter on 17 July 2014 and dismissed the application. His grounds of decision, dated 12 September 2014, is reported as *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2014] 4 SLR 773 ("*Ridzuan – judicial review (HC)*").

6 The present matter is an appeal against the Judge's decision in *Ridzuan – judicial review (HC)* dismissing OS 348/2014.

Facts of the drug trafficking offences

7 The Appellant and Abdul Haleem worked as bouncers in the same night club and had known each other for about a year prior to the date of their arrest.

8 Sometime in February 2010, the Appellant met one Rosli, who informed the Appellant that he (Rosli) could supply the Appellant with drugs. Rosli asked the Appellant if he was interested in trafficking drugs. The Appellant gave Rosli his number. Thereafter, the Appellant was repeatedly contacted by one Afad, who identified himself as Rosli's friend, and asked the Appellant if he was interested in obtaining drugs.

9 The Appellant in turn asked Abdul Haleem if he was interested in selling heroin. Abdul Haleem expressed interest. They both agreed to purchase one "ball" of heroin to repack and sell. The arrangement was that the Appellant would deal with the supplier and provide the capital to purchase the heroin. Both of them would do the repackaging and also look for customers. The profit was to be split equally between them. The Appellant did not tell Abdul Haleem when they would obtain the supply of heroin or who his supplier was.

10 On 4 May 2010, when Afad called again, the Appellant agreed to purchase one ball of heroin from him. Afad told the Appellant to wait for a phone call from one Gemuk, who would tell the Appellant when he could collect the heroin from a "jockey". We understand the term jockey to refer to a drug courier.

11 At about 2.00pm on 5 May 2010, Gemuk called the Appellant from a private number (see *Abdul Haleem – conviction (HC)* at [16]) [note: 1] and told him that the jockey would deliver half a ball of heroin that day and the second half on another day. Shortly thereafter, the jockey called the Appellant and arrangements were made for Abdul Haleem to collect the heroin from the jockey.

12 The Judge made a finding of fact that Gemuk called the Appellant from a private number. His decision is silent on whether the others (*ie*, Rosli, Afad and the jockey) similarly called the Appellant from private numbers. In the Appellant's long statement recorded on 12 May 2010, he stated that "the Malaysians", presumably referring to the aforementioned three persons, always called him from private numbers. [note: 2] In the course of his examination-in-chief during the criminal trial, the Appellant confirmed that the three individuals called him using private numbers and that he did not know how to contact them. [note: 3]

13 Later on 5 May 2010, Abdul Haleem collected a bundle of heroin from the jockey and then returned to the Appellant's flat ("the Flat"). Together, they repackaged the heroin into 20 small plastic sachets, each containing about 8g of heroin. There was also a small amount of granular heroin left over which they used to partially fill up another plastic sachet. They intended to top it up with the next batch of heroin that they were going to receive.

14 On 6 May 2010 at about 5.00pm, the Appellant received another call from Gemuk who told him to "standby" to collect the remaining half ball of heroin. Again, Abdul Haleem, on the instructions of the Appellant, went to collect the heroin from the jockey. However, this second delivery involved additional bundles of heroin above and beyond the remaining half ball of heroin which the Appellant and Abdul Haleem had agreed to purchase. Gemuk informed them that the additional bundles were for Gemuk's other customers. Gemuk instructed the Appellant and Abdul Haleem to take one bundle for themselves and to keep the rest; the other customers would call the Appellant to make arrangements to collect the remaining bundles. At the criminal trial, there was a dispute as to whether Gemuk had specifically informed the Appellant that the other bundles also contained heroin. The Judge made a finding of fact that the Appellant had actual knowledge that the additional bundles also contained heroin (see *Abdul Haleem – conviction (HC)* at [38]). The Court of Appeal upheld this finding (see *Abdul Haleem – conviction (CA)* at [52]).

15 The second delivery of heroin was made by the same jockey driving the same car. This time, the jockey asked Abdul Haleem to get into the car because of the large amount of heroin. At Abdul Haleem's suggestion, they drove to Novena Square which they thought would be a "safe place" for the jockey to pass him the heroin. [note: 4] Eight bundles of heroin in total changed hands. Having received the heroin, Abdul Haleem took a taxi back to the Flat. The Appellant was with him in the Flat when they were arrested by officers from the Central Narcotics Bureau ("CNB"). Following his arrest, Abdul Haleem provided the police with information concerning the ethnicity of the jockey as well as information about the car which the jockey drove. [note: 5] The Appellant also provided some information to this effect. But his knowledge was based on what Abdul Haleem had told him. [note: 6]

16 The PP preferred two separate charges against the Appellant and Abdul Haleem, each relating to a discrete portion of the seized heroin since they both admitted that they had agreed to purchase only one ball of heroin for their own purposes and had intended to sell that quantity of heroin only. The diamorphine found in seven of the eight bundles they received in the second delivery formed the subject of the Capital Charge. The subject of the Second Charge was the diamorphine found in the remaining bundle and the 21 plastic sachets. Although the bundles were received as an undifferentiated whole, the PP gave the Appellant and Abdul Haleem the benefit of the doubt and

selected the bundle that contained the least amount of diamorphine as the bundle they claimed to have purchased for their own purposes.

Conviction and sentence

17 The Appellant and Abdul Haleem were convicted of both charges preferred against them. Given that they were tried after the commencement of the new s 33B of the MDA, they were eligible to be punished under the alternative sentencing regime prescribed in that section, provided that they met the requirements set out therein. For present purposes, it would suffice to note that under s 33B(1)(*a*) of the MDA, the court has the discretion to sentence a person convicted of an offence under s 5(1), being an offence punishable with death under s 33 of the MDA, to life imprisonment and 15 strokes of the cane instead of death if he: (a) proves on a balance of probabilities that his involvement in the trafficking offence was limited to those acts prescribed in s 33B(2)(*a*); and (b) the PP certifies that he has "substantively assisted" CNB in disrupting drug trafficking activities within or outside Singapore (see s 33B(2)(*b*) of the MDA).

18 In relation to the Capital Charge, the Judge found that the Appellant and Abdul Haleem had received the additional seven bundles of heroin from the jockey on the second delivery (these were the bundles that formed the subject of the Capital Charge) for the sole purpose of handing them over to Gemuk's other customers. Therefore their acts in relation to the Capital Charge were limited to those falling within s 33B(2)(*a*)(ii) or 33B(2)(*a*)(iii) of the MDA (see *Abdul Haleem – conviction (HC)* at [55]–[56]). Thus they both satisfied the first of the two requirements mentioned above at [17]. However, the PP only issued a certificate of substantive assistance to Abdul Haleem but not to the Appellant. Therefore the Judge's discretion under s 33B(1)(*a*) of the MDA was invoked for the purposes of sentencing Abdul Haleem. He sentenced Abdul Haleem to life imprisonment and 15 strokes of the cane for the Capital Charge. As the Appellant did not obtain the certificate of substantive assistance from the PP, he was given the mandatory death sentence.

19 In relation to the Second Charge, both Abdul Haleem and the Appellant were given the mandatory minimum sentence of 20 years' imprisonment and 15 strokes of the cane.

20 The total number of strokes of the cane that Abdul Haleem was ordered to undergo was capped at the maximum of 24 strokes. Further, the Judge ordered that the Appellant was not to undergo caning as long as the conviction and sentence for the First Charge stood.

21 As mentioned above at [4], the Appellant's appeal against his conviction on the Capital Charge was dismissed.

OS 348/2014

22 The Appellant sought leave to apply for the following by way of OS 348/2014:

(a) a declaration that the PP had acted in bad faith in not granting the Applicant a certificate of substantive assistance;

(b) a mandatory order for the PP to grant the Applicant a certificate of substantive assistance;

(c) an order for the case to be remitted to the trial judge to re-consider and pass the appropriate sentence under s 33B(1) of the MDA; and

(d) that the stay of execution granted by the Court of Appeal continue until the final determination of this application.

