IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 77

Civil Appeal No 23 of 2020

Between

(1) Gobi a/l Avedian
(2) Datchinamurthy a/l Kataiah

… *Appellants*

And

Attorney-General

… *Respondent*

In the matter of Originating Summons No 111 of 2020

Between

(1) Gobi a/l Avedian
(2) Datchinamurthy a/l Kataiah

… *Applicants*

And

Attorney-General

… *Respondent*

Civil Appeal No 24 of 2020

Between

(1) Datchinamurthy a/l Kataiah
(2) Gobi a/l Avedian

… *Appellants*

And

Attorney-General

… *Respondent*

In the matter of Originating Summons No 181 of 2020

Between

(1) Gobi a/l Avedian
(2) Datchinamurthy a/l Kataiah

… *Applicants*

And

Attorney-General

… *Respondent*

JUDGMENT

[Administrative Law] — [Judicial review]
[Administrative Law] — [Remedies] — [Declaration]
[Civil Procedure] — [Affidavits] — [Interlocutory proceedings]

Version No 1: 27 Oct 2020 (22:41 hrs)

TABLE OF CONTENTS

BACKGROUND **1**

THE APPLICATIONS **2**

THE HEARING BELOW **4**

THE APPELLANTS' SUBMISSIONS 4

THE AG'S SUBMISSIONS 6

THE DECISION 8

THE PRESENT APPEALS **9**

EVENTS PRIOR TO THE HEARINGS 10

THE FIRST HEARING ON 2 APRIL 2020 11

SUBSEQUENT EVENTS 11

THE SECOND HEARING ON 15 JUNE 2020 12

THE PARTIES' SUBMISSIONS **12**

THE APPELLANTS' SUBMISSIONS 12

THE AG'S SUBMISSIONS 14

OUR DECISION **16**

THE APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEW 16

The Mandatory Order and the Court Immunity Order *17*

The Prohibiting Order *20*

THE APPLICATION FOR DECLARATORY RELIEF 29

MR DATCHINAMURTHY'S ALLEGATIONS ON THE CONDUCT OF THE SPS **34**

Version No 1: 27 Oct 2020 (22:41 hrs)

CONCLUSION.....38

Version No 1: 27 Oct 2020 (22:41 hrs)

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Gobi a/l Avedian and another
v
Attorney-General and another appeal

[2020] SGCA 77

Court of Appeal — Civil Appeals Nos 23 of 2020 and 24 of 2020
Andrew Phang Boon Leong JA, Judith Prakash JA and Woo Bih Li J
2 April, 15 June 2020

13 August 2020 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Background

1 Mr Gobi a/l Avedian ("Mr Gobi") and Mr Datchinamurthy a/l Kataiah ("Mr Datchinamurthy") are Malaysian citizens who were convicted in separate proceedings for drug-related offences and sentenced to the death penalty. They are currently held in Changi Prison awaiting the execution of their sentences. Mr Gobi has filed a separate application in CA/CM 3/2020 to review his conviction and the Court of Appeal has reserved judgment in that matter.

2 On 16 January 2020, Lawyers for Liberty ("LFL"), a non-governmental organisation based in Malaysia, released a press statement where it claimed that it had discovered that "brutal and unlawful methods" were used in judicial executions in Singapore ("the LFL Press Statement"). LFL had allegedly been informed that in the event that the rope broke during an execution, officers from

the Singapore Prison Service ("SPS") were trained to execute the prisoner by kicking the back of the prisoner's neck. This was done surreptitiously and specific measures were adopted to ensure nothing incriminating would be revealed in a subsequent autopsy. LFL claimed that this information had been provided by a former SPS officer ("the Witness").

The applications

3 On 28 January 2020, the appellants filed HC/OS 111/2020 ("OS 111") pursuant to O 53 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules") for leave to commence judicial review and sought the following orders:

(a) a prohibiting order directing that their executions be stayed pending investigation of the allegations that executions were carried out by kicking to the back of the neck as there was an imminent risk that the appellants might be executed in breach of their rights under Arts 9 and 12 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution") ("the Prohibiting Order"); and

(b) a mandatory order directing that the Attorney-General ("the AG") and the Minister for Home Affairs ("the Minister") provide protection from criminal and civil liabilities to the Witness to enable him to provide the necessary information in support of the application ("the Mandatory Order").

4 The appellants were represented by Mr Ravi s/o Madasamy ("Mr Ravi"), an advocate and solicitor with Carson Law Chambers.

5 In their affidavit filed in support of OS 111, the appellants exhibited the LFL Press Statement and an affidavit deposed by Mr Zaid bin Abd Malek

Version No 1: 27 Oct 2020 (22:41 hrs)

("Mr Zaid"). Mr Zaid is the appellants' Malaysian solicitor, and he alleged that he had met the Witness in his office in Kuala Lumpur. The Witness had served in the SPS from 1991 to 1994 and provided details of the training he received as an SPS officer. He told Mr Zaid that the officers were trained to execute prisoners by kicking the back of their neck in the event that the rope broke during a judicial execution. According to Mr Zaid, he had perused certificates and documents which confirmed that the Witness had served in the SPS from 1991 to 1994. The Witness was only prepared to reveal his identity and file an affidavit attesting to the facts if he was granted immunity from civil and criminal prosecution by the relevant Singapore authorities. This formed the basis of the request for the Mandatory Order.

6 The AG filed two affidavits in reply. The first was an affidavit by Chief Prosecutor Kow Keng Siong ("CP Kow") who stated that the AG had considered the matter and would not grant immunity from criminal prosecution to the Witness for any offence that he had committed or might commit. The second was an affidavit by Deputy Assistant Commissioner See Hoe Kiat ("Dy Asst Commr See") of the SPS who unequivocally denied that the SPS had ever carried out any training or given instructions on the alleged execution method.

7 A pre-trial conference ("PTC") for OS 111 was held on 4 February 2020, where Mr Ravi appeared for the appellants and Mr Wong Woon Kwong ("Mr Wong") appeared for the AG. Mr Wong requested that OS 111 be heard on an urgent basis and stated, "I am also instructed to state that we are expressly reserving all our rights against Mr Ravi". We will refer to this particular statement as "the Statement". Mr Ravi asked if the Statement was a threat against him and his concerns were recorded twice by the assistant registrar, who informed him that he could clarify the Statement with Mr Wong after the PTC.

Version No 1: 27 Oct 2020 (22:41 hrs)

8 At the PTC, Mr Ravi also sought leave to tender a further affidavit from the Witness, and he was permitted to file this affidavit by 10 February 2020. No affidavit was filed. Instead, the appellants filed HC/OS 181/2020 ("OS 181") for declaratory relief that the Statement breached their right to a fair hearing of OS 111 under Art 9 of the Constitution.

9 At the next PTC on 11 February 2020, Mr Ravi confirmed that the Witness would not file an affidavit. He also applied for and was granted leave to amend OS 111 as follows:

> (a) Prayer 1(a) (see [3(a)] above) was amended from a stay "*pending investigation of the allegations that executions* are carried out by kicking to the back of the neck" to a stay "*in light of the alleged contingent protocol that executions* are carried out by kicking to the back of the neck" [emphasis added].
>
> (b) Additional prayers were added for (i) an order that the court grants immunity from criminal prosecution and/or civil liabilities to the Witness ("the Court Immunity Order"); and (ii) an order that OS 111 be stayed pending the decision in OS 181 or any appeals arising from the application.

