IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 122

Civil Appeal No 155 of 2020

Between

Syed Suhail bin Syed Zin

… *Appellant*

And

Attorney-General

… *Respondent*

In the matter of Originating Summons No 891 of 2020

Between

Syed Suhail bin Syed Zin

… *Applicant*

And

Attorney-General

… *Respondent*

GROUNDS OF DECISION

[Constitutional Law] — [Judicial review]
[Constitutional Law] — [Equal protection of the law]

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Syed Suhail bin Syed Zin
v
Attorney-General

[2020] SGCA 122

Court of Appeal — Civil Appeal No 155 of 2020
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Judith Prakash JA
22 September, 23 October 2020

23 December 2020

Sundaresh Menon CJ (delivering the grounds of decision of the court):

1 The appellant is a prisoner facing capital punishment who has exhausted his rights of appeal and was not granted clemency. He was scheduled to be executed on 18 September 2020. On 16 September 2020, the appellant filed HC/OS 891/2020 ("the application") seeking leave to commence judicial review proceedings against his imminent execution on two grounds: first, a challenge against the exercise of the power of clemency ("the clemency ground"), and second, a challenge against the scheduling of his execution ahead of other prisoners similarly awaiting capital punishment ("the scheduling ground"). The High Court dismissed the application but stayed the appellant's execution pending his appeal to this court. After considering the further materials which the parties placed before us, we allowed the appellant's appeal and gave him leave to commence judicial review proceedings solely on the scheduling ground. We now provide our full reasons for doing so.

Background

2 The appellant, a Singapore citizen, was convicted by the High Court on a charge of possessing not less than 38.84g of diamorphine for the purpose of trafficking under s 5(1)(*a*) read with s 5(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") and was sentenced to the mandatory death penalty on 2 December 2015. His appeal to this court in CA/CCA 38/2015 ("CCA 38/2015") was ultimately dismissed on 18 October 2018.

The procedure for carrying out the death penalty

3 Following the final imposition of the death sentence after the disposal of any appeal by the Court of Appeal, a number of legally prescribed steps must be taken before the death sentence can be carried out. For the purposes of the present discussion, it is useful for us to outline them briefly.

(a) Under Art 22P(2) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution"), the trial judge and the presiding judge of the Court of Appeal that dealt with the case must furnish reports to the President, who will forward them to the Attorney-General ("the AG"). The AG provides his opinion on them, and the reports and the AG's opinion are sent to the Cabinet so that it may advise the President on the exercise of the clemency power under Art 22P(1).

(b) Under s 313(*e*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"), a more comprehensive set of documents relating to the case must also be forwarded to the Minister by the presiding judge of the Court of Appeal that dealt with the case.

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(c) Under Art 22P(1) of the Constitution, the Cabinet is to consider whether to advise the President to grant clemency, and the President is obliged to act in accordance with the Cabinet's advice (see *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 ("*Yong Vui Kong (Clemency)*") at [82] and [180]).

(d) If clemency is not granted, then under s 313(*f*) of the CPC, the President is to transmit to the Court of Appeal an order stating the time and place of execution. Section 313(*f*) stipulates that this must be done "in accordance with the Constitution". By virtue of Art 21(1) of the Constitution, this means that the President must act in accordance with the advice of the Cabinet (or a Minister acting under the general authority of the Cabinet) when setting the time and place of execution.

(e) Under s 313(*g*) of the CPC, upon receiving the President's order under s 313(*f*) the Court of Appeal will cause a warrant to be issued under the seal of the Supreme Court setting out the prescribed time and place of execution. The warrant is directed to the Commissioner of Prisons who must then carry out the execution (s 313(*i*) of the CPC).

(f) Under s 313(*h*) of the CPC, the President may order a respite of the execution before it is carried out, and subsequently appoint some other time or place for the execution. The President's power to order a respite of the execution of any sentence is set out in Art 22P(1)(*b*) of the Constitution, and this power must therefore also be exercised in accordance with the Cabinet's advice.

4 The events described above unfolded in the present case as follows.

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(a) On 5 July 2019, the appellant was informed that his petition for clemency to the President had been rejected.

(b) On 20 January 2020, the President made an order for the appellant to be executed on 7 February 2020.

(c) On 5 February 2020, the acting President ordered a respite of the appellant's execution.

(d) On 8 September 2020, the President made a new order for the appellant to be executed on 18 September 2020.

The application

5 The appellant filed the application on 16 September 2020 seeking leave to apply for a prohibiting order against the Singapore Prison Service ("the SPS") in order to stay his execution. The application was supported by an affidavit filed by the appellant's counsel, Mr Ravi s/o Madasamy ("Mr Ravi"), on the appellant's behalf ("Mr Ravi's supporting affidavit").

6 The application was brought on two grounds. Under the clemency ground, the appellant contended that his execution would be in breach of Art 22P and/or Art 9 of the Constitution, on the basis that the clemency power under Art 22P had been extinguished owing to disuse. In Mr Ravi's supporting affidavit, it was asserted that clemency had not been granted in any capital case since 1998 despite there having been many executions, and that this suggested that there was a blanket policy by the Cabinet of disregarding clemency petitions in all drug-related cases. On this basis, it was submitted that the appellant's case received no individual consideration. Mr Ravi's supporting affidavit further argued that the disuse of the clemency power in drug-related cases since 1998 resulted in the clemency power being "wholly extinguished".

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For this, he relied on the decision of the Federal Court of Australia in *Ruddock v Vadarlis* (2001) 110 FCR 491 ("*Ruddock*"). The foregoing arguments were said to have two implications: first, the failure to consider the appellant's clemency petition individually amounted to a breach of natural justice contrary to Art 9(1) of the Constitution ("Art 9(1)"), and second, the extinction by disuse of the clemency power, which was essential in mitigating the harshness of the death penalty, violated his right to life under Art 9(1).

7 Under the scheduling ground, the appellant contended that the fixing of the date of his execution violated his right to equality under Art 12 of the Constitution ("Art 12"). Mr Ravi's supporting affidavit claimed that no executions had been carried out to date in 2020, and that there were other prisoners awaiting capital punishment who had been sentenced to death prior to the appellant. He further alleged that the reason the appellant had been scheduled for execution ahead of other such prisoners was because of a decision by the State not to execute foreigners while border restrictions owing to the Coronavirus Disease 2019 ("COVID-19") were in place, as this prevented their family members from entering Singapore and the repatriation of their remains. The appellant advanced two arguments under this ground:

(a) First, he argued that the order of execution of prisoners should follow the order in which they were sentenced to death. The failure to follow this order deprived the appellant of his right to a fair trial, as he would thereby be deprived of time within which he might have been able to adduce new evidence to seek to have his conviction reopened by the court ("the new evidence argument").

(b) Second, the appellant argued that the scheduling of the executions of Singaporeans ahead of those of foreigners was an act of

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"discrimination based on expediency" that violated his right to equal protection under Art 12(1) of the Constitution ("Art 12(1)") ("the discrimination argument"). He further argued that such discrimination based on nationality was expressly prohibited by Art 12(2).

8 At the same time, the appellant also applied for leave under s 394H of the CPC to make a review application under s 394J of the CPC, seeking to reopen his concluded appeal in CCA 38/2015 on the basis that relevant evidence had not been adduced. The appellant was granted leave, and we heard his review application together with the present appeal on 22 September 2020. On 16 October 2020, we issued our judgment, *Syed Suhail bin Syed Zin v Public Prosecutor* [2020] SGCA 101, dismissing the review application. The issues in the review application have no bearing on the present appeal, and we need say nothing further about them.

The decision below

9 It was not disputed that the requirements for leave to commence judicial review proceedings are that (*Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 ("*Ridzuan*") at [32]):

(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 must disclose an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought by the applicant.

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As there was no dispute as to the sufficiency of the appellant's interest in the matter, the parties' arguments revolved around the first and last requirements.