The Appellant's arguments below

23 The Appellant's position before the Judge was set out in *Ridzuan – judicial review (HC)* at [19]–[23]:

(a) He and Abdul Haleem participated in the same criminal enterprise so it was not right for only Abdul Haleem to have been given the certificate of substantive assistance (at [19]).

(b) He and Abdul Haleem were both found to have satisfied s 33B(2)(*a*) of the MDA. Therefore, both should have been granted the certificate of substantive assistance (at [20]).

(c) He and Abdul Haleem gave the same information and yet only Abdul Haleem was given the certificate of substantive assistance. The PP had to produce evidence to support his position that the differentiated treatment was based on dissimilar levels of assistance rendered by the offenders (at [21]).

(d) His level of involvement in the criminal activity was greater than Abdul Haleem's. Abdul Haleem could not have provided more information. Hence the non-certification decision was made in breach of Art 12 of the Constitution (at [22] and [47]).

(e) Proper and fair procedure was not followed prior to the non-certification decision being made because the Appellant was not given an opportunity to assist CNB. Therefore, the PP's decision was made in bad faith (at [21] and [23]).

Decision below

24 The Judge rejected all the Appellant's arguments. He held:

(a) An offender's criminal conduct is not a consideration that is relevant to the PP's decision on whether to grant a certificate of substantive assistance under s 33B(2)(*b*) of the MDA (at [45]).

(b) Satisfaction of the requirements in s 33B(2)(*a*) does not necessarily mean that the offender should be granted a certificate of substantive assistance under s 33B(2)(*b*) of the MDA. The two requirements are distinct (at [53]).

(c) The Appellant had not adduced any evidence to prove that he had provided either the same or more information than Abdul Haleem. Their involvement in the criminal activity was different. It was not shown that the Appellant must necessarily have known more than Abdul Haleem (at [48]).

(d) The PP did not have to justify his decision not to grant a certificate of substantive assistance on every occasion where bare and unsubstantiated allegations are made by an accused person as to the propriety of the PP's decision. To hold otherwise would hamper the operational effectiveness of CNB (at [51]).

(e) The MDA does not require the PP to expressly invite an offender to provide information to avail himself of the alternative sentencing regime under s 33B(1)(*a*) of the MDA. It was up to the

offender to decide whether and when he wished to extend any information to CNB (at [69]).

25 The Judge concluded that the Appellant had not established a *prima facie* case of reasonable suspicion that the non-certification decision was made in bad faith and/or in breach of the equal protection clause in Art 12 of Constitution (at [72]). Therefore, he denied leave to the Appellant to commence judicial review proceedings against the PP.

The Appellant's case on appeal

26 The Appellant makes a number of arguments on appeal. First, he submits that the PP should have granted him a substantive assistance certificate on the basis that he had provided "sufficient information". [note: 7] His failure to do so is sufficient to establish a *prima facie* case of reasonable suspicion that the non-certification decision was made in bad faith.

27 Second, he submits that the fact that Abdul Haleem was granted the substantive assistance certificate while he was not, notwithstanding the fact that they were in "apparently the same or similar circumstances", is *prima facie* evidence suggesting that the non-certification decision was in breach of Art 12 of the Constitution. [note: 8] In connection with this argument, the Appellant draws attention to the fact that he is not aware of the grounds on which the PP made the non-certification decision. In his written submissions, he states [note: 9]:

> 32. … The Appellant has neither the means nor the knowledge of what the Public Prosecutor relied upon to give a certificate to Abdul Haleem but not to him.
>
> …
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> 33. … If, as the Attorney General submits, that the circumstances were different between Abdul Haleem and the Appellant, then we respectfully say that the fact remains, unfortunately, that the Appellant is in no position to confirm or deny such a statement.

28 The Appellant only points out the existence of this information asymmetry but does not explicitly make any arguments based on it. We understand him to be saying that since he is not privy to the actual grounds on which the non-certification decision was made, he cannot be expected to produce any evidence directly impugning the propriety of the PP's decision-making process. He can only highlight circumstances that suggest that the PP's decision was unconstitutional. He maintains that he has done so and has established a *prima facie* case of reasonable suspicion impugning the PP's decision.

29 The Appellant's third argument on appeal relates to the meaning that should be ascribed to the term "bad faith" in s 33B(4) of the MDA. He argues that "bad faith" within the meaning of s 33B(4) would be made out if he shows that proper procedure was not followed leading to a miscarriage of justice. [note: 10] He contends that proper procedure was not followed here. The Appellant should have been invited to provide CNB with information after the criminal trial. We understand him to be arguing that he may have withheld some information initially "so as not to prejudice [his] defence". [note: 11] He should have been invited to assist CNB at the close of the trial. This was not done here. Therefore, the non-certification decision was made in bad faith. [note: 12]

The Respondent's case on appeal

30 The Respondent's arguments in response are largely similar to the points made by the Judge in

his decision. Briefly put, the Respondent contends:

(a) It is not enough for the Appellant to simply assert that he had given CNB "sufficient information". He has to show that the information he gave enhanced the operational effectiveness of CNB. [note: 13]

(b) The Appellant has not shown that the information he gave CNB is identical to that given by Abdul Haleem. [note: 14] Simply based on what "can be gleaned from the public domain" (presumably referring to the statements that have been disclosed), there are differences between what the Appellant and Abdul Haleem told CNB. [note: 15] The Respondent states that the material in the "public domain" reveals that there are differences in terms of what the two offenders told CNB. Additionally, the Respondent also states that Abdul Haleem was more forthcoming in disclosing all he knew early on.

(c) "Bad faith" in the context of s 33B(4) of the MDA refers to the use of a discretionary power for extraneous purposes. [note: 16]

(d) The Appellant has not adduced any evidence to show that the non-certification decision was made for a purpose which is extraneous to the intended purpose of the s 33B regime. [note: 17]

(e) There was no procedural impropriety in the way the non-certification decision was made. The procedure that the Appellant argues for is not prescribed anywhere in s 33B of the MDA. [note: 18] It is also inconsistent with the intention of the alternative sentencing regime which is to give offenders an incentive to come clean at an early stage. [note: 19]

Issues in the present appeal

31 The following issues arise for determination in the present appeal:

(a) Can the PP grant an offender a certificate of substantive assistance on the basis that the offender gave CNB "sufficient information"?

(b) Does the Appellant need to produce evidence directly impugning the propriety of the PP's decision-making process or does he discharge the evidentiary burden he bears if he is able to highlight circumstances that establish a *prima facie* case of reasonable suspicion that the PP's decision was unconstitutional and/or made in bad faith?

(c) Has the Appellant established a *prima facie* case of reasonable suspicion that the PP acted in breach of Art 12 of the Constitution in making the non-certification decision?

(d) What connotes "bad faith" within the meaning of s 33B(4) of the MDA?

(e) Has the Appellant established a *prima facie* case of reasonable suspicion that the PP acted in bad faith in making the non-certification decision?

Our decision

Preliminary issues

Applicable test to determine if leave should be granted to commence judicial review proceedings

32 It is trite that the following three requirements have to be satisfied for leave to commence judicial review proceedings:

(a) the subject matter of the complaint has to be susceptible to judicial review;

(b) the applicant has to have sufficient interest in the matter; and

(c) the materials before the court have to disclose an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought by the applicant.

33 There is no doubt that the first two requirements have been satisfied by the Appellant. The Respondent accepted that to be the case before the Judge (see *Ridzuan – judicial review (HC)* at [17] and [36]). The only dispute is whether the third requirement has been satisfied.