The hearing below

10 Both OS 111 and OS 181 were heard by the High Court judge ("the Judge") on 13 February 2020.

The appellants' submissions

11 In respect of OS 111, Mr Ravi submitted that the "contingent protocol" (*ie*, the plan to execute a prisoner by kicking the back of the neck) was

Version No 1: 27 Oct 2020 (22:41 hrs)

susceptible to judicial review because the SPS was a statutory body under the Prisons Act (Cap 247, 2000 Rev Ed) ("the Prisons Act") and it carried out a public function of carrying out sentences passed by a court of law. There was a *prima facie* case of reasonable suspicion in favour of the Prohibiting Order because, if true, the allegations disclosed direct and blatant illegality in contravention of the Constitution. Section 316 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC") stipulated that a person must be executed by hanging by the neck; execution by kicking to the back of the neck was in breach of the CPC and, by extension, a breach of the right to life enshrined in Art 9 of the Constitution. The contingent protocol was also a breach of the right to equal treatment under Art 12 of the Constitution as the protocol was only applied when the rope broke, and this criterion was unintelligible and arbitrary. The court had the power to prohibit the Government from implementing a decision that was illegal or irrational. There was a risk that any judicial execution might lead to a prisoner being executed in a manner that was in breach of his constitutional rights, and all executions had to be stayed in view of the imminent risk of illegality.

12 In so far as the Mandatory Order was concerned, while the court could not compel the AG or the Minister to exercise their discretion in a certain way, it could compel them to *consider* exercising their discretion. In the circumstances, a refusal to grant immunity would be *ultra vires* and an abuse of discretion, as the threat of prosecution of the Witness denied the appellants an essential part of their evidence upon which they sought to make their case. It would also interfere with the appellants' legitimate expectation that they could adduce all relevant information in support of their case, subject to procedural requirements.

Version No 1: 27 Oct 2020 (22:41 hrs)

13 The court had the power to make the Court Immunity Order as it could compel the witness to testify, and pursuant to s 134(2) of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Evidence Act"), a witness could not be prosecuted for his answer nor have his answer proved against him in any criminal proceeding save a prosecution for giving false information. It would be in the public interest to have a full factual finding on the allegations and the Witness should be compelled to testify.

14 In respect of OS 181, the Statement was an implied threat to commence civil, criminal and/or punitive proceedings against Mr Ravi. It compromised the independence of counsel, which infringed the rule of law and the appellants' right to counsel and a fair hearing under Art 9 of the Constitution. OS 111 should be stayed pending OS 181 as Mr Ravi should be permitted to argue OS 111 without the threat hanging over him.

The AG's submissions

15 Mr Wong, appearing on behalf of the AG in OS 111, submitted that there was no decision susceptible to judicial review as the appellants had not exhausted their legal remedies. They had not applied for a stay of execution of their sentences or a grant of immunity for the Witness, and had instead come to the court as a first resort.

16 Specifically, in relation to the Prohibiting Order, there was no *prima facie* case of reasonable suspicion as there was no evidential basis to support the allegations. The appellants had not provided any admissible or reliable evidence to substantiate their claim and had only relied on hearsay evidence in the form of the LFL Press Statement and Mr Zaid's affidavit. Hearsay evidence was not admissible in affidavits filed in these proceedings, based on O 41 r 5(1) of the

Version No 1: 27 Oct 2020 (22:41 hrs)

Rules. Furthermore, the LFL Press Statement and Mr Zaid's affidavit contained inconsistencies between them, such as whether or not the execution method was used or was merely a contingent protocol, and whether or not it was still used today. The Witness, if he even existed, had not provided any evidence. On the other hand, Dy Asst Commr See had filed an affidavit and deposed that no such method or contingent protocol had ever existed.

17 The application for the Mandatory Order was baseless because the court did not have the power to direct a public body to exercise its discretion in a particular manner (see the decision of the High Court in *Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 ("*Borissik*") at [21]). The court could not substitute its decision for that of the original decision-maker. Though the appellants submitted that the court could compel the AG and the Minister to *consider* exercising discretion, there had been no request for immunity at all and no opportunity for the authorities to consider exercising discretion. In any event, after OS 111 had been filed, the AG had considered the matter and had decided not to grant immunity, and his decision could not be questioned.

18 There was also no legal basis for the appellants to seek the Court Immunity Order as the High Court had no power to grant immunity, and such an order was not within the scope of judicial review.

19 Mr Francis Ng SC ("Mr Ng") appeared on behalf of the AG in OS 181 and submitted that there was no "real controversy" that warranted declaratory relief as the Statement was not a threat, but common legal parlance familiar to all lawyers. The AG was merely keeping his options open, including the option of seeking costs personally against Mr Ravi. In any event, no identifiable constitutional right had been breached. The appellants did not have a

Version No 1: 27 Oct 2020 (22:41 hrs)

constitutional right to representation as Art 9(3) of the Constitution only concerned the right to counsel at the time a person was arrested. As for the allegation that the Statement breached the right to a fair hearing, there was no suggestion that the High Court could not conduct a fair hearing or that Mr Ravi could not act independently for the appellants. Mr Ravi had, in fact, continued to act for the appellants, and he must therefore have been unconcerned about the alleged threat. In reality, OS 181 was an abuse of the process of the court that had been filed to delay OS 111.

The decision

20 The Judge dismissed both applications (see *Gobi a/l Avedian and another v Attorney-General* [2020] SGHC 31 ("the GD")).

21 As the appellants had applied to stay OS 111 in favour of OS 181, the Judge dealt with OS 181 first. The Judge dismissed OS 181 as there was no basis for the claim that Mr Ravi had been threatened. Mr Wong was merely communicating a position familiar to all lawyers: the express reservation of existing legal rights that might be exercised in the future. The Statement was a reminder to Mr Ravi that he should conduct himself appropriately. There was no basis for concluding that Mr Ravi would have felt threatened in any way, or that it would have been reasonable for him to do so, or that Mr Wong's communication could have any bearing on how Mr Ravi would conduct the case. Given the lack of a factual basis, there was no need to discuss the scope of rights under Art 9 of the Constitution, and the application to stay OS 111 pending OS 181 was rendered moot by the dismissal of OS 181 (see the GD at [4]–[6]).

Version No 1: 27 Oct 2020 (22:41 hrs)

22 The Judge also dismissed OS 111. The appellants could not rely on the LFL Press Statement as media reports were not reliable evidence that could be used in judicial proceedings. Mr Zaid's affidavit contained hearsay evidence. Affidavits for O 53 applications had to comply with O 41 r 5(1) of the Rules, and O 41 r 5(2) did not apply as this was not an interlocutory proceeding. The affidavit could only contain such facts as the deponent was able of his own knowledge to prove. That being the case, the appellants had only presented bare and unsubstantiated assertions in support of the Prohibiting Order. There was simply no credible basis for leave, much less a *prima facie* case of reasonable suspicion (see the GD at [9]–[12]).

23 Mr Ravi had accepted that the court could not compel the Minister or the AG not to prefer charges. The AG had already exercised his prosecutorial discretion, and this was the sole province of the AG. The appellants had not sought any decision from the Minister and there was no basis in law to impose a duty on the Minister to consider granting immunity. There was also no basis in law for the Court Immunity Order and it was not a prayer for a prerogative order that came within O 53 of the Rules (see the GD at [13]–[14]).

The present appeals

24 After the applications were dismissed, Mr Ravi indicated that he had instructions to appeal and agreed to the appeals being heard on an expedited basis. On 19 February 2020, the appellants filed CA/CA 23/2020 ("CA 23") against the decision in OS 111 and CA/CA 24/2020 ("CA 24") against the decision in OS 181.

