IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 274

Originating Summons No 825 of 2021

Between

(1) Syed Suhail Bin Syed Zin
(2) Moad Fadzir Bin Mustaffa
(3) Hamzah Bin Ibrahim
(4) Norasharee Bin Gous
(5) Nazeri Bin Lajim
(6) Rosman Bin Abdullah
(7) Roslan Bin Bakar
(8) Masoud Rahimi Bin Merzad
(9) Zamri Bin Mohd Tahir
(10) Fazali Bin Mohamed
(11) Rahmat Bin Karimon
(12) Ramdhan Bin Lajis
(13) Jumaat Bin Mohamed Sayed
(14) Muhammad Faizal Bin Mohd Shariff
(15) Abdul Rahim Bin Shapiee
(16) Muhammad Salleh Bin Hamid
(17) Mohammad Reduan Bin Mustaffar

… *Plaintiffs*

And

Attorney-General

… *Defendant*

JUDGMENT

Version No 1: 02 Dec 2021 (12:21 hrs)

[Civil Procedure] — [Amendments] — [Originating summons]
[Civil Procedure] — [Witnesses]
[Constitutional Law] — [Attorney-General] — [Prosecutorial discretion]
[Constitutional Law] — [Discrimination]
[Constitutional Law] — [Equality before the law]
[Constitutional Law] — [Fundamental liberties] — [Right to life and personal liberty]
[Courts and Jurisdiction] — [Court judgments] — [Declaratory]
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Syed Suhail bin Syed Zin and others
v
Attorney-General

[2021] SGHC 274

General Division of the High Court — Originating Summons No 825 of 2021
Valerie Thean J
8 November 2021

2 December 2021 Judgment reserved.

Valerie Thean J:

Introduction

1 The plaintiffs are 17 inmates of Changi Prison of Malay ethnicity who have been convicted of drug trafficking or drug importation under the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA") and sentenced to suffer death. Save for the 11th plaintiff, who is a Malaysian national, all the plaintiffs are Singapore nationals.[1]

2 In Originating Summons No 825 of 2021 ("OS 825"), the plaintiffs seek the following declarations against the Attorney-General ("the AG"):[2]

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1 Joint Affidavit of Plaintiffs affirmed on 13 August 2021 ("Plaintiffs' Joint Affidavit") at paras 3.1 and 3.2.

2 HC/OS 825/2021, Prayers 1–3.

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(a) a declaration that the AG acted arbitrarily against the plaintiffs as persons of Malay ethnicity, in breach of Art 9(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution"), when prosecuting them for capital drug offences under the MDA;

(b) a declaration that the AG discriminated against the plaintiffs as persons of Malay ethnicity, in breach of their rights to equal treatment under the law protected by Art 12(1) of the Constitution, when prosecuting them for capital drug offences under the MDA; and

(c) a declaration that the AG exceeded his powers under Art 35(8) of the Constitution and/or ss 24–26 and 32 of the MDA, and acted unlawfully, through bias or by taking into account irrelevant factors when prosecuting the plaintiffs for capital drug offences under the MDA.

3 The plaintiffs seek to make these allegations against both the AG, in the exercise of his prosecutorial discretion under Art 35(8) of the Constitution, and against officers in the Central Narcotics Bureau ("the CNB"), whom the AG represents in these proceedings pursuant to s 19(3) of the Government Proceedings Act (Cap 121, 1985 Rev Ed) ("the GPA").[3]

Preliminary matters

4 OS 825 and the supporting affidavit made jointly by the 17 plaintiffs were filed on 13 August 2021. In response, the AG filed two affidavits on 6 September 2021 – one sworn by the AG, and the other affirmed by the

[3] Plaintiffs' Joint Affidavit at para 3.5.

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Director of the CNB – denying the allegations. The plaintiffs thereafter filed two interlocutory summonses, on 24 September 2021 and 8 October 2021. I dealt with these two applications on 14 October 2021.

Summons No 4462 of 2021

5 The first of the two interlocutory matters concerned oral evidence to be given by a witness. On 13 September 2021, the plaintiffs informed the Registrar, in a letter, that they wished to respond to the evidence and contentions contained in the Director of the CNB's affidavit by adducing evidence from "a witness in the employ of the CNB that contradicts these contentions". This letter stated that the plaintiffs were in possession of a copy of a police report filed by this unnamed witness which raised "certain allegations of discrimination targeted at the Malays during the investigation process". The letter further stated that the witness was "concerned that he may face the risk of action taken against him by the Attorney-General on behalf of the State for giving evidence in relation to the extent of discrimination targeted at the Malays during the investigation process", but that "no such risks would occur if he [was] giving evidence under an Order of Court or if he [was] being subpoenaed".[4] The name of this witness was revealed at a registrar's pre-trial conference on 14 September 2021 to be one Mr Muhammad Zuhairi bin Zainuri ("Mr Zuhairi").[5]

6 This was new evidence for which an opposing party ought to have a right of reply, not evidence properly said to be adduced in response to the CNB's denial of the allegations of discrimination. At a subsequent pre-trial conference

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4 Letter from K K Cheng Law LLC to the Registrar, Supreme Court dated 13 September 2021 at paras 3–5; Defendants' Submissions for HC/SUM 4462/2021 dated 12 October 2021 ("DWS (SUM 4462)") at para 3.

5 DWS (SUM 4462) at para 4.

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on 20 September 2021, I directed the plaintiffs to file a summons for the relief they sought with a supporting affidavit.

7 On 24 September 2021, the plaintiffs filed Summons No 4462 of 2021 seeking leave for Mr Zuhairi to give oral evidence in support of their application in OS 825.[6] In their supporting affidavit, the plaintiffs exhibited three police reports filed by Mr Zuhairi in 2020 and 2021 which contained allegations that the CNB had adopted racially discriminatory practices in investigating its officers.[7] The plaintiffs also annexed an affidavit affirmed by their counsel, Mr Ravi s/o Madasamy ("Mr Ravi"), on 24 September 2021 ("Mr Ravi's First Affidavit"). Mr Ravi's First Affidavit stated that Mr Zuhairi had informed Mr Ravi that he had "evidence on how the [CNB] management had generally discriminated against Malays and not just during internal investigations of officers". It then provided particulars of this evidence and stated that Mr Zuhairi had "indicated that he was content for [Mr Ravi] to disclose this information in any potential third-party action for discrimination against the CNB", but that Mr Zuhairi was only prepared to give oral evidence and was unwilling to attest to these facts by way of affidavit as he was still under the employ of the CNB.[8]

8 A reply affidavit was filed on behalf of the AG by State Counsel Ms Regina Lim on 1 October 2021 ("Ms Lim's Affidavit"). This affidavit exhibited a further five police reports filed by Mr Zuhairi between October 2019 and September 2021, including a police report filed by Mr Zuhairi on

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6 HC/SUM 4462/2021, Prayer 1.

7 1st Affidavit of Syed Suhail bin Syed Zin affirmed on 24 September 2021 ("Mr Suhail's 1st Affidavit") at paras 5–7 and Annexes A–C.

8 Mr Suhail's 1st Affidavit at paras 9–10 and Annex D (1st Affidavit of Ravi s/o Madasamy affirmed on 24 September 2021 ("Mr Ravi's 1st Affidavit")) at paras 7–8.

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24 September 2021 at 5.47pm ("the Eighth Police Report").[9] In the Eighth Police Report, Mr Zuhairi denied making most of the statements attributed to him in the relevant paragraph of Mr Ravi's First Affidavit.[10]

9 In response, further affidavits were filed to attest to the veracity of Mr Ravi's First Affidavit. These affidavits showed that the plaintiffs' solicitors sent Mr Zuhairi a draft of his affidavit on 11 August 2021 and that Mr Zuhairi raised no objections to the accuracy of the contents of this draft affidavit, but stated in a WhatsApp message on 12 August 2021 that he was unable to sign the affidavit "due to certain reason", including that he might need the approval of his Permanent Secretary in order to do so given that he was still in CNB's employ, and that he thought it was "best if [he] deal[t] with [his] case first".[11] The contents of para 4 of this draft affidavit were similar to what is set out at [12] below.[12] Mr Ravi's paralegal also stated that Mr Zuhairi had asserted that he was speaking the truth about the allegations of racial discrimination.[13] Meanwhile, Mr Ravi's knowledge manager said that Mr Zuhairi had shared several general instances of discrimination against drug suspects with him and Mr Ravi during a meeting on 16 July 2021, which corresponded to the account of Mr Zuhairi's evidence in Mr Ravi's First Affidavit.[14]

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9 Affidavit of Lim Siew Mei Regina affirmed on 1 October 2021 ("Ms Lim's Affidavit") at para 7.

10 Ms Lim's Affidavit, Exhibit LSMR-5 at pp 24–25.

11 Affidavit of Sankari d/o Loganathan affirmed on 8 October 2021 ("Ms Loganathan's Affidavit") at paras 5 and 7 and Exhibit SL-1; Affidavit of Kerk Cheng Yi @ Guo Rendi affirmed on 8 October 2021 ("Mr Guo's Affidavit") at paras 5–7 and Exhibit KCY-1 at Annex A p 1 (showing Mr Zuhairi's draft affidavit being sent to him *via* WhatsApp).

12 Ms Loganathan's Affidavit at para 6; Mr Guo's Affidavit, Exhibit KCY-1 at Annex A pp 3–4 (paras 4–6 of Mr Zuhairi's draft affidavit).

13 Ms Loganathan's Affidavit at para 10.

14 Mr Guo's Affidavit at para 4.

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10 The plaintiffs' written submissions indicated they would issue a subpoena for Mr Zuhairi's attendance if the court should give leave,[15] and I approached the application on this basis. Leave could be granted under O 28 r 4(3) of the Rules of Court (2014 Rev Ed) ("the ROC") if it would secure the just, expeditious and economical disposal of the proceedings. The application failed, however, for reasons of relevance.

11 The plaintiffs relied on three police reports made by Mr Zuhairi on 6 January 2020, 12 May 2021 and 1 September 2021. The first plaintiff, Mr Syed Suhail bin Syed Zin ("Mr Suhail"), stated in his affidavit that these reports were a "startling revelation of the discriminatory practices against the Malays which [the plaintiffs] already had encountered".[16] The allegations made by Mr Zuhairi in these police reports, however, did not appear to be relevant to the prosecution of the plaintiffs or any arbitrary, discriminatory or unlawful action against Malay *capital drug offenders*. Instead, these reports dealt with Mr Zuhairi's belief that he, as a Malay *CNB officer*, had been targeted in internal investigations by the CNB:

> (a) The police report filed on 6 January 2020 stated that it was lodged "against the CNB Director and his management into possible promoting enmity between different groups on the ground of race. I wish to state that I felt that *I* was racially profiled to be investigated and prosecute whereas, it may be different actions taken towards another race" [emphasis added].[17]

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15 Plaintiffs' Written Submissions for HC/SUM 4462/2021 and HC/SUM 4680/2021 dated 12 October 2021 ("PWS (SUMs)") at paras 4–5 and 11.