Scope of review

34 Section 33B(4) of the MDA sets out two grounds on which the PP's decision on whether an offender should be given a certificate of substantive assistance can be challenged. It states:

> (4) The determination of whether or not any person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities shall be at the sole discretion of the Public Prosecutor and *no action or proceeding shall lie against the Public Prosecutor in relation to any such determination unless it is proved to the court that the determination was done in bad faith or with malice*.
>
> [emphasis added]

35 In addition to those two grounds, the PP's decision can also be challenged on the ground that it was unconstitutional. This ground of review flows from the doctrine of constitutional supremacy. In Singapore, the Constitution is supreme and all governmental powers are ultimately derived from and circumscribed by the Constitution. In *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 ("*Phyllis Tan*"), the Court of Three Judges observed at [143]:

> In Singapore, the Constitution establishes a form of parliamentary government (based on the Westminster model) based on the separation of the legislative, executive and judicial powers. … As each of them is limited in its authority and power by the Constitution itself, it is necessary that there should exist a means whereby each arm may be prevented from acting beyond its constitutional powers. Under the Constitution, the means adopted and recognised by all three arms of government is the judicial power of the court to review the legality of legislative and executive acts and declare them unconstitutional and of no legal effect if they contravene the provisions of the Constitution. …

Therefore, all executive acts must be constitutional and the court is conferred the power to declare void any executive act that contravenes the provisions of the Constitution. The PP performs an executive act when he exercises the discretion conferred on him by s 33B(2)(*b*) of the MDA. Therefore, the exercise of his discretion pursuant to this provision can be reviewed on constitutional grounds.

Which party bears the burden of proof and when will the PP be called to give reasons for his decision?

36 In general, a person who challenges an executive decision based on an alleged breach of one or more of the fundamental liberties enshrined in the Constitution or based on other grounds of review established in administrative law bears the burden of having to establish a *prima facie* case of reasonable suspicion of breach of the relevant standard. He will be granted leave to commence judicial review proceedings only if he satisfies this threshold requirement. This is because decisions of constitutional office holders and other officials are presumed to be made in conformity with the law. The presumptions of constitutionality and regularity apply as a matter of the separation of powers doctrine (in the context of constitutional office holders) and legal policy (in the context of other officials) (*Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 ("*Ramalingam*") at [44] and [47]). It falls upon the applicant to adduce *prima facie* evidence of breach of the relevant standard in order to rebut the presumption. The decision-maker is not required to justify his decision until the applicant has crossed this threshold. Indeed it would not be sensible to hold that the presumption of legality applies and at the same time require the decision-maker to disclose the reasons for his decision every time a challenge is lodged against his decision.

37 Courts in the United States have held that applicants who bring constitutional challenges against executive decisions made pursuant to legislative provisions which are similar to s 33B of the MDA are required to establish a "substantial threshold showing" of some form of impropriety on the part of the executive arm of the government before the executive is called upon to justify its decision. The US Sentencing Commission Guidelines Manual ("USSG") §5K1.1 enables the US government to make a motion on behalf of a particular offender who has rendered "substantial assistance in the investigation or prosecution of another person who has committed an offense" to grant the court discretion to impose a sentence on him which is below the statutory minimum. At the Second Reading of the Misuse of Drugs (Amendment) Bill (No 27 of 2012) ("the Bill"), which was when the new s 33B of the MDA was debated in Parliament, Mr K Shanmugam, the Minister for Law, expressly acknowledged in Parliament that s 33B of the MDA is modelled after such provisions (see *Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89).

38 It would be highly relevant for present purposes to refer to the decision of the US Court of Appeals for the Fourth Circuit in *United States of America v John Stevens LeRose* 219 F 3d 335 (4th Cir, 2000) which concerned a constitutional challenge brought in respect of a government decision whereby a motion under USSG §5K1.1 was made in respect of one co-offender but not others. There, the accused pleaded guilty to two charges pertaining to a criminal transaction in which three of his brothers were also involved. He argued that he was entitled to a reduced sentence under USSG §5K1.1 even though the government declined to make a motion on his behalf. He contended that the government's failure to make the motion amounted to a violation of his due process and equal protection rights under the US Constitution. His basis for this argument was that the assistance he provided the government was almost identical to that provided by one of his brothers who received a substantial assistance motion. The US district court thought that he had made a "substantial threshold showing" that the refusal resulted from improper or suspect motives. The district court ordered the government to respond with reasons for refusing to make the motion on behalf of the accused. After the hearing, the district court concluded that the accused person's constitutional rights were violated and departed from the sentencing guidelines in sentencing him (*ie*, treated him as though he had received a substantial assistance motion). The government appealed. The US Court of Appeals for the Fourth Circuit reversed the district court. The Court of Appeals stated at [23]–[27]:

> … [C]ourts may review a prosecutor's refusal to file a motion for substantial assistance and grant relief if the refusal is based on an unconstitutional motive such as race or religion, or is not rationally related to a permissible government objective. See *Wade v. United States*, 504 U.S. 181, 185-86, 118 L. Ed. 2d 524, 112 S. Ct. 1840 (1992); *Maddox*, 48 F.3d at 795.

Before a court may order discovery or hold an evidentiary hearing on the government's refusal to make the motion, the defendant must first make a 'substantial threshold showing' that the refusal resulted from improper or suspect motives. …

In attempting to make a threshold showing, LeRose argued that the assistance he provided to the government was almost identical to that provided by his brother Rodney who received a substantial assistance motion. LeRose averred that he and Rodney were directed by the same federal agents, approached many of the same suspects, subjected their families to similar dangers, and performed their assigned duties in good faith. Based on these assertions, LeRose contended that the government's refusal to make a substantial assistance motion for him was not rationally related to a legitimate government end.

As an initial matter the proffer by LeRose was clearly insufficient to identify and demonstrate any improper basis for the government's decision, and at this point the court's inquiry should have ended. However, instead of deciding whether LeRose had made a 'substantial threshold showing,' the district court impermissibly shifted to the hearing portion of the *Wade* framework and directed the government to respond with reasons for refusing to make the motion on LeRose's behalf. The government explained that it had evaluated the assistance of both brothers and concluded that LeRose's assistance was not as substantial as Rodney's. The government pointed out that LeRose's cooperation, though undertaken in good faith, did not lead to any charges, arrests, or filings of information. The government further observed that LeRose never testified at trial or in front of a grand jury. As for the comparison with Rodney's efforts, the government noted that Rodney offered extensive assistance in an investigation of a corrupt state senator who later pled guilty to various charges. … While LeRose also played a role in the investigation of the senator, the materials submitted by LeRose to the district court indicated that this was limited to 'telephone tag' and that LeRose never made contact with the senator.

After hearing the government, the district court concluded that the government's conduct deprived LeRose of 'due process and equal protection under the specific facts of this case, and… no legitimate government objective is served by such disparate treatment of [LeRose].' J.A. 234. We disagree. ***First, as previously stated, LeRose failed to make a substantial threshold showing as required by Wade. The lion's share of the information provided to the district court simply cataloged LeRose's efforts. Explanations of the extent of a defendant's assistance do not entitle a defendant to a hearing. See Wade, 504 U.S. at 187. Nor does the mere fact that the government made the motion for one brother, but refused to make it for the other brother, absent a suspect reason, establish a substantial threshold showing.*** '[M]otions for substantial assistance do not require the government to reward the least culpable or the most helpful codefendant.' *Maddox*, 48 F.3d at 796. *When a defendant does not demonstrate an improper refusal by the government to make a § 5K1.1 motion, the inquiry comes to an end.* ***Second, even if we were to conclude that LeRose carried his burden and made a substantial threshold showing, the government's decision was clearly rationally related to a legitimate government end.*** Rodney's significant efforts in obtaining the conviction of the state senator obviously played a large part in the government's decision to make a motion for substantial assistance and cannot be compared to LeRose's unsuccessful attempts to establish contact with the senator. In this important regard, LeRose's assistance simply did not match that of his brother. ***See United States v. Doe, 170 F.3d 223, 224 (1st Cir. 1999) (noting that when the government receives no benefit from a defendant's efforts or information, the government's refusal to make a substantial assistance motion is rationally related to a legitimate government end)*** . Affirmation of the district court's departure based on LeRose's assistance would encourage criminal defendants to challenge the government's refusal to make such a motion on the mere ground that they cooperated, a result

> contrary to the established law of this circuit. See *Wallace*, 22 F.3d at 87 (concluding that full and truthful cooperation does not by itself entitle a defendant to a substantial assistance motion).
>
> [emphasis added in italics and bold italics]

It is evident from the above that in the US, an offender who wishes to challenge the government's decision not to make a motion on his behalf must make a "substantial threshold showing" that the government's refusal resulted from improper or suspect motives. The government will be called to give reasons for its decision *only* if the threshold is crossed. We consider this just to be another way of stating that an applicant must adduce enough evidence to establish a *prima facie* case of reasonable suspicion of breach of the relevant standard before the evidentiary burden shifts to the executive for it to justify its decision.

