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

**[2021] SGHC 31**

Originating Summons No 891 of 2020 (Summons No 4887 of 2020)

Between

Syed Suhail bin Syed Zin

… *Applicant*

And

Attorney-General

… *Respondent*

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# JUDGMENT

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

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# v
# Attorney-General

**[2021] SGHC 31**

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8 February 2021 Judgment reserved.

**See Kee Oon J:**

## Introduction

1 The applicant, Syed Suhail bin Syed Zin, is a prisoner awaiting capital punishment. He was granted leave by the Court of Appeal to commence judicial review proceedings in CA 155/2020, solely on the ground of his challenge against the scheduling of his execution ostensibly ahead of other prisoners similarly awaiting capital punishment. Accordingly, he filed the application in the present summons for a prohibiting order to stay his impending execution under O 53 r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC").

2 Having considered the parties' submissions, I dismiss the application. I set out my reasons for doing so below.

## Background and procedural history

### *Trial, appeal and scheduling of execution*

3 On 2 December 2015, the applicant was convicted and sentenced to the mandatory death penalty for trafficking in not less than 38.84g of diamorphine under the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). The facts of the case are set out in *Public Prosecutor v Syed Suhail bin Syed Zin* [2016] SGHC 8 ("*Syed Suhail (HC)*"). On 18 October 2018, the applicant's appeal in CA/CCA 38/2015 against his conviction and sentence was dismissed by the Court of Appeal.

4 On 5 July 2019, the applicant was notified that his petition for clemency had been rejected. On 20 January 2020, the President of the Republic of Singapore (the "President"), acting pursuant to s 313(*f*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"), ordered the sentence of death imposed on the applicant to be carried out on 7 February 2020. On 5 February 2020, the President ordered a respite of the execution pending any further order. This order was made pending the outcome of a separate application for judicial review in relation to an alleged unlawful method of execution. This application was dismissed in *Gobi a/l Avedian and another v Attorney-General and another appeal* [2020] 2 SLR 883 ("*Gobi (JR)*") on 13 August 2020 and the scheduling of execution of sentences of death resumed thereafter. Following the resolution of *Gobi (JR)*, on 8 September 2020, the President issued a new order for the applicant to be executed on 18 September 2020.

### *Review applications taken out by the applicant*

5 Shortly before his scheduled date of execution, the applicant (through his counsel Mr Ravi s/o Madasamy ("Mr Ravi")) made two applications. First,

on 16 September 2020, he commenced OS 891/2020 seeking leave to apply for a prohibiting order for the stay of his execution pending the outcome of the application (the "Judicial Review Leave Application"). Second, on 17 September 2020, he commenced CA/CM 28/2020, seeking leave under s 394H of the CPC to review his conviction as well as to reopen his case for resentencing (the "Criminal Review Application"). I will briefly set out the proceedings of these applications.

*Judicial Review Leave Application*

6 The Judicial Review Leave Application was accompanied by a statement made pursuant to O 53 r 1(2) of the ROC and an affidavit filed on the applicant's behalf by Mr Ravi ("Mr Ravi's 1st affidavit"). Leave was sought on two grounds:

(a) First, the President's power to grant clemency under Art 22P(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("Constitution") had fallen into disuse and had been extinguished. Further, due to a blanket policy to deny clemency petitions for all drug-related matters, the applicant's petition had not been individually considered. Therefore, the applicant's right under Art 9 of the Constitution had been violated.

(b) Second, the scheduling of executions should follow the sequence in which offenders had been sentenced to death. The failure to follow this sequence deprived the applicant of time to adduce new evidence to seek to have his conviction reopened. Further, the applicant had been discriminated against on the ground of his nationality as a Singaporean, as the execution of non-Singaporeans had been halted until the re-opening of Singapore's borders due to the COVID-19 pandemic. As

such, the applicant's rights to equal protection under both Art 12(1) and (2) of the Constitution had been violated (the "scheduling ground").

7 I dismissed the Judicial Review Leave Application on 17 September 2020 and granted a stay of execution pending the applicant's appeal against my decision.

8 The applicant's appeal against my refusal to grant leave was heard by the Court of Appeal in CA 155/2020 (the "Judicial Review Leave Appeal") on 22 September and 23 October 2020. After the hearing on 22 September, the court posed several questions for the parties to address before it would come to a decision on whether to grant leave to commence judicial review proceedings. One such question was whether a prisoner awaiting capital punishment had a legitimate legal expectation that the date on which his sentence is to be carried out will not result in his being treated differently as compared to other prisoners who are not similarly situated. Both parties filed further submissions in respect of the questions posed by the court. The respondent also filed an affidavit affirmed by Mr Lim Zhi Yang ("Mr Lim"), a Senior Director in the Policy Development Division of the Ministry of Home Affairs ("MHA"), on 29 September 2020 ("Mr Lim's 1st affidavit") in support of their submissions.

9 On 23 October 2020, after hearing the parties' submissions, the Court of Appeal granted the applicant leave to commence judicial review proceedings solely on the scheduling ground. The court's full grounds of decision were issued on 23 December 2020 in *Syed Suhail bin Syed Zin v Attorney-General* [2020] SGCA 122 ("*Syed Suhail (Judicial Review Leave Appeal)*"). For present purposes, two salient points from that decision need to be set out here. The first pertains to the legal principles applicable when assessing a potential breach of Art 12(1), and the second to a comparator raised by the applicant who had been

sentenced to death before him, but whose execution had not yet been scheduled at the time he was slated to be executed (*ie*, 18 September 2020).

