IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 60

Civil Appeal No 101 of 2020

Between

Daniel De Costa Augustin

… *Appellant*

And

Attorney-General

… *Respondent*

In the matter of Originating Summons No 614 of 2020

Between

Daniel De Costa Augustin

And

Attorney-General

EX TEMPORE JUDGMENT

[Administrative Law] — [Judicial review]
[Constitutional Law] — [Judicial review]

Daniel De Costa Augustin
v
Attorney-General

[2020] SGCA 60

Court of Appeal — Civil Appeal No 101 of 2020
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Judith Prakash JA
30 June 2020

30 June 2020

Sundaresh Menon CJ (delivering the judgment of the court *ex tempore*):

Introduction

1 On 23 June 2020, the President of the Republic of Singapore dissolved Parliament and issued the Writ of Election for the country's General Elections 2020 (the "Election") pursuant to Art 65(3) of the Constitution of the Republic of Singapore (1999 Rev Ed, 1985 Reprint) (the "Constitution") and s 24(1) of the Parliamentary Elections Act (Cap 218, 2011 Rev Ed) (the "PEA"). On the same day, the appellant commenced a judicial review application (HC/OS 614/2020) for (i) declarations that the rights to vote and to free and fair elections are fundamental rights guaranteed under the Constitution; and (ii) a prohibitory order against holding the Election. In his supporting affidavit, the appellant explains that the holding of the Election at this time, whilst we are amid the global coronavirus disease ("COVID-19") pandemic, will impinge on his rights to vote and to free and fair elections and it must therefore be postponed. The

application was and is contested by the Attorney-General who is the respondent before us.

2 COVID-19 is a highly infectious and potentially life-threatening disease. It has brought about rapid and dramatic changes to many aspects of everyday life, one manifestation of which is the fact that the Court of Appeal has convened this morning by videoconference to hear this appeal brought against the orders made by a High Court Judge last evening. It is evident that without an effective vaccine, the risk of infection is such that radical measures have had to be taken urgently in the bid to curb a public health emergency. These measures include mandatory social distancing, the wearing of face masks, 14-day periods of quarantine and size limits on public gatherings. In the context of the Election, the Parliamentary Elections (COVID-19 Special Arrangements) Act (Act 21 of 2020) (the "PE(C19)A") was passed on 4 May 2020 and *facilitates* changes to the electoral process, such as procedures for voters subject to COVID-19 movement controls, in order to minimise health risks.

3 The appellant does not challenge the constitutionality of the PE(C19)A but maintains that the precautions that are necessitated by public health considerations at this time will deprive the electorate of a free and fair Election because, among other things, they unfairly disadvantage opposition parties. Global restrictions implemented to combat COVID-19 mean that overseas voters have limited methods of casting their ballot, curtailing their right to vote. There are also concerns in respect of the safety of polling agents, who will be subject to unnecessary risks that may result in COVID-19 infection. For these, among some other reasons, it is contended that the Returning Officer, who is appointed by the Minister under s 3(1) of the PEA, should be enjoined from proceeding to hold the Election.

The Judge's decision

4 As noted above, the appellant filed his application on the same day that Parliament was dissolved, and the Writ of Election was issued. At his request that the matter be disposed of before Nomination Day, which is today, his application was fixed for hearing before the High Court Judge ("the Judge") yesterday. The Judge heard the parties and gave his decision last evening. The appellant intimated his intention to file an appeal and this court was convened to hear the matter on an expedited basis this morning.

Our decision

5 Before we set out our decision and our brief grounds for coming to the view that we have, it is helpful to set out some key points in the case that was advanced by the appellant:

> (a) The appellant does not contest the decision to dissolve Parliament. Counsel for the appellant, Mr Ravi, told us this morning that Parliament having been dissolved he was in any case not in a position to challenge that fact. While we think that is correct, the more significant point in our view is that under Art 65(3) of the Constitution, once a Prime Minister, who commands the confidence of the majority in Parliament, advises the President to dissolve Parliament, the President is obliged to do so. Although the language of Art 65(3) frames this in the negative, by providing that the President "shall not be obliged to act in this respect in accordance with the advice of the Prime Minister *unless* he is satisfied that … the Prime Minister commands the confidence of a majority of the Members of Parliament" [emphasis added], the effect is the same.

