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

[2023] SGHC 346

Originating Application No 987 of 2023
(Summons No 3096 of 2023)

In the matter of Order 4, Rule 7 of the Rules of Court 2021

And

In the matter of Article 9 and 12 of the Constitution of the Republic of Singapore (2020 Rev Ed)

Between

(1) Masoud Rahimi bin Mehrzad
(2) Syed Suhail bin Syed Zin
(3) Roslan bin Bakar
(4) Rosman bin Abdullah
(5) Pausi bin Jefridin
(6) Iskandar bin Rahmat
(7) Mohammad Rizwan bin Akbar Husain
(8) Saminathan Selvaraju
(9) Ramdhan bin Lajis
(10) Jumaat bin Mohamed Sayed
(11) Lingkesvaran Rajendaren
(12) Mohammad Azwan bin Bohari
(13) Mohammad Reduan bin Mustaffar
(14) Omar bin Yacob Bamadhaj
(15) Muhammad Hamir bin Laka
(16) Jumadi bin Abdullah
(17) Muhammad Salleh bin Hamid
(18) Moad Fadzir bin Mustaffa
(19) Zamri bin Mohd Tahir
(20) Gunalan Goval

(21) Steve Crocker
(22) Shisham bin Abdul Rahman
(23) Chandroo Subramaniam
(24) Mohd Akebal s/o Ghulam Jilani
(25) A Steven Raj s/o Paul Raj
(26) Sulaiman bin Jumari
(27) Mohamed Ansari bin Mohamed Abdul Aziz
(28) Sanjay Krishnan
(29) Chong Hoon Cheong
(30) Kishor Kumar a/l Raguan
(31) Hamzah bin Ibrahim
(32) Pannir Selvam a/l Pranthaman
(33) Datchinamurthy a/l Kataiah
(34) Teo Ghim Heng
(35) Tan Kay Yong
(36) Roshdi bin Abdullah Altway

… *Applicants*

And

The Attorney-General

… *Respondent*

JUDGMENT

[Civil Procedure — Striking out]
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5 December 2023 Judgment reserved.

Hoo Sheau Peng J:

Introduction

1 HC/OA987/2023 ("OA987") is an application by 36 prisoners awaiting capital punishment ("the Applicants") for declarations that two *new* provisions introduced by way of s 2(*b*) of the Post-appeal Applications in Capital Cases Act 2022 (No. 41 of 2022) ("the PACC Act") are "void for being inconsistent with the right to fair trial and access to justice contained in [Art 9 of the Constitution of the Republic of Singapore (2020 Rev Ed) ("Constitution")] and inconsistent with [Art 12 of the Constitution]".[1]

2 The two provisions introduced by the PACC Act under challenge are s 60G(7)(*d*) and s 60G(8) of the Supreme Court of Judicature Act 1969 (2020 Rev

[1] Prayers 1(a) and 1(b) of the HC/OA987/2023.

Ed) ("SCJA") ("the impugned provisions"). However, it must be noted that the PACC Act has not come into force, and the new provisions are not yet operative.

3 By way of HC/SUM 3096/2023 ("SUM3096"), the Attorney-General ("the AG") applies under O 9 r 16(1)(*a*) of the Rules of Court 2021 ("ROC") to strike out OA987 as disclosing no reasonable cause of action. This is the matter before me. Having considered the parties' submissions, I now give my decision.

Background

4 The PACC Act was enacted to deal with any post-appeal application in a capital case ("PACC application") by a prisoner awaiting capital punishment ("PACP") by introducing a new procedure for such PACC applications within the SCJA.

5 At the second reading of the Post-appeal Applications in Capital Cases Bill (Bill No 34/2022) ("the PACC Bill"), Senior Parliamentary Secretary to the Minister for Law, Ms Rahayu Mahzam ("SPS Rahayu"), explained as follows (Singapore Parliamentary Debates, Official Report (29 November 2022) Vol 95, Sitting No 77):

> [PACC applications] are applications that are filed by [a PACP], after all avenues of appeal have been exhausted. Normally, given that all appeals have been exhausted, there will be no further applications possible. These amendments provide a process for making such applications.[2]

6 Further, as set out in the Explanatory Statement to the PACC Bill, the new procedure (which introduces certain matters to be considered by the Court of Appeal when hearing an application for permission to make a PACC

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[2] Respondent's Bundle of Authorities dated 20 October 2023 ("RBOA"), Tab 18.

application) seeks to ensure that safeguards are in place to prevent abuse of process by a PACP when making a PACC application.[3]

7 By s 2(*b*) of the PACC, the new procedure is introduced by way of ss 60F-60M of the SCJA. The key aspects of the new procedure are as follows:[4]

(a) By s 60F of the SCJA, a PACC application means any application (not being a review application under s 394F of the Criminal Procedure Code 2010 (2020 Rev Ed) ("CPC")) made by a PACP to which either of the following applies:

(i) The application is for a stay of execution of the death sentence on the PACP; or

(ii) The determination of the application calls into question, or may call into question, the propriety of the conviction of, the imposition of the sentence of death, or the carrying out of the sentence of death on the PACP.