10 First, in relation to whether there was a breach of Art 12(1), the court stated that the right to equal protection is "based on impermissible differential treatment" (*Syed Suhail (Judicial Review Leave Appeal)* at [49]). In determining whether differential treatment is impermissible, the court held that the test to be applied is "not as high as deliberate and arbitrary discrimination" (at [60]–[61]), thus clarifying passages in *Eng Foong Ho and others v Attorney-General* [2009] 2 SLR(R) 542 ("*Eng Foong Ho*") at [30] and *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 ("*Ridzuan*") at [49]. Instead, the applicant would need to show that he "could be considered to be equally situated" as the person with whom comparisons are made such that differential treatment would require justification. If the applicant can discharge this evidential burden, the respondent would then be called upon to justify the differential treatment (at [61]):

> … the first limb of this test (the applicant's evidential burden) corresponded to an assessment of whether the persons in question could be said to be equally situated such that any differential treatment required justification, and the second limb of the test (when the evidential burden shifted) amounted to the question of whether the differential treatment was reasonable – meaning whether it was based on "legitimate reasons" which made the differential treatment "proper". There are readily available standards by which reasonableness can be assessed in this context: the rationale for differential treatment can be legitimate only if it bears a sufficient rational relation to the object for which the power was conferred. In more straightforward cases, it may also be possible to discern a lack of legitimate reasons if the differential treatment is based on plainly irrelevant considerations or is the result of applying inconsistent standards or policies without good reason.

11 The court further stated at [62] that:

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

12 The court went on to explain that in respect of the first limb, prisoners may *prima facie* be regarded as equally situated once their clemency petitions had been rejected and before their executions had been scheduled (*Syed Suhail (Judicial Review Leave Appeal)* at [64] and [66]). The court held that "prisoners have a legitimate legal expectation under Art 12(1) that they be treated equally in the scheduling of their executions, and any departure from equal treatment ought to be justified by legitimate reasons". As for what would constitute 'equal treatment', the court accepted the position advanced by the MHA in Mr Lim's 1st affidavit, that being, "all else being equal, prisoners whose executions arise for scheduling should be executed in the order in which they were sentenced to death". In respect of the second limb, the court made no conclusive determination as to what legitimate reasons would justify differential treatment. It did however, recognise that some flexibility would be necessary in the scheduling of executions, but that such flexibility must be lawfully exercised (at [72]).

13 In addition, the court rejected the applicant's attempt to establish a right under Art 12(1) on the basis that new evidence might emerge thus enabling him to file a further challenge to reopen his conviction. The court made clear that the applicant's legal expectation under Art 12(1) in relation to the scheduling of his execution "derived from a much more concrete interest… of not having his

death sentence carried out on a date which was decided without due regard to his constitutional rights" (at [68]).

14 Second, I now turn to a comparator raised by Mr Ravi only before the Court of Appeal. It was stated in Mr Lim's 1st affidavit at [11] that the applicant was the first offender whose execution was scheduled to be carried out following the resolution of *Gobi (JR)*. This scheduling was also stated to have been done in accordance with certain prerequisites and supervening policy considerations, including "the dates on which the sentences of death were pronounced on offenders" (Mr Lim's 1st affidavit at [6]–[9]). However, the court highlighted an unexplained inconsistency between Mr Lim's 1st affidavit and the known facts. In Mr Lim's 1st affidavit, he averred at [12] that:

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

Contrary to this, and in support of the scheduling ground, Mr Ravi orally submitted that one Datchinamurthy a/l Kataiah ("Datchinamurthy") had been sentenced to death before the applicant, but his date of execution had yet to be fixed at the time of the applicant's then-scheduled date of execution of 18 September 2020. Mr Ravi did not raise this fact in the Judicial Review Leave Application before me and had only done so at the hearing on 22 September 2020 before the Court of Appeal (*Syed Suhail (Judicial Review Leave Appeal)* at [16]). Datchinamurthy's death sentence had been upheld on appeal and his clemency petition had also been rejected. As Datchinamurthy was one of the

prisoners who brought the application which was rejected in *Gobi (JR)*, the scheduling of executions of the applicant and Datchinamurthy would have arisen at the same time following the resolution of *Gobi (JR)*.

15 As such, it appeared that Datchinamurthy and the applicant were equally situated, and Datchinamurthy should have been scheduled for execution earlier than the applicant. There was thus an apparent inconsistency on the face of the record between the MHA's assertion that the applicant was the "first to be sentenced to death" amongst all equally situated prisoners and the fact that Datchinamurthy's execution had not been scheduled. As no other differentiating factors were put forth by the respondent to justify the differential treatment of the applicant and Datchinamurthy (*Syed Suhail (Judicial Review Leave Appeal)* at [75] and [76]), the court held that the applicant had met the low bar of showing a *prima facie* case of reasonable suspicion that he had been treated differently from another equally situated prisoner without any legitimate reasons. Leave was therefore granted for the applicant to commence judicial review proceedings solely on the scheduling ground.

*Criminal Review Application*

16 The Court of Appeal heard the Criminal Review Application on 22 September 2020 together with the Judicial Review Leave Appeal. On 16 October 2020, the court dismissed the Criminal Review Application. Its full reasons are set out in *Syed Suhail bin Syed Zin v Public Prosecutor* [2020] SGCA 101 ("*Syed Suhail (Criminal Review)*").

17 The two grounds on which the applicant made the Criminal Review Application (*Syed Suhail (Criminal Review)* at [11]) are not particularly relevant to the issues before me, save that: (a) they both turned on whether new evidence

could be adduced as well as their materiality; and consequently (b) they did not rely on any change in the law that could impact the applicant's present case. I will return to these points when I consider whether the applicant is equally situated with Datchinamurthy as well as another comparator Mr Ravi raised in the hearing before me on 30 November 2020.

**Preliminary issue**

18 Before I consider the substantive issues, a preliminary point regarding whether the applicant identified the appropriate party in seeking relief ought to be addressed. The respondent submitted in the present summons, as he did in the Judicial Review Leave Application before me, that the applicant's application for a prohibiting order against the Singapore Prison Service ("SPS") was misconceived. In the scheduling of executions, it is well-settled that the SPS acts pursuant to a warrant issued under the seal of the Supreme Court which sets out the time and place of execution prescribed by a corresponding order of the President. The President in turn acts in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet.