16 Mr Suhail's 1st Affidavit at paras 5–8.

17 Mr Suhail's 1st Affidavit at Annex B, p 14.

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(b) The police report filed on 12 May 2021 stated that he felt he was "racially targeted by CNB Management for having *officers of Malay race* to be prosecuted or being referred for investigation, whereas other races may be given preferential treatment", and that "there were few incidents whereby CNB management would only refer *Malay race officers* to other law enforcement agencies for investigation but treated other races with more favourable outcomes" [emphasis added].[18]

(c) The police report filed on 1 September 2021 stated that Mr Zuhairi "felt that Mr Xavier and/or CNB management together with CPIB officer Mr Johnston Kan had racially profile *me* for prosecution and failed to conduct proper investigations. CNB management is known to refers Malay races for investigation conducted by external agencies whereas, Chinese *officer* would be receiving preferential treatments and not leading to prosecution" [emphasis added].[19]

12 The only part of Mr Suhail's affidavit dealing with matters relevant to OS 825 were the contentions made in Mr Ravi's First Affidavit, which was annexed to Mr Suhail's. Mr Ravi's First Affidavit stated that Mr Zuhairi had evidence of how the CNB management had discriminated against *Malay persons generally*, and that the particulars of this evidence were as follows:

(a) CNB officers "have always been arresting more Malays in capital drug trafficking cases disproportionately as compared to other races such as Chinese".[20]

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18 Mr Suhail's 1st Affidavit at Annex C, p 18.

19 Mr Suhail's 1st Affidavit at Annex A, p 9.

20 Mr Suhail's 1st Affidavit at Annex D (Mr Ravi's 1st Affidavit) at para 7(a).

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(b) The majority of CNB officers were Malay and spoke the Malay language more frequently, and "would therefore find it easier to communicate with people of the same race and with the same frequency of communication".[21]

(c) Flowing from (b) above, "a substantial number of informers who tipped off the CNB officers are Malays, and they would generally report against Malay drug trafficking suspects".[22]

(d) CNB officers "tend to seek out Malay informers who can provide information on Malay drug trafficking suspects, and did not put in proportionate effort to seek out Chinese informers to request for information on Chinese drug trafficking suspects".[23]

(e) The majority of the higher-ranking members of the CNB were Chinese, and Mr Zuhairi "had seen instances where Chinese drug trafficking suspects were given favourable treatment as compared to Malay drug trafficking suspects, as these high-ranking officers also find it easier to speak with people of the same race (*ie*, Chinese) and with the same frequency of communication". This had resulted in "a higher rate of drug trafficking suspects being let off".[24]

(f) Mr Zuhairi "had also observed that Malay drug trafficking suspects are tortured by CNB officers more often than Chinese drug

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21 Mr Suhail's 1st Affidavit at Annex D (Mr Ravi's 1st Affidavit) at para 7(b).

22 Mr Suhail's 1st Affidavit at Annex D (Mr Ravi's 1st Affidavit) at para 7(c).

23 Mr Suhail's 1st Affidavit at Annex D (Mr Ravi's 1st Affidavit) at para 7(d).

24 Mr Suhail's 1st Affidavit at Annex D (Mr Ravi's 1st Affidavit) at para 7(e).

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trafficking suspects to sieve out admissions that amounted to pleas of guilt".[25]

13 Ms Lim's affidavit in response exhibited five other police reports made by Mr Zuhairi which were not annexed to Mr Suhail's affidavit. In the Eighth Police Report (which was the third report filed by Mr Zuhairi on 24 September 2021), Mr Zuhairi denied having made the statements set out at [12(a)], [12(d)], [12(e)] and [12(f)] above.[26] Mr Zuhairi said that the statement at [12(e)], that "Chinese drug trafficking suspects were given favourable treatment as compared to Malay drug trafficking suspects", was only a partial truth as he had not specifically mentioned the word "trafficking".[27] More fundamentally, this assertion was in any event general and unparticularised, and did not show that Mr Zuhairi was able to provide any concrete evidence on the specific matters raised by the plaintiffs in OS 825. The statements that Mr Zuhairi did *not* deny related only to the majority of CNB officers finding it easier to communicate with Malay persons ([12(b)] above) and informers reporting against Malay drug trafficking suspects ([12(c)] above), neither of which went towards substantiating the plaintiffs' allegations in OS 825. Further affidavits were filed by Mr Ravi, his paralegal, and his knowledge manager to contradict Mr Zuhairi's Eighth Police Report, but these did not inject any relevance into the general assertions made in the earlier statements.

14 Associated with the issue of relevance was the reliability of Mr Zuhairi as a witness, in the light of his denials. At the hearing of this summons, Mr Ravi suggested that it was more likely that Mr Zuhairi, who was already reluctant to

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25 Mr Suhail's 1st Affidavit at Annex D (Mr Ravi's 1st Affidavit) at para 7(e).

26 Ms Lim's Affidavit at Exhibit LSMR-5, pp 2–3.

27 Ms Lim's Affidavit at Exhibit LSMR-5, p 2.

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give evidence in OS 825, became "scared" and attempted to protect himself by filing the Eighth Police Report.[28] Mr Ravi also emphasised that Mr Zuhairi had not denied making the statements at [12(b)] and [12(c)] above;[29] that "drug suspects" must logically include "drug trafficking suspects";[30] and that Mr Zuhairi's denials in the Eighth Police Report were "merely self-serving and contradictory in view of what he had not denied".[31] At the hearing, Mr Ravi seemed to envisage that he would impeach his own witness. Nevertheless, the issue at hand was not what Mr Zuhairi had already said – which would be irrelevant for the reasons explained above – but what Mr Zuhairi *knew*. His usefulness as a witness and the relevance of his evidence depended on whether he had specific knowledge or evidence of arbitrariness, discrimination, bias or the taking into account of irrelevant considerations by the AG or the CNB *in relation to the 17 plaintiffs*, which were the issues in OS 825 as defined by the plaintiffs themselves. Mr Ravi's submission at the hearing was that if the CNB discriminated against Malay officers, there must *a fortiori* have been discrimination against Malay drug trafficking suspects as a matter of "[c]ommon sense and logic".[32] Contrary to his assumption, the two issues were not causally linked in that manner.

15 Therefore, in my view, the plaintiffs failed to show that Mr Zuhairi could give evidence that would assist in the just disposal of OS 825. Accordingly, the application was dismissed.

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28 Notes of Argument, 14 October 2021 at p 2 line 31 to p 3 line 6.

29 PWS (SUMs) at para 8.

30 2nd Affidavit of Ravi s/o Madasamy affirmed on 7 October 2021 ("Mr Ravi's 2nd Affidavit") at paras 5 and 7; Notes of Argument, 14 October 2021 at p 2 lines 18–21.

31 Mr Ravi's 2nd Affidavit at para 8.

32 Notes of Argument, 14 October 2021 at p 14 lines 6–10.

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Summons No 4680 of 2021

16 The second interlocutory summons, Summons No 4680 of 2021, arose out of Ms Lim's Affidavit. At para 9 of Ms Lim's Affidavit, she stated that the Eighth Police Report "raises serious doubts about the veracity of the claims made in Mr Ravi's affidavit and calls into question the entire basis for SUM 4462".[33] On 8 October 2021, the plaintiffs filed SUM 4680 to seek leave to amend OS 825 to include an additional prayer for a declaration that the AG and/or the State Counsel having conduct of OS 825 had breached rr 15 and/or 29 of the Legal Profession (Professional Conduct) Rules 2015 ("the PCR") in filing Ms Lim's Affidavit, occasioning a breach of fair trial in OS 825.[34]

17 This application also failed for want of relevance. An amendment to the originating summons to add an additional prayer under O 20 r 7 read with O 20 r 5(1) of the ROC should enable the real questions or issues in controversy between the parties to be determined: *Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal* [2010] 1 SLR 52 at [113]. This threshold was not met here. The real questions or issues in controversy between the parties in OS 825 are whether the plaintiffs' rights under Art 9(1) and Art 12(1) of the Constitution were breached, and whether the AG had acted unlawfully, either through bias or by taking into account irrelevant considerations in prosecuting them under the MDA. Far from enabling these core questions to be determined, allowing the alleged disciplinary breaches of rr 15 and/or 29 of the PCR to be subsumed within OS 825 would distract the parties and the court from the determination of these core questions by introducing unrelated matters into the proceedings. Indeed, the alleged breach of r 29 of the PCR related to the duties

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33 Ms Lim's Affidavit at para 9.

34 HC/SUM 4680/2021, Prayer 1.

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owed by the State Counsel to *Mr Ravi* in his personal capacity as a legal practitioner, and OS 825 was not the appropriate platform to ventilate these complaints. The plaintiffs' vague submission that these allegations cast doubt on the State Counsel's impartiality and the plaintiffs' right to a fair hearing was speculative and unsupported by any particulars.

18 Further, OS 825 was not the proper forum to determine issues of disciplinary breach.

19 In *Then Khek Khoon and another v Arjun Permanand Samtani and another* [2012] 2 SLR 451 at [22], Quentin Loh J (as he then was) stated:

> It … seems to me that *where one is concerned only with breaches of the LPPCR, which do not trigger any concurrent breach of legal obligations owed by the counsel to the court or the client at Common Law,* ***the proper forum for investigation and determination of the breach is the Law Society rather than the court***. I should not be taken to say that this is an immutable rule. There may be *special or exceptional circumstances where the nature of the complaint is such that on an objective view, a reasonable, fair minded observer would think that a fair trial would not be possible without the court's intervention and restraint of the advocate or solicitor from continuing to act.* Where matters impinge on the proper administration of justice, due process and wider public interest issues, the court should intervene, either on its own initiative or pursuant to a complaint by the other party. The Court must not allow confidence in the administration of justice to be undermined.
>
> [emphasis added in italics and bold italics]

This passage was referenced by See Kee Oon J in *Syed Suhail bin Syed Zin and others v Attorney-General and another* [2021] 4 SLR 698 at [57]. Mr Ravi represented the plaintiffs in that case.

20 At the hearing of this summons, Mr Ravi referred me to cases where the Court of Appeal, as opposed to the Law Society, had pronounced on disciplinary

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breaches *he himself* had committed (in another case involving Mr Suhail), as well as some committed by Mr Eugene Thuraisingam ("Mr Thuraisingam"). Though he did not specify which cases, he was presumably referring to *Syed Suhail bin Syed Zin v Public Prosector* [2021] 2 SLR 377 ("*Syed Suhail (Costs)*"), *Miya Manik v Public Prosecutor and another matter* [2021] SGCA 90 ("*Miya Manik*") and *Imran bin Mohd Arip v Public Prosecutor and another appeal* [2021] SGCA 91 ("*Imran bin Mohd Arip*").

(a) In *Syed Suhail (Costs)*, the Prosecution had indicated its intention to seek a personal costs order against Mr Ravi. In ordering that Mr Ravi was personally liable to pay costs to the Prosecution, the Court of Appeal found that he had acted improperly in several respects. An example was where he made baseless allegations against the applicant's previous counsel and "failed to abide by his professional duty to give counsel whose conduct he was criticising in court an opportunity to respond", and had thereby breached r 29 of the PCR (see *Syed Suhail (Costs)* at [28]–[40], and in particular at [36] and [38]). The Court of Appeal therefore held that Mr Ravi's improper conduct had led to the incurring of unnecessary costs by the Prosecution and that it was just to make a personal costs order against him (*Syed Suhail (Costs)* at [49] and [51]).