10 The High Court judge ("the Judge") heard and dismissed the application on 17 September 2020. In his oral grounds, the Judge held that the subject matter of the complaint was not susceptible to judicial review as the SPS did not make any decision of its own; it was merely acting pursuant to the warrant issued by the Supreme Court. There was also nothing to suggest that the warrant issued by the Supreme Court was unlawful. The Judge further held that he would in any case have found the application to be time-barred.

11 Next, the Judge held that there was in any event no *prima facie* case of reasonable suspicion to justify the granting of leave. The Judge found the clemency ground unmeritorious because he considered that there was no basis for the assertion that there was a blanket policy of rejecting clemency petitions. The Judge held that the scheduling ground was also unsustainable: the new evidence argument could not establish any actual or potential prejudice to the appellant because due process had already taken its course. As for the discrimination argument, the appellant had furnished no grounds for his belief that nationality was the differentiating criterion in the scheduling of his execution owing to the COVID-19 situation.

12 Following the dismissal of the application, the AG applied for a costs order to be made against Mr Ravi personally under O 59 r 8(1)(*c*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) on the basis that the clemency ground was scandalous and frivolous. The Judge declined to order any costs. The Judge granted the appellant leave to appeal against the dismissal of the application and made an interim order for a stay of the execution pending the hearing of the appeal.

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The parties' arguments on appeal

13 On appeal, the parties advanced substantially the same submissions that they had made before the Judge, with the AG seeking to defend the decision and reasoning of the Judge. The AG further invited us to rule that the High Court had no power to order a stay of the execution, as the Judge had ordered.

14 Having considered the parties' written submissions as well as their oral submissions at the hearing before us on 22 September 2020 ("the first hearing"), we concluded that further analytical clarity was needed on the interaction between Art 12 and the scheduling of executions. We framed this issue in the form of the following questions:

(a) Does a prisoner awaiting capital punishment have a legitimate legal expectation that the date on which his sentence is to be carried out will not result in his being treated differently as compared to other prisoners who are similarly situated? ("Question 1")

(b) Does the answer to Question 1 differ if prisoners who are Singaporean are treated differently from those who are not Singaporean? ("Question 2")

(c) In respect of Questions 1 and 2, are there considerations that could justify differential treatment for the purposes of Art 12 of the Constitution? ("Question 3")

15 Mr Francis Ng Yong Kiat SC ("Mr Ng"), who appeared for the AG, sought an adjournment to file further submissions and an affidavit to address these questions. We granted this request, and likewise granted Mr Ravi leave to file submissions as well as an affidavit in reply.

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16 At the first hearing, Mr Ravi also provided, for the first time, a specific detail in support of the scheduling ground: he claimed that there was a prisoner awaiting capital punishment who had been convicted earlier than the appellant, but who had not been scheduled for execution. This was Datchinamurthy a/l Kataiah ("Datchinamurthy"), a Malaysian national who had instructed Mr Ravi to act as his counsel after the dismissal of his appeal in CA/CCA 8/2015.

MHA's affidavit and the parties' further submissions

17 Following the first hearing, the AG filed an affidavit which was sworn by Mr Lim Zhi Yang, a Senior Director at the Ministry of Home Affairs ("MHA"), with the authorisation of the Minister ("MHA's affidavit").

18 MHA's affidavit stated that there were two prerequisites that had to be met before it would commence scheduling an execution: first, the death sentence must have been upheld by the Court of Appeal, and second, the Cabinet must have advised the President not to grant clemency. After these prerequisites were met, MHA would have regard to the following non-exhaustive list of what it referred to as "supervening factors based on policy considerations" in scheduling the execution (which we will refer to as "MHA's stated considerations" for convenience):

(a) the date of the pronouncement of the death sentence;

(b) the determination of any other court proceedings affecting the prisoner or requiring his involvement;

(c) the policy that co-offenders sentenced to death will be executed on the same day;

(d) whether the prisoner has previously been scheduled to be executed; and

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(e) the availability of judges to hear any application by the prisoner to the courts before the intended date of execution.

19 MHA's affidavit stressed that it did not take into account factors such as the type of offence, age, race, gender and nationality in the scheduling of executions.

20 MHA's affidavit then addressed the circumstances of the appellant's case. It explained that the scheduling of executions had been suspended in February 2020 owing to an application for judicial review arising from an alleged unlawful method of execution. This challenge was ultimately dismissed by the Court of Appeal on 13 August 2020 in *Gobi a/l Avedian and another v Attorney-General and another appeal* [2020] 2 SLR 883 ("*Gobi (JR)*"). The scheduling of executions resumed thereafter, with the appellant's execution being the first one to be scheduled. MHA's affidavit stated:

> At the time the execution of the sentence of death on [the appellant] was scheduled, … *as compared to all the other offenders in the same position as he was* (i.e. offenders whose legal and clemency processes had been completed and for whom all applicable supervening factors based on policy considerations had been resolved), [*the appellant*] *was the first to be sentenced to death.* [emphasis added]

21 In respect of prisoners scheduled to be executed while COVID-19 restrictions were in place, MHA stated that it "can and will" make arrangements for their relatives to enter Singapore to visit them prior to their execution (subject to travel restrictions imposed by the other country, over which MHA would have no control). MHA revealed that in the appellant's case, arrangements were made to facilitate a visit by his uncle who resided in Malaysia, but the uncle eventually declined to make the visit.

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22 In the AG's further submissions, the AG argued in essence that Question 1 ought to be answered in the negative because the scheduling of executions was a matter for the exercise of discretion by the Executive. As to Question 2, the AG relied upon the statement in MHA's affidavit that nationality was not a factor taken into consideration in the scheduling of executions. In relation to Question 3, the AG submitted that any differential treatment between prisoners in the scheduling of executions would not fall foul of Art 12 because this would have been based on MHA's stated considerations, which were justifiable factors to consider. The AG further argued that the key reference point was the date on which each prisoner was sentenced to death; in other words, equal treatment involved prisoners being scheduled to be executed in the order in which they were sentenced to death, all else being equal.

23 The appellant chose not to file a reply affidavit. In his further submissions, the appellant accepted that the order in which executions were carried out need not be "strictly sequential", but that any differential treatment required a legitimate justification. He asked the court to draw the conclusion that he was being scheduled for execution ahead of other prisoners who had been sentenced to death earlier in time solely because of his nationality.

The issues on appeal

24 The following issues arose for our determination:

(a) Was the subject matter of the application susceptible to judicial review?

(b) Was the application time-barred?

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(c) Was there a *prima facie* case of reasonable suspicion to support the granting of leave to commence judicial review proceedings, either on the clemency ground or on the scheduling ground?

(d) Finally, there was the ancillary issue of whether the High Court was competent to grant the stay of the execution in the present case.

25 At the hearings before us, Mr Ng did not press the AG's case on either issue (a) or (b) above, focusing his submissions instead on whether the appellant could make out a *prima facie* case of reasonable suspicion. Nevertheless, as issues (a) and (b) were threshold questions which had to be answered in the appellant's favour before leave for judicial review could be granted, we will briefly explain why we differed from the Judge on these issues.

Whether the subject matter of the application was susceptible to judicial review

26 The question of whether a matter is susceptible to judicial review typically depends on the nature of the power being exercised. Whether there exists a decision for the court to review in the first place could be considered a preliminary issue falling within this question: see *Gobi (JR)* ([20] *supra*) at [48]. The AG submitted that there was no decision taken by the SPS that was susceptible to judicial review in the present case, since in carrying out the execution the SPS would have simply been acting upon the warrant issued by the Supreme Court under s 313(*g*) of the CPC, which was in turn mandated by the President's order (see [3(e)] above). In our judgment, this presented an unduly narrow interpretation both of the appellant's application and of the scope of judicial review.