19 I note that the respondent repeated their submissions as they did not have the benefit of the Court of Appeal's full reasons before appearing before me on 30 November 2020. Nevertheless, this issue has already been considered and determined. The Court of Appeal held that in relation to the scheduling ground, the applicant's complaints against the SPS should correctly be understood as complaints against a decision taken by the Cabinet, since the SPS's letter to the applicant stating the date on which his execution was scheduled had in fact conveyed a decision made by the Cabinet (*Syed Suhail (Judicial Review Leave Appeal)* at [29]).

20 I therefore proceed to consider the substantive merits of the present application for judicial review on this basis.

**Issues before this court**

21 As the Court of Appeal had only granted leave to the applicant to commence judicial review proceedings in relation to the scheduling ground, the issues arising for determination before this court are whether there has been a violation of Art 12 in two respects:

(a) In respect of Art 12(1), whether the applicant was subject to impermissible differential treatment *vis-à-vis* other prisoners who were sentenced earlier than him and who have had their clemency petitions rejected, but whose execution had not been scheduled at the point when his date of execution was scheduled (the "sequence of execution argument"); and

(b) In respect of both Art 12(1) and (2), whether the applicant had been discriminated against as a Singaporean *vis-à-vis* non-Singaporeans by virtue of having his date of execution allegedly scheduled earlier as a result of the COVID-19 pandemic (the "nationality argument").

**Parties' submissions**

22 In support of the present summons, Mr Ravi filed an affidavit on behalf of the applicant dated 6 November 2020 ("Mr Ravi's 2nd affidavit"). The respondent filed a reply affidavit on 20 November 2020 ("Mr Lim's 2nd affidavit), both to address the alleged inconsistency in Mr Lim's 1st affidavit and in response to Mr Ravi's 2nd affidavit.

***The applicant's submissions***

23 In relation to the sequence of execution argument, the applicant advanced a few broad arguments. I have reordered them in such sequence as to follow their logical progression:

(a) First, "all drug offenders sentenced to death" fell within the same class and thus ought to be treated equally.

(b) Second, being treated equally in the present context requires that the scheduling of executions follows the sequence in which the prisoners were sentenced so as to not deprive them of time to adduce new evidence to reopen their conviction.

(c) Third, within this class in which the applicant fell, there were other prisoners who had been sentenced earlier than him but whose executions had not been scheduled. In addition to Datchinamurthy, the applicant further highlighted that another prisoner, one Masoud Rahimi bin Mehrzad ("Masoud"), had also been sentenced to death before the applicant but his date of execution had yet to be scheduled. Masoud's case was not raised before the Court of Appeal, but only to me in Mr Ravi's 2nd affidavit at [11].

(d) Fourth and consequently, the order in which the execution of prisoners' sentences was scheduled did not share a logical nexus with the order in which they were sentenced, and thus the applicant's constitutional right under Art 12(1) had been breached.

24 In relation to the nationality argument, the applicant submitted that he had been discriminated against as a result of an "exercise of expediency", thus violating his right to equal protection under Art 12(1) of the Constitution.

According to the applicant, Singaporeans were being executed first while the execution of death sentences for non-Singaporeans (among whom only Datchinamurthy had been identified) was being halted till the reopening of Singapore's borders in view of the COVID-19 situation. This was allegedly because non-Singaporeans awaiting capital punishment would face difficulties with having access to their family members and problems might also arise in the repatriation of their mortal remains. In addition, such discrimination against him based on nationality violated Art 12(2) of the Constitution, which expressly provides that there shall be no discrimination against citizens of Singapore on the ground only of place of birth, in connection with certain stipulated categories.

***The respondent's submissions***

25 In relation to the sequence of execution argument, the respondent submitted that there was no statutory provision requiring that the execution of sentences on offenders sentenced to death be carried out in the same sequence in which the sentences were imposed. Further, even if there were such a requirement, the scheduling of the execution of sentences of death was carried out in a principled and rational manner, having regard to whether different supervening factors based on policy considerations that apply to different offenders have been resolved. In Mr Lim's 2nd affidavit, he stated at [7] that scheduling of the execution of the sentence of death is done by reference to the resolution of various supervening factors based on policy considerations, including:

(a) the dates on which the sentences of death were pronounced on offenders;

(b) the determination of any court proceedings affecting the offender (other than the proceedings which have to be concluded before the MHA will commence the scheduling of his execution, such as his appeal against his conviction and/or sentence), whether or not the offender is a litigant in those proceedings (*eg*, confiscation proceedings under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed), forfeiture proceedings under the MDA, or proceedings in which the offender's testimony may be required);

(c) whether there are co-offenders sentenced to death. Where co-offenders have been sentenced to death, the execution of the sentences will be scheduled on the same date;

(d) whether the offender had previously been scheduled to have his sentence carried out, though such sequencing in such situations may not always be possible, when for example, it is difficult to change the existing schedules; and

(e) the availability of judges to hear any legal application by the offender before the intended date for the execution of the sentence.

26 The above factors were also set out at [7] of Mr Lim's 1st affidavit. In this regard, the respondent submitted that Datchinamurthy and Masoud were not, at the time when the applicant's execution was scheduled, in the same position as the applicant. This was because they were not offenders in respect of whom all supervening factors based on policy considerations, which affected the scheduling of executions of sentence, had been resolved. The MHA was aware, at the point of scheduling the execution of the applicant's sentence, that the Attorney-General's Chambers ("AGC") would be reviewing

Datchinamurthy and Masoud's cases following the Court of Appeal's determination of CA/CM 3/2020 (*Gobi a/l Avedian v Public Prosecutor* [2020] SGCA 102 ("*Gobi (CM)*")). Datchinamurthy and Masoud were therefore offenders whose cases were affected by the determination of court proceedings in which they were not litigants, and they therefore did not fall into the same class of offenders as the applicant for purposes of scheduling the execution of sentences.