(b) This leads to Art 66 of the Constitution which provides that "There *shall* be a general election at such time, within 3 months after every dissolution of Parliament, as the President shall … appoint" [emphasis added]. Mr Ravi did not address us substantively on the relevance of this provision but, with respect, this seemed to us, as we observed, to be a point of considerable importance to the present application. If the Dissolution itself was not being challenged, then the Constitution itself provides that a general election "shall" be conducted within three months and it is not at all evident to us how the court could restrain this from happening. It should be noted that the application was not targeted at specific complaints but was seeking the restraint of the Election.

6 We turn to consider the arguments that Mr Ravi put before us, leaving to one side the considerable obstacle we have just outlined as to the combined effect of Art 65(3) and Art 66. Mr Ravi emphasised that his claim rested on the assertion that a citizen of Singapore has a fundamental right to vote. Later in the course of his submissions, he framed this in terms that encompassed a right to free and fair elections. In considering this argument, it may be necessary for us to consider:

(a) the nature, source and content of the asserted right;

(b) the specific way in which it is said to be threatened or violated; and

(c) the basis upon which the appellant establishes that he has standing to seek vindication of that right.

The right to vote

7 Turning to the right to vote, in our judgment, following from the effect of Art 66 read with Art 65(3) as we have outlined above, it is plain that once Parliament is dissolved, the Constitution *mandates* the holding of a general election. Correspondingly, Art 39(1) speaks of Members of Parliament ("MPs") as "elected" members returned at a general *election*. The term general election is not defined but this plainly contemplates an election at which citizens vote to elect their MPs. Further, this in turn leads to the selection of the Prime Minister who pursuant to Art 25 is the Member who commands the confidence of the majority of the MPs. This indeed is the essence of the Westminster system of Government which is reflected in the institutional design that is embodied in the Constitution. This much was essentially recognised by the Court of Appeal in *Vellama d/o Marie Muthu v Attorney-General* ("*Vellama*") [2013] 4 SLR 1 where it said as follows at [79]:

> … the form of government of the Republic of Singapore as reflected in the Constitution is the Westminster model of government, with the party commanding the majority support in Parliament having the mandate to form the government. *The authority of the government emanates from the people.* Each Member *represents the people of the constituency* who voted him into Parliament. The voters of a constituency are entitled to have a Member *representing and speaking for them* in Parliament. The Member is not just the mouthpiece but *the voice of the people of the constituency*. [emphasis added]

8 Unsurprisingly, the Attorney-General maintained that this was all uncontroversial and we agree. However, we correct one aspect of Mr Ravi's submission on this point. Mr Ravi described the right to vote as an unenumerated right. We disagree. The notion of unenumerated rights was rejected in *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 ("*Yong Vui Kong*") at [68]–[75], especially [73] and [75], where we stated as follows:

> In our judgment, where a right cannot be found in the Constitution (***whether expressly or by necessary implication***) *the courts do not have the power to create such a right out of whole cloth simply because they consider it to be desirable* or perhaps to put it in terms that might *appear* more principled, to be part of natural law … [R]eading unenumerated rights into the Constitution would entail judges sitting as a super-legislature and enacting their personal views of what is just and desirable into law, which is not only undemocratic but also antithetical to the rule of law. [emphasis added in bold italics]

9 In our judgment, the right to vote is best understood as a right that is found in the Constitution either as a matter of construing it in its entirety or as a matter of necessary implication in the light of the reference to elections contained in Art 66 and Art 39(1). Mr Ravi seemed to accept this when it was pointed out to him.