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27 The sole prayer in the appellant's application, which was not felicitously drafted, read as follows:

> That the Plaintiff be granted a **Prohibitory Order** for a *stay of execution* of the plaintiff by Singapore Prison Service *pending the outcome of this application* as [(i)] the said direction to execute the Plaintiff as directed by the Singapore Prison Service, violates his right to equality guaranteed under Article 12 of the Constitution of the Republic of Singapore because the Singapore Prison Service has effected a differential treatment between Foreigners and Singaporeans in carrying out the death sentence as the execution of Foreigners has been halted due to the COVID-19 situation, and because the order of execution does not follow the order of sentencing as those handed a similar sentence and prior to the Plaintiff, will only have their sentences carried out after his; and [(ii)] the said direction to execute is in breach of Article 22P of the Constitution of the Republic of Singapore as the powers of pardon under Article 22P has fallen into disuse since 1998 for drug offenders as no clemency has been granted and this is a result of a blanket policy justice and therefore, has been extinguished and accordingly, this violates the Plaintiff's right to life guaranteed under Article 9 of the Constitution of the Republic of Singapore and consequently, breaches the fundamental rules of natural justice.
>
> [emphasis in original in bold; emphasis added in italics]

The statement which accompanied the application under O 53 r 1(2) of the Rules of Court was phrased in identical terms, save for an additional prayer for any other orders that the court deemed fit.

28 The only relief sought in the application was a prohibiting order for a stay of the appellant's execution "pending the outcome of this application". As such, on its face the application appeared to pray only for interim relief and not any final relief, although this was supplemented by a generic prayer for relief in the statement. A fuller picture of the relief the appellant sought emerged, however, from a closer reading of the application and Mr Ravi's supporting affidavit.

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29 Turning first to the clemency ground, it was clear that the illegality complained of was the alleged failure of the Cabinet to advise the President to exercise the clemency power, and not any decision of the SPS (see [6] above). As for the scheduling ground, Mr Ravi's supporting affidavit relied upon a letter from the SPS stating the date on which the appellant's death sentence would be carried out. Mr Ravi's supporting affidavit characterised this as reflecting the SPS's "decision". Although it was perhaps understandable that the appellant might have misunderstood the SPS's letter as conveying a decision *made by the SPS* to execute him on a certain date, it is clear from our explanation of the statutory framework at [3] above that the SPS's letter in fact conveyed a decision made by the Cabinet. Correctly understood, the appellant's complaints under the scheduling ground were therefore also against a decision taken by the Cabinet.

30 The application and its supporting documents, both individually and when read together, ultimately left little doubt as to the essential matters that the application was concerned with. The AG was also correctly identified as the respondent. In any event, under O 53 r 3(2) of the Rules of Court, at the hearing of the judicial review proceedings the court is empowered to allow the statement to be amended to clarify the relief sought. We were therefore not prepared to dismiss the application solely on the basis that on the face of the documents, the SPS had been identified as the appropriate target for relief.

31 In the absence of full arguments on this issue, we were also inclined to accept that a prohibiting order could in principle be obtained against the SPS in the present case. "A prohibiting order may be used to restrain a public body from abusing its powers or acting illegally" (*Gobi (JR)* ([20] *supra*) at [54]). Our tentative view was that a prohibiting order could be issued against an unlawful administrative act, even if the illegality did not stem from an exercise

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of discretion by the actor in question. In the present case, if the appellant's allegations were true, the SPS's execution of the appellant on the stipulated date would be unlawful, and a prohibiting order ought to lie against the SPS even if the more appropriate remedy would be a quashing order against the Cabinet's decisions. Indeed, an administrative act which carried no discretion of its own could still be construed as a decision to implement an anterior decision by another body, and would nonetheless be subject to judicial review for illegality (see *Lim Mey Lee Susan v Singapore Medical Council* [2011] 4 SLR 156 at [25], which was upheld by the Court of Appeal without comment on this specific point in *Lim Mey Lee Susan v Singapore Medical Council* [2012] 1 SLR 701).

Whether the present application was time-barred

32 In his oral grounds, the Judge appeared to accept the AG's submission that the application breached the three-month time bar under O 53 r 1(6) of the Rules of Court. O 53 r 1(6) provides that leave will not be granted to apply for a quashing order more than three months from the date of the decision in question, unless the delay is accounted for satisfactorily to the court. Strictly speaking, this time bar applies only to quashing orders, and not mandatory orders or prohibiting orders: *Per Ah Seng Robin and another v Housing and Development Board and another* [2016] 1 SLR 1020 ("*Robin Per*") at [48]. Nevertheless, leave to apply for a prohibiting order must still be brought "within a reasonable time": *Robin Per* at [49]–[50]. We also note that despite nominally seeking a prohibiting order against the SPS, the present application could be construed in substance as seeking relief in the form of a quashing order against the Cabinet's decisions (see [29] and [31] above).

33 In any event, however, the scheduling ground and the clemency ground were distinct and severable limbs of the application. So far as the scheduling

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ground was concerned, the President's order for the appellant's execution was only made on 8 September 2020. The application was filed just over a week thereafter. There was therefore no undue delay on the scheduling ground, and no basis for finding this limb of the application to be time-barred. And, for the reasons which we are about to give, we did not think that there was any merit in the appellant's case on the clemency ground. As such, there was no need for us to decide whether there had been any undue delay in the appellant's challenge on the clemency ground.

The clemency ground

34 The appellant's case on the clemency ground rested on two key arguments: first, that the Cabinet must have had a blanket policy of disregarding clemency petitions in all drug-related cases, and second, that the clemency power under Art 22P of the Constitution had been "wholly extinguished" due to disuse.

35 On the second argument, the appellant relied solely on the *dicta* of Black CJ sitting in the Federal Court of Australia in *Ruddock* ([6] *supra*) at [19], and in particular, the words set out in italics below:

> The doubts about the continued existence of the prerogative power that would seem to underlie the judicial observations to which I have referred raise the difficult question, on which opinion is divided, whether a particular prerogative power may revive after it has fallen into disuse. *There is an argument that a long period of disuse extinguishes the prerogative*, because it would be illusory to say that Parliament has, in such circumstances, made a choice to leave the prerogative in the Crown's hands … . Another view is that the prerogative may be revived in 'propitious' circumstances, but not when it would be 'grossly anomalous and anachronistic' … . [emphasis added]

36 As is evident from this passage, Black CJ considered this to be a "difficult question, on which opinion is divided", and his judgment in *Ruddock*

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did not express any concluded view on it. Indeed, against the possibility offered by Black CJ, there is the much more emphatic observation of Lord Reid in *Burmah Oil Company (Burma Trading Ltd) v Lord Advocate* [1965] AC 75 at 101D: "The prerogative is really a relic of a past age, *not lost by disuse*, but *only available for a case not covered by statute*" [emphasis added].

37 More importantly, the prerogative powers of the Crown in other Commonwealth jurisdictions bear no resemblance to the clemency power under Art 22P of the Constitution in Singapore. As alluded to in Lord Reid's observation set out above, it is inherent in the nature of prerogative powers that they are uncodified. It can only be for that reason that there can be any suggestion that prerogative powers may be extinguished by disuse. We do not see how the same can be true of powers expressly provided for in a written constitution. The analogy which the appellant sought to draw with the clemency power in Singapore was therefore entirely misconceived.