Version No 1: 27 Oct 2020 (22:41 hrs)

Events prior to the hearings

25 On 24 February 2020, the appellants filed notices of their intention to act in person in the appeals. On 9 March 2020, Mr Gobi wrote to the Registry of the Supreme Court ("the Registry") requesting "Mackenzie [*sic*] friend assistance" and copies of the notes of evidence and the Judge's decision below. The Registry provided the documents and informed Mr Gobi that he had to obtain the consent of the person whom he sought to be appointed as his McKenzie friend.

26 On 19 March 2020, the appellants requested an adjournment of the hearing of the appeals that had been fixed on 2 April 2020. They indicated that they had only had sight of the Judge's decision when the Registry sent the documents to them, and they wished to adduce an affidavit from the Witness in evidence. However, they could only do so with the assistance of their families who were based in Malaysia, and their families could not assist them because of the movement control order implemented by the Malaysian government on 18 March 2020 in the light of the COVID-19 pandemic. Mr Gobi also indicated that he required his family's assistance to obtain Mr Ravi's consent to act as his McKenzie friend.

27 The Attorney-General's Chambers ("AGC") objected to the appellants' request by a letter dated 20 March 2020 that also set out the timeline of events that had occurred since the applications were filed. It later indicated by a letter dated 25 March 2020 that it intended to file an affidavit to adduce relevant evidence pertaining to the adjournment application.

Version No 1: 27 Oct 2020 (22:41 hrs)

The first hearing on 2 April 2020

28 The appeals were first heard on 2 April 2020. At the hearing, Mr Wong sought leave to admit two affidavits by Superintendent Toh Gek Choo of the SPS ("Supt Toh's affidavits") into evidence. The affidavits dealt with the events leading up to the appellants' filing of their notices of intention to act in person. The appellants did not object and the affidavits were admitted into evidence.

29 The appellants repeated their request for an adjournment as they wished to obtain an affidavit from the Witness and Mr Ravi's consent to act as their McKenzie friend. We allowed the appellants' request and also directed that, if the Witness did not file an affidavit, the appellants' Malaysian solicitors should file an affidavit to explain why it was not possible to obtain an affidavit from the Witness.

Subsequent events

30 On 21 April 2020, Mr Datchinamurthy wrote to the Registry to complain that the appellants' correspondence with their lawyers and families had been "illegally copied and forwarded by prison to the [Deputy Public Prosecutor]". This appeared to be a reference to Supt Toh's affidavits, which contained copies of documents that the appellants' family members had brought to Changi Prison when they visited the appellants. Mr Datchinamurthy complained that this gave the AG an "undue advantage" over the appellants and sought an order preventing the SPS from making copies of their documents.

31 In response, the AGC denied that the SPS had copied any correspondence between inmates and their lawyers or forwarded it to the AGC. Their position in relation to the appellants' correspondence with their families,

Version No 1: 27 Oct 2020 (22:41 hrs)

however, was that it was not confidential or privileged. In view of the appellants' allegations, we directed the Registry to inform the SPS to send a representative to assist the court on this issue at the next hearing. We also indicated that until the hearing, the SPS was not to disclose any correspondence between the appellants and any person to the AGC without the appellants' consent or leave of court, and, similarly, the AGC was not to seek such correspondence.

32 On 24 April 2020, the appellants confirmed that Mr Ravi had agreed to act as their McKenzie friend, and Mr Ravi was appointed as a McKenzie friend on 29 April 2020. The appellants' Malaysian solicitor, Mr Zaid, also filed an affidavit dated 21 May 2020. He indicated that he had met the Witness who confirmed that he was able and willing to depose an affidavit, but only if he was granted immunity from civil and criminal liabilities. This second affidavit by Mr Zaid did not contain any material information that was not already in his first affidavit (see [5] above).

The second hearing on 15 June 2020

33 The appeals were next heard on 15 June 2020. Mr Ravi was present as the appellants' McKenzie friend. Supt Toh of the SPS was also present.

The parties' submissions

The appellants' submissions

34 The appellants did not file their appellants' case but made oral submissions during the second hearing.

35 The appellants highlighted that the AG had relied on the affidavit filed by Dy Asst Commr See (see [6] above), but Dy Asst Commr See had been the

Version No 1: 27 Oct 2020 (22:41 hrs)

Superintendent of Institution A1 only from March 2014 to September 2018. He could not have had personal knowledge of the training or conduct of judicial executions prior to that time, particularly from 1991 to 1994 when the Witness had served in the SPS. Dy Asst Commr See also could not have had personal knowledge of whether or not the rope had ever broken during judicial executions as he could not have witnessed all of the executions. He must have relied on documents or information in the possession of the SPS, but those documents had not been produced in court. The only witnesses with relevant personal knowledge would be the Superintendents, medical officers and SPS officers who witnessed executions from 1991 to 1994, but they did not give evidence.

36 Dy Asst Commr See also failed to provide any details about how judicial executions were conducted or how officers were trained to react in the event the rope broke during an execution. Judicial executions were carried out in the presence of a medical officer, and a coroner, who was a judicial officer of the State Courts, would conduct an inquiry after the execution to satisfy himself that the execution had been carried out duly and properly. However, the medical officer was also employed by the SPS and the coroner was not present for the execution itself. There were no independent third parties, such as family members, present at the execution. Given the lack of information on the conduct of judicial executions, the court should investigate the matter in detail.

37 Without the Witness's evidence, the appellants were deprived of an opportunity to bring relevant evidence before the court. The Witness could not be a figment of the imagination as he had provided specific details of his employment and training. The fact that he was willing to provide these details showed that his evidence was true. Though the AG said the Witness had nothing to fear if he was telling the truth, given the gravity of the allegations, it was

Version No 1: 27 Oct 2020 (22:41 hrs)

reasonable that the Witness would worry about becoming a target of the State. At the very least, the court should grant a conditional immunity order such that the Witness would be immune from prosecution if the court found that the allegations were true.

38 Turning to the Statement, the appellants questioned the necessity of a reminder that the AG could apply for costs against Mr Ravi personally if this option was already known to Mr Ravi. The unnecessary reminder caused Mr Ravi anxiety and fear of the unknown, which affected his ability to represent the appellants in the best way. The act of seeking costs against him personally prior to the appeals was also proof that the AG was trying to deter Mr Ravi from representing them, as the AG should have waited until the appeals were over.

The AG's submissions

39 The AG maintained, in essence, the same submissions that were proffered in the court below on appeal. In so far as CA 23 was concerned, it was argued that there was no decision by an executive body to be impugned. There was no material that disclosed an arguable or *prima facie* case of reasonable suspicion in favour of granting the Prohibiting Order as the only evidence tendered were the LFL Press Statement and Mr Zaid's affidavit, which were inconsistent and unreliable. Mr Zaid's evidence was hearsay and therefore inadmissible pursuant to O 41 r 5(1) of the Rules. In contrast, Dy Asst Commr See's evidence had not been rebutted.

40 The application for the Mandatory Order was flawed as the court could not direct any public body how and in what manner they should perform their duties. At the time of the filing of the applications, there had been no attempt made by the appellants to seek immunity for the Witness and therefore no

Version No 1: 27 Oct 2020 (22:41 hrs)

opportunity for the executive body to consider exercising its discretion. In any event, the AG had subsequently exercised his discretion and decided not to grant immunity. There was no basis in law to impose a duty on the Minister to consider granting immunity from civil liability.