27 In relation to the nationality argument, the respondent submitted that the applicant had not provided evidence for his assertion that the execution of death sentences for non-Singaporeans had been halted. Mr Lim averred at [8] of his 1st and 2nd affidavits that nationality is not a factor considered in the scheduling of the execution of sentences of death. Even though the applicant had notice of this point, which had been disclosed during the appeal hearing, he did not challenge this in Mr Ravi's 2nd affidavit filed in the present summons. Further, for offenders whose death sentences had been scheduled, the government will make arrangements to facilitate access to their family members residing overseas ([13] of Mr Lim's 1st and 2nd affidavits). The imposition of COVID-19 restrictions had also not presented any difficulties to the repatriation of mortal remains abroad ([22] of Mr Lim's 2nd affidavit). Accordingly, the respondent submitted that the applicant's belief that nationality was taken into account in the scheduling of an offender's date of execution had been conclusively refuted by Mr Lim's affidavits.

## My decision

### *Test to be applied in respect of Art 12(1)*

28 The test to be applied when determining whether there was a breach of Art 12(1) was in dispute in the present case. The applicant submitted that he was

relying on the principle set out in the case of *Ong Ah Chuan and another v Public Prosecutor* [1979–1980] SLR(R) 710 ("*Ong Ah Chuan*") at [35] that "[e]quality before the law and equal protection of the law require[d] that like should be compared with like", and that this principle had been endorsed in *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 ("*Ramalingam*") at [61]. The applicant then cited [62] of *Ramalingam* in support of his position that he, Datchinamurthy and Masoud were 'like' and should thus have been treated alike. At [62] of *Ramalingam*, the court stated that "[w]hat a class of offenders defined in penal legislation have in common is that they all fulfil the specified ingredients of the same criminal offence". Relying on this, the applicant submitted that, by analogy, the class of offenders which he, Datchinamurthy and Masoud came within would be all drug offenders who had been sentenced to death.

29 The respondent orally submitted in response that the applicant had mischaracterised the court's holding at [62] of *Ramalingam*. The court at [62] of *Ramalingam* was simply referencing *Ong Ah Chuan* to explain how Art 12(1) applied in the context of determining the constitutionality of penal legislation. Indeed, the court expressly drew a distinction between the legislative and executive contexts (*Ramalingam* at [61]). In the present case, the respondent submitted that the court was not concerned with the constitutionality of legislation, but rather administrative or executive action. Therefore, the appropriate test for determining whether Art 12(1) has been breached in the context of administrative action was that set out at [49] of *Ridzuan* referencing *Public Prosecutor v Ang Soon Huat* [1990] 2 SLR(R) 246 at [23], namely, whether there was "deliberate and arbitrary discrimination against a particular person", and where arbitrariness "implies the lack of any rationality". The

respondent submitted that the test of deliberate and arbitrary discrimination was also applied in *Eng Foong Ho*.

30 Notwithstanding various specific references to arbitrary and capricious decision-making in Mr Ravi's 2nd affidavit (see [14], [19] and [21]), the applicant clarified in oral submissions that he was not in fact alleging arbitrariness but was instead relying on *Ong Ah Chuan* and *Ramalingam* to advance the broader proposition that persons who are equally situated had the right to be equally treated.

31 Article 12(1) states:

> 12.–(1) All persons are equal before the law and entitled to the equal protection of the law.

32 The general principle, that like should be compared with like, applies to all acts of the State, whether legislative or executive (*Ramalingam* at [61]). The proper test to be applied must turn on the specific application or formulation of this general principle in the given context. The Court of Appeal in *Syed Suhail (Judicial Review Leave Appeal)* clarified the test to be adopted in determining whether there has been a breach of Art 12(1) on the basis that there was impermissible differential treatment in the context of executive action, which was what the applicant was alleging in this case (see [10]–[11] above). The court considered that the "deliberate and arbitrary" test would set too high a bar and would not be sufficient to secure for every person equal protection of the law as guaranteed under Art 12(1). It reasoned that, if the determination of whether the executive had acted in a manner which lacked rationality was not distinct from whether it had differentially treated persons in an impermissible manner in breach of Art 12(1), Art 12(1) would be rendered nugatory, according no greater

protection than the ordinary grounds of judicial review (*Syed Suhail (Judicial Review Leave Appeal)* at [57]).

33 The question that arose in the present case was whether, in the scheduling of the date of his execution, the State had differentially treated the applicant in a manner which was impermissible, having regard to the cases of Datchinamurthy and Masoud. According to the applicant, all three of them were equally situated. The first and main enquiry is therefore whether the applicant, Datchinamurthy and Masoud were equally situated persons, and whether they were differentially treated. If so, the court must then carefully scrutinise whether this differential treatment was based on legitimate reasons.

***The sequence of execution argument***

34 I begin by addressing the sequence of execution argument. *Gobi (CM)* was heard by the Court of Appeal on 16 June 2020 and the court thereafter reserved judgment. The AGC then informed the MHA that the decision in *Gobi (CM)* could have implications on cases in which the presumption in s 18(2) of the MDA had been applied. On 3 July 2020, the AGC notified the MHA that Datchinamurthy and Masoud fell into this category of cases. As these cases would be assessed by the AGC after the Court of Appeal delivered its decision in *Gobi (CM)*, the sentences of Datchinamurthy and Masoud were not scheduled to be carried out after the resolution of *Gobi (JR)*.

35 Contrary to the applicant's arguments, I find that there is a clear differentiating factor between his case and the cases of Datchinamurthy and Masoud. As a consequence of the application and eventual decision of the Court of Appeal in *Gobi (CM)*, both Datchinamurthy and Masoud had a realistic expectation that their cases would be reviewed and potentially reopened on the merits, but the applicant did not have any such expectation. The applicant's case

therefore could not be said to be equally situated. As pointed out by the Court of Appeal in *Syed Suhail (Judicial Review Leave Appeal)* at [67], where a prisoner had further pending recourse or if there were other relevant pending proceedings in which the prisoner's involvement is required, such prisoners would not be equally situated compared to other prisoners who had been sentenced and whose clemency petitions had been rejected. The rationale for this was that the time taken for the proceedings to be completed would turn on the circumstances of each individual case, such that it would be difficult to make any meaningful comparison between prisoners. The same reasoning would apply here, as the amount of time it would take for each case to be reviewed by the AGC and for the legal process to run its course if further proceedings were commenced would necessarily vary depending on the facts of each offender's case.