38 Turning to the first argument, the analysis must begin with the principles governing judicial oversight of the clemency power that were set out by this court in *Yong Vui Kong (Clemency)* ([3(c)] *supra*). Chan Sek Keong CJ held that the exercise of the clemency power would be subject to judicial review where it was exercised in bad faith for an extraneous purpose, or where its exercise contravened constitutional protections and rights (*Yong Vui Kong (Clemency)* at [80]). Specifically, in advising the President on the exercise of the clemency power, the Cabinet *must* consider the materials provided to it under Art 22P(2) of the Constitution "impartially and in good faith" (at [82]):

> 83 It therefore follows that if, hypothetically speaking, conclusive evidence is produced to the court to show that the Cabinet never met to consider the offender's case at all, or that the Cabinet did not consider the Art 22P(2) materials placed before it and merely tossed a coin to determine what advice to

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> give to the President … the Cabinet would have acted in breach of Art 22P(2). If the courts cannot intervene to correct a breach of Art 22P of this nature, the rule of law would be rendered nugatory. …

39 On the other hand, Chan CJ made it clear that as long as the clemency power was exercised lawfully in the sense described above, the merits of the clemency decision fell outside the purview of the courts, in line with established administrative law principles and the doctrine of the separation of powers (at [75] and [74(d)]). As the concurring judgment of Phang and Rajah JJA in *Yong Vui Kong (Clemency)* (which Chan CJ also agreed with) emphasised, the Cabinet, in advising the President on whether to grant clemency, is entitled to take into account public policy considerations concerning the nature of the offence and the legislative policy underlying the imposition of the prescribed punishment (at [192]).

40 For the appellant to succeed in the clemency ground, therefore, he would have to show at a minimum that the Cabinet advised the President in accordance with a policy so absolute that the mere identification of a clemency petition as falling within a certain broad category of cases (such as drug-related cases) would automatically lead to it being rejected. A policy in such stark terms, if it existed, would arguably be unconstitutional along the lines described in *Yong Vui Kong (Clemency)* above, because it would not be meaningfully different from an omission by the Cabinet to consider the appellant's case at all.

41 In our judgment, the appellant's case did not establish even a *prima facie* case of reasonable suspicion that such an unconstitutional policy was in place. Even though this threshold for leave is a very low one (see *Gobi (JR)* ([20] *supra*) at [54]), the burden of crossing it remained upon the appellant, and could not be met by unsupported assertions. As we pointed out to the appellant in the course of the first hearing, the mere fact that few or even no clemency petitions

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have been granted over a long period of time was insufficient to raise the suspicion that the Cabinet did not give each clemency petition individual consideration. In this analysis, one cannot ignore the exceptional nature of the clemency power; as Chan CJ observed in *Yong Vui Kong (Clemency)* at [74(c)]:

> Ordinarily, the law should be allowed to take its course. However, when the clemency power is exercised in favour of an offender, it will 'involve a departure from the law' … in that, in the interests of the public welfare, the law (in terms of the punishment mandated by the law) is prevented from taking its course.

It was therefore entirely conceivable that the policy considerations accorded primacy by the Cabinet pointed towards allowing the law to take its course in almost every case except those with truly exceptional circumstances, and that over the course of many years there have simply been few or no such cases.

42 Whether the court ought to draw such inferences as to establish a *prima facie* case of reasonable suspicion of illegality is a fact-sensitive issue in each individual case. In the present case, even if we took the statistics presented by the appellant at face value, this still failed to provide sufficient support for the existence of the unconstitutional policy which he asserted was responsible for those outcomes. These statistics were unexceptionable for the reasons we have explained above. As such, we did not give the appellant leave to commence judicial review proceedings in respect of the clemency ground.

The scheduling ground

43 Art 12(1) provides that "All persons are equal before the law and entitled to the equal protection of the law". As the oft-cited *dictum* of Lord Diplock in *Ong Ah Chuan and another v Public Prosecutor* [1979]–[1980] SLR(R) 710 at [35] explains, equal protection requires that "like should be compared with like", and Art 12(1) assures to the individual "the right to equal treatment with

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other individuals in similar circumstances". This protection applies in two distinct scenarios: differential treatment provided by a statutory classification, and differential treatment as a result of executive or administrative action (see *Eng Foong Ho and others v Attorney-General* [2009] 2 SLR(R) 542 ("*Eng Foong Ho*") at [27]–[28]). We are presently concerned with the latter.

Judicial review of the scheduling of executions

44 The AG submitted that the scheduling ground amounted to an argument that prisoners awaiting capital punishment had a right to determine the sequence in which their sentences were carried out. The AG argued that there was no such right, relying on the judgment of Chan CJ in *Yong Vui Kong (Clemency)* ([3(c)] *supra*) at [74(e)] for the proposition that an offender's life was regarded by the law as being "forfeit" once he was sentenced to death. The AG's further submissions also appeared to suggest that the scheduling of executions was purely a matter of executive discretion and could not be challenged by way of judicial review. This seemed to be the purport of the AG's reliance on the notion of a prisoner's life being legally "forfeit" in the present context. In fairness, however, when we queried Mr Ng on this point at the hearing on 23 October 2020 ("the second hearing"), he clarified that the AG was *not* taking such a position.

45 The reference by Chan CJ in *Yong Vui Kong (Clemency)* at [74(e)] to a prisoner's life being regarded as legally "forfeit" upon being sentenced to death should be understood in its context:

> In the specific context of a death sentence case … the grant of clemency to the offender confers a gift of life on him. This is because the offender has effectively already been deprived of his life by the law due to his conviction for a capital offence. If clemency is granted to the offender, his life will be restored to him, whereas if clemency is not granted, his life will be forfeited

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> as decreed by the law. In other words, in a death sentence case, the clemency decision made, be it in favour of or against the offender, *does not* deprive the offender of his life; the law (in terms of the conviction and death sentence meted out on the offender by a court of law) has already done so. [emphasis in original]

46 This passage drew a distinction between the role of the court in a capital case, which was to pronounce or affirm the death sentence (if warranted), and the role of the Executive in wielding the clemency power, which was to intervene in this process if it considered that the law should not take its course. This served to support Chan CJ's broader point that "the clemency power is a legal power of an extraordinary character" (at [74]). Although Chan CJ went on to hold that the clemency power was not justiciable on the merits (see [39] above), there was nothing to suggest that this was because the prisoner's life was "forfeit". On the contrary, Chan CJ firmly recognised that a proper clemency process was *part of* the "law" in accordance with which a prisoner can lawfully be deprived of his life under Art 9(1):

> 84 My conclusion that the clemency power is subject to judicial review may also be said to be a corollary of the right to life and personal liberty guaranteed by Art 9(1) of the Singapore Constitution, which provides that '[n]o person shall be deprived of his life or personal liberty save in accordance with law'. In [*Thomas Reckley v Minister of Public Safety and Immigration (No 2)* [1996] AC 527], Lord Goff said at 540 … :
>
> > A man accused of a capital offence in [t]he Bahamas has of course his legal rights. In particular he is entitled to the benefit of a trial before a judge and jury, with all the rights which that entails. After conviction and sentence, he has a right to appeal to the [Bahamian] Court of Appeal and, if his appeal is unsuccessful, to petition for leave to appeal to the Privy Council. After his rights of appeal are exhausted, he may still be able to invoke his fundamental rights under the [Bahamian] Constitution. ***For a man is still entitled to his fundamental rights, and in particular to his right to the protection of the law, even after he has been sentenced to death.*** If therefore it is proposed to execute him contrary to the law, for example … because

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> there has been a failure to consult the Advisory Committee on the Prerogative of Mercy as required by the [Bahamian] Constitution, then he can apply to the [Bahamian] Supreme Court for redress under article 28 of the [Bahamian] Constitution. [emphasis added]
>
> 85 I agree with this statement of law (interpreted *mutatis mutandis*) as regards the applicability of Art 9(1) of the Singapore Constitution to the clemency process, not because an offender has any constitutional or legal right or even any expectation with respect to the grant of clemency to him, but because the requirements of Art 22P(2) must be complied with as that is what the law mandates. As just pointed out at [82]–[83] above, in a death sentence case, the Cabinet must consider impartially and in good faith the Art 22P(2) materials submitted to it before it advises the President on how the clemency power should be exercised. **That said, I reiterate that a decision not to exercise the clemency power in favour of the offender in a death sentence case does *not*, in the legal sense, deprive him of his life or personal liberty since he has already been sentenced to death by a court in accordance with law** (see sub-para (e) of [74] above). If clemency is granted to an offender in a death sentence case, it restores to him his life, which the law has already decreed is to be forfeited.
>
> [emphasis in original in italics; emphasis added in bold]