(b) Further, the new procedure only applies to a PACC application filed by a PACP after the "relevant date". For present purposes, this may be taken to mean after the appeal in the PACP's capital case has concluded or the sentence of death has been confirmed by the Court of Appeal: s 60F of the SCJA.

(c) A PACP seeking to make a PACC application must first obtain permission ("PACC permission") from the Court of Appeal to do so: s 60G(1) of the SCJA.

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3 RBOA, Tab 17.

4 RBOA, Tab 3.

(d) In deciding whether to grant an application for PACC permission, the Court of Appeal must consider the four matters set out in s 60G(7)(*a*)-(*d*) of the SCJA as follows:

(i) Whether the PACC application is based on material (being evidence or legal arguments) that, even with reasonable diligence, could not have been adduced in court before the relevant date;

(ii) Whether there was any delay in filing the application for PACC permission after the material was obtained and the reasons for the delay;

(iii) Whether the applicant has complied with the procedural requirements in relation to the filing of written submissions and any documents as prescribed by the ROC, and the timelines for doing so;

(iv) Whether the PACC application to be made has a reasonable prospect of success.

(e) By s 60(8) of the SCJA, "[a]n application for PACC permission may, without being set down for hearing, be summarily dealt with by a written order of the Court of Appeal."

(f) Before summarily refusing an application for PACC permission, the Court of Appeal must, in addition to considering the four matters mentioned in s 60G(7) of the SCJA, consider the applicant's written submissions, if any: see s 60G(9)(*a*) of the SCJA.

(g) Before summarily allowing an application for PACC permission, the Court of Appeal must, in addition to considering the four matters in

s 60G(7) of the SCJA, consider the applicant's written submissions, if any, and the respondent's written submissions, if any: see s 60G(10) of the SCJA.

8 The PACC Act was passed in Parliament on 29 November 2022, assented to by the President on 27 December 2022, and published in the Government Gazette on 13 January 2023. As noted above at [2], the PACC Act has yet to come into force, and the new procedure is not operative.

OA987

9 As stated at [1] above, OA987 is a constitutional challenge seeking declarations that the impugned provisions, ss 60G(7)(*d*) and 60G(8) of the SCJA (set out at [7(d)(iv)] and [7(e)] above), are void for being inconsistent with Arts 9 and 12 of the Constitution. In a brief supporting affidavit filed on behalf of the Applicants ("the Affidavit") by the first applicant, Mr Masoud Rahimi bin Mehrzad ("Mr Masoud"), he asserts:

(a) that s 60G(7)(*d*) of the SCJA "places upon an applicant the burden of showing that the applicant has a 'reasonable prospect of success' in order to obtain the PACC permission to commence the relevant challenge to conviction or sentence or a stay of execution. This condition denies an applicant recourse to the processes of the court on grounds of a predictive exercise at the outset of the proceedings. This requirement is onerous, oppressive and in breach of the right to fair trial and access to justice contained in [Art 9 of the Constitution] and inconsistent with [Art 12 of the Constitution]." (para 6 of the Affidavit);

(b) that s 60G(8) of the SCJA "allows the PACC application to be dismissed summarily without being set down for hearing. This prevents

> the applicant from addressing the court or effectively canvasing [*sic*] his arguments before the court on an application upon which his life hinges. This is onerous, oppressive and in breach of the rights to fair trial and access to justice contained in [Art 9 of the Constitution] and inconsistent with [Art 12 of the Constitution]." (para 7 of the Affidavit); and
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> (c) that "[he has] the legal standing to move this court for the prayers contained in [OA897] as a convicted person under a capital sentence, whose right to move the court is constitutionally obstructed or hindered by [the impugned provisions]." (para 8 of the Affidavit).

SUM3096

The AG's case

10 Under O 9 r 16(1)(*a*) of the ROC, the court may order any or part of any pleading to be struck out on the ground that it discloses no reasonable cause of action. By O 9 r 16(3) of the ROC, the rule applies to an originating application as if it were a pleading. This is the basis the AG relies on for SUM3096.