39 In our judgment, the position should be no different when an applicant takes out an application to commence judicial review proceedings to challenge the PP's decision not to grant him a certificate of substantive assistance. He must establish a *prima facie* case of reasonable suspicion that the PP had breached the relevant standard before he is granted leave. The PP is not required to justify his decision until this threshold is crossed. We consider this to be a normatively sensible position to adopt as well. If the PP is required to disclose his reasons every time an applicant challenges his decision not to issue a certificate of substantive assistance, over time much of CNB's *modus operandi* may end up in the public domain. This would have severe detrimental effects on CNB's enforcement capabilities and consequently on the broader public interest.

Type of evidence that an applicant has to produce

40 An applicant seeking leave to commence judicial review proceedings to challenge the PP's decision not to grant him a substantive assistance certificate is not required to produce evidence directly impugning the propriety of the PP's decision-making process (*eg*, records of meetings that show that the decision was motivated by malice, bad faith, unconstitutional considerations). This is only logical, because the applicant would not be privy to the details of the process by which the PP reached his decision. We also note that this court has proceeded on the basis that an applicant challenging an executive decision can discharge the evidentiary burden he bears by highlighting circumstances that establish a *prima facie* case that the decision was made in breach of relevant standards as shown in the following two cases.

41 First, in *Ramalingam*, the Court of Appeal stated that prosecutorial power could not be exercised arbitrarily or for purposes extraneous to that for which it was granted (*ie*, for purposes other than for the *bona fide* prosecution of criminals). Further, it stated that Art 12 of the Constitution required the PP to give unbiased consideration to every offender and to avoid taking into account any irrelevant consideration (at [51]). In an *obiter* portion of the decision, the court accepted that the PP did not have a general obligation to disclose reasons for a particular prosecutorial decision he made in his capacity as the PP, whenever it was challenged (at [74]). Nonetheless, an applicant who challenged an exercise of prosecutorial discretion bore the burden of establishing a *prima facie* case that the aforementioned standard had been breached. The court was cognisant that it would be "virtually impossible" to discharge this burden in some cases. For example, where an accused was aggrieved that he was not charged under an alternative applicable statutory regime under which he would have been liable for a more lenient sentence if he was found guilty (at [69]). In such circumstances, the evidential burden remained on the applicant notwithstanding the fact that it was unlikely that he would have direct proof of the PP's decision-making process. The court suggested that in those type of cases, the applicant could, for example, discharge that burden

by producing evidence that another offender in similar circumstances had been prosecuted under the alternative statutory regime (at [26]–[27]). Additionally, the court stated that where the PP preferred charges of different severity against co-offenders involved in the same criminal enterprise, an accused person who had been charged with a more severe offence could challenge the PP's charging decision by showing that there were no facts on which the PP could have lawfully differentiated between him and his co-offender(s). The court stated at (at [70]–[71]):

> 70 … [T]he mere differentiation of charges between co-offenders, even between those of equal guilt, is not, *per se*, sufficient to constitute *prima facie* evidence of bias or the taking into account of irrelevant considerations that breaches Art 12(1). Differentiation between offenders of equal guilt can be legitimately undertaken for many reasons and based on the consideration of many factors (see [63] above). It is for the offender who complains of a breach of Art 12(1) to prove that there are no valid grounds for such differentiation. In the absence of proof by the offender, the court should not presume that there are no valid grounds in this regard.
>
> 71 Given that there are many legitimate reasons for the Prosecution to differentiate between the charges brought against different offenders involved in the same criminal enterprise, such differentiation *per se* does not necessarily mean that the Prosecution has not given unbiased consideration to the offender or offenders in question, or that the Prosecution has taken into account irrelevant considerations. Put another way, such differentiation, without more, does not raise an inference of breach of Art 12(1). Rather, in the absence of *prima facie* evidence to the contrary, the inference would be that the Prosecution has based its differentiation on relevant considerations. *This conclusion does not mean that an aggrieved offender can never prove a case of unlawful discrimination. Such a case may be self-evident on the facts of a particular case (for example, where a less culpable offender is charged with a more serious offence while his more culpable co-offender is charged with a less serious offence, when there are no other facts to show a lawful differentiation between their respective charges).*
>
> [emphasis added]

The relevant point for present purposes is that the court did not require evidence directly impugning the propriety of the PP's decision-making process pursuant to which he decided to prefer differentiated charges.

42 Second, in *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189, the appellant, who had been convicted of a drug trafficking offence and sentenced to death, applied for leave to commence judicial review proceedings to challenge the President's decision declining to exercise clemency in his favour. This court held that the clemency process under Art 22P of the Constitution was justiciable. The Cabinet had to consider (at [85]):

> ... [I]mpartially and in good faith, the Art 22P(2) materials [*ie*, the report of the trial judge; the report of the presiding judge of the appellate court if there was an appeal; and the AG's opinion on the report(s)] submitted to it before it advises the President on how the clemency power should be exercised.

The court also held that the clemency power was reviewable on the ground of breach of the rule against bias. An applicant who sought to challenge the President's decision would bear the burden of proving bias on the part of the Cabinet (at [112]). The appellant in that case challenged the decision not to grant him clemency on this ground. He did not produce evidence directly impugning the Cabinet's decision-making process. Rather, he relied upon a statement by the Minister for Law at a dialogue session and argued that the Minister's statement suggested that he and in turn, the rest of

the Cabinet, had predetermined to turn down the appellant's clemency application. The court was content to proceed on that footing and examined (at [119]–[128]) whether the Minister for Law's statement in fact created a "reasonable suspicion of bias by reason of predetermination".

43 To reiterate, in our judgment, the Appellant in this case does not have to produce evidence directly impugning the propriety of the PP's decision-making process. Inferences could be made from the objective facts.

Can the PP grant an offender a substantive assistance certificate on the basis that he had given CNB "sufficient information"?

44 It is not entirely clear what the Appellant means by "sufficient information". In making this argument he refers to a portion of his examination-in-chief during the criminal trial where he stated that he would have given CNB any information he had pertaining to the drug syndicate he was dealing with. [note: 20] Therefore, we understand him to be arguing that he should be given the substantive assistance certificate because he had been forthcoming in disclosing all he knew to CNB.

45 It is abundantly clear from the Parliamentary debates at the Second Reading of the Bill that an offender's good faith cooperation with CNB is not a necessary or sufficient basis for the PP to grant him a certificate of substantive assistance. The Minister moving the Bill stated that "[a]ssistance which does not enhance the enforcement effectiveness of CNB will not be sufficient" (*Singapore Parliamentary Debates, Official Report* (12 November 2012) vol 89 (Mr Teo Chee Hean, Deputy Prime Minister and Minister for Home Affairs)). Rather, the certificate would only be granted when the offender's assistance yields actual results in relation to the disruption of drug trafficking.