47 Hence, the pronouncement of the death sentence by a court means that the *eventual* deprivation of the prisoner's life would not be a violation of Art 9(1), *provided that it is carried out in accordance with law*. This would first require an appeal to the Court of Appeal or (if the offender does not file an appeal) a review by the Court of Appeal under s 394B of the CPC, and the denial of clemency. Finally, as this court held in CA/CM 6/2019 *Pannir Selvam a/l Pranthaman v Public Prosecutor* ("*Pannir Selvam*"), a prisoner ought to have a reasonable opportunity to consider and take advice on whether he had any grounds on which to challenge the clemency decision. In *Pannir Selvam*, the applicant was informed of the rejection of his clemency petition at the same time as his scheduled date of execution, which was just one week away. We considered this period of time to be inadequate. We refer to the passage of an

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adequate period of time as envisaged in *Pannir Selvam* as the "*Pannir Selvam* period".

48 However, as the passage from *Yong Vui Kong (Clemency)* set out above made clear, the prisoner's loss of his right to life under Art 9(1) at the end of the criminal process does not extinguish his other legal rights. This is a corollary of the cherished notion that the rule of law demands that the courts should be able to examine the exercise of discretionary power by the State (see *Nagaenthran a/l K Dharmalingam v Public Prosecutor and another appeal* [2019] 2 SLR 216 ("*Nagaenthran*") at [73] and *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86]). Such discretion as the State may have to determine the time and manner in which an execution is to be carried out must be among its gravest discretionary powers, and must have and be subject to legal limits: namely, the usual principles of judicial review, such as illegality or irrationality, and the fundamental liberties protected by the Constitution. For instance, in *Gobi (JR)* ([20] *supra*) at [69], this court considered it as clear beyond argument that an unlawful method of execution would be subject to judicial review.

49 In the present case, Mr Ravi made it plain at the first hearing that the scheduling ground was being advanced solely on the basis of Art 12. As Art 12(1) states, "*All persons* are … entitled to the equal protection of the law" [emphasis added], and even after exhausting all his legal remedies against his death sentence the appellant remained a person entitled to the equal protection of the law. The right to equal protection under Art 12(1) is based on impermissible differential treatment. Differential treatment perpetrated by a public authority is presumptively subject to scrutiny under Art 12(1), regardless of whether the persons involved, taken individually, have any freestanding legal right to being treated in a certain way. Thus, for instance, an offender charged under the MDA might not have a freestanding legal right that the Public

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Prosecutor ("the PP") adopt a set of considerations that would result in *his* particular level of assistance to the authorities being deemed "substantive assistance" under s 33B of the MDA (see *Nagaenthran* at [84]–[86]). Nonetheless, he does have a right under Art 12(1) that the PP not deny him a certificate of substantive assistance if he grants one to another equally situated offender who provided an equivalent level of assistance (see *Ridzuan* ([9] *supra*) at [51]). To give one clear example in the present context, which we put to Mr Ng in the course of the oral arguments, we have no doubt that if the State were to schedule the executions of some prisoners at the earliest possible date, and delay scheduling the executions of other prisoners for years or indefinitely without any legitimate reason, this would be unlawful under Art 12(1) (if not on other grounds as well).

50 It was for this reason that we framed Question 1 (see [14(a)] above) in terms of whether a prisoner awaiting capital punishment had a "legitimate legal expectation" that he would not face differential treatment in the scheduling of his execution. This catered for at least two kinds of concerns. First, there could be an argument that such prisoners had no legally significant interest to be protected by Art 12. This could, for example, be because of the notion that their lives were legally "forfeit", which we have categorically rejected. Second, there was the question of the appropriate baseline for equal treatment – in other words, all else being equal, did equal treatment entail scheduling executions in the order in which the prisoners were sentenced to death, or in the order in which their clemency petitions were rejected, or on some other basis?

51 The AG's further submissions, however, also appeared to interpret "legitimate legal expectation" in Question 1 as a reference to the doctrine of legitimate expectations, a distinct (and contested) doctrine of administrative law under which a public authority may be bound by its representations as to its

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future course of action. The AG therefore additionally argued that the appellant had no such legitimate expectation. However, the doctrine of legitimate expectations is entirely distinct from equal protection under Art 12(1), and, as Mr Ravi made clear (see [49] above), had no relevance to the present case. We therefore do not need to consider it further.

Assessing executive action under Art 12(1)

52 Before we turn to the second concern at [50] above, we first consider the appropriate test to apply under Art 12(1) in the present case. The AG submitted that where executive action is at issue, the test to be applied should be whether there is deliberate and arbitrary discrimination, with "arbitrary" implying the lack of any rationality. This was also cited by this court in *Ridzuan* ([9] *supra*) at [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 ("*Ang Soon Huat*")] at [23]). This test was applied by this court in [*Eng Foong Ho* ([43] *supra*)] at [30] …

53 The pronouncement in *Ang Soon Huat*, delivered by Chan Sek Keong J (as he then was) sitting in the High Court, relied solely on the decision of the Privy Council in *Howe Yoon Chong v Chief Assessor* [1990] 1 SLR(R) 78 ("*Howe Yoon Chong (1990)*"). That was a case which concerned the drawing up of annual valuation lists for property tax purposes by the Chief Assessor. Because it was impossible in practice for the valuation of every property to be updated annually, at any given point the valuations of some properties would be more recent than those of others. In a situation of rising property prices, this led to those properties facing higher taxes. The Privy Council held that such shortcomings did not violate Art 12(1):

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> 17 In their Lordships' opinion it is clear that, as the American authorities recognise, *absolute equality in the field of valuation for property tax purposes is not attainable*. Inequalities which result from the application of a *reasonable administrative policy* do not amount to *deliberate and arbitrary discrimination*. …
>
> 18 The Act of 1961, by its general scheme and its specific provisions, aimed at practical equality of valuations on an up-to-date basis. The extent to which practical equality was capable of being achieved, in an inflationary environment, depended on the extent of the resources available to the Chief Assessor. Some values were bound to fall behind others. The extent to which this happened depended on the progress the Chief Assessor was able to make in keeping the valuation list up-to-date, the level of inflation, and the passage of time. It was these circumstances and not any 'intentional violation of the essential principle of practical uniformity' which led to disparities. The extent of these disparities at a particular time is not in itself capable of evidencing an infringement of Art 12(1) …
>
> [emphasis added]

54 The Privy Council in *Howe Yoon Chong (1990)* at [15] cited its earlier decision involving the same litigants, *Howe Yoon Chong v Chief Assessor* [1979–1980] SLR(R) 594 ("*Howe Yoon Chong (1980)*"), which also concerned a similar challenge to the valuation list. The application of Art 12(1) by the Privy Council in *Howe Yoon Chong (1980)* appears to have set the foundation for the "deliberate and arbitrary" test, albeit not in those exact words:

> 13 The Constitution, being the supreme law of Singapore, will of course prevail over any law or any administrative practice inconsistent with it. Their Lordships do not in any way underrate the fundamental importance of the Constitution or of Art 12(1) in particular. … *But a breach of the equal protection clause could not be established by proving the existence of inequalities due to inadvertence or inefficiency unless they were on a very substantial scale.* Several authoritative decisions on the equal protection provision of the Fourteenth Amendment to the American Constitution were brought to the attention of their Lordships. Some caution is required in applying these authorities to the Constitution of Singapore but their Lordships see no reason to doubt that 'intentional systematic under-valuation', such as was envisaged by the Supreme Court