(b) In *Miya Manik*, the Court of Appeal found that there were "numerous aspects" of that case which, "taken together, suggested that Mr Thuraisingam may have been in breach of one or more of his duties" (*Miya Manik* at [83]). It found Mr Thuraisingam's conduct of the matter to be "wholly unsatisfactory" as he had "encumbered the court with a patently unmeritorious application which wasted the court's time" (*Miya Manik* at [85]).

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(c) In *Imran bin Mohd Arip* at [97]–[98], the Court of Appeal found that Mr Thuraisingam's conduct, in informing his client's former counsel of the allegations made against them on the same day that the allegations were made known to the court, was conduct "in contravention of Rule 29 of the [PCR]" and "[fell] far short of the standards that are expected of counsel".

21 Based on these cases, Mr Ravi contended that the AG was wrong to argue that the court lacked jurisdiction and power to grant the declaration sought.[35]

22 However, these cases did not assist the plaintiffs' application. All advocates and solicitors, and all Legal Service Officers, are officers of the Supreme Court under s 82(1) of the Legal Profession Act (Cap 161, 2009 Rev Ed). The court undoubtedly retains "a supervisory jurisdiction to regulate the conduct of its officers", the purpose of which is to ensure that its officers "adhere to a minimum standard of propriety in conduct": *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [73] and [75]. A court may comment on the propriety of conduct affecting court proceedings. A prayer for a declaration is a not a necessary condition for it to do so, and neither was such a prayer in issue in the three cases where the Court of Appeal commented on Mr Ravi and Mr Thuraisingam's conduct. As Mr Ravi agreed at the hearing, no additional prayer would be required if I were minded to comment on the conduct of any of the lawyers appearing in OS 825.

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[35] Notes of Argument, 14 October 2021 at p 5 lines 25–31 and p 6 lines 6–8 and 14–17.

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23 The application to amend OS 825 was therefore misconceived and I dismissed it.

OS 825

24 OS 825 is an application by the plaintiffs for declaratory relief under O 15 r 16 of the Rules of Court (2014 Rev Ed) ("the ROC"). The requirements that must be satisfied before a court will grant declaratory relief are set out in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and another appeal* [2006] 1 SLR(R) 112 ("*Karaha Bodas*") at [14]):

(a) the court must have the jurisdiction and power to award the remedy;

(b) the matter must be justiciable in the court;

(c) as a declaration is a discretionary remedy, it must be justified by the circumstances of the case;

(d) the plaintiff must have *locus standi* to bring the suit and there must be a real controversy for the court to resolve;

(e) any person whose interests might be affected by the declaration should be before the court; and

(f) there must be some ambiguity or uncertainty about the issue in respect of which the declaration is asked for so that the court's determination would have the effect of laying such doubts to rest.

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Parties' positions

The plaintiffs

25 The plaintiffs do not contend that the AG or the CNB *deliberately or expressly* discriminated against Malay persons in cases involving capital drug offences.[36] Instead, their case is that the AG's and the CNB's exercise of their powers has *resulted in* the arbitrary and discriminatory treatment of Malay offenders during the investigation and prosecution of capital drug offences.[37] The key steps in their argument are as follows.

26 First, the plaintiffs submit that, as Malay persons, they were *statistically* more likely to be investigated and/or prosecuted for capital drug offences under the MDA:[38]

> (a) Although Malay persons make up just 13.5% of the resident population (as of June 2020), they comprise 77% of Singaporean residents sentenced to death for drug offences from 2010 to 2021. Malay persons are therefore significantly over-represented in the population of offenders sentenced to death for drug offences.[39] This disparity between the proportion of Malay persons in the ordinary population and the proportion of Malay persons among those sentenced to death for drug offences has increased over the last decade, while the number of Chinese persons sentenced to death for drug offences has decreased.[40]

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36 Plaintiffs' Written Submissions for HC/OS 825/2021 dated 1 November 2021 ("PWS") at paras 8–9.

37 PWS at para 5.

38 PWS at paras 6–7.

39 Plaintiffs' Joint Affidavit at paras 6.1–6.3 and Annexes A and B; PWS at paras 6 and 13.

40 Plaintiffs' Joint Affidavit at para 6.4 and Annex C; PWS at para 15.

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(b) From 2010 to 2021, the AG was significantly less likely to exercise his prosecutorial discretion to reduce the charge preferred against Malay offenders to reflect an amount of drugs below the death penalty threshold, than they were for offenders of other ethnicities.[41]

(c) Malay persons charged with capital drug offences are more likely to be convicted and are less likely to receive an alternative sentence to death under s 33B of the MDA.[42]

(d) The totality of this evidence demonstrates that Malay persons who have committed a capital drug offence are far more likely to receive a death sentence than persons of other ethnicities.[43]

27 Second, the plaintiffs contend that this statistical evidence powerfully demonstrates unequal results in the application of the death penalty in capital drugs cases between persons of different ethnicities.[44] The affidavits filed by the AG and the Director of the CNB have not challenged this statistical evidence or provided alternative statistical information.[45] The AG has also not provided any explanation for the disproportionate number of Malay persons sentenced to death for drug trafficking offences.[46] The over-representation of Malay persons is so stark in capital drug offences that there is, at the very least, a *prima facie*

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41 Plaintiffs' Joint Affidavit at para 8.1; PWS at para 16.

42 Plaintiffs' Joint Affidavit at para 9.1; PWS at paras 17 and 33.

43 PWS at para 18.

44 PWS at para 23.

45 PWS at para 25.

46 PWS at para 27.

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case of reasonable suspicion that arbitrariness and discrimination have crept into the investigatory and prosecutorial processes.[47]

28 Third, the plaintiffs argue that this ethnic disparity emerged as a consequence of inadequate policies or criteria, or an inconsistent application of those policies or criteria, or unconscious biases that have been insufficiently neutralised through monitoring, training and review.[48] The type of punishment for drug trafficking and importation offences is solely determined by the weight of drugs specified in the charge.[49] Consequently, in practice, there are only a limited number of factors affecting whether a death sentence is ultimately imposed on a drug offender, namely: (a) the CNB's policing and investigation practices; (b) the charge preferred by the AG in the exercise of his prosecutorial discretion; and (c) whether the offender is convicted of the capital charge.[50] The onus is on the AG to have adequate policies and practices in place to ensure that death sentences do not directly or indirectly affect one particular ethnic group disproportionately without legitimate reasons.[51]

29 Fourth, in relation to each of the three specific declarations sought, the plaintiffs argue that:

(a) their right to equal treatment under Art 12(1) of the Constitution has been breached because Malay offenders who have committed capital

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47 PWS at para 19.

48 PWS at para 8.

49 PWS at para 28.

50 PWS at paras 28–39.

51 PWS at para 10.

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drug offences are more likely to be sentenced to death than offenders of other ethnicities within the same class, and this calls for justification;[52]

(b) their rights under Art 9(1) of the Constitution, which guarantees protection from arbitrary treatment, have been breached because powers exercised in breach of Art 12(1) and decisions made by public officers influenced by bias or irrelevant factors such as ethnicity are arbitrary exercises of power which are unlawful;[53] and

(c) the significantly reduced likelihood of Malay offenders who have committed capital drug offences receiving a reduced charge, compared to offenders of other ethnicities who have committed the same offence, gives rise to a real apprehension of bias or that the irrelevant factor of ethnicity has influenced the investigatory and/or prosecutorial processes.[54]

30 Fifth, the plaintiffs contend that by demonstrating that Malay persons are disproportionately punished with the death penalty for drug offences compared to offenders of other ethnicities, they have presented a *prima facie* case that their rights under Arts 9(1) and 12(1) have been breached or that the AG has been biased or taken into account irrelevant factors (such as ethnicity) when exercising his powers. It is now for the *AG* to show that his powers were exercised in accordance with robust policies, criteria and safeguards, which provide legitimate reasons for the disparate negative impact on Malay offenders. In the absence of legitimate reasons from the AG for the differentiation between

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52 PWS at para 67.

53 PWS at paras 43–44.

54 PWS at para 72.

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Malay persons and persons of other ethnicities, the court should grant the declaratory relief sought.[55]

The AG

31 The plaintiffs' allegations are categorically denied by the AG and the Director of the CNB. The AG filed an affidavit stating that the plaintiffs' ethnicity was not a factor in the decisions to prefer the charges against them, and that the Attorney-General's Chambers ("AGC") does not have any policies or practices pertaining to the exercise of prosecutorial discretion that involve considerations of an offender's ethnicity.[56] Similarly, the Director of the CNB filed an affidavit maintaining that the CNB's investigative and enforcement practices are not targeted towards any particular ethnic community, and that none of the plaintiffs were arrested or investigated on account of their race or ethnicity. Instead, they were arrested and investigated because there was evidence that they had committed offences under the MDA.[57]

32 The AG makes four submissions.

33 First, the AG contends that the statistical data presented in the plaintiffs' joint affidavit dated 13 August 2021 ("the Joint Affidavit") is inaccurate, deliberately selective, based on questionable assumptions, and methodologically flawed, for the following reasons.[58]

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55 PWS at paras 75–77.

56 Affidavit of Lucien Wong Yuen Kuai sworn on 31 August 2021 ("AG's Affidavit") at para 6.

57 1st Affidavit of Ng Ser Song affirmed on 1 September 2021 at para 5; 2nd Affidavit of Ng Ser Song affirmed on 29 September 2021 at para 5.

58 Defendants' Written Submissions for HC/OS 825/2021 dated 1 November 2021 ("DWS") at paras 4(a) and 7.

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(a) The plaintiffs' data is inaccurate and unreliable because they have not explained how they identified the ethnic group of each offender in their data;[59] it omits a significant number of unreported cases;[60] and it omits cases where offenders were convicted on capital charges at first instance but no death sentence was imposed (including cases where the AG issued the offender a Certificate of Substantive Assistance ("CSA") and the court found that the offender was a courier).[61] Thus, although the plaintiffs' data purports to represent all prosecutions for capital drug offences and their outcomes, their omission of significant groups of cases renders their calculations inaccurate and unreliable. The plaintiffs have therefore failed to establish the alleged significant disparity in the numbers of Malay capital drug offenders on which their arguments are based.[62]

(b) The plaintiffs' presentation of data is selective and biased.[63] Cases where CSAs were issued (which would increase the proportion of offenders not sentenced to death) were excluded from the plaintiffs' data. In addition, cases with pending appeals against death sentences were included (which increased the proportion of offenders sentenced to death), but cases with pending appeals against non-capital sentences were excluded (which decreased the proportion of offenders not sentenced to death).

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59 DWS at para 8.