36 The Court of Appeal in *Adili Chibuike Ejike v Public Prosecutor* [2019] 2 SLR 254 ("*Adili*") clarified the law pertaining to the interplay between the presumption under s 18(1) of the MDA and the doctrine of wilful blindness. It held that the knowledge presumed under s 18(1) of the MDA is the fact of actual knowledge, not wilful blindness (at [66]–[71]), which is a mixed question of law and fact. Accordingly, where it is the prosecution's case that an accused person was wilfully blind, it was not open to the prosecution to invoke the s 18(1) presumption. The court left open whether their decision ought also to apply to the presumption under s 18(2) (at [72]). Subsequently, in *Gobi (CM)*, the interplay between the presumption under s 18(2) and the doctrine of wilful blindness arose for consideration, and the parties both submitted that the holding in *Adili* ought to be extended to s 18(2). The Court of Appeal agreed, and similarly held that the knowledge that was presumed under s 18(2) of the MDA was confined to actual knowledge of the nature of the drugs in an accused's possession and did not encompass knowledge of matters to which the accused

person was said to be wilfully blind. The doctrine of wilful blindness was therefore irrelevant to the analysis of whether the s 18(2) presumption had been rebutted (at [53]–[56]).

37 The AGC's review of Datchinamurthy and Masoud's cases was premised on the fact that in those cases, the prosecution's case encompassed wilful blindness to the nature of the drugs, alongside the courts' resultant findings of failure to rebut the presumption of knowledge of the nature of drugs in s 18(2) of the MDA. From a perusal of the record in *Syed Suhail (HC)*, it is manifestly clear that no question of wilful blindness surfaced whether at the applicant's trial or on appeal. The applicant had acknowledged that he was in possession of all the drugs in question at his trial, and he knew that they were heroin (*Syed Suhail (HC)* at [26]). The prosecution's case against the applicant therefore did not depend on the presumption in s 18(2) of the MDA. Indeed, as stated at [16]–[17] above, the applicant had already applied to have his case reviewed in *Syed Suhail (Criminal Review)*. His application was made chiefly on the basis that new material pertaining to his abnormality of mind ought to be adduced. The Court of Appeal dismissed the application, finding that the material could have been obtained with reasonable diligence at an earlier stage, and in any case, was "far from being of the compelling nature required to satisfy the requirement under s 394J(3)(*c*) [of the CPC]" (at [29]). Again, no issue of wilful blindness in relation to s 18(2) of the MDA arose. As such, his case was distinguishable from those of Datchinamurthy and Masoud. In any event, it was never suggested in the applicant's submissions before me that his case ought to be reviewed on similar grounds.

38 While Datchinamurthy and Masoud had technically exhausted the legal process and there were no legal proceedings pending that directly involved them, it would be inconceivable for their executions to have been scheduled.

The AGC's indication that their cases would be reviewed following the Court of Appeal's decision in *Gobi (CM)* pointed to a real likelihood that further proceedings in respect of their cases could be initiated. The possibility of there being a further pending recourse did not arise out of a mere or fanciful hope.

39 In *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 ("*Kho Jabing*") at [49]–[50], the court considered the balance between prevention of error and the principle of finality as follows:

> 49 The question for us in the present context is whether we have struck the right balance between the prevention of error (which demands some degree of corrigibility) and the according of proper respect to the principle of finality (which necessitates a policy of closure). It is axiomatic that this balance will have to be struck differently at different stages of the criminal process. As we venture further along the criminal process, we must give greater presumptive weight to the veracity of the findings already made and accord greater prominence to the principle of finality. An appeal is an avenue for error correction. For this reason, in an appeal, the decision of the trial court must be examined for error, but due deference must be accorded to that court's findings, and new evidence cannot be admitted, save in limited circumstances. A review is an avenue for the correction of miscarriages of justice. Thus, it is only in exceptional cases that a matter will be reopened on its merits, and the instances in which the Court of Appeal's inherent power of review will be exercised must be few and far between.
>
> 50 In our judgment, the principle of finality is no less important in cases involving the death penalty. There is no question that as a modality of punishment, capital punishment is different because of its irreversibility. For this reason, capital cases deserve the most anxious and searching scrutiny. This is also reflected in our laws. Division 1A of Pt XX of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC") provides that a sentence of death imposed by the High Court has to be reviewed by the Court of Appeal even where no formal appeal has been filed, and the court must be satisfied of the correctness, legality and propriety of both the accused person's conviction and his sentence before the sentence is carried into effect. But, once the processes of appeal and/or review have run their course, the legal process must recede into the background, and attention must then shift from the legal contest to the search for repose. We do not think it benefits

> anyone – not accused persons, not their families nor society at large – for there to be an endless inquiry into the same facts and the same law with the same raised hopes and dashed expectations that accompany each such fruitless endeavour.

40 It is crucial that in the cases of Datchinamurthy and Masoud, the review and potential re-opening of their convictions were not in pursuit of an "endless inquiry into the same facts and the same law". The realistic possibility of a review and further legal proceedings following the court's determination in *Gobi (CM)* shifted the balance discussed in *Kho Jabing* towards the prevention of error, such that the legal process was still at the forefront of their cases.

41 In contrast, as clarified at [12] of Mr Lim's 2nd affidavit, all supervening factors based on policy considerations that applied to the applicant had been resolved. The applicant did not, at the point of the scheduling of his execution, have any similar potential further recourse. Unlike Datchinamurthy and Masoud's cases, no findings were made at the applicant's trial in respect of wilful blindness or failure to rebut the presumption in s 18(2) of the MDA. As noted above (at [37]), the prosecution did not invoke s 18(2) of the MDA at all.