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> in *Sioux City Bridge Co v Dakota County* 260 US Reports 441 (1923); 67 Law Ed 340 would be a breach of Art 12(1) of the Singapore Constitution. No case of that sort was made in this appeal. *Something less might perhaps suffice*, but their Lordships are of opinion that, *where the defects are the result of inadvertence or inefficiency, such as is alleged in this case, the test of unconstitutionality would not be substantially different from the test of validity of the list.* In the present case defects on the necessary scale have not been proved to exist.
>
> [emphasis added]

55 A number of observations can be made about these pronouncements. First, while *Howe Yoon Chong (1980)* states that "intentional systematic under-valuation" would be a breach of Art 12, it did not suggest that this was the threshold for establishing a breach; instead, the Privy Council was prepared to accept that "[s]omething less might perhaps suffice". Second, the reasoning in *Howe Yoon Chong (1990)* was focused upon the specific context at hand. The fact that the issue was essentially one of *efficient* public administration, and the *practical impossibility of achieving a more equal outcome*, would have weighed heavily on the standard to be applied. Likewise, while the language in *Howe Yoon Chong (1980)* might arguably have been more general, the entire discussion was centred around alleged inefficiencies in the compilation of the valuation list. In holding that the test of unconstitutionality in that context would not be substantially different from the test of the validity of the valuation list (which would be irrationality), the Privy Council should not be understood as setting out a general principle for the application of Art 12 in every context. Third, as alluded to in *Howe Yoon Chong (1990)* at [18], the statutory scheme in fact expressly conferred upon the Chief Assessor the discretion to adopt the previous valuation list and to amend it rather than drawing up a new list (see *Howe Yoon Chong (1990)* at [9]).

56 In *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR(R) 78, M Karthigesu JA, sitting in the High Court, considered whether the "deliberate

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and arbitrary" standard could have any applicability to Art 12(1) in the context of a *statutory* classification. Karthigesu JA commented at [67]:

> I think, however, that in the light of the court's duty to uphold the fundamental liberties, the test of arbitrariness … ('lack of any rationality') appears to pitch the threshold too low. It cannot be the case that any discriminatory legislative provision which skirts the boundaries of rationality must be constitutionally valid. The obligation of the court to uphold the Constitution, and in particular, the fundamental liberties, is not satisfied by subjecting the impugned legislation to minimal scrutiny …

Karthigesu JA's decision was ultimately reversed on a criminal reference to the Court of Appeal in *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489, but without any comment on this specific point.

57 In the context of the present case, we respectfully agree with the concerns expressed by Karthigesu JA as to the "deliberate and arbitrary" test. The treatment of individuals by the Executive in a manner which lacks rationality would fall foul of the ordinary principles of judicial review for irrationality, or for taking into account irrelevant considerations or disregarding relevant ones. That is distinct from acts that are impermissibly *discriminatory* in nature which would fall within the scope of Art 12(1). The two should not be conflated. Otherwise, all executive action which could be challenged under Art 12(1) would only be vulnerable to challenge under the ordinary grounds of judicial review, and this would render Art 12(1) nugatory so far as it related to executive action. The "deliberate and arbitrary" test in fact sets the bar even higher and requires deliberate *and* arbitrary discrimination. This would suggest that even discrimination which was irrational but merely reckless or negligent would not fall afoul of Art 12(1). In our judgment, applying such a low standard of protection under Art 12(1) where life and liberty are at stake would not live up to its promise of securing for every person the equal protection of the law.

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58 A closer look at cases where executive action has been challenged under Art 12(1) also reveals a significantly more robust approach being applied, particularly where the executive action in question involved a determination of an individual case rather than an administrative policy of broad application.

59 In *Eng Foong Ho* ([43] *supra*), the appellants were devotees of a temple who challenged the compulsory acquisition by the State of its land. In its judgment, the Court of Appeal (at [28]–[30]) referred to *Howe Yoon Chong (1980)* and *Howe Yoon Chong (1990)* before citing the "deliberate and arbitrary" test with approval. The court observed, however, that the appellants had conceded that the State had acted in good faith in acquiring the land (at [31]). The court went on to consider the reasons given by the officers overseeing the land acquisition for their decision, and found it "plain" (at [32]) that it was justified by valid planning considerations (at [32]–[37]). The court therefore did not in fact apply the strict "deliberate and arbitrary" test in *Eng Foong Ho*.

60 In *Ridzuan* ([9] *supra*), the offender challenged the PP's decision not to issue him with a certificate of substantive assistance under s 33B of the MDA, amongst other things on the basis that his co-offender Abdul Haleem had been granted such a certificate. The Court of Appeal's judgment in *Ridzuan* at [49] reiterated the "deliberate and arbitrary" test, citing its application in *Eng Foong Ho* and *Ang Soon Huat* ([52] *supra*). However, the court's elaboration of how the offender could make good his case under Art 12(1) is instructive:

> 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

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> importantly, that he and his co-offender had provided *practically the same information* to [the Central Narcotics Bureau] – 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 … means … 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. [The court goes on to explain a number of possible legitimate reasons.] Thus, it would be proper for the PP to treat the co-offenders differently.
>
> [emphasis added]

61 This explanation suggests that the bar for a challenge under Art 12(1) is not as high as deliberate and arbitrary discrimination. Instead, it would have been sufficient for the applicant in *Ridzuan* to discharge his evidential burden by showing that he could be considered to be equally situated with his co-offender. This would then shift the burden to the PP to provide justification for treating them differently. In our judgment, the first limb of this test (the applicant's evidential burden) corresponded to an assessment of whether the persons in question could be said to be equally situated such that any differential treatment required justification, and the second limb of the test (when the evidential burden shifted) amounted to the question of whether the differential treatment was reasonable – meaning whether it was based on "legitimate reasons" which made the differential treatment "proper". There are readily

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available standards by which reasonableness can be assessed in this context: the rationale for differential treatment can be legitimate only if it bears a sufficient rational relation to the object for which the power was conferred. In the case of a statutory power, this would refer to the object of the statutory provision. In more straightforward cases, it may also be possible to discern a lack of legitimate reasons if the differential treatment is based on plainly irrelevant considerations or is the result of applying inconsistent standards or policies without good reason.

62 In short, whether the scheduling of the appellant's execution in the present case breached Art 12(1) would turn on: (1) whether it resulted in the appellant being treated differently from other *equally situated* persons; and (2) whether this differential treatment was reasonable in that it was *based on legitimate reasons*. Under this test, the notion of being equally situated is therefore an analytical tool used to isolate the purported rationale for differential treatment, so that its legitimacy may then be assessed properly.

63 When applying this test, the court would have due regard to the nature of the executive action in question. Since the present case was concerned with a decision which was necessarily taken on an individual rather than a broad-brush basis, and one which affected the appellant's life and liberty to the gravest degree, the court had to be searching in its scrutiny. Although the acts of those holding public office enjoy a presumption of constitutionality (see *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [47], citing *Howe Yoon Chong (1990)* ([53] *supra*) at [13]), this presumption, like that enjoyed by primary legislation, "can be no more than a starting point" that the acts in question "will not presumptively be treated as suspect" (*Saravanan Chandaram v Public Prosecutor and another matter* [2020] 2 SLR 95 at [154]; and see *Wham Kwok Han Jolovan v Public Prosecutor* [2020] SGCA 111 at [26]–[28]).

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In other words, it merely reflected the incidence of the evidential burden of proof on the appellant. Further, the same searching scrutiny we have just described would equally apply when considering whether the appellant has discharged his evidential burden and thereby overcome the presumption of constitutionality.

Art 12(1) and the scheduling of executions

64 We now turn our focus specifically to the standards of fairness which prisoners awaiting capital punishment are entitled to expect when it comes to the scheduling of their executions. In our judgment, for this purpose prisoners may *prima facie* be regarded as being equally situated once they have been denied clemency. This also corresponds to the point of time at which the prerequisites for scheduling the prisoner's execution are taken to have been met, according to MHA's affidavit (see [18] above). We will refer to this in short as the point in time when the prisoner's execution "arises for scheduling".