46 The question of whether the offender had cooperated with CNB in good faith is an irrelevant consideration because the purpose of giving the court the discretion to sentence "couriers" (a term used during the Parliamentary debates to refer to persons whose involvement in the trafficking offence is limited to those acts enumerated in s 33B(2)(*a*) of the MDA) who have rendered substantive assistance to CNB to life imprisonment and caning instead of death is to enhance the operational effectiveness of CNB. It was thought that providing an incentive for offenders to come forward with information would enhance the operational effectiveness of CNB in two ways. First, it would give CNB an additional source of intelligence to clamp down on drug trafficking activities. Second, it would disrupt drug trafficking syndicates' established practices and create an atmosphere of risk for the members of these syndicates as there would be uncertainty as to whether an apprehended courier would reveal all their secrets. This is evident from the following excerpt of the speech of Mr Teo Chee Hean (*Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89):

> As Mr Shanmugam said, we must be clear about what the policy intent is. The policy intent of this substantive cooperation amendment to our mandatory death penalty regime is to maintain a tight regime – while giving ourselves an additional avenue to help us in our fight against drugs, and not to undermine it.
>
> Couriers do play a key role in the drug network. In fact, they are often our key point of contact with the drug network. Let me explain why. Illicit drugs are not manufactured or grown in Singapore because of our tough laws and enforcement. All our drugs therefore have to be couriered into Singapore. Thus, couriers are a key part of the network which has to be vigorously targeted and suppressed in order to choke off the supply to Singapore. And they are the main link to the suppliers and kingpins outside Singapore.

…

> We cannot be sure how exactly couriers or the syndicates will respond to this new provision. But we have weighed the matter carefully, and are prepared to make this limited exception if it provides an additional avenue for our enforcement agencies to reach further into the networks, and save lives from being destroyed by drugs and hence make our society safer.
>
> Syndicates may now be forced to re-organise their operations to more tightly compartmentalise the information. Or they may have to stop using experienced couriers who may have, through several trips, gleaned more information about the networks. They may have to look for new couriers, which will make their supply chain less reliable. All in all, it will create an atmosphere of risk and uncertainty in the organisation, because they do not know if one of them gets caught, whether he will reveal secrets that will then cause problems for all of them. Our intent is to make things as difficult as possible for the syndicates and to keep them and drugs out of Singapore.

47 The fact that an offender cooperates in good faith with CNB in and of itself does not enhance CNB's operational effectiveness. The Minister for Law, explained this point in the following manner (*Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89 (Mr K Shanmugam)):

> Some Members have asked, would it be better to say that the courier has done his best, that he has acted in good faith – should he not qualify. ….
>
> The short answer is that it is not a realistic option because every courier, once he is primed, will seem to cooperate. Remember we are dealing not with an offence committed on the spur of the moment. We are dealing with offences instigated by criminal organisations which do not play by the rules, which will look at what you need, what your criteria are and send it to you. So if you say just cooperate, just do your best, all your couriers will be primed with beautiful stories, most of which will be unverifiable but on the face of it, they have cooperated, they did their best. And the death penalty will then not be imposed and you know what will happen to the deterrent value. Operational effectiveness will not be enhanced. …

48 In the premises, we do not accept the Appellant's first argument. In fact, the PP would be acting *ultra vires* if he were to exercise his discretion under s 33B(2)(*b*) of the MDA in favour of an offender simply on the basis that he was forthcoming in disclosing all he knew to CNB even though the information he gave did not lead to the actual disruption of drug trafficking activities within or outside Singapore.

Has the Appellant established a prima facie ***case of reasonable suspicion that the PP acted in breach of Art 12 of the Constitution?***

49 In the context of executive actions, the equal protection clause in Art 12 is breached if "there is deliberate and arbitrary discrimination against a particular person ... [a]rbitrariness implies the lack of any rationality" (*Public Prosecutor v Ang Soon Huat* [1990] 2 SLR(R) 246 at [23]). This test was applied by this court in *Eng Foong Ho and others v Attorney-General* [2009] 2 SLR(R) 542 at [30] in determining whether the acquisition by the Collector of Land Revenue of property on which a temple was located and not the properties of a nearby mission and church violated Art 12 of the Constitution.

50 The Appellant has attempted to discharge his evidential burden by referring to the statements that he and Abdul Haleem gave the police following their arrest, their evidence at the criminal trial and the Judge's factual findings. He argues that these demonstrate that they were in "apparently same or

similar circumstances". In other words, the Appellant argues that Abdul Haleem could not have given any more information to CNB than he had since Abdul Haleem's level of participation in the drug trafficking offences was "same or similar" to his. Therefore, the Appellant maintains that he and Abdul Haleem gave practically the same information to CNB. Yet, only Abdul Haleem was granted the substantive assistance certificate. According to the Appellant, this is *prima facie* evidence suggesting that the non-certification decision was in breach of Art 12 of the Constitution. [note: 21]

Ways a similarly situated applicant can discharge his evidentiary burden

51 In our judgment, an applicant who alleges that the PP's decision declining to grant him a certificate of substantive assistance was made in breach of Art 12 of the Constitution would satisfy the evidentiary burden he bears if he can show two things – first, that his level of involvement in the offence and the consequent knowledge he acquired of the drug syndicate he was dealing with was practically identical to a co-offender's level of involvement and the knowledge the co-offender could have acquired, and second, and more importantly, that he and his co-offender had provided practically the same information to CNB – yet only his co-offender had been given the certificate of substantive assistance. This follows from our holding at [40]–[43] above that the applicant does not have to produce evidence directly impugning the process by which the PP reached his decision; instead, he can discharge the evidentiary burden he bears by highlighting circumstances that raise a *prima facie* case of reasonable suspicion of breach of the relevant standard. The situation we described earlier in this paragraph, if it were to occur, will raise questions as to why only one co-offender and not the other was granted the certificate of substantive assistance. In our judgment, this would be adequate to raise a *prima facie* case of reasonable suspicion that the PP acted arbitrarily in choosing to grant only one co-offender the certificate of substantive assistance.

52 It is important to stress that a finding that an applicant has managed to discharge his evidentiary burden does not amount to a ruling that the PP's decision was *in fact* improper. Rather, all it means is that the evidentiary burden shifts and the PP would have to justify his decision. There may be legitimate reasons for the PP's decision to treat each co-offender differently even in the situation described above. As mentioned above, the question of whether an offender renders substantive assistance depends on whether the information he provides leads to the actual disruption of drug trafficking activities within or outside Singapore (see [45] above). The level of involvement of each offender in a criminal enterprise involving several offenders may be virtually identical. But one offender, by virtue of his superior memory or sharper perceptiveness, may be able to provide better information (*eg*, of the physical appearance of the syndicate members, car licence plate numbers) that leads to the actual disruption of drug trafficking activities. This is just one example of a situation where the PP would be perfectly justified in granting one co-offender the certificate of substantive assistance but not the other. There may also be reasons for the PP's decision to issue the certificate of substantive assistance only to one co-offender even where it is shown that the co-offenders had given practically identical information. For example, one offender may have provided the information early on leading to tangible and effective outcomes in relation to the disruption of drug trafficking activities whereas the other may have deliberately withheld the information for a protracted period such as to render the information of no operational use. Thus, it would be proper for the PP to treat the co-offenders differently.

Were the Appellant's and Abdul Haleem's respective levels of involvement in the crime identical?

53 In the present case, the co-offenders' level of involvement in the crime was clearly not identical. The Appellant and Abdul Haleem were involved in different capacities. The Appellant was the one who arranged the drug deliveries. However, on his own admission, the Appellant did not have the contact details of any of the drug syndicate members he was communicating with. Abdul Haleem, on

the other hand, had interacted first-hand with the jockey. He had more than cursory contact. On the second occasion, Abdul Haleem was in the car with the jockey for some time. There might have been things said by the jockey to him or things said by the jockey to his principal on the mobile phone and overheard by him. Therefore, it is entirely conceivable that Abdul Haleem could have given some valuable information to CNB above and beyond information concerning the physical appearance of the jockey or the description of the car he drove. The CNB officers who were tailing the jockey during the second delivery would not have been privy to what transpired in the car and hence might have found such information valuable.

Has the Appellant shown that he and Abdul Haleem gave practically identical information to CNB?