60 DWS at paras 9–11.

61 DWS at paras 12–13.

62 DWS at paras 14–17.

63 DWS at paras 18–21.

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(c) The plaintiffs' data contains several assertions which are not attributable to action by the CNB and/or the AG. The outcome of a criminal prosecution lies within the domain of the *court* that hears the matter. Further, no explanation was given for focusing on the period from 2010 to 2021 and no account was given for policy, environmental and other changes that took place during that period. More fundamentally, no consideration was given to the fact that the plaintiffs were arrested and prosecuted for different offences committed under different circumstances, and their cases were therefore subject to entirely different considerations. The plaintiffs' analysis focuses only on the offender's ethnicity to the exclusion of all other facts.[64]

34 Second, the AG submits that even if the statistical data had been correctly presented, the plaintiffs' conclusions from the data are logically flawed.[65]

(a) The AG rejects the suggestion that a material difference in investigation, prosecution and judicial outcomes at the macro level gives rise to a *prima facie* case of discrimination. Individual offending, and hence macro-level patterns of offending, are influenced predominantly by a number of complex sociological and environmental factors (such as socio-economic factors, proximity or exposure to drug-related offending and drug trafficking recruitment patterns). The mere fact of differential outcomes does not suggest bias or a deliberate discriminatory policy. Investigation, prosecution and judicial outcomes

64 DWS at paras 22–25.

65 DWS at paras 4(b) and 26.

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(including sentencing) are highly fact-sensitive and cannot be compared in the superficial and reductive way the plaintiffs suggest.[66]

(b) Although one of the plaintiffs' central allegations is that the CNB acted in a discriminatory manner against them, they have not identified any case where considerations of ethnicity resulted in an improperly conducted investigative or prosecutorial process, whether in relation to themselves or any other person.[67]

35 Third, the AG argues that the plaintiffs have no legal basis to assert that their constitutional rights have been infringed, as their broad-brush presumptions regarding their data do not meet the test of unconstitutionality.[68]

(a) With regard to Art 12(1), the plaintiffs bear the evidential burden of proving that they were treated differently from other equally situated persons.[69] However, the plaintiffs have not identified any offenders with whom they claim to be equally situated. Indeed, the plaintiffs have omitted to draw any comparisons between themselves and the group of persons with whom they are the most closely situated – namely, their own co-offenders.[70] The plaintiffs' case is also premised wholly on statistics and they have not made any specific statement as to how the investigative or prosecutorial process was arbitrary or discriminatory in *their own cases*. Even if the statistics show that a particular group of persons is over-represented in prosecutorial or judicial outcomes, that

66 DWS at paras 27 and 30.

67 DWS at para 29.

68 DWS at paras 4(c) and 31.

69 DWS at paras 33–34.

70 DWS at paras 37 and 40.

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does not alone raise even a *prima facie* case of discrimination, and the plaintiffs' broad assertion that they and other Malay offenders must have been the targets of discrimination because of their ethnicity is a leap of logic from these statistics.[71]

(b) With regard to Art 9(1), this challenge must fail in so far as the plaintiffs are arguing that the deprivation of their lives is not in accordance with law on the sole basis of an Art 12(1) breach. The plaintiffs do not allege that their convictions were wrong as each of them was convicted of their respective offences after due process.[72]

36 Fourth, the AG submits that OS 825 is an abuse of process because it is merely an opportunistic attempt to use the court's civil jurisdiction to drip-feed new arguments to impugn the plaintiffs' criminal convictions and sentences, which many of the plaintiffs have already sought to challenge unsuccessfully. The plaintiffs are simply attempting to delay the execution of their proper legal punishment and re-open their own long-concluded criminal cases, and they have failed to provide any logical explanation for commencing OS 825 instead of filing a review application under Division 1B of Part XX of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC").[73]

Issues

37 The arguments raise the following issues:

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71 DWS at paras 42 and 44.

72 DWS at paras 45–46.

73 DWS at paras 5, 48–53, 60 and 66(b).

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(a) First, whether the statistical evidence furnished by the plaintiffs reflects arbitrariness, discrimination, bias or the taking into account of irrelevant considerations.

(b) Second, in the light of the evidence, whether any of the three declarations sought should be granted. The plaintiffs bear the burden of proof and for present purposes, the crucial requirement from *Karaha Bodas* is that declaratory relief must be "justified by the circumstances of the case". This is a higher threshold than in an application for leave to commence judicial review, where leave will be granted if the applicant can show a *prima facie* case of *reasonable suspicion* (see *Gobi a/l Avedian and another v Attorney-General and another appeal* [2020] 2 SLR 883 at [54]).

(c) Third, whether OS 825 is an abuse of process.

38 I deal with these issues in turn.

Statistical premise of OS 825

39 In the present case, the plaintiffs' case rests entirely on statistical evidence. They have not put forward any evidence that they were, as a matter of fact, treated differently because of their ethnicity. Instead, the plaintiffs urge the court to *infer*, from the statistical *effect* of the AG and/or the CNB's decisions, that the investigatory and prosecutorial processes must have been influenced by discrimination on the ground of ethnicity. The plaintiffs also do not allege that the AG and/or the CNB have adopted any expressly discriminatory policy. Rather, the crux of the plaintiffs' argument appears to be that individual officers have "unwittingly" been influenced by "unconscious biases" regarding the offender's ethnicity in investigating and prosecuting

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offences; and that when these decisions are considered collectively, they have resulted in the statistical over-representation of Malay drug offenders among drug offenders sentenced to death.[74]

40 The plaintiffs have collated publicly available information from reported judgments on the number of individuals of different ethnicities arrested and prosecuted for capital drug offences, primarily from 2010 to 1 June 2021, in Annex B to their Joint Affidavit.[75] From this information, they derive a series of calculations showing the statistical likelihood of:

(a) Malay persons being convicted and sentenced to death for capital drug offences;

(b) Malay persons being prosecuted for capital drug offences; and

(c) Malay persons being charged with non-capital charges for drug offences.

41 The AG has pointed out that various calculations contain inaccuracies. The plaintiffs acknowledge that their calculations may be imperfect and incomplete, but explain that these are premised on the information available to them. For reasons I will explain below (at [60] and [95]), the onus is on the plaintiffs to establish a *prima facie* case. In this respect, the calculations need not be perfectly accurate if a *prima facie* case is made out having regard to logic and common sense. Conversely, the AG is not, by the mere fact of the plaintiffs filing suit, under a responsibility to adduce all the statistics that the plaintiffs clearly wish to see if no *prima facie* case is made out. It is on this basis that I consider the plaintiffs' statistical evidence.

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74 PWS at paras 8–9 and 76.

75 Plaintiffs' Joint Affidavit at para 6.2.

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42 I deal first with the calculations relating to [40(a)], as these are the focus of the plaintiffs' arguments.

Conviction and sentencing outcomes

43 The plaintiffs argue, using statistics from the period from 2010 to 1 June 2021, that Malay persons are disproportionately represented in the group of offenders sentenced to death for capital drug offences, and that the likelihood of Malay offenders being sentenced to death was higher than that for the other ethnic groups. In particular:

(a) 64.9% of drug offenders sentenced to death and whose death sentences were upheld on appeal were Malay (Calculation 1A).[76] Within this group, focusing on Singaporean residents, 77% of drug offenders sentenced to death and whose death sentences were upheld on appeal were Malay (Calculation 5A).[77] This is an increase from the earlier period from 2000 to 2009 (Calculation 6A).[78]

(b) Of the group of Malay persons prosecuted for capital drug offences, 75.8% were sentenced to death, while the equivalent percentages for other ethnicities were lower (Calculation 3C).[79] Within this group, focusing on Singaporean residents, 79.7% were sentenced to death. This was argued to be by far the highest percentage across the four ethnic groups under consideration (Calculation 8C).[80]

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76 Plaintiffs' Joint Affidavit, Annex B at pp 33–34 (Calculation 1A).

77 Plaintiffs' Joint Affidavit, Annex B at p 62 (Calculation 5A).

78 Plaintiffs' Joint Affidavit, Annex B at p 70 (Calculation 6A).

79 Plaintiffs' Joint Affidavit, Annex B at p 45 (Calculation 3C).

80 Plaintiffs' Joint Affidavit, Annex B at p 77 (Calculation 8C).

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(c) Of the group comprising Malay offenders prosecuted for capital drug offences and Malay offenders who were convicted but charged below the death penalty threshold, 59.5% were sentenced to death. This was contended to be the highest percentage across the four ethnic groups under comparison (Calculation 4B).[81] Within this group, focusing on Singaporean residents, 63.5% were sentenced to death, while the equivalent percentages for other ethnicities were significantly lower (Calculation 9B).[82]

44 These statistics relate to conviction and sentencing outcomes, which are a product of the court process. The plaintiffs were convicted and sentenced by courts of competent jurisdiction after due process was accorded to them and they had several opportunities to challenge the grounds for their convictions and sentences in the criminal proceedings against them. In arriving at these conviction and sentencing decisions, the relevant courts would have assessed the specific evidence in each plaintiff's case. While the plaintiffs argue that Malay persons charged with capital drug offences are more likely to be convicted and sentenced to death,[83] they do not allege that the *courts* take offenders' ethnicities into account in arriving at these decisions. Instead, the plaintiffs submit that there are two reasons that *indirectly* account for the disproportionate representation of Malay persons among offenders sentenced to death for capital drug offences:[84]

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81 Plaintiffs' Joint Affidavit, Annex B at p 54 (Calculation 4B).

82 Plaintiffs' Joint Affidavit, Annex B at p 84 (Calculation 9B).

83 PWS at para 33; Plaintiffs' Speaking Note for HC/OS 825/2021 dated 8 November 2021 ("PC's Speaking Note") at para 3.6(iii).

84 Plaintiffs' Joint Affidavit at para 9.1; PWS at paras 34–35.

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(a) First, the generally lower socio-economic and educational status of Malay persons in Singapore, such that they may be less able to express themselves articulately or appear credible when giving evidence. The various evidentiary presumptions under the MDA mean that exculpatory evidence in drug trafficking cases depends heavily on the accused's testimony.

(b) Second, the CNB's investigation preferences and how assiduous it is in collecting evidence against the suspect.

45 The plaintiffs have not adduced any evidence whatsoever to support either of their two proposed reasons. The first proposition that Malay drug offenders facing capital charges are less able (despite interpretation services and assigned counsel) to express themselves articulately or appear credible compared to drug offenders of other ethnicities is wholly unfounded. The assertion was made without any rationale or evidence in support.

46 As for the second proposed reason, I note preliminarily that the prayers in OS 825 refer only to the actions of the "Defendant" (*ie*, the AG) in "prosecuting" the plaintiffs. OS 825 does not include any prayers for declarations in respect of the actions of the *CNB* in investigating the plaintiffs. The plaintiffs explained in their Joint Affidavit that "[r]eferences to the CNB are references to the Defendant in its capacity as the appropriate party to civil proceedings under s 19(3) of the [GPA]".[85] However, although the AG is the proper *named defendant* to OS 825 by virtue of s 19(3) of the GPA, the *acts* that the plaintiffs claim are unconstitutional were those of both the AG and the CNB.

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85 Plaintiffs' Joint Affidavit at para 3.5.

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The plaintiffs should therefore have amended the prayers sought in OS 825 to refer to the alleged acts of both the "Defendant" and the CNB.

47 Even putting aside this procedural flaw, the plaintiffs have offered no evidence to support their assertions that "CNB investigatory practices are targeted towards intercepting offenders from the Malay community, and less towards detecting offenders from other communities",[86] or that the suspect's ethnicity influences the assiduousness of CNB officers in collecting evidence. Indeed, the only evidence adduced by the plaintiffs to support their broader claim that "the manner in which the CNB deploys its resources has resulted in discrimination against Malays" – in that the CNB is more likely to arrest an offender who has committed a capital drug offence if the offender is Malay[87] – is the CNB's statistic (in Annex E to the plaintiffs' Joint Affidavit) that 49.3% of the offenders arrested for drug *abuse* in 2020 were Malay.[88] The plaintiffs themselves did not rely on this statistic in their written or oral submissions and, in my view, it provides no support for their allegations against the CNB in OS 825.