41 There was no basis for the Court Immunity Order in an application for judicial review as it was not a prerogative order. Section 134(2) of the Evidence Act did not provide a legal basis for such an order, and in any event, the provision did not apply to the present proceedings or exempt the Witness from prosecution for what occurred outside of court.

42 In so far as CA 24 was concerned, there was no factual basis to claim that the AG had threatened Mr Ravi as the Statement was merely a salutary reminder to Mr Ravi to conduct himself properly. The act of reserving rights was common legal parlance and did not amount to a threat. The AG was keeping all options against Mr Ravi open, including the option of applying for a personal costs order against him pursuant to O 59 r 8(1) of the Rules. It was also obvious from Mr Ravi's own conduct that he did not feel threatened and that the Statement did not affect his ability to act for the appellants as he did not seek clarification from Mr Wong as regards what the Statement meant and continued to represent the appellants. The reservation of rights was necessary and appropriate given the nature and contents of OS 111, which was founded on extremely serious and scandalous allegations against the SPS. The events surrounding the filing of OS 181 suggested that it was a strategy to deflect attention from the lack of credible evidence in OS 111. It was a deliberate and orchestrated attempt to politicise the proceedings.

Version No 1: 27 Oct 2020 (22:41 hrs)

Our decision

43 There are two issues in the appeals before us:

(a) whether or not the appellants should be granted leave to commence judicial review; and

(b) whether or not the appellants should be granted declaratory relief in relation to the Statement.

The application for leave to commence judicial review

44 Judicial review is the process by which the court exercises supervisory jurisdiction over the decisions of public bodies. This control is exercised by prerogative orders, and the High Court has the power to issue a mandatory order, a prohibiting order and/or a quashing order pursuant to para 1 of the First Schedule of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA"). An application must be made according to the procedure in O 53 of the Rules. A party that wishes to commence judicial review must first apply for leave to do so. Three requirements must be satisfied before the court will grant leave (see the decisions of this court in *Lee Pheng Lip Ian v Chen Fun Gee and others* [2020] 1 SLR 586 ("*Lee Pheng Lip*") at [24] and *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [85]):

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

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

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

Version No 1: 27 Oct 2020 (22:41 hrs)

45 As this court recently reiterated, the requirement to obtain leave for judicial review is intended to filter out groundless or hopeless cases at an early stage. Its aim is to prevent the waste of judicial time and protect public bodies from harassment (see *Lee Pheng Lip* at [25]).

The Mandatory Order and the Court Immunity Order

46 We deal first with the appellants' applications for the Mandatory Order and the Court Immunity Order. Given the appellants' position that the Witness will depose an affidavit if granted immunity, our decision on these issues could conceivably affect the evidence before us on the Prohibiting Order.

47 The court can direct a public body to *consider* exercising its discretion if the public body had not exercised it yet (see the decision of the High Court in *Re San Development Co's Application* [1971–1973] SLR(R) 203 at [16]). However, once the public body has considered exercising its discretion and declined to do so, or has exercised it in a certain way, the court cannot, by way of a mandatory order, direct it to exercise its discretion in a different way (see *Borissik* ([17] *supra*) at [21]). Furthermore, the exercise of the power as to whether or not immunity to the Witness is to be granted is an exercise of an executive power that is of constitutional significance. Article 35(8) of the Constitution vests prosecutorial discretion wholly in the AG, who may exercise his discretion as he sees fit. Once the AG has exercised his prosecutorial discretion, the court will not interfere unless the discretion has been exercised unlawfully (see the decision of this court in *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 ("*Ramalingam*") at [44]).

48 The AG's first argument is that no request for immunity was ever made to the AG or the Minister and so there is no decision for this court to review.

Version No 1: 27 Oct 2020 (22:41 hrs)

When asked, Mr Wong indicated that such a request could have been made in writing to the AG beforehand. The authorities on whether a matter is susceptible to judicial review have focused on the jurisdictional issue of the source and the nature of power exercised by the executive bodies in reaching their decision (see, for example, the decisions of this court in *Manjit Singh s/o Kirpal Singh and another v Attorney-General* [2013] 2 SLR 844 at [25]–[28] and *Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR(R) 133 at [41]). The question of whether there must be a *decision* at all is a preliminary issue and the answer seems obvious. As a general rule, an applicant for judicial review of a decision by a public body must exhaust all alternative remedies before invoking the jurisdiction of the court for judicial review (see *Borissik* at [25]), and where there is no decision there is nothing to review. An executive body cannot be faulted for failing to exercise its discretion when the opportunity to exercise the said discretion was not brought to its attention prior to the commencement of judicial proceedings. If the court, in the exercise of its supervisory jurisdiction, cannot substitute its decision for the decision of the executive body, then it cannot be asked to make a decision where the executive body has not had the opportunity to do so.

49 In any event, according to CP Kow's affidavit, the AG has since considered the matter and declined to grant the Witness immunity from criminal prosecution for any offences that he had committed or will commit. In doing so, the AG has exercised his discretion. The appellants submitted that this is an abuse of discretion as it deprived them of a chance to bring relevant evidence before the court, but as Mr Wong pointed out, this decision does not prevent the Witness from giving evidence. The appellants have not raised any other reason why the AG's decision might be an abuse of discretion. Given that there is no basis to claim that the exercise of discretion is unlawful, this is not a matter that

Version No 1: 27 Oct 2020 (22:41 hrs)

the court can interfere with now as the court cannot direct a public body to perform its duty in a particular way (see *Borissik* at [21]).

50 Though the appellants also seek a mandatory order directing the Minister to grant immunity from criminal and civil liability, they have not indicated any legal basis that the Minister can rely upon to grant immunity. The prosecutorial power may be part of the executive power but, under existing constitutional practice, it is independently exercised by the AG and not the Minister (see *Ramalingam* at [44]). The Minister cannot interfere with the AG's exercise of discretion. Nor have the appellants indicated what civil liabilities the Witness will risk by testifying, and so there is no basis to find that the Minister can grant immunity from those liabilities.

51 Finally, the appellants' application for the Court Immunity Order rests on s 134(2) of the Evidence Act, which states as follows:

> (2) No answer which a witness shall be compelled by the court to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

52 Section 2(1) of the Evidence Act provides that Part III of the Evidence Act (which s 134(2) falls within) applies to judicial proceedings but not to affidavits presented to court. The Witness would not be able to rely on this provision to avoid prosecution for potential criminal offences revealed in his affidavit or for events that occurred outside of judicial proceedings, such as his initial communications with LFL. In any event, the provision does not exempt a witness from prosecution for giving false evidence, and that may possibly be the offence that the Witness is concerned about.

Version No 1: 27 Oct 2020 (22:41 hrs)

53 We therefore dismiss the appellants' prayers for leave to commence judicial review to seek the Mandatory Order and the Court Immunity Order as there is no legal basis for the orders that they seek.

The Prohibiting Order

54 A prohibiting order may be used to restrain a public body from abusing its powers or acting illegally. The threshold of proof for an application for leave to commence judicial review, including an application for leave to seek a prohibiting order, is a very low one of a *prima facie* case of reasonable suspicion (see [44] above), but this does not mean that the evidence and arguments placed before the court can be either skimpy or vague and bare assertions will not suffice (see the decision of the High Court in *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue* [2006] 3 SLR(R) 507 at [24] (affirmed in *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue* [2007] 2 SLR(R) 568 (without reference to this particular point which nevertheless remains applicable as a general proposition))).