10 The fact that the right is uncontroversial would stand in the way of the declaratory rights the appellant was seeking since there would be no real controversy for us to rule on and this is a necessary condition for this appeal to succeed. Mr Ravi however contended that he was seeking a declaration that the right to vote was part of the basic structure of the Constitution and in that sense it is a "fundamental" right which cannot be abrogated by Parliament. The way the argument was framed was, with respect, mistaken. The right to vote is plainly a constitutional right and so in accordance with Art 4 of the Constitution, any law that is inconsistent with it would be open to challenge. But the reference to the basic structure doctrine and the suggestion by Mr Ravi that this has been accepted as part of the law of Singapore is mistaken. In *Yong Vui Kong*, we said this at [72]:

> We have outlined the contours of the basic structure doctrine above only to show that it is inapplicable in the present case: clearly there is nothing inherent in the system of government set up by our Constitution which requires a finding that the prohibition against torture forms part of its basic structure.

> However, this also means that it is unnecessary … for us to reach the question of whether such a doctrine as was set down in [*Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461 ("*Kesavananda*")] is or is not part of our law, nor, if it were, what its extent or effect might be. *Kesavanada* holds that the basic structure of a constitution may not be amended even by a validly passed constitutional amendment … since we are not considering the validity of a constitutional amendment, this issue does not arise for our decision here and we therefore express no view on this.

11 It is plain that the doctrine has yet to be accepted as part of our law. It is also important to set the context of the doctrine correctly and once that is done, its irrelevance to this case becomes evident. We are not dealing with the validity or otherwise of any constitutional amendment and therefore this simply does not arise to be considered in this case. Again, Mr Ravi seemed to accept this when it was explained to him.

12 It follows that there is no essential controversy over the existence of the constitutional right to vote and on this basis the application for declaratory relief fails. As Mr Ravi also accepted that his claim to the prohibitory order was contingent on the declaratory orders, this is enough to dispose of the appeal. However, we go on to explain why this was misplaced in any event.

No controversy as to free and fair election

13 It quickly became evident that the appellant really had no case to mount in connection with the right to vote. Of course, the critical task for a litigant seeking to vindicate a right is to establish the precise content of the right and to show how that right is being violated. In the context of the right to vote, Mr Ravi accepted that at its core, it covered the right of Singaporeans to cast their votes at an election. Since an election has been called, there is nothing to suggest that this right is being directly threatened in any way. Mr Ravi then explained that the right to vote encompasses a right to free and fair elections. While we

agree that as a statement of principle elections must be free and fair, the precise content of what constitutes a free and fair election is contestable and it is incumbent on the appellant to demonstrate the specific aspects of the pending Election that he contends are *constitutionally impermissible*. Mr Ravi relied on a few grounds which quickly reveal the difficulties in his case:

(a) He pointed to s 8 of the PE(C19)A which exempts the Returning Officer or the Director of Medical Services and those acting under their authority from "advising voters against voting at an election if, on the polling day … they … exhibit acute respiratory symptoms or are febrile; or may have been exposed to the risk of becoming infected with, or a carrier of, the COVID-19". He submitted that this could disenfranchise a substantial body of the electorate. But when we asked who was at risk of being disenfranchised and how, Mr Ravi was unable to explain this. As we pointed out to him, this provision merely exempts two public servants (and those acting under their authority) from the risk of prosecution for breaching the prohibition against dissuading voters from casting their ballots under s 81(1) of the PEA. Moreover, it pertains to an *advisory* which on the face of the provision did not exclude the right of a voter to cast her ballot subject to taking appropriate public health precautions. Indeed, as we pointed out to Mr Ravi, and as he did not seriously challenge, this Act was an effort to *facilitate* the conduct of elections and to safeguard the rights of Singaporeans to vote while also protecting the interests of the community from the risk of illness during an especially difficult time for the nation.