48 The plaintiffs' case against the CNB must therefore fail, and I do not deal with those allegations any further.

Exercise of prosecutorial discretion

49 I turn now to the calculations for [40(b)] and [40(c)] above, which relate specifically to the AG's exercise of prosecutorial discretion from 2010 to 1 June 2021.

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86 Plaintiffs' Joint Affidavit at para 7.1.

87 PWS at para 30.

88 Plaintiffs' Joint Affidavit at para 6.8 and Annex E.

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(a) 55% of all offenders prosecuted for capital drug offences were Malay (Calculation 3B),[89] and 70.2% of offenders prosecuted for capital drug offences who were Singaporean residents were Malay (Calculation 8B).[90]

(b) Of the group comprising Malay persons prosecuted for capital drug offences and Malay persons who were convicted but charged below the death penalty threshold, 21.4% had their charges reduced below the death penalty threshold. The equivalent percentage was 27.3% for Chinese persons, 55.4% for Indian persons and 50% for persons of other ethnicities (Calculation 4A).[91] Within this group, focusing on Singaporean residents, 20.3% had their charges reduced below the death penalty threshold. The equivalent percentage was 33.3% for Chinese persons and 52.6% for Indian persons (Calculation 9A).[92]

50 I pause here to note that, where the plaintiffs' data refers to cases of "reduced" charges, this appears to refer broadly to cases where the offender was charged with trafficking drugs of a weight below the death penalty threshold despite having trafficked drugs of a weight above the death penalty threshold.[93]

51 Taking the plaintiffs' statistical evidence on the AG's exercise of prosecutorial discretion *at its highest*, these calculations indicate only that Malay persons are disproportionately represented in the group of offenders

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89 Plaintiffs' Joint Affidavit, Annex B at p 44 (Calculation 3B).

90 Plaintiffs' Joint Affidavit, Annex B at p 76 (Calculation 8B).

91 Plaintiffs' Joint Affidavit, Annex B at p 53 (Calculation 4A).

92 Plaintiffs' Joint Affidavit, Annex B at p 83 (Calculation 9A).

93 See Plaintiffs' Joint Affidavit, Annex B at pp 46–52 (for Calculation 4A) and pp 78–81 (for Calculation 9A).

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prosecuted for capital drug offences, and that they are statistically less likely than offenders of other ethnicities to have their charges reduced below the death penalty threshold. It provides no basis for the court to conclude that individual prosecutors were influenced by the ethnicity of offenders in making prosecutorial and charging decisions. The plaintiffs suggest that ethnicity may have influenced the assessment of the public interest considerations in the exercise of prosecutorial discretion to prefer non-capital charges,[94] but this submission is also wholly unsubstantiated. Importantly, the plaintiffs do not allege that the AG prosecutes Malay persons for capital offences when there are in fact *no grounds* for doing so. Instead, the plaintiffs' case seems to be that, as between two offenders whom the AG has *similarly strong grounds* for prosecuting for capital drug offences, the AG is more likely to prosecute the Malay offender than the offender of another ethnicity. However, the plaintiffs' statistical data does not support this proposition. The plaintiffs have provided no statistical or other evidence of, for example, Chinese offenders in comparable positions escaping prosecution or being offered reduced charges while their Malay counterparts are charged with capital offences.

52 The plaintiffs also concede that there is no discrimination in the AG's issue of CSAs. They explain that they omitted from their statistics cases where offenders were convicted on capital charges at first instance, but no death sentence was imposed, because there was no material disparity between the proportion of offenders of each ethnicity who received CSAs, and the AG's issue of CSAs is therefore not responsible for the disproportionate number of Malay persons facing death sentences.[95] Yet the plaintiffs' allegation behind their application for declaratory relief is the *general* allegation that there was

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94 PWS at para 31.

95 PWS at para 36; PC's Speaking Note at paras 3.3–3.4.

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discrimination by the AG when prosecuting them for capital drug offences under the MDA. It is not a specific allegation that the discrimination pertained only to certain stages of the prosecutorial process. If it were the case that the AG had discriminated against the plaintiffs as persons of Malay ethnicity or had taken into account their ethnicity in prosecuting them, it would be logical for that discrimination to be seen in the issue of CSAs as well.

53 These shortcomings in the statistical data become stark when the legal requirements relevant to the requested declarations are considered.

Whether there is any basis to grant the declarations sought

Article 9(1)

54 The first declaration sought by the plaintiffs is a declaration that the AG acted arbitrarily against them as persons of Malay ethnicity in breach of Art 9(1) of the Constitution when prosecuting them for capital drug offences under the MDA.

55 Article 9(1) provides that "[n]o person shall be deprived of his life or personal liberty save in accordance with law". It is well established that, where the deprivation of life or liberty takes place in accordance with legislation, there are two ways of showing that the relevant legislation is not "law" within the meaning of Art 9(1): see *Public Prosecutor v ASR* [2019] 1 SLR 941 at [89]. First, it can be shown that the law is inconsistent with a higher law in Singapore and is therefore not law. Second, it can be shown that the alleged law is so arbitrary and absurd that it does not constitute "law" under Art 9(1).

56 The plaintiffs do not make arguments on either limb to challenge the constitutionality of the imposition of the death penalty for drug trafficking

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offences as prescribed under Schedule 2 of the MDA.[96] Nor do they dispute, in these proceedings, the correctness and propriety of their criminal convictions and sentences. Their argument is that exercises of power in breach of Art 12(1) of the Constitution, biased decisions made by public officers and decisions influenced by irrelevant factors such as ethnicity are arbitrary exercises of power which are not lawful exercises of power under Art 9(1).[97] There is no causal link between premise and conclusion in this last argument.

57 Accordingly, I dismiss the prayer for a declaration under Art 9(1).

Article 12(1)

58 The second declaration sought by the plaintiffs is a declaration that the AG discriminated against the plaintiffs as persons of Malay ethnicity, in breach of their rights to equal treatment under the law protected by Art 12(1) of the Constitution, when prosecuting them for capital drug offences under the MDA.

59 Article 12(1) of the Constitution provides that "[a]ll persons are equal before the law and entitled to the equal protection of the law". In *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 ("*Syed Suhail (Leave)*") at [61]–[62], the Court of Appeal set out a two-step test for determining whether *executive action* breached Art 12(1):

(a) First, the plaintiffs would need to show that they were treated differently from *other equally situated persons*.

(b) If the plaintiffs succeed in establishing this, the burden would shift to the AG to show that this differential treatment was reasonable in

96 PWS at para 4(i).

97 PWS at paras 43–44.

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> that it was *based on legitimate reasons*. "Legitimacy" here requires that the rationale for the differential treatment "bears a sufficient rational relation to the object for which the power was conferred". It may also be possible to discern a lack of legitimate reasons if the differential treatment was based on plainly irrelevant considerations or was the result of applying inconsistent standards or policies without good reason.

60 The burden is on the plaintiffs to adduce sufficient evidence to show a *prima facie* breach of Art 12(1). It is only if the plaintiffs are able to do so that the evidential burden will shift to the AG to justify his prosecutorial decisions to the court, failing which the AG will be found to be in breach of Art 12(1) (see *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 ("*Ramalingam*") at [27]–[28]).

61 The plaintiffs characterise their case as one based on *indirect* discrimination but have omitted to explain precisely how such discrimination arises on the facts.[98] Article 12(1) enshrines a broadly framed constitutional guarantee of equal protection. While there are no local cases developing the concept of indirect discrimination, I agree with the plaintiffs' submission that the wording of Art 12(1) is broad enough to prohibit both direct discrimination and indirect discrimination. I would add that while there are no doubt differences across various jurisdictions on indirect discrimination, I consider it appropriate in this case to analyse the plaintiffs' legal position on the basis of the arguments made and cases cited before me. Direct and indirect discrimination were defined as follows by the UK Supreme Court in *Essop and others v Home Office (UK Border Agency); Naeem v Secretary of State for*

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[98] Notes of Argument, 8 November 2021 at p 8 lines 13–15 and p 10 line 6.

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Justice [2017] 1 WLR 1343 ("*Essop*"), a case cited by the plaintiffs,[99] at [1] and [25]:

> *Direct discrimination is comparatively simple: it is treating one person less favourably than you would treat another person, because of a particular protected characteristic that the former has.* Indirect discrimination, however, is not so simple. *It is meant to avoid rules and practices which are not directed at or against people with a particular protected characteristic but have the effect of putting them at a disadvantage.* It is one form of trying to 'level the playing field.'
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> …
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> *Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic.* Indirect discrimination does not. *Instead it requires a causal link between the [provision, criterion or practice in question] and the particular disadvantage suffered by the group and the individual.* The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. *Indirect discrimination assumes equality of treatment—the [provision, criterion or practice] is applied indiscriminately to all—but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified.* The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.
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> [emphasis added]

62 The distinction between direct and indirect discrimination is key to pinpointing the precise nature of the plaintiffs' Art 12(1) claim. Using the court's definition in *Essop*, direct discrimination is based on the unequal treatment of persons in the same class on the ground of some characteristic shared by some of those persons. Indirect discrimination, however, is premised on the *equal treatment* of persons engendering *unequal results* because one group of persons suffers a particular disadvantage. While the plaintiffs have

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[99] Plaintiffs' Bundle of Authorities dated 1 November 2021 ("PBOA") at Tab H.

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relied on indirect discrimination, on closer examination, their case is premised on *direct* discrimination.

63 The plaintiffs' case is that the statistical disparities between Malay offenders and offenders of other ethnicities are attributable to inadequate policies or criteria guiding the exercise of prosecutorial discretion, or an inconsistent application of those (unspecified) policies or criteria, or unconscious biases of prosecutors that have been insufficiently neutralised through monitoring, training and review.[100] This is in substance an allegation of direct discrimination, in that the AG's policies, criteria and practices have allowed individual prosecutors to treat Malay suspects less favourably than other suspects *because of their ethnicity.* But such direct discrimination "expressly requires a causal link between the less favourable treatment and the protected characteristic" (see *Essop* at [25], quoted at [61] above), and the plaintiffs' statistical evidence provides no basis for the court to infer such a causal link between the AG's decisions to prosecute Malay suspects and their ethnicity. Indeed, as the AG argues (see [34] above), there are many individual, case-specific factors which could break the causal connection the plaintiffs seek to draw between Malay ethnicity on one end, and the less favourable treatment on the other. The statistical evidence the plaintiffs rely on in this case is, analytically, not itself sufficient to establish such a causal connection. Absent such a causal link to show *direct* discrimination, the plaintiffs would have to adduce specific evidence that some indiscriminately applied policy, criteria or practice of the AG's has put Malay ethnicities at a particular disadvantage in order to support a claim of *indirect* discrimination. This, however, is not their case.

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100 PWS at para 8.

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64 I return, then, to the first step of the test set out in *Syed Suhail (Leave)*, which requires the plaintiffs to show that they were treated differently from other equally situated persons. The notion of being equally situated is "an analytical tool used to isolate the *purported rationale* for differential treatment, so that its legitimacy may then be assessed properly" [emphasis added] (*Syed Suhail (Leave)* at [62]). In this case, the plaintiffs argue that the alleged differential treatment is evidenced by the fact that Malay persons are disproportionately represented in the group of offenders prosecuted for capital drug offences and are less likely than offenders of other ethnicities to have their charges reduced below the death penalty threshold. The plaintiffs further argue that the purported rationale for this differential treatment is simply the fact that an individual is of Malay ethnicity.