55 The Witness was given multiple opportunities to depose an affidavit but declined to do so, and so the only evidence before this court is the LFL Press Statement and Mr Zaid's affidavit. We agree with the Judge that the LFL Press Statement did not provide a sufficient basis to grant leave to commence judicial review. Media statements on their own are not reliable evidence and the LFL Press Statement, in particular, did not identify the source of the information or its relevance to the present-day conduct of judicial executions.

56 We turn to consider Mr Zaid's affidavit. Order 41 rule 5(1) of the Rules provides that an affidavit may contain only such facts as the deponent is able of his own knowledge to prove, but an exception in O 41 r 5(2) permits an affidavit

Version No 1: 27 Oct 2020 (22:41 hrs)

to contain hearsay evidence where it is sworn for the purpose of being used in interlocutory proceedings. Mr Wong had submitted, and the Judge had accepted, that an application for leave to commence judicial review was not an interlocutory proceeding on the authority of this court's decision in *OpenNet Pte Ltd v Info-communications Development Authority of Singapore* [2013] 2 SLR 880 ("*OpenNet*").

57 *OpenNet* involved an application to strike out a notice of appeal that had been filed against a decision by the High Court *not* to grant leave to commence judicial review. The applicant had argued that the respondent (who was the appellant in the substantive appeal) had omitted to obtain the leave of court to file an appeal. Leave of court is required to file an appeal "where a Judge makes an order at the hearing of any interlocutory application" pursuant to s 34(2)(*b*) read with para 1(*h*) of the Fifth Schedule of the SCJA save for certain exceptions. Paragraph 1(*h*) was para (*e*) of the Fifth Schedule at the time of the decision in *OpenNet*. The applicant in *OpenNet* argued that the decision not to grant leave was an order at the hearing of an interlocutory application, in part because the respondent itself had proceeded on the basis that its application for leave to commence judicial review was an interlocutory proceeding by including hearsay evidence in its affidavits (at [12]). Chao Hick Tin JA, delivering the judgment of the court, held that an appeal to the Court of Appeal would generally be as of right for orders made at the hearing of interlocutory applications which had the effect of finally disposing of the substantive rights of the parties (at [18]). For that reason, the application for leave to commence judicial review did not come within the meaning of "interlocutory application". In refusing to grant leave, the judge had *decided upon the substantive issue in the application and the substantive rights of the parties had come to an absolute end unless there could be an appeal* (at [21]). Even if the respondent had

Version No 1: 27 Oct 2020 (22:41 hrs)

assumed that it was an interlocutory proceeding and included hearsay evidence in its affidavits, such a belief on the respondent's part carried little weight (at [13]).

58 The present matter, however, may be *distinguished* from *OpenNet*. As we noted at the hearing, the question before this court in *OpenNet* was whether an order refusing leave to commence judicial review was "an order made at the hearing of any interlocutory application" *for the purposes of filing an appeal to the Court of Appeal*. In *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 ("*Dorsey*"), this court clarified that the reference to an "order" should be read in light of its purpose and context to mean "interlocutory order" (see *Dorsey* at [85]). Accordingly, when determining whether leave to appeal is required pursuant to para 1(*h*) of the Fifth Schedule to the SCJA, the court must *first* consider whether an application is interlocutory and *then* look further at whether the order is also interlocutory (see the decision of this court in *Telecom Credit Inc v Midas United Group Ltd* [2019] 1 SLR 131 ("*Telecom Credit*") at [18]). If both questions are answered in the affirmative, then the matter falls within the ambit of para 1(*h*) and leave to appeal is required.

59 In *OpenNet*, the court held that an application for leave to commence judicial review was not an interlocutory application because the decision to refuse leave meant that the substantive rights of the parties had come to an absolute end (at [21]). However, our decisions in *Dorsey* and *Telecom Credit* clarified the distinction between an interlocutory application and an interlocutory order. An interlocutory application is an application whose determination *may or may not* finally determine the parties' rights in the cause of the pending proceedings in which the application is being brought (see *Telecom Credit* at [26]), while an interlocutory order is an order that *does not* finally dispose of the rights of the parties (see *Dorsey* at [28] and *Telecom Credit*

Version No 1: 27 Oct 2020 (22:41 hrs)

at [19]). A better understanding of the decision in *OpenNet* is that an *order* refusing leave to commence judicial review was not an *interlocutory order* because it had the effect of finally disposing of the rights of the parties. This was also explained in *Dorsey* (at [90]–[91]):

> 90 … Put simply, *OpenNet* held in effect that the 2010 amendments did not apply to an *order* that was final in the sense that it effectively disposed of a party's substantive claim to relief, even if that order was made in the course of an application that might have been interlocutory in nature.
>
> 91 It should be noted that an application for leave to seek judicial review is commenced by originating summons; but unlike say an originating summons seeking leave to administer pre-action interrogatories, if leave to apply for judicial review is granted, the originating summons is not spent. Instead, the substantive application for judicial review is made by a summons issued within the same originating summons. Yet, this did not prevent this court in *OpenNet* from holding that the *order* refusing leave to apply for judicial review was appealable as of right because its effect was to finally dispose of the applicant's claim to substantive relief.
>
> [emphasis in original]

60 *Dorsey* therefore suggested that an application for leave to commence judicial review could be an interlocutory application but since an order refusing leave was a final order, the matter did not fall within the ambit of para 1(*h*) of the Fifth Schedule and the court in *OpenNet* correctly held that the order was appealable as of right.

61 The question before us in these proceedings does not concern para 1(*h*) of the Fifth Schedule. Instead, the question is whether Mr Zaid's affidavit, which contained hearsay evidence, was admissible and could be placed before the court for consideration at the hearing of OS 111 pursuant to O 41 r 5(2), which refers to "[a]n affidavit sworn for the purpose of being used in *interlocutory proceedings*" [emphasis added]. In contrast to para 1(*h*), O 41 r 5(2) does not refer to an "order" because the admissibility of an affidavit is a

Version No 1: 27 Oct 2020 (22:41 hrs)

question that the court must consider *before* it reaches a decision. The focus of O 41 r 5(2) is on the nature of the proceedings rather than the outcome which has yet to be determined. In that context, the proceedings in an application for leave to commence judicial review must be treated as interlocutory proceedings as the application is, in fact, only an application for leave and not the substantive application for judicial review. Where the application is dismissed, the parties' rights would be finally determined but where the application is allowed, the applicant would then commence proceedings for a judicial review by a summons issued within the same originating summons (see O 53 r 2(1)(*a*) of the Rules).

62 We note that in *Telecom Credit*, this court observed that an application for leave to commence judicial review was not an interlocutory application within the meaning of para 1(*h*) of the Fifth Schedule (at [28]), but the case concerned the nature of garnishee proceedings and this observation was not necessary to the eventual decision. It should also be noted that the proposition in *Telecom Credit* would indeed be correct if there is a *rolled-up hearing* pursuant to which the court concerned is to determine the substantive merits together with the leave application (see, for example, the decisions of the High Court in *Yong Vui Kong v Attorney-General* [2011] 1 SLR 1 at [16] (affirmed in *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189) and *Agilah a/p Ramasamy v Commissioner for Labour* [2019] 4 SLR 972 at [30]). In that situation, once the application is disposed of, there is "nothing more to proceed on" (see *Telecom Credit* at [28]).

63 In the circumstances, Mr Zaid's affidavit was admissible in OS 111 pursuant to O 41 r 5(2) of the Rules at the point in time when the question arose for determination.