11 The AG states that the applicable test is whether the action has some chance of success when only the allegations in the pleadings are considered: *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 ("*Gabriel Peter*") at [21]. Furthermore, the AG submits that given the nature of the declarations sought, the burden is on the Applicants to show that they have a viable legal claim to begin with: *Iskandar bin Rahmat and others v Attorney-General and another* [2022] 2 SLR 1018 ("*Iskandar Rahmat*") at [33].[5]

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5 Respondent's Written Submissions dated 20 October 2023 ("RWS"), para 9.

12 The AG's striking out application rests on two main grounds. First, the *threshold* requirements for such an application are not met. According to the AG, "the constitutional challenge in OA987 is a non-starter, because the PACC Act has not even come into force yet. The provisions therefore do not, at this time, affect any right or interest [the Applicants] may have."[6] The Applicants have not made any substantive claim, or sought any substantive relief. In fact, if they do, they would not have to contend with the relevant provisions, as they are not in force.[7]

13 Therefore, the Applicants are unable to show an "actual or arguable" violation of their personal rights: *Tan Eng Hong v Attorney General* [2012] 4 SLR 390 ("*Tan Eng Hong"*) at [73], [75], [78] and [79].[8] They have no *locus standi* for the application. Along the same vein, there is no real controversy between the parties for the court to resolve.[9]

14 Secondly, and in any event, it is the AG's position that the impugned provisions are clearly consistent with Arts 9 and 12 of the Constitution. Thus, OA987 contains no viable claim, and has no chance of success.[10]

The Applicants' case

15 Turning to the Applicants' case, while there are 36 applicants, they put forth a common position. In particular, the Applicants agreed to abide by one

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6 RWS, para 3.

7 RWS, para 4.

8 RWS, para 14.

9 RWS, para 13.

10 RWS, para 5 and 17.

set of written submissions filed by Mr Masoud.[11] At the hearing, Mr Masoud made further submissions on behalf of the Applicants, and the Applicants confirmed that they align themselves with Mr Masoud's position. In addition, the second applicant, Mr Syed Suhail bin Syed Zin, and the sixth applicant, Mr Iskandar bin Rahmat ("Mr Iskandar"), made a few additional points.

16 In relation to the applicable legal test, the Applicants argue that the burden falls on the AG to prove that the claim is "obviously unsustainable, the pleadings [are] unarguably bad and it must be impossible, not improbable, for the claim to succeed before the court will strike it out: *Leong Quee Ching Karen v Lim Soon Huat and others* [2023] 4 SLR 1133 ("*Leong Quee Ching Karen*") at [26]. It is wrong for the AG to contend that the burden rests on the Applicants to show that they have a viable legal claim.[12]

17 As for the first ground, the Applicants rely, *inter alia,* on *Tan Eng Hong* at [110] to argue that "[i]n certain cases, the very existence of an allegedly unconstitutional law in the statute books may suffice to show a violation of an applicant's constitutional rights." The PACC Act, having been passed by Parliament, assented to by the President, and published in the Government Gazette, is a law in the statute books. It will come into effect as a matter of course. The Applicants fall within the context contemplated in *Tan Eng Hong*. The AG's argument that there is no viable cause of action simply because the provisions are not in force, is contrary to *Tan Eng Hong,* and is wrong.[13]

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11 Applicants' Written Submissions dated 16 November 2023 ("AWS").

12 AWS, paras 7 to 13.

13 AWS, paras 16 to 19.

18 As for the second ground, for reasons I shall expand on later, the Applicants contend that the provisions are in violation of Arts 9 and 12 of the Constitution, and that the AG has failed to show the impossibility of their case.[14]

Issues to be determined

19 Based on the arguments, there are two main issues to be determined:

(a) Whether the Applicants have met the threshold requirements for the application; and

(b) Whether there is a viable claim that the impugned provisions are inconsistent with Arts 9 and 12 of the Constitution.

20 Before I deal with these in turn, I briefly discuss the applicable legal principles for a striking out application under O 9 r 16(1)(*a*) of the ROC.

Preliminary matter: The applicable legal principles for a striking out application

21 As stated in *Gabriel Peter* (at [21]), for a striking out application based on the ground that the pleading discloses no reasonable cause of action, the applicable test is whether the action has some chance of success. This also applies to an originating application.