42 The applicant had argued that not following the sequence of scheduling would deprive him of time to adduce new evidence to reopen his case. However, that argument was entirely speculative. The principle of finality applied with full force to his case. In this connection, the applicant had already attempted unsuccessfully to reopen his case on its merits. As the Court of Appeal stated in *Syed Suhail (Criminal Review)*, repeated applications until a desired outcome is achieved would be the "very *perversion* of justice and fairness and would make a *mockery* of the rule of law" (emphasis in original) (at [1]). Having regard to the principle of finality in proceedings, stringent requirements must be satisfied before the court would review its decision under s 394J of the CPC (*Syed Suhail (Criminal Review)* at [1] and [14]).

43 In my assessment, Mr Lim's 2nd affidavit has sufficiently clarified how Datchinamurthy and Masoud's factual circumstances differed from the applicant's. There is thus a clear and indisputable differentiating factor between the applicant and Datchinamurthy and Masoud such that he was not equally situated together with them. In the context of equal protection in Art 12(1), this was not a situation where like was not being treated alike. I am satisfied that there is no inconsistency in relation to the scheduling of the applicant's execution *vis-à-vis* the arrangements pertaining to Datchinamurthy and Masoud.

44 There is therefore no merit in the applicant's argument that his rights under Art 12(1) had been violated by virtue of him being treated differently from Datchinamurthy and Masoud. The sequence of execution argument fails *in limine* on the first limb of the test set out in *Syed Suhail (Judicial Review Leave Appeal)* (at [61]). It is not strictly necessary to address the second limb of the test, but I find in any event that sufficient explanation has been furnished in Mr Lim's 2nd affidavit to establish that any perceived differential treatment affecting the applicant was based on legitimate reasons. There was no violation of the applicant's legitimate legal expectation that he would not face differential treatment in the scheduling of his execution, as compared to other persons who are equally situated.

45 I note that the applicant has had ample opportunity to challenge the clarification made in Mr Lim's 2nd affidavit relating to Datchinamurthy and Masoud's factual circumstances. He did not take this course at the hearing of the present summons. He also did not dispute that all supervening factors based on policy considerations had been resolved in his case. Instead, his primary contention remained unchanged from his submission before the Court of Appeal in *Syed Suhail (Judicial Review Leave Appeal)*, *ie*, that all three of them were

drug offenders facing death row and therefore fell within the same class of offenders. This expansive argument glosses over the objective facts which disclosed an indisputable difference in their cases. The applicant made no attempt to address this difference and indeed, he was unable to do so as it clearly demonstrated that he was not equally situated with Datchinamurthy and Masoud.

46 For completeness, the applicant's reliance on [62] of *Ramalingam* to advance his case that the class of offenders relevant in the present case to determine whether they were equally situated should be "all drug offenders sentenced to death" was misplaced. For reference, the Court of Appeal in *Ramalingam* stated at [62]:

> In the context of penal legislation, the Privy Council stated (at [39] of *Ong Ah Chuan*) that "Art 12(1) of the Constitution [was] not concerned with equal punitive treatment for equal moral blameworthiness; it [was] concerned with equal punitive treatment for similar legal guilt". What a class of offenders defined in penal legislation have in common is that they all fulfil the specified ingredients of the same criminal offence. Within this class, there may be substantial variations in moral blameworthiness among the offenders. The fact that penal legislation does not distinguish between offenders within the same class based on such moral differences does not in itself render such legislation in breach of Art 12(1).

47 It is clear that the court, in referencing *Ong Ah Chuan* at [62] of *Ramalingam*, was referring to the application of Art 12(1) in the context of penal legislation, which was "concerned with equal punitive treatment for similar legal guilt". The court held that Art 12(1) would apply differently in the context of prosecutorial decisions as compared to the legislative domain, as the prosecution had to consider a wide range of factors in addition to the legal guilt of the offender (*Ramalingam* at [61] and [63]; see also *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012 at [23]).

48 The pivotal question in the present case was when offenders could be said to be equally situated for the purposes of scheduling of their sentence of execution. The formulation for the application of Art 12(1) in the context of penal legislation had no applicability here, and the type of offence an offender was sentenced for, whether under the MDA or otherwise, would also not generally be relevant.

***The nationality argument***

49 I turn next to the nationality argument. As mentioned at [30] above, the applicant had eventually clarified that he was not alleging that the Cabinet's decision had been arbitrary or that the State had acted in bad faith by considering nationality as a factor in the scheduling of executions.

50 Instead, the applicant asserted that he had been discriminated against *vis-à-vis* non-Singaporeans whose executions had been halted as a result of the COVID-19 pandemic for reasons of expediency. Instead of alleging arbitrariness, the applicant appeared to be arguing that the *effect* of the MHA having taken into account considerations arising from the COVID-19 situation was that Singaporeans, including the applicant, had been unequally treated *vis-à-vis* non-Singaporeans. This was impermissible discrimination in breach of Art 12(1) and (2). As with the sequence of execution argument, the applicant relied on *Ramalingam* and *Ong Ah Chuan* for the general principle that like cases must be treated alike.

51 It is settled law that the State may not exercise its discretion in breach of the fundamental liberties guaranteed under the Constitution, including Art 12. However, the burden of proof is on the applicant to adduce sufficient evidence to prove a *prima facie* breach before the evidential burden will shift to the State

to justify its exercise of discretion. Where a *prima facie* breach is found, it is rebuttable by the State. If the State fails to do so, it would be found to be in breach of the Constitution (*Ramalingam* at [27]–[28], [69]).

52 As stated by the court in *Ramalingam* at [27]:

> That the burden of proof lies on the offender in this regard is a wholly trite proposition that is reflected in s 103(1) of the Evidence Act, which states that "[w]hoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist".