54 We noted that the information both offenders gave the police after their arrest is largely similar, save for minor differences (*eg*, Abdul Haleem was able to guess at the licence plate number of the car that the jockey drove [note: 22]). However, we are unable to hold that the Appellant had discharged the evidentiary burden he bore just on the basis of our comparison of the statements that he and Abdul Haleem gave the police following their arrest. This is because we are not privy to the full details of all the information that both offenders gave CNB over the course of this matter proceeding through the justice system. Only a selection of the information they gave has been placed before the court. We would be engaging in conjecture if we concluded on the basis of what is before us that the Appellant and Abdul Haleem had given practically identical information to CNB.

55 At the initial hearing of this appeal, we thought that perhaps the Appellant could have summoned Abdul Haleem to testify as regards all the information that he provided CNB, so that a proper comparison could have been undertaken between that and the information which the Appellant said he had given to CNB. Counsel for the Appellant did not apply for this to be done at the hearing of OS 348/2014. Notwithstanding that, we considered that it might be appropriate to remit the matter to the Judge for him to receive Abdul Haleem's evidence given that the outcome of this appeal would have a bearing on whether the Appellant's death sentence should stand. At the first hearing of this matter on 12 March 2015, we conveyed our proposed course of action to the parties and gave them an opportunity to respond. The Appellant was content for the matter to be remitted to the Judge for him to receive Abdul Haleem's evidence. Senior State Counsel Francis Ng, who appeared for the Respondent, stated that calling Abdul Haleem to give evidence might have ramifications on the operational effectiveness of CNB. He requested an adjournment for the Respondent to carefully consider and respond to our proposed course of action. We acceded to the request and also granted Mr Ng liberty to convey the Respondent's views to us by letter before the next hearing.

(1) The Respondent's objections to the matter being remitted to the Judge for him to receive Abdul Haleem's evidence

56 The appeal was subsequently re-scheduled for continued hearing on 7 April 2015. On 2 April 2015 the Respondent wrote objecting to the course of action we had proposed on two grounds. First, the Respondent contended that courts are ill-placed to consider whether an offender had rendered substantive assistance in disrupting drug trafficking activities because that determination involved a "multi-faceted enquiry" engaging a "multitude of extra-legal factors". What seemed like a minor difference, could, when viewed in light of operational considerations, turn out to be a determinative consideration in deciding whether an offender had rendered substantive assistance. The PP was best-placed to make this determination. The Respondent appeared to be arguing that there would be little point in the Judge receiving Abdul Haleem's evidence because it is not simply a matter of comparing the information which the Appellant and Abdul Haleem had given. Rather, the information both offenders gave had to be considered in light of other factors, such as CNB's operational considerations, to ascertain its true worth in disrupting drug trafficking activities. The Judge would

not be in a position to make proper comparison of the information since he would not be aware of these other considerations.

57 Second, the Respondent argued that calling Abdul Haleem to give evidence would be contrary to Parliament's intention. It would create the possibility of confidential information (*eg*, information concerning CNB officers' line of questioning and details of the type of information they sought) being released into the public domain. CNB's enforcement capabilities may be compromised as a result. Additionally, the Respondent might also have to call CNB officers to testify in rebuttal. This would create the possibility of CNB officers being cross-examined on how they had gone about their duty. As seen from the following comment by the Minister for Law at the Second Reading of the Bill, this was something which Parliament clearly wanted to avoid (*Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89 (Mr K Shanmugam)):

> Ms Lim suggested that if there are concerns about confidentiality, why not have it *in camera*, although I am not quite sure she used that phrase. The real point is this. Just imagine the scenario. In a case, the defendant argues that he rendered substantial assistance – it is CNB's fault for not dismantling some organisation overseas, it is something which CNB did or did not do, what intelligence agencies and officers did and did not do. And you put the officers on the stand and cross-examine them on their methods, their sources, their thinking. Ask yourself whether that is the best way of dealing with this question. Is that helpful?

58 The Respondent also stated that it was prepared to make an affidavit affirming the position it had taken all along in submissions – *ie*, that there were material differences between the information that the two offenders gave and further that the information that Abdul Haleem gave had enhanced CNB's enforcement effectiveness whereas the Appellant's information did not result in similar outcomes.

(2) Exchange of affidavits and letters

59 At the conclusion of the hearing on 7 April 2015, we directed the Respondent to file and serve an affidavit covering the factual material set out in [58] above. We also directed the Appellant's counsel, Mr James Bahadur Masih, to respond as to whether he wished to make further submissions on the material contained in the Respondent's affidavit after he received it.

60 Deputy Public Prosecutor Shahla Taufiq @ Shahla Iqbal, who had conduct of the criminal trial, filed an affidavit on behalf of the Respondent on 10 April 2015. Therein she stated that she handed the following materials to the PP before delivery of verdict in the criminal trial for the PP to determine whether the Appellant and/or Abdul Haleem should be granted certificate(s) of substantive assistance:

> (a) the information provided to CNB by Abdul Haleem and the information provided to CNB by the Appellant, which sets of information were not identical;
>
> (b) information pertaining to operational matters and the follow up; and
>
> (c) the views of CNB as to whether substantive assistance had been provided by Abdul Haleem and the Appellant.

She proceeded to state that the PP, having regard to the abovementioned material, determined that:

> (a) Abdul Haleem had substantively assisted CNB in disrupting drug trafficking activities within

Singapore and that he should therefore receive a certificate of substantive assistance in the event of his conviction on the Capital Charge; and

(b) the Appellant had not substantively assisted CNB in disrupting drug trafficking activities within or outside Singapore, and that he should therefore not receive a certificate of substantive assistance in the event of his conviction on the Capital Charge.

61 One of the Appellant's counsel, Mr Rajan Supramaniam, filed an affidavit on 22 April 2015. A copy of a letter from the Appellant addressed to the Chief Justice was exhibited in the affidavit. The Appellant stated the following in that letter:

(a) The Appellant's counsel wrote to the Respondent requesting CNB to take further information from him following the dismissal of CCA 3/2013 (*ie*, his appeal against conviction).

(b) A CNB officer met him on 16 April 2014 to record the information which he wanted to give. The CNB officer told him that he could request his counsel to write to CNB if he had any further information to provide.

(c) After a few months passed with no word from CNB, he requested his counsel to write to CNB requesting them to meet him because he had more information to share. CNB refused to meet him and instead requested him to write to CNB and the Attorney-General's Chambers ("AGC") on this matter.

(d) He personally wrote to CNB and AGC on 4 March 2015 informing them of "a person who is involved in drug activities in Singapore as well as Malaysia". He also provided them with information regarding his "where-about and hangouts".

(e) He was informed by his counsel on 12 March 2015 that the first lot of information he had given was not adequate and that, as yet, there had not been any response as regards the further information he had provided.

62 On 23 April 2015, the Respondent wrote to the court stating that a "number of assertions made by the Appellant are either untrue or inaccurate" but chose not to particularise what was objectionable because of considerations related to confidentiality and also "[s]o as not to prejudice the Appellant". The Respondent also expressed a willingness to respond to any specific concerns we might have arising from the affidavit filed on behalf of the Appellant.

63 We asked the Respondent to confirm on affidavit whether the fresh information that the Appellant provided on 4 March 2015 and any and all other information that he had given had been assessed and whether the same had been put before the PP for his decision. We asked the Respondent to state on affidavit that the PP, having considered all the information, chose to maintain his earlier decision not to issue the Appellant with the certificate of substantive assistance if that was his position. We also requested the Respondent to confirm explicitly that the PP was satisfied that there is a material difference between the information given by Abdul Haleem as compared to that furnished by the Appellant.

64 Mr Ng filed two affidavits on behalf of the Respondent. The first was dated 8 May 2015 where he clarified that the Appellant had in fact personally volunteered information twice – first on 30 April 2014 and then again on 5 March 2015. Mr Ng stated that the new information was placed before the PP for his decision prior to the first hearing of this matter on 12 March 2015. He further stated that the PP considered the new information alongside information pertaining to operational matters and

CNB's views on whether, based on the new information, the Appellant had provided substantive assistance in disrupting drug trafficking. Having done so, the PP determined on 8 March 2015 that the Appellant had not substantively assisted CNB in disrupting drug trafficking activities within or outside Singapore. Mr Ng's second affidavit dated 14 May 2015 confirmed that there is a material difference between the information given by Abdul Haleem as compared to that given by the Appellant.