Version No 1: 27 Oct 2020 (22:41 hrs)

64 The rationale for the exception in O 41 r (2) of the Rules was considered by the High Court in *Jurong Shipyard Pte Ltd v BNP Paribas* [2008] 4 SLR(R) 33 ("*Jurong Shipyard*"), citing the explanations in earlier decisions of the English courts (at [85]–[87]):

> 85 … The rationale for the admissibility of hearsay affidavit evidence in interlocutory proceedings was articulated by Jessel MR in *Gilbert v Endean* (1878) 9 Ch D 259 (at 266):
>
> > No doubt in the case of interlocutory applications the Court as a matter of necessity is compelled to act upon such evidence when not met by denial on the other side. In applications of that kind the Court must act upon such evidence, *because no evidence is obtainable at so short a notice, and intolerable mischief would ensue if the Court were not to do so. The object of these applications is either to keep matters as they are or to prevent the happening of serious or irremediable mischief*, and for those purposes the Court has been in the habit of acting upon this imperfect evidence. [emphasis added]
>
> 86 Similarly, Peter Gibson J stated in *Savings & Investment Bank Ltd v Gasco Investments (Netherlands) BV* [1984] 1 WLR 271 at 282:
>
> > [T]he purpose of [the exception] is to enable a deponent to put before the court in interlocutory proceedings, *frequently in circumstances of great urgency*, facts which he is not able of his own knowledge to prove but which, the deponent is informed and believes, can be proved by means which the deponent identifies by specifying the sources and grounds of his information and belief. [emphasis added]
>
> 87 Each of these justifications is present on the facts of the present originating summons. … Thus, the present originating summons is a prime example of an application ***where the circumstances are of great urgency and evidence is not obtainable at short notice, and the object is either to keep matters as they are or to prevent the happening of serious or irremediable harm***.
>
> [emphasis added in bold italics]

65 The hearsay exception may therefore be understood as a consequence of the *urgency* common in interlocutory proceedings and a desire to preserve the

Version No 1: 27 Oct 2020 (22:41 hrs)

status quo pending final hearing. The purpose of the exception is to infuse the necessary flexibility into interlocutory proceedings and to ensure accessibility to relevant evidence within a short period of time (see *Singapore Court Practice 2017* vol 1 (Jeffrey Pinsler gen ed) (LexisNexis, 2017) at para 41/5/3–3A). These considerations may be particularly relevant in certain interlocutory applications, such as an application for an injunction (as was the case in *Jurong Shipyard* itself). In the present case, the application in OS 111 referred to the "imminent risk" of the appellants being subjected to illegal executions. We note that the Witness's evidence pertained to a protocol that allegedly existed more than 20 years before the applications were filed, and there was no evidence, even on the face of Mr Zaid's affidavit, that the protocol was still in place. Nor was there any evidence that the date of the appellants' judicial executions had been fixed. We accept, however, that there was no reason the executions would not be fixed soon, since Mr Ravi informed the Judge (at a later hearing) that the appellants' petitions for clemency had been rejected at the time OS 111 had been filed. In the context of those pending executions, the importance of preventing irremediable harm to the appellants took on greater significance, and there was therefore sufficient reason to admit Mr Zaid's affidavit.

66 However, that is not the end of the matter. First, an affidavit filed pursuant to O 41 r 5(2) of the Rules must still meet the requirements in the provision itself. As a safeguard, O 41 r 5(2) requires the deponent to state "the sources and grounds" of the statements of information or belief contained in the affidavit. The failure to identify the sources of information contained in certain paragraphs may render those paragraphs inadmissible as pure hearsay evidence (see the decision of the High Court in *Dynacast (S) Pte Ltd v Lim Meng Siang and others* [1989] 2 SLR(R) 226 at [19]). Secondly, the admissibility of the affidavit is a distinct question from the *weight* a court should accord to the

Version No 1: 27 Oct 2020 (22:41 hrs)

evidence within. The appropriate weight to be placed on statements in an affidavit will depend on the circumstances of the case. Although an affidavit filed in interlocutory proceedings such as the present application may be admitted notwithstanding the fact that it contains hearsay evidence, the evidence contained therein must still meet a minimum threshold of reliability before a court will accord it any weight. What this minimum threshold is will depend on the facts of each case but it should not be permissible for a deponent to obtain leave to commence judicial review simply by stating – without more − that he has been told something that he believes to be true. He must identify the source (here, the Witness), as required by O 41 r 5(2), and the source must be prepared to take responsibility for the truth of what he has said. For that reason, though admissible, Mr Zaid's affidavit failed to meet the minimum threshold of reliability. He identified the Witness in vague terms and provided details of the Witness's employment with the SPS, which would suggest that the Witness had personal knowledge of the protocol. However, he failed to provide the name or address of the Witness and it was insufficient for the Witness to say, through Mr Zaid, that he would sign an affidavit in the event he was granted immunity. The appellants submitted that the Witness's willingness to disclose details of his training proved that the information he gave was true, but that is not a logical inference to make. This court simply does not have enough evidence to judge the reliability of the Witness's evidence and no weight can be placed on Mr Zaid's affidavit. We also note that ample time had been provided to furnish the requisite details since the adjournment of the first hearing on 2 April 2020.

67 In the light of the above, it is not strictly necessary to consider the affidavit filed by Dy Asst Commr See to rebut Mr Zaid's evidence, but since the appellants raised certain issues with it we address it for completeness. The appellants highlighted that Dy Asst Commr See could not have personal

Version No 1: 27 Oct 2020 (22:41 hrs)

knowledge of the conduct of *all* executions and would have relied on official SPS records for the information in his affidavit. They also argued that the medical officers involved were employed by the SPS and were not independent witnesses. At the hearing, Mr Wong clarified that the medical officers present at judicial executions were doctors sent by clinics pursuant to contracts between the SPS and the clinics, and were not employed directly by the SPS.

68 Dy Asst Commr See's evidence was that he was the Superintendent of Institution A1 from March 2014 to September 2018. We accept that any knowledge he had about the relevant details prior to that date, to the extent that it was based on official records, would not have been sufficient to rebut the appellants' allegations *if there had been any reliable evidence suggesting illegal conduct in judicial executions in the first place*. We say this because the crux of the allegation is that this was a *secret* protocol and specific steps were taken to ensure that secrecy. Presumably, it would not have been documented in official records. If, for example, the Witness had given evidence of specific instances when the protocol was used, this could have been rebutted by the evidence of someone else with personal knowledge of the same incidents and not merely by reliance on the official records. At the same time, we highlight that the appellants' position on whether this protocol was ever used or was merely a contingency varied. The Witness did not identify any specific instances when the protocol was used or when he learned of it. For obvious reasons it would not be practical to demand that every person who has ever been present at a judicial execution since the 1990s or might have learned of this protocol give evidence, and in the circumstances we do not think Dy Asst Commr See can be faulted for relying on official records. The evidence tendered by the AG is a consequence of the lack of detailed information provided by the Witness in

Version No 1: 27 Oct 2020 (22:41 hrs)

Mr Zaid's affidavit, which was too vague to rebut, and affirms our reasons for placing no weight on it.

69 For completeness, we also address the AG's argument that the appellants had failed to exhaust their legal remedies before applying for the Prohibiting Order. While it is not disputed that no application for a stay of execution of the sentences was made, a prohibiting order may be issued against an executive body *before* it has made a decision, if that decision would clearly be *ultra vires* and there is no subsequent remedy or redress (see the decision of Lord Hewart CJ in the English Divisional Court and affirmed by the English Court of Appeal in *The King v Minister of Health, ex parte Davis* [1929] 1 KB 619 (without reference to this particular point), cited in *Singapore Civil Procedure 2020* vol I (Chua Lee Ming gen ed) (Sweet & Maxwell, 10th Ed, 2020) at para 53/1/2). If there had been evidence in support of the existence of the alleged protocol, there is no doubt that such a protocol would be unlawful and *ultra vires*, and a prohibiting order could have been justified. The state of the evidence meant that that was plainly not the situation before us.