53 At the first limb of the test to determine whether there was a breach of Art 12(1) (see [10] above), the applicant bore the evidential burden of showing that he was equally situated with another person, such that any differential treatment between them required justification. This limb had to be satisfied before the evidential burden would shift to the State to justify the differential treatment (*Syed Suhail (Judicial Review Leave Appeal)* at [61]).

54 In *Ridzuan*, the offender applied for leave to commence judicial review proceedings, arguing that the prosecution's decision not to grant him a certificate of substantive assistance was made in breach of Art 12(1) as another offender involved in the same criminal enterprise had been granted a certificate. The Court of Appeal observed that the court would not require evidence that directly impugned the propriety of the prosecution's decision-making process. An offender could discharge his evidentiary burden by highlighting the circumstances that establish a *prima facie* case of a breach. The court could make inferences from objective facts (at [40]–[41], [43]). On the facts in *Ridzuan*, the offender would have discharged his evidential burden if he had shown: "first, that his level of involvement in the offence and the consequent knowledge he acquired of the drug syndicate he was dealing with was

practically identical to a co-offender's level of involvement and the knowledge the co-offender could have acquired, and second… that he and his co-offender had provided practically the same information to CNB – yet only his co-offender had been given the certificate of substantive assistance" (at [51]). Even though *Ridzuan* concerned leave to commence judicial review proceedings, the evidentiary burden discussed by the court in that case, if met by the offender, would have shifted the burden thereafter to the executive to justify the differential treatment (*Ridzuan* at [39], [52]).

55 The evidence which had to be adduced by an offender to satisfy his evidential burden would turn on the facts of each case and the nature of his challenge under Art 12(1). For example, the evidence which the offender in *Ridzuan* needed to adduce was grounded in the factual scenario of the case, *ie*, whether he was discriminated against *vis-à-vis* another offender in relation to the grant of a certificate of substantive assistance.

56 In the present case, the applicant contended that he had been discriminated against as a Singaporean because the scheduling of executions was impacted by COVID-19 measures. This is a narrow and fact-specific challenge. The applicant could have discharged his evidential burden if he had adduced evidence to show that there was an equally situated non-Singaporean who had been sentenced earlier and whose execution had not been scheduled at the point when his date of execution was fixed. Appropriate inferences could then be drawn from these facts and the applicant could have satisfied his burden of proof to establish a *prima facie* breach of Art 12(1).

57 I also note that in *Syed Suhail (Judicial Review Leave Appeal)* at [63], it was observed by the Court of Appeal that the court would have regard to the nature of the executive action in question in determining whether there was a

breach of Art 12(1). As the executive decision relating to the scheduling of execution was taken on an individual level and concerned the grave issue of deprivation of life, the court would be searching in its scrutiny. This same searching scrutiny would "equally apply when considering whether the [applicant] has discharged his evidential burden and thereby overcome the presumption of constitutionality".

58 In the present case, the applicant did not adduce any evidence at all to show such a *prima facie* breach of his right to equal protection under Art 12(1). The applicant had only identified one non-Singaporean, Datchinamurthy, whose clemency petition had been rejected and whose execution had not been scheduled at the point of time when the applicant's date of execution was fixed. Crucially, as discussed at [34]–[44] above, Datchinamurthy was not equally situated with the applicant. Put simply, they were not in the same boat, even though they all belonged to a generic group of prisoners awaiting capital punishment. No reference was made to Masoud's case, and rightly so, since Masoud is a Singaporean. His case was brought up principally to support the applicant's sequence of execution argument. It is irrelevant for the purpose of the nationality argument.

59 As such, the applicant had not cleared the threshold required to discharge his evidential burden for the State to be called upon to justify any differential treatment.

60 It was not disputed that the State had a discretion to schedule executions. However, discretion exercised by the executive was susceptible to judicial review, including whether such exercise had contravened a person's right to equal protection under Art 12 (*Ramalingam* at [51], see also *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86]). Assuming, *ex*

*hypothesi*, that there was a non-Singaporean who was equally situated with the applicant and who had been sentenced earlier than the applicant, but whose execution had not been scheduled at the point when the applicant's date of execution was fixed on 18 September 2020, there would *prima facie* be differential treatment requiring justification under the first limb of the test set out in *Syed Suhail (Judicial Review Leave Appeal)* (at [61]). The question which would then follow would be whether the State had legitimate reasons for such differential treatment, pursuant to the second limb of the test.

61 Assuming for the sake of argument that the COVID-19 situation had in fact been considered by the State as a factor in the scheduling of executions, on the presumptive basis that the pandemic had affected the access of prisoners to their families and/or posed difficulties to the repatriation of mortal remains, clarification would be needed from the MHA as to how the COVID-19 measures had affected such scheduling, to ascertain whether it would constitute a legitimate reason to justify differential treatment.

62 Legitimate reasons have to bear a "sufficient rational relation to the object for which the power was conferred" (*Syed Suhail (Judicial Review Leave Appeal)* at [61]). The State has the power to set the time and place of executions in the legally prescribed steps leading to an offender's death sentence being carried out (see *Syed Suhail (Judicial Review Leave Appeal)* at [3]), to facilitate the administration of justice and enable the law to take its course. Operational concerns would have to be taken into consideration in the scheduling of executions and the MHA may also face various administrative constraints as a result of the COVID-19 pandemic. Even then, the State's exercise of discretion has to be made in accordance with Art 12. In my view, COVID-19 restrictions may not be sufficient to amount to a legitimate reason to justify differential treatment between Singaporeans and non-Singaporeans in the scheduling of

executions. That said, my observations are merely *obiter*. As Mr Lim's 2nd affidavit stands, it did not contain sufficient specificity and clarity to enable a conclusion on the impact of COVID-19 on the scheduling of executions. I shall briefly elaborate below.