65 However, as the Privy Council explained in *Ong Ah Chuan and another v Public Prosecutor* [1979–1980] SLR(R) 710 ("*Ong Ah Chuan*") at [35], the right to equal protection requires that "like should be compared with like", and individuals should be accorded "equal treatment with other individuals in similar circumstances". In *Ong Ah Chuan* at [35], the Privy Council also noted (albeit in the context of considering whether *legislation* breached Art 12(1)) that Art 12(1) "does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is *some difference in the circumstances of the offence that has been committed*" [emphasis added]. For example, in *Syed Suhail (Leave)*, prisoners were regarded as being equally situated after clemency had been denied and before their executions had been scheduled. Prior to the denial of clemency, the time it takes for a prisoner's proceedings to come to a conclusion "turns on the circumstances of each individual case, and it is therefore difficult to make any meaningful comparison between prisoners" (*Syed Suhail (Leave)* at [64]–[66]).

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66 In the present case, the plaintiffs' arguments are premised on the entire class of offenders who are suspected of having committed capital drug offences being regarded as equally situated persons. The plaintiffs contend that the fact that Malay offenders within that class are more likely to be sentenced to death than offenders of other ethnicities, constitutes differential treatment which calls for justification by the AG.[101]

67 Decisions to charge offenders within this class must turn on the precise circumstances of the offence committed in each case. As the Court of Appeal observed in *Ramalingam* at [24] in relation to the exercise of prosecutorial discretion, the AG is "entitled and obliged to take into account many factors" in deciding what offences two offenders involved in the same criminal conduct should be charged with, if any. The Court of Appeal in *Ramalingam* went on to list some relevant factors at [24] and [63]:

> Relevant factors for the Prosecution's consideration in making prosecutorial decisions include the available evidence, public interest considerations, the personal circumstances of the offender, the offender's degree of culpability, *etc.* Where these factors apply differently to different offenders, this would justify differential treatment between them.
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> …
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> [I]n the context of the prosecutorial power, the Prosecution is obliged to consider, in addition to the legal guilt of the offender, his moral blameworthiness, the gravity of the harm caused to the public welfare by his criminal activity, and a myriad of other factors, including whether there is sufficient evidence against a particular offender, whether the offender is willing to co-operate with the law enforcement authorities in providing intelligence, whether one offender is willing to testify against his co-offenders, and so on – up to and including the possibility of showing some degree of compassion in certain cases.

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101 PWS at paras 54 and 67.

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68 Similarly, in *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012 ("*Quek Hock Lye*") at [24], the Court of Appeal found that even divergent consequences faced by accused persons involved in the *same criminal enterprise*, arising from the prescribed punishments flowing from their respective charges by the AG, were not *per se* sufficient to found a successful Art 12(1) challenge. This was because, as the court explained, the different prosecutorial charging decisions may have been made for legitimate reasons, including the considerations outlined in *Ramalingam* at [63]. Even more legitimate considerations would be in play in cases that do *not* involve the same criminal conduct or enterprise, as the circumstances of the offences and the offenders themselves would differ. These considerations would provide legitimate reasons for differential treatment at the second step of the two-step test in *Syed Suhail (Leave)*. However, they are also relevant at the *first* step of the test in illustrating the rich diversity of circumstances that render it illogical to regard the entire class of offenders who are suspected of having committed capital drug offences as equally situated persons.

69 The importance of precisely and correctly identifying the group of equally situated persons is illustrated by the Court of Appeal's decision in *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 ("*Ridzuan*"). Here, the AG had granted a CSA under s 33B(2)(*b*) of the MDA to the applicant's co-offender, but not to the applicant, who was given the mandatory death sentence. The applicant alleged that the AG's decision declining to grant him a CSA was made in breach of Art 12. The Court of Appeal held that the applicant had to show two things in order to discharge his evidentiary burden: first, that his level of involvement in the offence and the consequent knowledge he acquired of the drug syndicate he was dealing with was practically identical to his co-offender's level of involvement and the knowledge his co-offender could have acquired; and, secondly and more

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importantly, that he and his co-offender had provided practically the same information to the CNB, yet only his co-offender had been given the CSA (*Ridzuan* at [51]). On the facts, the Court of Appeal found that the applicant's involvement in the crime was "clearly not identical" to that of his co-offender as they were involved in different capacities, with the applicant arranging the drug deliveries while his co-offender interacted first-hand with the drug courier (*Ridzuan* at [53]). The Court of Appeal also found that, as it was not privy to the full details of all the information that each offender gave the CNB, it "would be engaging in conjecture" if it concluded that the applicant and his co-offender had given practically identical information to the CNB (*Ridzuan* at [54]).

70 In *Ridzuan*, the Court of Appeal applied the test of "deliberate and arbitrary" discrimination (*Ridzuan* at [49]), which has since been superseded by the two-step test set out in *Syed Suhail (Leave)*. Nevertheless, the Court of Appeal in *Syed Suhail (Leave)* at [61] considered that it would have been sufficient for the applicant in *Ridzuan* to discharge his evidential burden by showing that he could be considered to be equally situated with his co-offender, such that any differential treatment required justification. Based on the Court of Appeal's analysis in *Ridzuan*, the applicant had not done so, and his Art 12(1) challenge would therefore have failed even under the two-step test in *Syed Suhail (Leave)*.

71 Here, the plaintiffs have not provided any explanation for omitting to draw comparisons between themselves and the co-offenders in their own cases, which are the group with whom the plaintiffs would appear to be most closely situated. As the AG points out, five of these co-offenders had their charges reduced below the capital threshold by the Prosecution.[102] This weakens the

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102 DWS at para 40.

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plaintiffs' case considerably. Further, even if the plaintiffs' statistical data is accepted as complete and accurate, the only variables reflected are the ethnic group and nationality of each offender. No account is taken of the multitude of other variables that would have contributed to the convictions and sentences in each case. The manner in which the plaintiffs' statistics are presented therefore *presupposes* that all these offenders were equally situated and that the sole reason for differential treatment was their ethnicity, which are the very facts the plaintiffs bear the burden of showing.

72 The AG has deposed that the ethnicity of the plaintiffs was not a factor in making the decisions to prosecute them and that no policies or practices pertaining to the exercise of prosecutorial discretion that involve considerations of an offender's ethnicity were applied in making those decisions. The AG has also deposed more generally that the AGC does not have any policies or practices pertaining to the exercise of prosecutorial discretion that involve considerations of an offender's ethnicity.[103] As *Ramalingam* and *Quek Hock Lye* make clear, there are a multitude of other factors based on which the AG could and should have legitimately differentiated between these offenders. The evidence adduced by the plaintiffs is therefore not sufficient to show even a *prima facie* breach of Art 12(1), as it does not show that the plaintiffs, as Malay persons, were accorded differential treatment from *other equally situated persons*.

73 A parallel can be drawn with *Syed Suhail (Leave)*, where the Court of Appeal held at [41]–[42] that the mere fact that few or even no clemency petitions had been granted over a long period of time was insufficient to raise the suspicion that the Cabinet had adopted an unconstitutional blanket policy of

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103 AG's Affidavit at para 6.

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disregarding clemency petitions in all drug-related cases. It was "entirely conceivable" that, over the course of many years, there had simply been few or no exceptional cases where the exercise of the clemency power was warranted. Similarly, in the present case, it may well be that from 2010 to 1 June 2021 there were, as a matter of fact, more cases against Malay offenders where the AG had grounds to prosecute the offender for a capital drug offence. These statistics alone do not raise the suspicion that the AG made the relevant prosecutorial decisions *because* the offender was of Malay ethnicity.

74 This conclusion is buttressed by the presumptions of constitutionality and legality which provide, albeit only as a starting point, that the acts of those holding public office will not presumptively be treated as suspect: see *Syed Suhail (Leave)* at [63] and *Ramalingam* at [46]–[47] and [72]. The plaintiffs rely on the remarks of Quentin Loh J (as he then was) in *Lim Meng Suang and another v Attorney-General* [2013] 3 SLR 118 at [107] cautioning a party seeking to uphold the constitutionality of an impugned legislative provision against a posture that he "need only sit back and see what the challenger puts forward".[104] Nevertheless, in the present case, in the AG's exercise of his constitutional role, it is clear that a multitude of considerations may legitimately influence the AG's exercise of his prosecutorial discretion given its highly fact-specific nature, and these surrounding circumstances provide an eminently reasonable basis for treating different offenders differently. Applied in this context, the presumptions of constitutionality and legality mean that general statistical disparities will not, without more, be presumed to be attributable to direct discrimination on the ground of ethnicity in *prima facie* breach of Art 12(1).

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104 PWS at para 26; PC's Speaking Note at para 4.1.

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(1) Local case law

75 I deal here with the plaintiffs' assertion that it "has already been established in Singapore that an inequality in the result of the exercise of a power is sufficient to give rise to a suspicion of unequal treatment", relying on the Court of Appeal's decision in *Eng Foong Ho and others v Attorney-General* [2009] 2 SLR(R) 542 ("*Eng Foong Ho*") at [25].[105] This is a fundamental mischaracterisation of *Eng Foong Ho*.

76 *Eng Foong Ho* concerned the Jin Long Si Temple ("the Temple") which was located next to the Ramakrishna Mission ("the Mission") and the Bartley Christian Church ("the Church"). The Collector of Land Revenue had compulsorily acquired the Temple property, but not the land occupied by the Mission or the Church. The appellants, who were devotees of the Temple, applied for a declaration that the acquisition of the Temple property violated Art 12 of the Constitution.

77 The appellants' case was that the right to equal treatment in Art 12 required that if the property (or place of worship) of one religious group was compulsorily acquired by law in an area where other religious groups also had properties (or places of worship), all should be similarly dealt with at the same time: *Eng Foong Ho* at [24]. However, the appellants were not arguing that there ought to be equality of *result* in the application of the relevant law. This would lead to "absurd" outcomes. Instead, the Court of Appeal understood the appellants' argument to be that "whilst there was, *factually* speaking, an inequality in *result*, this result came about because of a *normatively* defective *process of treatment* that had violated Art 12 of the Constitution". To ascertain

105 PWS at para 20.

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whether this was indeed the case, the court had to examine "the reasons why the State had chosen to acquire the [T]emple property and not those of the Mission and the Church, and whether the reasons show that there was any discrimination against the appellants as members of the Temple" (*Eng Foong Ho* at [25]).