70 In spite of the admissibility of Mr Zaid's affidavit, there is insufficient evidence to substantiate the allegation. There is no *prima facie* case of reasonable suspicion in favour of granting the application. CA 23 is therefore dismissed.

The application for declaratory relief

71 We turn to CA 24, which is an appeal against the Judge's decision not to grant declaratory relief in relation to the Statement, "I am also instructed to state that we are expressly reserving all our rights against Mr Ravi" (see [7] above). An application for declaratory relief is made under O 15 r 16 of the

Version No 1: 27 Oct 2020 (22:41 hrs)

Rules. The principles in relation to standing are not in dispute (see the decision of this court in *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 ("*Tan Eng Hong*") at [72]):

> (a) the applicant must have a "real interest" in bringing the action;
>
> (b) there must be a "real controversy" between the parties to the action for the court to resolve; and
>
> (c) the declaration sought must relate to a right which is personal to the applicant and which is enforceable against an adverse party to the litigation.

72 The question of whether the applicant has a "real interest" must be judged in relation to the rights which are the subject matter of the application, but where there is a violation of a constitutional right, sufficient interest is *prima facie* made out (see *Tan Eng Hong* at [83]). The element of a "real controversy" must be established on the facts of the case between the parties (see *Tan Eng Hong* at [131]–[133]). The court can grant declaratory relief even though the facts on which the action is based are theoretical, as long as there is a real legal interest in a case being heard (see *Tan Eng Hong* at [143]).

73 The AG submitted that there was no real controversy as the Statement was not a threat. In Mr Wong's affidavit, he explained as follows:

> The express reservation of the Government's rights against Mr Ravi was simply a statement giving him express notice that the Government was keeping open the full range of possible options that it might avail itself of in relation to his conduct of OS 111 as might be warranted and supported by the evidence. These options include applying for an order of costs against Mr Ravi personally as provided for in O 59 r 8 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

Version No 1: 27 Oct 2020 (22:41 hrs)

74 At the hearing, Mr Ng clarified that the Statement also included the option of making a complaint against Mr Ravi with the Law Society of Singapore ("the Law Society").

75 The court may make a personal costs order against a solicitor where it appears that costs have been incurred unreasonably or improperly in any proceedings or have been wasted by a failure to conduct proceedings with reasonable competence and expedition pursuant to O 59 r 8(1) of the Rules. A complaint may be made by the AG against any regulated legal practitioner to the Law Society pursuant to s 85(3) of the Legal Profession Act (Cap 161, 2009 Rev Ed). In both situations, there is no requirement that a warning to such effect must be delivered to the solicitor beforehand, but we accept that in the proper circumstances and with *specificity*, it would be the appropriate thing to do.

76 Contrary to the AG's submission, however, it is not common for one counsel to inform another that rights are being reserved against him personally. The reservation of rights is common legal parlance, but a distinction must be drawn between the reservation of rights against litigants and against solicitors. A statement that all of a party's rights against another party are expressly reserved is common in civil disputes.

77 Mr Ng submitted that the AG wanted to put Mr Ravi on notice early and cited the decision of Woo Bih Li J in *Yong Vui Kong v Attorney-General* [2015] SGHC 178 ("*Yong Vui Kong*"), where the AGC had written to a solicitor to state that it might, in certain circumstances, make the necessary applications including an application for an order under O 59 r 8 of the Rules (at [14]). Woo J considered this relevant to his decision to order the solicitor concerned to pay costs personally as the solicitor had due notice of the AG's intention to seek a personal costs order (at [52]).

Version No 1: 27 Oct 2020 (22:41 hrs)

78 However, the warning letter in *Yong Vui Kong* was *not* the same as the Statement before us. The letter in *Yong Vui Kong* informed the solicitor that any application for leave to apply for judicial review, in the circumstances of the case thus far, would be considered vexatious, and it *specifically* raised the possibility of a personal costs order under O 59 r 8 of the Rules (see *Yong Vui Kong* at [14]). This clearly and unequivocally put the solicitor on notice by informing her that she had to desist from the further step of filing an application for leave to commence judicial review, and that there might be specific consequences should she refuse to do so. In contrast, the Statement was a wide and open-ended reservation. If the intention was to confine it to the two options of a personal costs order or a disciplinary complaint (see [75] above), then this should have been made clear to Mr Ravi with some reasons.

79 The *context* in which such a statement may be made is also important. One solicitor might wish to put another solicitor on notice if the former thinks the latter is behaving inappropriately, in order to enable the latter to have the opportunity to stop or change his conduct. In *Yong Vui Kong,* the warning was in the context of a pending application for leave to commence judicial review, and the solicitor was informed that she should refrain from filing the application in order to avoid certain specific consequences. In the present case, however, there was nothing in the record before us to elaborate how Mr Ravi had acted improperly at the PTC so as to trigger the Statement. The Statement itself indicates that Mr Wong was *instructed* to reserve the AG's rights, and these instructions must have come *before* the PTC and *not* in response to Mr Ravi's conduct *during* the PTC. The *lack of specificity* also meant that Mr Ravi was not aware of what he ought to refrain from doing to avoid the consequences. In the circumstances, we think the Statement might reasonably have been construed as intimidating.

Version No 1: 27 Oct 2020 (22:41 hrs)

80 For completeness, we add that the AG did apply for costs against Mr Ravi personally in OS 111 and OS 181, and that the applications were dismissed by the Judge on 11 March 2020. The Judge observed during the proceedings on costs that the Statement might be seen as discourteous, although Mr Ng clarified that there was no such intention. The Judge also observed that a specific reservation of costs would have served the technical purpose of giving notice and if there had been specificity, there would have been no opportunity for a misunderstanding between the parties. We agree with the Judge that the Statement was unnecessarily vague, and that it is a matter of good practice moving forward for counsel to be clearer about their intentions to avoid situations such as these.

81 In any event, however, we do *not* find that the Statement was a breach of Art 9 of the Constitution. The appellants relied on the right to counsel articulated in Art 9(3), which falls under Art 9 (titled "Liberty of the person") and states as follows:

> (3) Where a person is *arrested*, he shall be informed as soon as may be of the grounds of his *arrest* and shall be allowed to consult and be defended by a legal practitioner of his choice.
>
> [emphasis added]

82 The constitutional right to counsel exists in the context of *criminal* and not *civil* proceedings. Although the appellants are currently in prison, this does not mean that they have the right to counsel in all applications, and an application for judicial review is a civil matter. In any event, we also do not see how the Statement deprived the appellants of the assistance of counsel as Mr Ravi continued to represent them in the applications before the Judge. Further, Mr Ravi did not say what steps he would have taken in the hearing below had the Statement not been made, and he only stepped down from

Version No 1: 27 Oct 2020 (22:41 hrs)

representing the appellants after the Judge had rendered her decision. Neither did the appellants seek any consequential relief beyond a mere declaration.