22 As to the legal onus in a striking out application, I agree with the Applicants that it falls on the AG, as the applicant in SUM3096, and not the Applicants, to show that there is *no* reasonable cause of action (*Leong Quee Ching Karen* at [26], [36], [57]). That said, although an application on this

[14] AWS, para 54.

ground must be very clearly justified by the party applying to strike out, given that the test under O 9 r 16(1)(*a*) is whether the pleading discloses a reasonable cause of action, the respondent nonetheless bears some onus of demonstrating that theirs is a reasonable cause of action with a prospect of success (*Richland Trade & Development v United Malayan Banking* [1996] 4 MLJ 233 at pp 244 and 249). Indeed, drawing from *Iskandar Rahmat* (at [33]), which is relied on by the AG, to begin with, a viable claim must be shown.

23 For completeness, I should add that the court's power to strike out is a draconian one, to be exercised only in plain and obvious cases. It should not be exercised too readily unless it is clearly shown that the case is wholly devoid of merit (see *Gabriel Peter* at [39]). With these applicable legal principles in mind, I turn to the first issue.

Issue 1: Whether the Applicants have met the threshold requirements for the application

24 As held in *Tan Eng Hong* at [72] and [115] and *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at [16], the three elements which must be met for an applicant to possess *locus standi* to bring an action for declaratory relief in constitutional challenges are as set out in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and another appeal* [2006] 1 SLR(R) 112 ("*Karaha Bodas*"). These are as follows:

(a) The applicant must have a "real interest" in bringing the action (*Karaha Bodas* at [19]);

(b) There must be a "real controversy" between the parties for the court to resolve (*Karaha Bodas* at [19]); and

(c) The declaration must relate to a right which is personal to the applicant and which is enforceable against an adverse party to the litigation (*Karaha Bodas* at [15], [16] and [25]).

25 In respect of these requirements, the Court of Appeal in *Tan Eng Hong* provided the following clarifications. First, the element of "real controversy" is a matter that goes towards the discretion of the court, rather than jurisdiction (*Tan Eng Hong* at [115] and [137]). This requirement ensures that the person seeking declaratory relief has a real interest in doing so, that they are able to secure a proper contradictor who has a true interest to *oppose* the declaration sought, and furthermore prevents the court from being distracted by having to deal with theoretical issues from deciding real, subsisting problems (*Tan Eng Hong* at [132]). Second, for the "real interest" requirement, sufficiency of interest is *prima facie* made out once there is a violation of constitutional rights (*Tan Eng Hong* at [83] and [115]). Third, for the requirement that there must be a violation of "a personal right", as every constitutional right is a personal right, demonstrating that a constitutional right has been violated will suffice (*Tan Eng Hong* at [80] and [115]).

26 On this last point, the Court of Appeal further opined that "a violation of constitutional rights *may* be brought about by the very existence of an allegedly unconstitutional law in the statute books" (see *Tan Eng Hong* at [115]). Relying on this and a similar statement at [110], and other observations in the case, the Applicants argue that the fact that the impugned provisions are in the statute books, *without more,* gives rise to an arguable case of a violation of their constitutional rights. Having considered the Applicants' submissions, however, I am unable to agree.

27 First, the plain fact of the matter is that these impugned provisions do not as yet have legal effect. Given that the provisions are not operational, I find that they do not engage the Applicants' constitutional rights, or for that matter, any other of their legal rights and interests. To put it another way, should any of the Applicants wish to make any post-appeal applications at all to the courts at present, they do not have to contend with the impugned provisions, or the PACC Act, at all. Contrary to what Mr Masoud asserted at para 8 of the Affidavit, his "right to move the court" is by no means "obstructed or hindered by [the impugned provisions]" (see [9(c)] above).

28 Second, and as pointed out by the AG, the mere prospect of the PACC Act becoming operative in the *future* does not suffice to establish standing for OA987. At the hearing, Mr Iskandar argued that it would only be a matter of time before the law is in force. He did not see the difference between arguing the matter now, or later in the future. In response, the AG replied that even if the law were to come into force sometime in the future, that does not mean that the strict requirements for a constitutional challenge should be ignored. The Applicants must show a violation of their constitutional rights *now*, and not merely a violation of such rights in the future.

29 On this, I agree with the AG. In *Tan Seng Kee v Attorney-General and other appeals* [2022] 1 SLR 1347 ("*Tan Seng Kee*"), the repealed s 377A of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code") was held to be legally unenforceable, owing to representations made by the AG that it would not be enforced (*Tan Seng Kee* at [148]–[149]). While this would only be so until the Government gave clear notice that it intended to reassert its right to enforce s 377A by way of prosecution, until it did, there was no controversy and no real threat of prosecution, and the appellants therefore did not have standing to pursue their constitutional challenges (*Tan Seng Kee* at [153] and [330]). Thus,

even though a law might be on the books and might gain or regain its legal effect upon some act on the part of the Executive, until it did, and so long as it remains legally unenforceable, there can be no real and credible threat of infringement of rights, and consequently no standing to challenge its constitutionality. Taking the Applicants' case at its highest, even if it can be shown for certain that the Applicants *will* have *locus standi* once the operative date of the impugned provisions is made known, before such a time, this does not suffice to ground *locus standi* for OA987.