78 On the facts, the Court of Appeal held that there had been no violation of Art 12, applying the threshold of "intentional and arbitrary discrimination" (*Eng Foong Ho* at [30]). As I have noted, this "deliberate and arbitrary" test is no longer the applicable test for a breach of Art 12(1) following *Syed Suhail (Leave)*. Nevertheless, in *Syed Suhail (Leave)* at [59], the Court of Appeal observed that it had not in fact applied the strict "deliberate and arbitrary" test in *Eng Foong Ho* as it had considered the reasons given by the officers overseeing the land acquisition for their decision and found it "plain" that the decision was justified by valid planning considerations (*Eng Foong Ho* at [32]–[37]). This suggests that the outcome of *Eng Foong Ho* would be similar under the two-step test set out in *Syed Suhail (Leave)*. At the first step of the test, the court would have found that the Temple, the Mission and the Church were equally situated and yet the Temple was treated differently. However, at the second step of the test, the court would have found that this differential treatment was based on legitimate reasons – in this case, valid planning considerations that the Collector of Land Revenue was entitled to take into account in exercising his powers of compulsory acquisition. *Eng Foong Ho* therefore does not detract from the need for the plaintiffs to show that they were *treated differently from equally situated persons*, having regard to the different legal and evidential considerations (such as those outlined at [67] above) that would apply in different cases.

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(2) Foreign case law

79 The plaintiffs also rely on several discrimination cases from the US, the UK, the European Court of Human Rights ("the ECtHR") and Canada, where statistical evidence was used to demonstrate the unequal effects of a law or policy.[106] While the differences in the legal framework for equality and discrimination claims in other jurisdictions mean that the reasoning in these foreign cases cannot be directly transposed into our context, I accept that they are relevant in analysing the content of the broadly framed right to equal protection in Art 12(1). The more fundamental obstacle faced by the plaintiffs is that these foreign cases do not support their position.

80 I begin with the US case of *Yick Wo v Hopkins* 118 US 356 (1886) ("*Yick Wo*"),[107] where the petitioners were Chinese nationals who operated laundry businesses in wooden buildings. A municipal ordinance provided that it was unlawful for any person to carry on a laundry business without first obtaining the consent of the board of supervisors of the building. The petitioners were found guilty of violating this ordinance and were imprisoned. The US Supreme Court held that, although the ordinance was "fair on its face and impartial in appearance", it had been applied by the authorities in a discriminatory way. The petitioners had "complied with every requisite", yet the consent of the supervisors of the building was withheld from them and 200 other Chinese nationals while 80 other non-Chinese individuals were permitted to carry on the same business under similar conditions. No reason for this discrimination was shown and the irresistible conclusion was that the only reason for it was

106 PWS at paras 21–22.

107 PBOA at Tab U.

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"hostility to the race and nationality to which the petitioners belong[ed]". The imprisonment of the petitioners was therefore illegal (*Yick Wo* at 373–374).

81 Of significance was the precise factual data adduced in *Yick Wo*: statistics concerning like applications by other ethnicities, and statistics relevant to Chinese persons with the same eligibility. The class of equally situated persons was identified with far more specificity: the persons equally situated to the petitioners were those carrying on laundry businesses under similar conditions, and the only apparent reason for the stark difference in their treatment was the petitioners' race and nationality. In contrast, in the present case, the plaintiffs have not attempted to identify suitable comparators to whom they are equally situated, for example by virtue of having committed similar offences *under similar circumstances* (although even this would not necessarily mean they were equally situated persons). On the plaintiffs' statistical evidence, unlike in *Yick Wo*, it cannot be concluded that the reason for their differential treatment was their ethnicity.

82 The remaining foreign cases cited by the plaintiffs wholly differ from the present case as they concerned *indirect* discrimination, that is, cases in which a policy or practice applied *indiscriminately* to all persons had the effect of putting one class of persons at a disadvantage.

83 First, in *DH and others v Czech Republic* (2007) 47 EHRR 59 ("*DH*"),[108] the applicants, who were of Roma origin, had been placed in special schools for children with special needs, in contrast to ordinary primary schools. The applicants alleged that they had been discriminated against in the enjoyment of their right to education on account of their race or ethnic origin because the

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108 PBOA at Tab F.

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number of Roma children in special schools was disproportionately high. The ECtHR noted that "a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group". Such a situation might amount to indirect discrimination, as that concept had been developed in European jurisprudence (*DH* at [184]). The issue was therefore whether the legislation on placements in special schools had been applied in a manner which resulted in a disproportionate number of Roma children, including the applicants, being placed in special schools without justification, and whether such children were thereby placed at a significant disadvantage (*DH* at [185]).

84 The ECtHR held that, in assessing the impact of a measure or practice on an individual or group, "statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the *prima facie* evidence the applicant is required to produce" (*DH* at [188]). In *DH*, the statistical data relied on by the applicants was obtained from questionnaires sent out to the head teachers of special and primary schools in the town in question in 1999. While the ECtHR accepted that these statistics might not be entirely reliable as no official information on the ethnic origin of the pupils existed, the ECtHR nevertheless considered that these figures revealed a dominant trend, confirmed both by the respondent State (the Czech Republic) and independent supervisory bodies, which showed that the number of Roma children in special schools was disproportionately high. Thus, despite being couched in neutral terms, the relevant statutory provisions "had considerably more impact in practice on Roma children than on non-Roma children" (*DH* at [193]).

85 The statistical evidence was "sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination", and the burden of proof

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therefore shifted to the Government to show that the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin (*DH* at [195]). The Government failed to do so. The ECtHR found that the Government could not rely on the tests used to assess children's learning abilities or difficulties to justify the impugned difference in treatment because these tests were "conceived for the majority population and did not take Roma specifics into consideration", and there was at least "a danger that the tests were biased and that the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them" (*DH* at [199]–[201]). On this basis, the ECtHR ultimately concluded that there had been a violation of Art 14 of the European Convention on Human Rights (which provides that the enjoyment of the rights and freedoms in the Convention "shall be secured without discrimination on any ground"), read in conjunction with Art 2 of Protocol No 1 of the same (which protects the right to education) (*DH* at [210]).

86 Second, in *R v Secretary of State for Employment, ex parte Seymour-Smith and another* [2000] 1 All ER 857 ("*Seymour-Smith*"),[109] the applicants were female employees who were dismissed before they had completed the qualifying period (two years of continuous employment) for compensation for unfair dismissal. They applied for judicial review of the legislation which had increased the qualifying period from one year to two years, contending that it was indirectly discriminatory against women as fewer women than men were able to comply with it. The UK House of Lords found that the evidence showed a persistent and constant disparity over a long period between the proportions of men and women able to satisfy the qualifying period, so as to amount to indirect discrimination for the purposes of Art 119 of the Treaty Establishing

[109] PBOA at Tab O.

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the European Community (which enshrined the right to equal pay for equal work as between men and women), unless shown to be justified by objective factors unrelated to any discrimination based on sex. However, the House of Lords went on to find that the legislation in question was a reasonable response to a legitimate aim unrelated to any discrimination based on sex, and that it was therefore objectively justified.

87 Third, in *Fraser v Canada (Attorney General)* [2020] SCJ No 28 ("*Fraser*"),[110] the claimants were three women who were retired members of the Royal Canadian Mounted Police ("RCMP"). After taking maternity leave, they faced difficulties in combining their work obligations with their childcare responsibilities, and the RCMP did not permit regular members to work part-time. Consequently, they enrolled for a job-sharing programme in which members could split the duties and responsibilities of one full-time position. The claimants were later informed that they would not be able to purchase full-time pension credit for their job-sharing service. The claimants argued that the pension consequences of job-sharing had a discriminatory impact on women contrary to s 15(1) of the Canadian Charter of Rights and Freedoms, which provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination", and in particular without discrimination based on certain protected characteristics (including sex).

88 A majority of the Supreme Court of Canada allowed the claimants' claim on the basis of "adverse impact discrimination", which occurs when "a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground" (*Fraser* at [30]).

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110 PBOA at Tab I.

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This is a similar concept to indirect discrimination, as defined at [61] above. The Court held that full-time RCMP members who job-shared had to sacrifice pension benefits because of a temporary reduction in working hours, and that this arrangement had a disproportionate impact on women and perpetuated their historical disadvantage (*Fraser* at [6]). More precisely, the use of an RCMP member's temporary reduction in working hours as a basis to impose less favourable pension consequences plainly had a disproportionate adverse impact on women, as the evidence showed that: (a) RCMP members who worked reduced hours in the job-sharing programme were predominantly women with young children; and (b) from 2010 to 2014, 100% of members working reduced hours through job-sharing were women, and most of them cited childcare as their reason for doing so (*Fraser* at [97] and [106]). While there was "no universal measure for what level of statistical disparity is necessary to demonstrate that there is a disproportionate impact", the goal of statistical evidence was ultimately to establish "a disparate pattern of exclusion or harm that is statistically significant and not simply the result of chance", and the weight given to statistics would depend on factors such as their quality and methodology (*Fraser* at [59]). Further, the statistics used in this case were bolstered by "compelling evidence about the disadvantages women face as a group in balancing professional and domestic work" (*Fraser* at [98]).

89 Fourth, in *Essop*, the claimants were employees of the UK Home Office who were all subject to the requirement to pass a core skills assessment as a prerequisite for promotion to certain civil service grades. A report commissioned by the Home Office from a firm of occupational psychologists revealed that candidates from Black and Minority Ethnic groups and older candidates had lower pass rates for the assessment than White and younger candidates, although the reason for this disparity was unknown (see *Essop* at [9]). The core skills assessment requirement was found to be indirectly

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discriminatory as it particularly disadvantaged the group to which the claimants belonged. It was in this context that the UK Supreme Court said at [28] of *Essop* that it was "commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence".[111] While it was unnecessary to further establish the *reason* for the particular disadvantage to which that group was put, the "essential element is a causal connection between the [provision, criterion or practice] and the disadvantage suffered, not only by the group, but also by the individual" (*Essop* at [33]).

90 *DH*, *Seymour-Smith*, *Fraser* and *Essop* were therefore cases where legislation, policy or criteria applied indiscriminately to all, but had the effect of putting a particular class of persons at a disadvantage because of some characteristic possessed by that class of persons, which the legislation, policy or criteria did not adequately take into account.

91 In contrast, in the present case, any contention that the AG's prosecutorial discretion should be applied indiscriminately to all persons would be untenable. As outlined at [67] above, the AG is entitled and obliged to take into account a range of factors in exercising his prosecutorial discretion under Art 35(8) of the Constitution. While the plaintiffs did make an assertion that Malay offenders are less able to express themselves articulately or appear credible when giving evidence in court because of their generally lower socio-economic and educational status in Singapore, this assertion was unsubstantiated (as I have explained at [45] above). Aside from this assertion, the plaintiffs' case is not based on any particular disadvantage suffered by Malay suspects as a group such that they are less able to meet requirements (for example, the requirements for the exercise of prosecutorial discretion not to

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111 PWS at para 22.

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charge a suspect with a capital drug offence) that are applied *indiscriminately* to suspects of all ethnicities. There is no evidence, in any event, that persons of the other ethnicities who have been charged with similar offences are not of the same socio-economic and educational status as the plaintiffs. Further, the plaintiffs "categorically reject" the suggestion that Malay persons are more likely to commit capital drug offences than persons of other ethnicities.[112] They have also not identified any particular policy or criterion that, while appearing to apply indiscriminately to all, has the effect of putting Malay persons at a disadvantage by subjecting them to requirements that they are less able to meet.

92 The foreign cases advanced by the plaintiffs therefore do not support the plaintiffs' argument that statistical disparities can suffice to establish a *prima facie* case of direct or indirect discrimination. I also highlight that the plaintiffs did not refer me to any cases, even from other jurisdictions, where statistical disparities in *prosecutorial or sentencing outcomes* across different demographic groups were held to establish a *prima facie* breach of the right to equal protection which required justification by the relevant authorities.