63 The applicant's specific contention was that as a result of the COVID-19 pandemic, nationality had been considered in the scheduling of executions such that there was a consequential halt of the executions of non-Singaporeans. The MHA had made clear at [8] of Mr Lim's 2nd affidavit as follows:

> For avoidance of doubt, factors such as the type of offence for which the offender was sentenced to death, age, race, gender and nationality are not considered in scheduling the execution of sentences of death.

64 At [22]–[23] of Mr Lim's 2nd affidavit, he also refuted the applicant's allegation that there had been any consequential halt of executions against non-Singaporeans due to COVID-19 measures. Further, he averred that the imposition of COVID-19 restrictions had not changed the position that nationality was not a factor considered in scheduling dates for the execution of sentences. In the absence of any evidence to the contrary, the applicant's contention had no basis to stand on. However, having said that, although it is the MHA's position that there was no such explicit halt of executions on the basis of nationality, the MHA did not expressly aver that COVID-19 restrictions did not impliedly or consequently affect the scheduling of executions.

65 It appeared to be implicitly acknowledged by the MHA that the facilitation of a prisoner's access to his family prior to his scheduled date of execution occurs as a matter of course. The MHA's position was that it would facilitate arrangements to allow a prisoner's relatives who live overseas to enter Singapore. It was not disputed that it had made arrangements for the applicant's

uncle who was living in Malaysia to visit him in Singapore. His uncle eventually declined to do so. However, it is not clear whether such an arrangement is a pre-condition to the scheduling of an execution, or whether a scheduled execution would still go ahead in the event that a prisoner's family members were in fact unable to travel to Singapore as a result of travel restrictions imposed due to the COVID-19 pandemic. The MHA acknowledged that it would have no control over travel restrictions imposed by foreign countries in which a prisoner's family members are residing.

66 If COVID-19 restrictions were taken into consideration in scheduling, or had caused scheduled executions to be postponed, this could bring about a situation where most or all Singaporeans on death row would be executed first because all their family members were in Singapore. In contrast, the executions of most or all foreigners could be put on hold, for example, because of travel restrictions imposed by their home countries which prevent their family members from entering Singapore. This would *in effect* amount to discrimination on the basis of nationality. Although nationality would not be taken into consideration *per se*, the natural and obvious *consequence* (unless *all* executions were put on hold indefinitely) would be that the executions of Singaporeans would more likely be expedited. Nationality, in turn, would bear no rational relation to the scheduling of executions. In such a situation, the COVID-19 restrictions would not be a legitimate reason to justify differential treatment.

67 In any event, I should emphasise that the question whether or how COVID-19 restrictions had affected the scheduling of executions did not arise for determination in the present case, since the applicant was unable to adduce any evidence to show *prima facie* that any equally situated non-Singaporeans had been differently treated.

68 The applicant's contentions in respect of the nationality argument were bare assertions based on pure conjecture and surmise. He did not file an affidavit to challenge the averments made in Mr Lim's 2nd affidavit or adduce any evidence to show that COVID-19 restrictions had an impact on the scheduling of sentences, such that he was discriminated against *vis-à-vis* equally situated non-Singaporeans. In the premises, his contentions do not withstand scrutiny. I am therefore unable to see any merit in the nationality argument.

69 I make a final comment on the applicant's reliance on Art 12(2) of the Constitution. Article 12(2) states:

> 12.–(2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens of Singapore on the ground only of religion, race, descent or place of birth in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

70 With respect, Art 12(2) is wholly inapplicable to the nationality argument. Given that Art 12(2) applies only to "citizens of Singapore", *ie*, Singaporeans, the reference to "place of birth" could not possibly be interpreted to mean "nationality". The Cabinet's exercise of discretion would also not fall into any of the stipulated categories to which Art 12(2) applies *viz*, "in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing of carrying on of any trade, business, profession, vocation or employment". This also finds support in academic writing: see Thio Li-Ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) at paras 13.008 and 13.009:

> 13.008 *Article 12(2) speaks to the Government, seeking to prevent the perpetuation of certain forms of discrimination against Singapore citizens through state action.* It provides that "except as expressly authorised by this Constitution", which may permit express limits to equality, there shall be no discrimination "on the ground only of religion, race, descent or place of birth" in relation to four things: any law, in relation to public authority employment positions, the administration of any law relating to the acquisition, holding or disposition of property or laws establishing or carrying on of any trade, business, profession, vocation or employment".
>
> 13.009 Article 12(2) forbids discrimination on the exclusive ground of four bases, "religion, race, descent or place of birth", which indicate the importance of their underlying values, as opposed to trivial basis for differentiation, such as hair length or music preferences. *This indicates the type of community the Constitution is designed to sustain, reflecting the goal of nurturing the ethos and practice of ethno-religious pluralism.* The Constitution specifically identifies the types of diversities and pluralisms it considers worthy of constitutional protection; it does not cover all possible claims raised under this banner in the political arena.
>
> [emphasis in original omitted, emphasis added in italics]

71 In any event, it would have sufficed for the applicant to rely on Art 12(1) of the Constitution to allege that he had been discriminated against *vis-à-vis* other non-Singaporeans. A non-Singaporean would also have been entitled to make a claim that he had been discriminated under Art 12(1) on the grounds of nationality if he had evidence of such discrimination (see *Lim Meng Suang and another v Attorney-General and another appeal and another matter* [2015] 1 SLR 26 at [93]).

72 For completeness, I mention in passing that at the close of the hearing of the present summons, Mr Ravi abruptly made a baseless and somewhat frivolous application for me to recuse myself on the ground that I was allegedly biased against him. Whatever Mr Ravi may have perceived to have provoked his application, it clearly bore no connection whatsoever to any part of the

substantive hearing, which had already reached its conclusion. Accordingly, I declined to recuse myself.

**Conclusion**

73 For the reasons stated above, the applicant was unable to show, whether on the basis of the sequence of execution or nationality arguments, that his rights under Art 12 of the Constitution had been infringed. The summons is therefore dismissed. I shall hear the parties' submissions on any consequential matters.

See Kee Oon
Judge of the High Court

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