(b) Mr Ravi then submitted that there were upwards of 200,000 Singaporeans residing overseas who might not be able to cast their ballots owing to travel restrictions. However, he was unable to identify

the constitutional basis upon which it could be said that the Government had an obligation to provide a means for every Singaporean anywhere in the world to be able to cast their ballots. Still less was he able to explain how the court could direct the Government to make such provision. He submitted this would follow from the principle of constitutional supremacy enshrined in Art 4, when that provision is concerned with the invalidation of acts and legislation inconsistent with the Constitution and not with empowering the court to give directions to the other branches of Government of policies that must be developed and implemented. As we noted in *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 at [90]:

> We began this judgment by observing that the specific responsibility for pronouncing on the legality of government actions falls on the Judiciary. It is appropriate at this juncture to parse this. To hold that this is so is not to place the Judiciary in an exalted or superior position relative to the other branches of the government. On the contrary, the Judiciary is one of three co-equal branches of government. But though the branches of government are co-equal, this is so only in the sense that none is superior to any other while all are subject to the Constitution. Beyond this, it is a fact that each branch of government has separate and distinct responsibilities. In broad terms, the Legislature has the power to make the laws of our land, and this power extends even to amending the foundation of our entire legal system and indeed, of our nation, the Constitution. The Executive has the power and the responsibility of governing the country within the framework of the laws established by the Legislature. And the Judiciary has the responsibility for the adjudication of controversies which carries with it the power to pronounce authoritatively and conclusively on the meaning of the Constitution and all other laws. It is the nature of this latter responsibility that results in the Judiciary being tasked with the role of pronouncing on the legality of government actions.

> It is vital to good governance that each of the branches of Government be mindful of the province that it has been assigned under the Constitution and that they all remain within their respective provinces while respecting the work of the other branches within their provinces.
>
> (c) Mr Ravi did not make further submissions to us orally but in his written submissions he relied on other aspects. For instance, he relied on the fact that polling agents might be exposed to risks in having to man polling stations but as we pointed out to him, those health concerns were not relevant to the right to vote and would have to be dealt with as part of the public health measures in place, which were not themselves the subject of any challenge before us.

14 For these reasons, it was clear to us that no question was raised that admitted of a real controversy in respect of the asserted right to free and fair elections. As we have said, it is correct to say as a matter of principle that elections should be free and fair but it falls on the appellant to identify specific aspects of what this requires, how this attracts constitutional status and how a breach of this is threatened and on none of these were we presented with even an arguable case.

Lack of standing

15 Again, we reiterate that this is enough to dispose of the appeal, but we briefly note the difficulties with the appellant's standing. In *Vellama*, this court held at [33] that the applicable principle where an application for relief is predicated on public rights is that the applicant must demonstrate that the interference with, or violation of, such a public right has caused him "special damage". We went on to observe at [43] that the applicant must demonstrate that "his personal interests are directly and practically affected over and above

the general class of persons who hold that right". In considering this, it is essential to first define the nature of the alleged right, as to which the difficulties we have noted above would all apply. But beyond that, in the case before us there is virtually nothing to demonstrate just what the appellant's special interest is. He has not demonstrated that his right to vote is in any way affected; to the extent he relies on the rights of voters overseas, he is not himself overseas; to the extent he relies on those who might be dissuaded by any public health advisory, not only is it premature to say whether such an advisory will be issued, he has not suggested he would be prevented from voting because adequate arrangements will not be made for him to vote. This again is a further basis for dismissing this appeal.

Conclusion

16 For these reasons we dismiss the appeal. We will hear the parties on costs.

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

Ravi s/o Madasamy (Carson Law Chambers) for the appellant; and Hri Kumar Nair *SC*, Tan Ruyan Kristy, Hui Choon Kuen, Seow Zhixiang, Lee Hui Min and Sarah Siaw (Attorney General's Chambers) for the respondent.