65 Mr Masih wrote to the Registry on 8 July 2015 stating that the Appellant wanted an opportunity to file an additional affidavit to address the issues raised in Mr Ng's two affidavits that he filed on behalf of the Respondent. We acceded to the request. The Appellant filed an affidavit on 24 July 2015. The Appellant made the following points in his affidavit:

(a) The Respondent has not given any particulars of the material differences that allegedly exist between the information given by Abdul Haleem as compared to that given by the Appellant.

(b) He accepted that he gave CNB additional information on 5 March 2015 (as opposed to on 4 March 2015 as he earlier claimed). He stated that the fact that the PP made his determination shortly thereafter, on 8 March 2015, suggests that he did not give adequate consideration to the information.

(c) He provided further details concerning the person whom he had written to CNB about in his 5 March 2015 letter (see [61(d)] above).

(3) Our decision

66 We are of the opinion that the three affidavits that were filed on behalf of the Respondent (see [60] and [64] above) are dispositive as far as the question of whether the Appellant and Abdul Haleem had given practically identical information to CNB is concerned. Having regard to what was clear Parliamentary intention underlying the scheme set out in s 33B of the MDA (see [46] above), and in order to ensure that the effectiveness of CNB is not undermined, we are in agreement with the Respondent that if we were to treat the issue of the grant of a certificate of substantive assistance as if it were a matter to be proven and justified at trial, our entire battle against drug trafficking, which we have relentlessly pursued for more than 40 years, would be seriously jeopardised and along with it so would the general interest of society. It is for this reason (the need to avoid jeopardising the operational capability of CNB) that we accept the submission of the Respondent (referred to at [56] above) that the Judge is not the appropriate person to determine the question of whether a convicted drug trafficker has rendered substantive assistance. Section 33B expressly confers upon the PP the discretion to make the decision on substantive assistance. We would also reiterate that we are, at this stage, not dealing with an accused (who is presumed innocent) but a person who is convicted, after due process, of drug trafficking and is, in the normal course, to be sentenced to suffer death. The statements in Parliament show quite clearly that the object of s 33B of the MDA is not to send the message that society has gone soft on drug traffickers; on the contrary, it is another string to our bow, perhaps in a different way, to combat drug trafficking – to get at the real kingpins behind the couriers. A convicted drug trafficker must "earn" the certificate of substantive assistance. It is not a matter of entitlement.

67 For completeness we feel obliged to make one additional point. We return to the statement of principle which we have articulated at [51] above as to what an applicant who alleges that the PP's discretion was exercised in breach of Art 12 of the Constitution must demonstrate. The critical element is that the information or other assistance in fact furnished by the applicant is substantially the same as that furnished by a co-accused who is nonetheless treated differently. Art 12 in essence requires that like be treated alike and it was in that context that we had raised the possibility

(referred to at [55] above) of remitting the matter to the Judge for him to receive Abdul Haleem's evidence so that a determination could be made as to whether the same information had been given by the Appellant and Abdul Haleem. Up to that point the PP had not stated in terms that there were material differences between the information furnished by the Appellant and by Abdul Haleem. In our judgment, the arguments advanced by the Respondent, which we have summarised at [56]–[57] above, against the course of action we had suggested were not germane to the factual question of whether the same information had been provided. That was the assertion made by the Appellant and if it were factually found to be true then it may well have warranted the inference being drawn that there was a reasonable suspicion of Art 12 having been violated. The arguments that were advanced by the PP go to the separate question of whether the court should assess the sufficiency of the information. As we have noted above, we accept that is not a task for us; but that is not the issue to which the possibility of receiving Abdul Haleem's evidence was directed. In the event, we did not think it was necessary or appropriate for us to go down that path because in response to our further request the PP did subsequently furnish an affidavit which stated in positive terms that there were material differences between the information that had been supplied by the Appellant and by Abdul Haleem and on this basis it was clear that the two accused persons were then not situated in the same position.

Conclusion

68 For the reasons stated above, we are of the view that the Appellant has not established a *prima facie* case of reasonable suspicion that the non-certification decision was in breach of Art 12 of the Constitution. Therefore, we reject the Appellant's second argument on appeal (see [27] above).

Has the Appellant established a prima facie ***case that the PP acted in bad faith?***

69 The Appellant argues that bad faith within the meaning of s 33B(4) of the MDA includes the following:

(a) taking into account improper considerations;

(b) not considering appropriate facts and circumstances; and/or

(c) not following proper procedure thus leading to a miscarriage of justice.

As stated above at [29], it appears that his argument on bad faith is pegged to the third limb only. In essence, the Appellant argues that the procedure the PP adopted in making the non-certification decision was improper because the PP did not invite the Appellant to give further and additional information after the criminal trial. The Appellant contends that a convicted drug trafficker should be given a fresh opportunity to provide information after the trial "so as not to prejudice [his] defence". [note: 23] Presumably, the Appellant is contemplating a situation where an accused chooses to withhold some information at the investigations stage on the basis that it would be inconsistent with the defence he wishes to run at trial and subsequently, having failed in his defence, decides to come clean. We note that the Appellant did not rigorously pursue this final ground of appeal at the hearings before us. We would also add that whether a convicted drug trafficker has any further information to offer is entirely a matter within his knowledge.

What connotes "bad faith" within the meaning of s 33B(4) of the MDA?

70 We do not accept the Appellant's suggestion that bad faith on the part of the PP would be made out if it can be shown that the PP took legally irrelevant considerations into account or failed to

take legally relevant considerations into account in reaching his decision on whether to issue the certificate of substantive assistance. The touchstone of "bad faith" in the administrative law context is the idea of dishonesty. Merely taking into account legally irrelevant considerations or failing to take into account legally relevant considerations, where there is no dishonesty involved, would not suffice. As Megaw LJ stated in *Cannock Chase District Council v Kelly* [1978] 1 WLR 1 (at 6D–6F):

> … I would stress—for it seems to me that an unfortunate tendency has developed of looseness of language in this respect—that bad faith, or, as it is sometimes put, 'lack of good faith,' means dishonesty: not necessarily for a financial motive, but still dishonesty. It always involves a grave charge. It must not be treated as a synonym for an honest, though mistaken, taking into consideration of a factor which is in law irrelevant.

Taking the cue from Megaw LJ's aforesaid statement, Alex Gask suggests that a decision maker is said to have acted in bad faith when he "acts dishonestly, taking action which is known by the actor to be improper" ("Other Grounds of Review" in *Judicial Review* (Helen Fenwick gen ed) (LexisNexis, 4th Ed, 2010) at para 13.2.1).

71 In our judgment, bad faith within the meaning of s 33B(4) of the MDA should be understood to refer to the *knowing* use of a discretionary power for extraneous purposes (*ie*, for purposes other than those for which the decision maker was granted the power). This is consonant with the interpretation of the concept of "bad faith" suggested by the Court of Three Judges in *Phyllis Tan*. In that case, the court stipulated the legal limits to the PP's exercise of his prosecutorial discretion. It stated (at [148]–[149]):

> 148 … First, he may not use his prosecutorial power in bad faith for an extraneous purpose. Second, he may not use it so as to contravene constitutional rights, such as the right to equality before the law and the equal protection of the law. …
>
> 149 The discretionary power to prosecute under the Constitution is not absolute. It must be exercised in good faith for the purpose it is intended, *ie*, to convict and punish offenders, and not for an extraneous purpose. …

These paragraphs should be read together with the examples the court gave of prosecutorial discretion being used for extraneous purposes. It stated at [132]:

> 132 … [T]he criminal process is intended for the *bona fide* prosecution of criminals, and to use it for an extraneous purpose is to abuse it. An example of such abuse is where the court process is being used to try the defendant on a criminal charge in order to harass him or teach him a lesson when the Prosecution has no or insufficient evidence to justify the charge, or for some extraneous purpose other than to convict and punish the defendant as an offender. Another example might be where the defendant has been promised immunity from prosecution by the prosecuting authorities in exchange for assisting the police in their investigations. Yet another example might be where the defendant is charged with a more serious charge (without any or sufficient evidence to support it) in order to pressure him to plead guilty to a charge for a less serious offence. ...