65 This framing is only sensible because prior to the denial of clemency, the time it takes for a prisoner's proceedings to come to a conclusion depends first and foremost on the amount of time needed at each stage of the trial, appeal and clemency process for a full and fair presentation and consideration of the merits of the case. This turns on the circumstances of each individual case, and it is therefore difficult to make any meaningful comparison between prisoners. In this regard, it was not suggested by the appellant, and we did not think it plausible to suggest, that all prisoners had to be executed in the order in which they were sentenced to death, no matter the stage at which their respective cases were. Therefore, if Prisoner A is sentenced to death on a later date than Prisoner B, but eventually Prisoner A's execution arises for scheduling while Prisoner

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B's clemency or appeal process is still pending, there is no suggestion that Prisoner A's execution must not take place until after Prisoner B is executed.

66 Likewise, it was also not suggested by the appellant that *after* the date of Prisoner A's execution has been scheduled and the relevant order made by the President, his date of execution ought to be delayed subsequently when Prisoner B's execution arises for scheduling, on the basis that their executions must follow the sequence in which their death sentences were pronounced. Therefore, for present purposes prisoners are considered equally situated after clemency has been denied *and* before their executions have been scheduled.

67 The discussion so far has rested on the premise that when clemency is denied, there is no further pending recourse or other relevant pending proceedings in which the prisoner's involvement is required. Where there are such other proceedings, the time taken for these proceedings to be completed would again turn on the circumstances of each individual case. It would be inappropriate to proceed with the scheduling of the execution of a prisoner while such matters are pending, as MHA rightly recognised (see [18(b)] above). Such prisoners would therefore not be equally situated compared to other prisoners awaiting capital punishment.

68 Here, we digress to address one of the appellant's contentions, which sought to establish a legal expectation based on the mere *prospect* of further recourse against his death sentence. He argued that his right to a fair trial would be compromised by an earlier execution because he would be deprived of time in which new evidence *might* emerge to justify reopening his conviction, compared to another prisoner whose execution was scheduled for a later date (see [7(a)] above). This represented an eventuality which was entirely speculative. *If* such grounds for a further legal challenge did emerge, the

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appellant would of course be entitled to file a further challenge in accordance with the relevant procedures, and his execution could not proceed until this challenge was fully disposed of (see *Yong Vui Kong v Public Prosecutor* [2010] 2 SLR 192 at [39]). Conversely, the mere hope that this might happen cannot give rise to a right under Art 12(1) for the appellant to have an equal chance of being the beneficiary of such an eventuality materialising compared to other prisoners. Instead, as we have alluded to at [48] above, the appellant's legal expectation to fair treatment under Art 12(1) in relation to the scheduling of his execution derived from a much more concrete interest – that of not having his death sentence carried out on a date which was decided without due regard to his constitutional rights.

69 The next question we had to consider was what it would mean for the appellant to be treated differently compared to other equally situated prisoners. MHA's affidavit implicitly accepted that the State had logistical or administrative limitations in scheduling the execution of prisoners. Otherwise, it would stand to reason that each execution which arose for scheduling would be scheduled for a date immediately following the expiry of the *Pannir Selvam* period (see [47] above). It was only where there are multiple executions which arise for scheduling at the same time, and it is not possible for them to all be scheduled for the same date, that the necessity for differential treatment would arise. In the present case, as MHA's affidavit explained, the scheduling of all executions was suspended from February to August 2020 owing to the then pending challenge in *Gobi (JR)* (see [20] above). As a result, following *Gobi (JR)*, there would presumably have been a number of prisoners whose executions arose for scheduling at the same time. This appeared to be what gave rise to the need for the State to consider the order in which these executions should take place.

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70 MHA's stated considerations (see [18] above) express a number of factors which are taken into account in scheduling prisoners' executions. In the AG's further submissions, however, one of these considerations was given primary importance: the AG took the position that all else being equal, prisoners should be executed in the order that they were first sentenced to death (see [22] above). MHA's affidavit also made it clear that this was the basis on which the appellant's execution was scheduled to be the first one to be carried out following *Gobi (JR)* (see [20] above). In other words, the AG took the position that all else being equal, the State would schedule executions so as to minimise the time that has passed for each prisoner since the pronouncement of their death sentence by the trial court. In fact, the AG's position was entirely in alignment with that of the appellant, who contended in the application that there should be a "logical nexus" between the date of the pronouncement of the death sentence and the order of execution (see [7(a)] above).

71 We accept the AG's position that the time that has passed since the pronouncement of the death sentence provides a rational baseline for equal treatment in the present context. Once the legal system has delivered a final verdict that the death penalty is to be carried out, it is only reasonable for the State to seek to minimise any further anguish to the prisoner in being detained in wait of execution. To this end, it is reasonable to take the position that this anguish would begin to mount from the date on which the prisoner is sentenced to death, and therefore, where there is a need to make a decision as to the sequence in which executions are carried out, to do so in an order that minimises the total time spent on death row for each prisoner.

72 We stress that in making these observations we are not dictating the considerations that the State can or must take into account when scheduling executions. We have not heard submissions, and make no ruling, on whether

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there is a fixed set of considerations that can apply in this context. Instead, what we have held is that prisoners have a legitimate legal expectation under Art 12(1) that they be treated equally in the scheduling of their executions, and any departure from equal treatment ought to be justified by legitimate reasons. We have accepted the State's position as to what equal treatment entails – namely, that all else being equal, prisoners whose executions arise for scheduling should be executed in the order in which they were sentenced to death – as being a rational baseline. We also make no conclusive determination as to what legitimate reasons may exist for a departure from this baseline. This is partly in recognition of the fact that as the statutory scheme has made the scheduling of executions an executive and not a judicial function, some flexibility in scheduling was desirable and intended. Nevertheless, as we have explained, this flexibility must be exercised lawfully.

73 Having stated its position as to how executions were scheduled, therefore, it was incumbent on the State to apply these criteria consistently. It can depart from its stated baseline only if there are legitimate reasons that weigh in a different direction. It was for the appellant to raise a *prima facie* case of reasonable suspicion that the State treated him differently from another equally situated prisoner and did not have legitimate reasons for doing so. We now turn to the relevant facts in the present case.

The facts of the present case

74 As stated at [16] above, Mr Ravi cited the case of Datchinamurthy in support of the alleged unequal treatment of the appellant. Although Datchinamurthy was not mentioned in Mr Ravi's supporting affidavit, we took judicial notice of the details of Datchinamurthy's case, since these details related solely to orders which were made by the courts.

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75 The appellant was sentenced to death in the High Court on 2 December 2015. Datchinamurthy was sentenced to death in the High Court before the appellant, on 15 April 2015. Datchinamurthy's death sentence was upheld by this court in CA/CCA 8/2015, and he was informed of the rejection of his clemency petition on 5 July 2019 (on the same day as the appellant). On 21 January 2020, the President made an order for Datchinamurthy to be executed on 12 February 2020. Datchinamurthy then filed HC/OS 111/2020 along with another prisoner, alleging that the SPS was prepared to use an unlawful method of execution. This application was ultimately rejected by this court in *Gobi (JR)* ([20] *supra*). Since this was the very matter that resulted in the scheduling of executions being suspended between February and August 2020 (see [20] above), this meant that Datchinamurthy and the appellant's executions would have arisen for scheduling at the same time upon the delivery of judgment in *Gobi (JR)*. On the face of the record, therefore, the appellant and Datchinamurthy appeared to be equally situated. However, no new order of execution has been made by the President in respect of Datchinamurthy.