(3) Conclusion on Art 12(1)

93 For these reasons, I find that the plaintiffs are unable to satisfy even the first step of the two-step test in *Syed Suhail (Leave)*. There is thus no basis for the court to grant a declaration that their Art 12(1) rights were breached. I add that even if the plaintiffs had succeeded in showing that they were treated differently from other equally situated persons, the burden on the AG at the second step of the test in *Syed Suhail (Leave)* would be discharged by showing that the *differential treatment of the plaintiffs* was reasonable, based on

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112 PC's Speaking Note at para 3.13.

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legitimate considerations influencing the exercise of prosecutorial discretion. In so far as the plaintiffs suggest that the AG would be required to "provide good reasons *for the [statistical] disparity*, or evidence that there are lawful and sufficient *safeguards* in place that would show on a balance of probabilities that the disparity is not due to ethnicity or other irrelevant considerations" [emphasis added],[113] the plaintiffs' interpretation of the second step of the test in *Syed Suhail (Leave)* is erroneous.

Bias and irrelevant considerations

94 The third declaration sought by the plaintiffs is premised on the allegation that the AG and/or the CNB exceeded its powers under Art 35(8) of the Constitution and/or ss 24–26 and 32 of the MDA, and acted unlawfully, through bias or by taking into account irrelevant factors (*ie*, their ethnicity) when prosecuting them for capital drug offences under the MDA. For the reasons explained at [46]–[48] above, I consider only the allegation against the AG for the purposes of this declaration.

95 The burden lies on the plaintiffs to "specifically produce *prima facie* evidence of bias or the taking into account of irrelevant considerations" in the AG's exercise of prosecutorial discretion so as to differentiate between offenders, and "the mere differentiation of charges between co-offenders, even between those of equal guilt, is not, *per se*, sufficient to constitute *prima facie* evidence of bias or the taking into account of irrelevant considerations" (*Ramalingam* at [70]). Absent *prima facie* evidence to the contrary, the inference would be that the Prosecution has based its differentiation on *relevant* considerations (*Ramalingam* at [71]).

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113 PWS at para 49.

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96 In the present case, the plaintiffs have made clear that they do not claim that the AG has a policy that deliberately or expressly discriminates against Malay persons in capital drug offences, or that any single public officer has deliberately discriminated against persons of Malay ethnicity when making prosecutorial decisions.[114] To justify the grant of this declaration, the plaintiffs must produce *prima facie* evidence that the AG's alleged bias or taking into account of irrelevant considerations operated specifically and directly *against them*. It would not be sufficient for the plaintiffs to rely on evidence that the AG was biased or took into account irrelevant considerations in prosecuting *other Malay persons*. In relying only on their statistical evidence, the plaintiffs are essentially urging the court to infer, from the fact that Malay offenders who have committed capital drug offences are *generally* less likely to receive reduced charges compared to offenders of other ethnicities, that the AG (or individual prosecutors) took into account the irrelevant consideration of ethnicity in prosecuting *the plaintiffs themselves*.[115] This is a logical leap and the plaintiffs have provided no evidential basis for the court to make such a finding. The AG has deposed that, based on the AGC's records pertaining to how the decision to prosecute each of the plaintiffs was made, their ethnicity was not a factor in making these decisions, and no policies or practices pertaining to the exercise of prosecutorial discretion that involve considerations of an offender's ethnicity were applied in making these decisions.[116] As explained at [74] above, the presumption of legality means that the statistical disparities relied on by the plaintiffs will not, without more, be presumed to be attributable to bias or the taking into account of irrelevant considerations.

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114 PWS at paras 8–9.

115 PWS at para 72.

116 AG's Affidavit at para 6.

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97 In any event, I have found that the plaintiffs have failed to establish that they were treated differently from equally situated persons on the ground of their ethnicity. It follows from this that they have failed to produce *prima facie* evidence of bias against them on this ground, or that the AG took into account their ethnicity in prosecuting them.

98 The plaintiffs further submit that the reduced likelihood of a Malay offender who has committed a capital drug offence receiving a reduced charge, compared to offenders of other ethnicities who have committed the same offence, gives rise to a real *apprehension* of bias or that the irrelevant factor of ethnicity has influenced the prosecutorial process. However, the plaintiffs' reliance on *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 ("*Yong Vui Kong*") at [90]–[91] for the proposition that the relevant bias can be merely *apparent*[117] is wholly misconceived. As the Court of Appeal explained in *Yong Vui Kong* at [91], the rule against bias is distinct from the constitutional prohibition against discrimination in Art 12. What the rule against bias prohibits is "a person acting as a judge in his own cause in any matter where there is an *actual or potential conflict of interest*" [emphasis added], so as to protect the integrity of the decision-making process. Thus, in *Yong Vui Kong* at [112], the Court of Appeal held that it was conceptually possible for the President or one or more members of the Cabinet to be placed in a conflict of interest *vis-à-vis* clemency decisions – for example, if the President was related to the offender in question – and for those decisions to then be challenged on the ground of bias. In so far as the plaintiffs are arguing that the statistical disparity in the treatment of Malay capital drug offenders gives rise to an unlawful *appearance of discrimination* against Malay offenders, the rule against bias is not properly invoked and adds nothing to the plaintiffs' arguments on Art 12(1) in this case.

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117 PWS at para 71.

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99 I therefore find that there is no basis for the court to grant the third declaration sought by the plaintiffs.

Abuse of process

100 I turn finally to consider the AG's submission that OS 825 is an abuse of process as the plaintiffs are merely attempting to launch another collateral attack against their previously concluded criminal appeals and to delay the execution of their proper legal punishment.

101 In this context, OS 825 is part of a series of unsuccessful post-appeal challenges started by one or more of the plaintiffs. It is also the second constitutional challenge based on Arts 9 and 12 that one or more of the plaintiffs have filed. On 16 September 2020, Mr Suhail applied for a prohibiting order against the Singapore Prison Service ("SPS") to stay his impending execution on the ground that his right to equality under Art 12(1) was violated by the differential treatment effected by the SPS between foreigners and Singaporeans in carrying out the death sentence, more specifically, because the order of execution did not follow the order of sentencing. He also argued that his right to life under Art 9(1) was violated because the clemency power under Art 22P of the Constitution had been extinguished owing to disuse.[118] While leave to pursue this judicial review application on the Art 12(1) ground was granted by the Court of Appeal on 23 December 2020 in *Syed Suhail (Leave)*, the substantive judicial review application was ultimately dismissed on 8 February 2021 by See Kee Oon J in *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 31 as Mr Suhail had failed to show that his rights under Art 12

118 HC/OS 891/2020.

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had been infringed. Mr Suhail's appeal against See J's decision was dismissed by the Court of Appeal on 10 August 2021.[119]

102 The AG contends that the plaintiffs ought properly to have raised the matters they are now relying on in their criminal cases, or to have filed a review application under Division 1B of Part XX of the CPC, instead of commencing civil proceedings *via* OS 825. The AG suggests that the plaintiffs did not do so because they would not have been able to obtain leave to make a review application under s 394H of the CPC as they would have first had to satisfy the stringent conditions in s 394J of the CPC. Moreover, their solicitors would have had to make an affidavit in accordance with the requirements in r 11(2)(*a*) of the Criminal Procedure Rules 2018, which would have required them to show, among other things, that there is "good reason why the material could not have been adduced in court earlier, at any stage of the proceedings in the criminal matter in respect of which the earlier decision was made".[120]

103 It is an abuse of process to invoke the civil jurisdiction of the court to mount a collateral attack on a decision made by the court in the exercise of its criminal jurisdiction: *Iskandar bin Rahmat v Public Prosecutor* [2021] SGCA 89 at [3]. On the other hand, different remedies exist under criminal and civil procedure for a variety of reasons. The anticipated unavailability of recourse under one cannot, as a matter of course, lead to an assumption that there is abuse in the use of another. In this regard, I note the plaintiffs' clarification that they seek only declaratory orders in OS 825, and that they understand that they would have to make a separate review application under s 394J of the CPC should they wish to overturn their criminal

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119 CA/CA 14/2021; no written grounds issued.

120 DWS at paras 50–53 and 57–60.

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convictions.[121] I am also cognisant of the fact that the plaintiffs' case in OS 825 is based in part on the outcomes of their criminal cases; and that their allegations of differential treatment against them collectively, as persons of Malay ethnicity, involve rather different considerations from those relevant to criminal conviction and sentencing.[122]

104 Nevertheless, it is well established that proceedings which are manifestly groundless or without foundation are an abuse of the process of the court: *Miya Manik* at [64]. It is in light of the speculative nature of this case that I consider the argument on abuse of process. First, an analysis of the statistical basis of the plaintiffs' case reveals that the premise of their case is logically flawed. The plaintiffs sought to argue that statistical disparities, without more, may suffice to establish a *prima facie* case of discrimination. This causal link is obscure. They have, in essence, asked the court to act on conjecture. Second, the plaintiffs have made no genuine effort to consider or explain how the legal requirements for the grant of declaratory relief, as well as for each of the three declarations sought, are met. Instead, they have baldly mischaracterised *Eng Foong Ho* and cited foreign cases without any responsible attempt to argue how the reasoning in these cases applies within the legal framework set out in our local jurisprudence on the relevant provisions of our Constitution. And, prior to the hearing of OS 825, I dealt with two interlocutory applications which were also patently groundless (see [5]–[23] above).

105 In the multi-cultural setting that forms the background to this application, serious allegations concerning ethnicity and equality ought not to be made without due care and diligence, particularly in cases where life and

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121 DWS at para 5.2; PC's Speaking Note at paras 5.2 and 5.4.

122 PC's Speaking Note at para 5.5.

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liberty are at stake. Judicial processes furnish specific remedies to plaintiffs who seek recourse premised on specific evidence of unlawfulness. The court exists as a forum for the assessment of facts, inferences to be drawn from facts, and the grant of particular relief within the framework laid down by existing case law and statute. The law develops in the specific context of the evidence adduced in each case by the parties before the court. It is disrespectful to the court process to bring before the court speculative assertions, conjecture cloaked in general interest, and cases that a cursory reading would show to be irrelevant. Fundamental to such misuse of the court's process is the diversion of valuable public resources away from the deserving litigants whom the court exists to serve. Public resources are finite: the cost of manifestly unmeritorious claims is borne by the community as a whole.

106 In light of the history of this matter, the evidence adduced and the legal arguments made, I find that OS 825 is an abuse of the process of the court.

Conclusion

107 In conclusion, I decline to grant any of the declarations sought by the plaintiffs and accordingly dismiss OS 825.

108 I shall hear the parties on costs. In this context, I note that various contentions were made in respect of conduct on both sides in relation to the interlocutory applications and OS 825. I did not deal with these issues in this judgment where their resolution was not necessary in coming to my various conclusions. Their proper place is in the context of costs, which I will consider

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if the need arises. Parties may write in with their positions on costs within 14 days.

Valerie Thean
Judge of the High Court

Ravi s/o Madasamy and Cheng Kim Kuan (K K Cheng Law LLC) for the plaintiffs;
Deputy Attorney-General Tai Wei Shyong, Ng Yong Kiat Francis SC, Lim Siew Mei Regina and Victoria Ting Yue Xin (Attorney-General's Chambers) for the defendant.

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