30 Third, even if the PACC Act *were* in force, and even if it *were* unconstitutional as alleged by the Applicants, this would not necessarily suffice for them to have standing to mount a constitutional challenge. To explain this, it is important to set out in some detail the reasoning in *Tan Eng Hong*. First, the Court of Appeal observed that constitutional rights are personal to all citizens. However, the mere holding of a constitutional right is insufficient to found standing to challenge an unconstitutional law. There must, said the Court of Appeal, be a violation of the constitutional right (see *Tan Eng Hong* at [93]). Such violation may be more easily demonstrated where the law specifically targets a group, and an applicant falls within the group.

31 However, whether the very existence of an allegedly unconstitutional law in the statute books suffices to show a violation of constitutional rights "depends on what exactly that law provides" (see *Tan Eng Hong* at [94]). The Court of Appeal in *Tan Eng Hong* took pains to emphasise that the court did not "lay down a general rule that the very existence of an allegedly unconstitutional law in the statute books suffices to demonstrate a violation of an applicant's constitutional rights". Each case must turn on its own facts, and the courts are to remain mindful that lax standing rules could "seriously curtail the efficiency of the Executive in practising good governance" (*Tan Eng Hong* at [109]).

Moreover, the Court of Appeal observed that while "it is conceivable that the very existence of an unconstitutional law in the statute books suffices" to make out a violation of a person's constitutional rights and thus standing, this would be an "extraordinary" and "rare" case, and "no such case has ever been brought to the attention of the courts here (*Tan Eng Hong* at [94] and [106]).

32 By the above, the question is whether this is the extraordinary and rare case which the Court of Appeal had in mind. At the hearing, Mr Masoud asserted that it is, because the PACC Act targets PACPs, and the Applicants are PACPs. In reply, the AG contended that even if this is so, a violation is not *conclusively* shown by the mere fact that an allegedly unconstitutional law appears to target a group. One key factor for consideration is what exactly the law provides, and it is to this that I turn.

33 The impugned provisions are aspects of a new procedure. As observed by the AG at the hearing, by way of contrast, s 377A of the Penal Code, which was also the subject matter in *Tan Eng Hong*, prescribed a criminal offence, and entailed the possible arrest, detention and prosecution of individuals. Being procedural in nature, the impugned provisions do not lay down any substantive law; they do not affect any substantive rights. In the criminal context, the implication of a possible violation arising from a procedural law is completely different from a possible violation of a substantive law. Substantive criminal law may affect the conduct of private citizens by holding would-be violators *in terrorem*, and its effects may thus be felt even in the absence of an actual prosecution (see *Tan Eng Hong* at [110]). However, the same cannot be said of procedural law. While the courts have emphasised that a person should not have to break the law in order to establish standing to challenge an allegedly unconstitutional law that is substantive in nature, where a procedural law is being challenged, similar concerns do not apply. Considering the nature of the

impugned provisions, their mere enactment, in my view, without more, does not suffice to demonstrate a violation of the Applicants' constitutional rights.

34 Accordingly, I do not consider this to be an exceptional and rare case, where the mere existence of the impugned provisions in the statute books suffices to show a violation of constitutional rights.

35 Along the same vein, there is no "real controversy" between the parties for the court to resolve. Preliminarily, while the AG's written and oral submissions appear to have treated this as a threshold requirement distinct from that of standing,[15] from the test endorsed in *Tan Eng Hong*, as laid out above at [24], the question of a real controversy goes towards the ultimate threshold issue of standing. Indeed, at least insofar as constitutional rights are concerned, it would appear that the question of a real controversy is closely related to that of a violation of rights, with both at times being dealt with in the same breath (see *Tan Seng Kee* at [153]).

36 In any event, nothing ultimately turns on this in the present case. Insofar as nothing that has arisen or happened thus far has affected the Applicants' rights, there can be no real controversy in respect of the PACC Act, whether of fact or law. At present, the Applicants are able to make any application they wish before the courts, without having to contend with the PACC Act. It bears remembering that the need for the existence of a real controversy stems from the function of the courts as being to adjudicate on and determine disputes between parties, rather than to give advisory opinions on abstract, hypothetical and/or academic questions (*Tan Eng Hong* at [132]). This element is not satisfied, as the challenge remains theoretical in nature.

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15 RWS, paras 13 and 14.