76 It thus appeared that all else being equal, Datchinamurthy should have been scheduled for execution on a date earlier than the appellant, since he was sentenced to death before the appellant. As we have explained at [72] above, this was the baseline for equal treatment taking the AG's position. MHA's affidavit, however, stated that at the time the appellant's execution was scheduled, he was "the *first to be sentenced to death*" [emphasis added] amongst all the equally situated prisoners (those "whose legal and clemency processes had been completed and for whom all applicable supervening factors based on policy considerations had been resolved") (see [20] above). It should be noted that these "supervening factors based on policy considerations" refer to MHA's stated considerations listed at [18] above, and include such factors as the date

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of pronouncement of the death sentence and the determination of other court proceedings involving the prisoner – which have already been considered in our comparison of the appellant's and Datchinamurthy's cases above. No other differentiating factors were available to justify the differential treatment of the appellant and Datchinamurthy. On the face of the record, there was therefore an apparent inconsistency between MHA's assertion and the known facts.

77 We considered this inconsistency sufficient to surmount the low bar of a *prima facie* case of reasonable suspicion to grant leave to commence judicial review proceedings. Given this conclusion, it was not necessary for us to go on to consider whether the appellant was specifically discriminated against on the grounds of nationality, as contended under the discrimination argument, or whether the legal analysis would be any different on this basis.

78 After we highlighted this apparent inconsistency at the second hearing, Mr Ng informed us that the AG wished to be given time to file a further affidavit to explain why Datchinamurthy had not been scheduled for execution. We did not grant this application for two related reasons. First, an application for leave to commence judicial review is intended to filter out groundless or hopeless cases at an early stage, so as to prevent wastage of judicial time and protect public bodies from harassment (see *Nagaenthran* ([48] *supra*) at [76]). Its purpose is expediency, and a protracted application for leave would be self-defeating. It is therefore exceptional for the parties to be granted leave to file further affidavits *on appeal* from an application for leave to commence judicial review, as we have done in the present case. We considered it inappropriate to protract this process further by granting the AG leave to file yet another affidavit after the *second* hearing of the appeal. As Mr Ravi intimated, he would then wish to file a reply affidavit, and this would only extend the proceedings even further. Second, Mr Ravi had given the AG notice at the first hearing that he

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intended to rely on Datchinamurthy's case in support of the scheduling ground. To the extent that MHA's affidavit then made assertions inconsistent with the facts of Datchinamurthy's case without providing any explanation, the AG could not argue that this was a problem that could not have been foreseen.

79 Instead, we considered that it would better serve the interests of justice if the appellant were granted leave to pursue his judicial review application in relation to the scheduling ground, so that all of the relevant evidence could be presented on behalf of the appellant and the State in those proceedings.

The High Court's stay of the execution

80 Finally, we address the High Court's power to grant a stay of the carrying out of an execution. The AG submitted that the Judge had no power to order such a stay. Instead, it was submitted that the correct procedure would be to file a criminal motion before the Court of Appeal for a stay of the execution, even if the substantive relief sought was by way of judicial review proceedings commenced in the High Court. The AG relied upon the decision of the Privy Council in *Thomas Reckley v Minister of Public Safety and Immigration* [1995] 2 AC 491 ("*Reckley*") at 496H–497A, which was cited with approval by this court in *Kho Jabing v Attorney-General* [2016] 3 SLR 1273 ("*Kho Jabing (JR)*") at [3], as setting out the appropriate principles on which the Court of Appeal should decide such a criminal motion.

81 However, *Reckley* in fact undermined the ultimate proposition advanced by the AG. In *Reckley* at 496H, the Privy Council said that "if the constitutional motion raises a real issue for determination, it must be right for *the courts* to grant a stay prohibiting the carrying out of a sentence of death pending the determination" [emphasis added]. Read in context, it was clear that the Privy

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Council was referring to *any* court which was competent to hear such a constitutional challenge. In fact, in *Kho Jabing (JR)*, the High Court had granted a stay of the applicant's execution in HC/OS 499/2016 pending an appeal to the Court of Appeal on the basis of *Reckley* (although it declined to grant a stay of the applicant's execution until the determination of the merits of HC/OS 499/2016). On appeal, this court made no adverse comment on the stay granted by the High Court.

82 The AG's position was that because it was the Court of Appeal that had issued the warrant of execution under s 313(*g*) of the CPC, only the Court of Appeal could stay the execution. The AG submitted that only this arrangement would be consistent with the statutory scheme under s 313 of the CPC, which did not provide any role for the High Court. In our judgment, s 313 was not intended to displace the availability of the general remedies in administrative law. These remedies are provided for in para 1 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), which confers upon the High Court the power to issue prerogative orders, such as a prohibiting order or a quashing order, "to any person or authority".

83 The concern expressed in the AG's submissions, that the High Court should not order relief which has the effect of suspending or superseding an order issued by the Court of Appeal, appeared to us essentially to be a misapplication of the doctrine of *stare decisis*. *Stare decisis* concerns the binding effect of a ruling on a *principle of law* by one court upon another court (or upon itself) (see, for example, *Mah Kah Yew v Public Prosecutor* [1968–1970] SLR(R) 851 at [6]). A decision or order cannot have the effect of *stare decisis* other than in respect of any principle of law that it embodies. As for the finality of a decision or order of a court, this is instead secured by the doctrine of *res judicata* (including the extended doctrine of *res judicata* which derives

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from abuse of process – see generally *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453). Where the doctrine of *res judicata* applies, the proceedings cannot be allowed to proceed *regardless* of the court in question. This is again illustrated by *Kho Jabing (JR)*, in which the applicant had filed a civil application in the High Court seeking to challenge the outcome of criminal applications heard by the Court of Appeal. This court's decision in *Kho Jabing (JR)* did not express any doubt on the High Court's jurisdiction to entertain the civil application on the basis that it was inferior in the judicial hierarchy to the Court of Appeal. Instead, it held that the civil application, being an attempt to relitigate the criminal applications on largely identical grounds, was an abuse of process (*Kho Jabing (JR)* at [2]).

84 The same principles apply to the present case. The doctrine of *stare decisis* has no applicability to the warrant of execution issued under s 313(*g*) of the CPC, and there is therefore no impediment to the High Court granting a stay of the execution in the exercise of its existing powers. In fact, the Court of Appeal will almost invariably cause the warrant of execution under s 313(*g*) to be issued upon receipt of the President's order under s 313(*f*) to carry out the execution, as the issuance of the warrant is a duty which carries minimal if any fresh discretion. The warrant issued under s 313(*g*) therefore does not even go so far as to certify the legality or constitutionality of the President's order and the decisions underlying it, beyond the fact that the order appeared on its face to be one validly made under s 313(*f*).

Conclusion

85 The facts of this case were unique in that they arose out of the context of a significant number of executions arising for scheduling at the same time due to their scheduling having been put on hold. It was in these circumstances

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that there was a need for the State to decide the sequence in which these executions were to be carried out. Nevertheless, the rarity of the circumstances did not preclude the need for the State to exercise its discretion in a manner which was consistent with the prisoners' legal and constitutional rights. Because there was an apparent inconsistency between the state of affairs asserted by the State and the known facts, we considered there to be a *prima facie* case of reasonable suspicion that merited further examination in judicial review proceedings. We did not consider it appropriate, given the preliminary nature of an application for leave to commence judicial review proceedings, to allow any further materials to be adduced before us at this stage.

86 For the reasons we have explained, we allowed the appeal and granted leave to the appellant to commence judicial review proceedings in the High Court solely on the scheduling ground. We directed the Registry to convene a case management conference urgently, so that the matter could be dealt with in the High Court expeditiously. We ordered that the appellant was to produce in the High Court the entirety of the evidence he wished to rely on to make good his contention, and that there should be no drip-feeding of the evidence by either party.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal

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Ravi s/o Madasamy (Carson Law Chambers) for the appellant;
Francis Ng Yong Kiat SC and Wuan Kin Lek Nicholas (Attorney-General's Chambers) for the respondent.

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