83 For those reasons, there is no basis for the relief sought and we dismiss CA 24 accordingly.

Mr Datchinamurthy's allegations on the conduct of the SPS

84 Before concluding, we think it is appropriate to highlight our concerns about the allegations raised by Mr Datchinamurthy regarding the SPS's actions on the documents brought to Changi Prison by his family members. As set out at [30] above, Mr Datchinamurthy was unhappy with the SPS's decision to forward to the AGC copies of documents that his family members had brought to Changi Prison. That the SPS did so is not disputed. The AGC and the SPS took the position that the documents were neither confidential nor privileged as they were not exchanged between the appellants and their legal advisors.

85 At the hearing, the appellants questioned the legal basis for the SPS to make copies of their documents. Supt Toh's affidavits stated that copies had been made for the SPS to carry out security checks, yet (the appellants argued) forwarding the documents was not necessary for these security checks. They sought a court order to prevent the SPS from copying or forwarding any documents and letters, and submitted that it was sufficient for the SPS to physically screen the documents and pass them along.

86 Section 84(1) of the Prisons Act states as follows:

> **84.**—(1) The Minister may make all such regulations not inconsistent with the provisions of this Act, as are necessary for the good management and government of prisons and reformative training centres or for carrying out the objects of this Act.

Version No 1: 27 Oct 2020 (22:41 hrs)

87 The regulations in question are the Prisons Regulations (Cap 247, 2002 Rev Ed) ("the Regulations"). Regulation 127A was inserted by the Prisons (Amendment) Regulations 2018 (S 533/2018) and states as follows:

> **Screening and recording of letters**
>
> **127A.**—(1) Every letter sent by or to a prisoner may be opened and read by a prison officer.
>
> (2) A copy may be made of every letter sent by or to a prisoner.
>
> (3) A letter sent by or to a prisoner may be withheld if it contains anything that affects the security or good order of the prison.
>
> (4) Paragraphs (2) and (3) do not apply to letters written by a prisoner to the prisoner's legal adviser and letters written by a prisoner's legal adviser.

88 To the extent that the appellants questioned the legality of the SPS making copies of their documents, reg 127A(2) provides a legal basis for the SPS to do so. We do not think, however, that reg 127A(2) goes so far as to permit the SPS to forward these copies to AGC.

89 Applying the three-step framework for statutory interpretation in our decision in *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850, the plain language of the provision clearly does not provide for such a power. The purpose of the Regulations, as set out in s 84(1) of the Prisons Act, is to facilitate the "good management and government" of prisons or for carrying out the objects of the Prisons Act. To this end, reg 127A provides (as the marginal note states) for the "[s]creening and recording of letters". Not surprisingly, reg 127A(1) permits a prison officer to open and read every letter sent by or to a prisoner. Further, reg 127A(3) provides that a letter sent by or to a prisoner may be withheld if it contains anything that affects the security or good order of the prison. Read in context, reg 127A(2) is intended to facilitate the SPS's role pursuant to this particular regulation by providing the requisite operational

Version No 1: 27 Oct 2020 (22:41 hrs)

powers. We do not see how forwarding prisoners' correspondence to the AGC would be relevant to the good management and government of the prison.

90 At the hearing, Mr Wong highlighted that the appellants had sought an adjournment of the previous hearing in part because they claimed they had only been told of the Judge's decision to dismiss OS 111 and OS 181 on 6 March 2020, and that the AGC had to verify these claims with the SPS to assist the court. In the course of verifying and preparing Supt Toh's affidavits, the SPS provided these documents to the AGC upon the AGC's request. In our view, while counsel have a duty to assist the court in the due administration of justice, this does not permit counsel to go beyond what is legally permissible. To the extent that the AGC might have sought information on, for example, when the appellants had received visits from Mr Ravi or family members, it could have approached the SPS for the requisite information, but we think that a different approach applies to correspondence and documents. There is an expectation of confidentiality in a letter or document shared between private parties. These are documents and information that the SPS has access to by virtue of its administrative role under reg 127A to screen and record letters, but there was no legal basis in the form of a positive legal right to forward copies of the same to the AGC.

91 Mr Wong highlighted that the documents that were forwarded in the present case were not confidential as they were draft notices of the appellants' intention to act in person, which were eventually filed in court as public documents. At the point in time when the AGC sought copies of the documents, however, there was no way of knowing whether or not they were confidential. The fact that the documents were eventually made publicly available demonstrates that the AGC could have approached the court, if necessary, and did not have to approach the SPS. We also highlight that even if the documents

Version No 1: 27 Oct 2020 (22:41 hrs)

were not privileged or confidential in the strictest sense of the word, they were still the prisoners' personal property. Had, for example, the SPS come into possession of copies of private letters wholly unrelated to ongoing litigation, there would have been no basis for the SPS to forward copies to the AGC. If the AGC had wished to obtain copies of letters belonging to the prisoner that were in the SPS's possession, the proper procedure would have been to obtain the prisoner's consent or an order of court.

92 At the hearing, Mr Wong also informed us of a separate incident. After the first hearing on 2 April 2020 (see [28]–[29] above), the AGC had forwarded a copy of the official minute sheet to the SPS so that the appellants could share the court's directions with their families. The AGC asked the SPS to notify it when the appellants had sent the minute sheet and, in that context and without a specific request from the AGC for these documents, the SPS proceeded to forward copies of the appellants' letters to their families to the AGC. Mr Wong agreed that the AGC should destroy the copies of such correspondence and, on 16 June 2020, the AGC wrote to inform the court that the copies had been destroyed. We were satisfied that the AGC had conducted itself properly in this regard by promptly destroying the copies upon being informed of the proper procedure it ought to adopt in relation to correspondence by or to prisoners.

93 At the hearing, it was conceded that the AGC had not properly considered this aspect of the prisoners' privacy when it obtained the documents from the SPS, and we accept that this was an oversight and not an attempt to seek an advantage in the proceedings. By virtue of the AGC's role as legal advisor to the SPS, it may have access to information that other counsel might not, and it must therefore exercise due caution to avoid the possibility of a mistaken impression that it seeks an undue advantage. Although the following oft-cited observations by Lord Hewart CJ in the decision of the English

Version No 1: 27 Oct 2020 (22:41 hrs)

Divisional Court in *The King v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256 at 259 were made in the context of the rules of natural justice, they are, in our view, equally applicable in the context of the present case – that "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done". Such an approach is particularly needful in the light of the fact that, as this court observed in *Khor Soon Lee v Public Prosecutor* [2011] 3 SLR 201, the Public Prosecutor is the guardian of the people's rights, including the rights of the accused (at [30], citing the decision (also of this court) in *Bachoo Mohan Singh v Public Prosecutor and other applications* [2010] 1 SLR 966 at [104]). In the present case, whilst the AG may not have acted, in the context of the judicial review proceedings, in his capacity as Public Prosecutor, the same principle applies in the light of the fact that these proceedings are inextricably connected to the relevant criminal proceedings. As guardian of the public interest, there is, *inter alia*, a duty to safeguard the rights of prisoners in the custody of the SPS.

Conclusion

94 For the reasons set out above, we dismiss the appeals. In the light of the position that the appellants are in, we make no order as to costs.

Andrew Phang Boon Leong	Judith Prakash	Woo Bih Li
Judge of Appeal	Judge of Appeal	Judge

Version No 1: 27 Oct 2020 (22:41 hrs)

The appellants in person (Ravi s/o Madasamy (Carson Law Chambers) as McKenzie friend);
Wong Woon Kwong, Seah Ee Wei and Pavithra Ramkumar (Attorney-General's Chambers) for the respondent in Civil Appeal No 23 of 2020;
Francis Ng Yong Kiat SC, Seah Ee Wei and Pavithra Ramkumar (Attorney-General's Chambers) for the respondent in Civil Appeal No 24 of 2020.

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