37 To round off, I note that the AG does not submit on the "real interest" requirement, being the third element to establish *locus standi.* In the context of constitutional rights, much like the real controversy requirement, this is closely intertwined with the question of whether a violation has occurred. As noted above at [25], sufficiency of interest is *prima facie* made out once there is a violation of a constitutional right (*Tan Eng Hong* at [83]). This issue may therefore be dealt with very briefly. In the main, the Applicants rely on the violation of their constitutional rights to establish a "real interest" in bringing the action (see [26] above). As they have failed to show a violation of their constitutional rights, they are also unable to meet the "real interest" requirement.

38 In view of the findings that the Applicants do not meet any of the three requirements for *locus standi* for OS987, there is no reasonable cause of action disclosed. On this ground alone, I would order OA987 to be struck out.

Issue 2: Whether there is a viable claim

39 For completeness, I turn to the second issue, whether the claim is bound to fail. I deal with the contentions in relation to Arts 9 and 12 separately.

Art 9

40 Art 9(1) of the Constitution states:

> No person shall be deprived of his life or personal liberty save in accordance with law.

41 The AG contends that the features contained in the impugned provisions *ie,* that the Court of Appeal considers the reasonable prospect of success of a PACC application in deciding whether to grant PACC permission, and the power to summarily deal with such an application, are familiar features within the legal system, whether in the context of capital cases or otherwise. Relying

on *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 ("*Kho Jabing*") at [49], the AG submits that given that PACPs have reached the very tail end of the criminal process, the principle of finality must be given greater prominence, and that concluded appeals should not be readily susceptible to challenge. It is not difficult to see why a process is put in place to sieve out frivolous post-appeal applications through the grant of permission. It is hopeless for the Applicants to argue that these provisions are inconsistent "with the right to fair trial and access to justice", and therefore infringe Art 9 of the Constitution.[16]

42 In response, the Applicants argue that the fact that there is the test of "a reasonable prospect of success" means that there is an assessment that an application is "more likely to succeed than not". Apart from setting "the bar too high for a leave application concerning capital cases", it is "also a qualitatively different exercise in which the Court has to predict the outcome of an application, as compared to making an assessment of whether a case, on the face of it, is frivolous or unmeritorious".[17] As for the summary process, the Applicants argue that an applicant will not be able to canvass further arguments and make further replies as he would be able to in an oral hearing, even when there may be significant factual or legal issues that remain to be addressed after submissions had been filed.[18]

43 These two features, the Applicants argue, ought to be considered collectively in discerning whether they are consistent with Art 9 of the Constitution.[19] Citing *R v Haevischer* [2023] SCC 11 ("*Haevischer*"), a decision

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16 RWS, paras 20 and 21.

17 AWS, paras 28, 30 and 32.

18 AWS, para 34.

19 AWS, para 36.

of the Canadian Supreme Court, the Applicants contend that in the criminal context, there should be summary dismissal of any application only if it is "manifestly frivolous". This high threshold for summary dismissal best preserves the right to fair trials, while ensuring efficient court proceedings.[20]

44 Having considered the parties' submissions, I agree with the AG that it cannot be said that the impugned provisions contravene Art 9 of the Constitution for the following reasons.

45 First, the right to a fair trial and access to justice cannot be looked at in isolation, but must be considered in light of the part which it plays in the complete judicial process (see *Haw Tua Tau and others v Public Prosecutor* [1981-1982] SLR(R) 133 at [25]). Here, the new procedure implemented by the PACC Act applies not to the trial stage, but to the post-appeal stage. Time and again, our courts have emphasised that concluded appeals should not be readily susceptible to challenge. Even in cases involving the death penalty, the well-established principle of finality is no less important (*Kho Jabing* at [50]). As set out at [5] above, the PACC Act is meant to provide a clear procedure for further applications taken out after appeals have been exhausted, where no such applications would normally be possible. Given that this new procedure governs the very tail end of the criminal process, the principle of finality of proceedings gains prominence. The PACC Act provides clarity as to the procedure for post-appeal applications, while implementing features designed to sift out unmeritorious applications. Viewed in this context, the scheme introduced by the PACC Act cannot be said to be violate Art 9 of the Constitution.

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[20] AWS, paras 38 and 39.

46 Second, the specific features and standards under attack are not novel ones within the legal system. I turn first to the applicable test to determine whether PACC permission should be granted under s 60G(7)(*d*) of the SCJA. As the AG highlights, a preliminary assessment of the merits of an application is required for an application to commence judicial review by requiring an applicant to show that there is an arguable case of reasonable suspicion in favour of the grant of remedies (see O 24 r 5(3)(*b*)(ii) of the ROC). In criminal cases, an appeal's prospect of success is a factor in deciding whether to grant permission for it to be filed out of time (*Adeeb Ahmed Khan s/o Iqbal Ahmed Khan v Public Prosecutor* [2022] 2 SLR 1197 at [17(c)].