These examples suggest that the PP's exercise of his prosecutorial power would be in bad faith if he *knowingly* puts it to a use for which it was not intended.

72 Before we move away from this issue of bad faith, we need to address the proposition made by the Appellant that where the PP has taken into account irrelevant considerations and has instead

failed to take into account relevant considerations, that would constitute bad faith. On the authorities that we have just alluded to, this proposition is erroneous. However, does it mean that where it has been shown that the PP has disregarded relevant considerations and/or failed to take relevant consideration into account, the aggrieved drug trafficker is without remedy? We would first observe that such a situation does not arise in the present case. The relevant considerations taken into account by the PP have been set out at [60] and [64] above and nothing was advanced by or on behalf of the Appellant to suggest that this was in any way erroneous. Having said that, if such a situation were to arise in a case and it is substantiated that relevant considerations were disregarded or irrelevant considerations were considered by the PP in coming to his decision, intuitively it seems inconceivable that the aggrieved person would be left without a remedy and that the decision of the PP should nevertheless stand. However, as we have not heard arguments on the point, it would be prudent for us to leave the decision to another day where such a point does arise and full arguments have been presented.

Has the Appellant established a prima facie *case that the PP knowingly used the power under s 33B(2)(b) of the MDA for an extraneous purpose?*

73 As mentioned above at [46], the object of the substantive assistance provision in the s 33B regime is to enhance the operational capacity of CNB. The PP would be acting in furtherance of this purpose if he exercises his discretion under s 33B(2)(*b*) of the MDA in favour of those couriers who provide information that leads to the *actual* disruption of drug trafficking activities within or outside Singapore.

74 In the present case, the Appellant has not adduced any evidence to show that the PP made the non-certification decision for a purpose which is extraneous to the intended purpose of the s 33B regime. Therefore, the Appellant has failed in establishing a *prima facie* that the PP acted in bad faith.

Review on grounds of procedural impropriety

75 The final point made by the Appellant in essence urges us to review the PP's decision on the ground of procedural impropriety. Procedural impropriety is a well-established ground of judicial review in administrative law. It is one of the three grounds of review suggested by Lord Diplock in the seminal *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] 1 AC 374 decision (at 410–411). He said the following when elaborating on what review on the ground of procedural impropriety would entail (at 411):

> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. ...

This suggests that a challenge based on procedural impropriety would be made out when it can be shown that a decision-maker reached a decision in breach of basic rules of natural justice and/or that he failed to adhere to legislatively prescribed procedural rules in reaching that decision.

76 The Appellant's argument based on procedural impropriety may not even take off the ground. This is because it is clear from a plain reading of s 33B(4) of the MDA that Parliament intended to limit judicial review of the PP's decision on whether to issue a certificate of substantive assistance to the

grounds of bad faith and malice. It appears that Parliament did not see a need for a more extensive scope of judicial review since there was an inbuilt self-check mechanism in the s 33B regime. At the Second Reading of the Bill, the Minister for Law stated (*Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89 (Mr K Shanmugam)):

> Next, on the issue of who decides cooperation and by what criteria. The Bill provides for the Public Prosecutor to assess whether the courier has substantively assisted CNB.
>
> …
>
> … I think Ms Lim, Mr Singh, Mrs Chiam and Ms Jamal, raised or implied the possibility of abuse, or at any rate that the Public Prosecutor may refuse to issue a certificate even though substantive assistance has indeed been provided.
>
> As I said earlier, I accept that the risk identified of course exists.
>
> What we have to assess is: overall, are we better off, if we reduce this risk and the issue is transferred to the Courts? That is a judgment call that is to be made. Is society better off? Which route has greater risks? And take into account the fact that the Public Prosecutor's discretion is not unfettered. It is subject to judicial review, either on bad faith or malice, which is expressly provided for, and of course, unconstitutionality, which goes without saying.
>
> There are also significant institutional incentives for the Public Prosecutor to exercise his discretion properly. Over time, if the Public Prosecutor consistently recognises cases where substantive assistance has been provided, that will obviously encourage more cooperation by couriers. On the other hand, *if the Public Prosecutor acts capriciously or inconsistently, the system cannot work.* So, over and above the judicial checks, it is really in the Public Prosecutor's interest to operate the system with integrity.
>
> [emphasis added]

It is an open question as to whether s 33B(4) of the MDA has effectively limited the court's power of review to only the grounds of bad faith and malice (besides review on grounds of unconstitutionality (see [35] above)). The Appellant made no submissions on this issue. As we have stated at [69] above, the Appellant did not place much emphasis on this last ground of appeal. In the circumstances, we do not think this would be an appropriate case to express concluded views on this issue.

77 In any event, the Appellant's argument based on procedural impropriety has no real merit. There is no requirement in s 33B that an offender must be expressly invited to give additional information after his conviction. We see no reason why basic rules of natural justice would require us to hold that there is in fact such a requirement bearing in mind that it would be exclusively within the knowledge of the convicted person whether he has any further information to offer to the authorities. Be that as it may, the Appellant was accorded opportunities to provide additional information to CNB following his conviction for drug trafficking. It seems he did so on three occasions (see [61(b)] and [64] above). The Respondent has confirmed on affidavit that all the information that the Appellant gave has been assessed and that the same was put before the PP for his decision on whether the Appellant had rendered substantive assistance. In these circumstances, we do not think there is any evidence of procedural impropriety.

Conclusion

78 In the result, we dismiss this appeal.

[note: 1] Muhammad Ridzuan's statement recorded on 11 May 2010 found at Appellant's core bundle pp 58–64, at p 59.

[note: 2] Record of Appeal vol II, pp 86–89 at p 88.

[note: 3] NE of day 8 of trial found at Record of Proceedings in Criminal Appeal No 3 of 2013 vol I, at pp 7, 10, 32.

[note: 4] Abdul Haleem's statement recorded on 12 May 2010 found at tab F of the Respondent's Supplemental Core Bundle at pp 32–33.

[note: 5] Abdul Haleem's statement recorded on 11 May 2010 found at tab E of the Respondent's Supplemental Core Bundle at p 28.

[note: 6] Muhammad Ridzuan's statement recorded on 11 May 2010 found at Appellant's Core Bundle pp 58–64, at p 60; Muhammad Ridzuan's statement recorded on 12 May 2010 found at pp 86–89 of Record of Appeal vol II at p 86.

[note: 7] Appellant's Case at para 31.

[note: 8] Appellant's Case at paras 33, 57(a)–(d).

[note: 9] Appellant's Case at paras 32–33.

[note: 10] Appellant's Case at para 39(c).

[note: 11] Appellant's Case at para 52.

[note: 12] Appellant's Case at para 52.

[note: 13] Respondent's Case at para 32.

[note: 14] Respondent's Case at para 28.

[note: 15] Respondent's Case at para 30.

[note: 16] Respondent's Case at para 47.

[note: 17] Respondent's Case at para 51.

[note: 18] Respondent's Case at para 38.

[note: 19] Respondent's Case at para 42.

[note: 20] NE of day 8 of trial found at Record of Proceedings in Criminal Appeal No 3 of 2013 vol I, at p 32.

[note: 21] Appellant's Case at paras 33 and 57(a)–(d).

[note: 22] Abdul Haleem's statement recorded on 11 May 2010 found at tab E of the Respondent's Supplemental Core Bundle at p 28.

[note: 23] Appellant's Case at para 52.