47 Insofar as Mr Masoud suggested that "a reasonable prospect of success" standard requires the court to predict the outcome of case without the full facts being put before it, and insofar as Mr Iskander similarly contended that the court is to act based on its "imagination", I strongly disagree. By the new procedure, it is contemplated that an applicant should put forth its best and strongest case in the application. The applicant should not withhold any evidence or arguments so as to reserve them for the later stages, be it at an oral hearing for PACC permission, or the full hearing of an PACC application itself. The court is meant to, and should, have before it all the evidence and arguments upon which an applicant intends to rely when applying for PACC permission, and the court will decide whether PACC permission ought to be granted based on such evidence and arguments as advanced by the applicant. There is no question of any coram proceeding based on "prediction" or "imagination". The argument is flawed.

48 Indeed, Art 9 does not prohibit prescription of tests. While the Applicants may disagree with the formulation ultimately settled on by Parliament, this is a matter rightfully for Parliament to determine. In short, a requirement for an applicant to demonstrate "a reasonable prospect of success"

to obtain permission to bring a PACC application cannot be said to violate Art 9 of the Constitution.

49 I also take the view that the Applicants' reliance on *Haevischer* is misplaced. There, the Canadian Supreme Court dealt with an application for a stay of proceedings for abuse of process, and held generally that an application in a criminal proceeding should only be summarily dismissed if the application is manifestly frivolous. However, it is important to reiterate that the applicable test in s 60G(7)(*d*) relates to whether PACC permission *should be granted* (whether the matter is dealt with in a summary manner or at a hearing). It does not set down any test for the *summary disposal* of the application for PACC permission without an oral hearing. As the AG submitted at the hearing, the Applicants appear to have conflated the two matters.

50 Next, I turn to the summary process to deal with applications for PACC permission set out in s 60G(8) of the SCJA. During the hearing, Mr Iskandar contended that it is objectionable that by s 60G(8) of the SCJA, an applicant may be denied the right to make oral submissions at a hearing. Mr Iskandar contended that this is a departure from the norm, and it is discriminatory against the Applicants. Citing *Newton, David Christopher v Public Prosecutor* [2023] SGHC 266 ("*Newton David Christopher*") at [13], Mr Iskandar argued that it is the common practice and indeed the norm that, even where written submissions have been filed in advance, parties would be afforded the opportunity to make oral submissions. Oral submissions will often be of considerable assistance to the court if the parties take the opportunity to highlight or emphasise key points, or to meaningfully respond to the arguments raised by the opposing party. At the same time, any misunderstandings, misconceptions, doubts or questions in the mind of the judge can be cleared up and resolved.

51 In my view, the comments in *Newton David Christopher* must be understood in context. There, the hearing was fixed for the accused to plead guilty, and written submissions had been filed by both counsel before the hearing where oral submissions were made on sentencing. One issue of concern was whether the first-instance judge had decided the matter based on the written submissions alone, even before oral submissions had been heard. In this connection, the importance of the oral hearing is highlighted (*Newton David Christopher* at [13]). Essentially, *Newton David Christopher* concerns a first instance hearing, and emphasises the importance of considering the oral submissions made at the end of a trial or a plead guilty hearing. These considerations do not apply to post-appeal applications, by which time, as pointed out earlier, an applicant would have exhausted trial and appeal processes (with full hearings accorded to them for those earlier stages).

52 To the contrary, it bears highlighting that in the criminal context, the courts may summarily deal with (i) appeals against conviction and/or sentence (see s 384(1) of the CPC); (ii) applications for permission to make a review application (see s 394H(7) of the CPC); (iii) review applications (see s 394I(10) of the CPC); and (iv) applications for leave to refer a question of law of public interest to the Court of Appeal (see s 397(3B) of the CPC). Indeed, Art 9 does not dictate that a right to a fair hearing must invariably entail the right to be heard at an oral hearing.

53 Likewise, by the new procedure, an applicant is not prevented from presenting his full materials (including evidence and arguments) for the consideration of the Court of Appeal, despite the application for PACC permission coming at the tail end of the criminal process. Indeed, before summarily refusing an application, the Court of Appeal must give proper consideration to the four matters set out in s 60G(7) of the SCJA. If there is new

material adduced by an applicant which could not have been adduced earlier even with reasonable diligence, that would be an important consideration. Even without an oral hearing, there is no doubt that an applicant is accorded a right to be heard.

54 Third, and related to the above, for very much the same reasons, the impugned provisions plainly do not impede access to justice. In fact, as stated above at [5], the PACC Act sets out and clarifies an avenue for PACC applications. If any applicant has a genuine and meritorious claim that has "a reasonable prospect of success", the Court of Appeal is well in the position to deliver the appropriate remedies. Access to justice does not require a criminal system to allow unmeritorious applications brought at the tail end of the criminal process to progress to the fullest extent. This would be at the expense of judicial and other scarce resources. A balance has been struck by the legislature within the new procedure to allow access to justice, while ensuring proper utilisation of judicial resources, and to preserve the integrity of the judicial process. The impugned provisions form two aspects of this new procedure. Given that PACPs making PACC applications have had their convictions and sentences affirmed by the Court of Appeal, there is no basis for the claim that these safeguards on post-appeal applications are "onerous" and "oppressive".

55 Accordingly, I find that any Art 9 challenge is without any chance of success.

Art 12

56 I turn next to Art 12 of the Constitution, the second substantive basis for the Applicants' challenge against the PACC Act. Art 12(1) states:

> All persons are equal before the law and entitled to equal protection of the law.

57 In this regard, the test for whether legislation is consistent with Art 12(1) is the "reasonable classification" test, under which a statutory provision prescribing a differentiating measure will be considered consistent with Art 12(1) only if: (a) the classification prescribed is founded on an intelligible differentia ("the first limb"); and (b) that differentia bears a rational relation to the object sought to be achieved by the provision ("the second limb") (*Tan Seng Kee* [305]).

58 However, as the Court of Appeal noted in *Tan Seng Kee*, there are two approaches to the reasonable classification test, the first being that in *Lim Meng Suang and another v Attorney-General and another appeal and another matter* [2015] 1 SLR 26 ("*Lim Meng Suang*"), which understood the reasonable classification test as serving the "minimal *threshold* function of requiring logic and coherence in the [statutory provision] concerned" [emphasis in original] (*Lim Meng Suang* at [66]). Under the *Lim Meng Suang* approach, a provision will fall foul of the first limb if it is unintelligible, either because it is incapable of being apprehended by the intellect or understanding, or because it is so unreasonable that no reasonable person would ever contemplate the differentia concerned as being functional as an intelligible differentia (*Tan Seng Kee* at [309]–[310]). As for the second limb, the question under the *Lim Meng Suang* approach is whether the differentia bears a "rational relation" to the legislative object of the statutory provision in question. Such a rational relation will more often than not be found, as a perfect relation or complete coincidence between the differentia and legislative object is not required (*Tan Seng Kee* at [311]).

59 The second approach to the reasonable classification test is that in *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 ("*Syed Suhail*").

Under the *Syed Suhail* approach, the inquiry under the first limb is directed towards simply identifying the purported criterion for differential treatment, "so that its legitimacy may then be assessed properly" under the second limb (*Tan Seng Kee* at [314]). Unlike the *Lim Meng Suang* approach, it entails no consideration of the reasonableness (or lack thereof) of the differentia embodied in the statutory provision concerned, *even* in cases where the differentia is extremely unreasonable (*Tan Seng Kee* at [315] and [318]). At the *second* stage of the reasonable classification test, like the *Lim Meng Suang* approach, the *Syed Suhail* approach considers whether the differential treatment is, or whether it bears any rational relation to any conceivable object of the law in question (*Tan Seng Kee* at [318]–[319]). Unlike the *Lim Meng Suang* approach, however, it then considers the *context* in determining how stringently a statutory provision should be scrutinised. While the relationship between the differentia and the object need not be perfect, the court would be averse to any framing of the object of a law which would be tantamount to saying that its object is to introduce differentia which it embodies, as such circular reasoning would render the reasonable classification test purely formalistic and effectively denude Art 12 of real force (*Tan Seng Kee* at [320], [325]–[326]). Moreover, where the impugned decision is one which affects the individual's life and liberty to a grave degree, the court would be more searching in its scrutiny (*Tan Seng Kee* at [325] and [327]).

60 The cumulative effect of these differences is that while the *Lim Meng Suang* approach regards the reasonable classification test as of a "threshold nature" and is only meant to sift out laws which are patently illogical and/or incoherent, the *Syed Suhail* approach contemplates a higher level of scrutiny when evaluating whether a statutory provision satisfies the "reasonable classification" test, particularly if the provision has a significant bearing on an

individual's life and liberty (*Tan Seng Kee* at [328]). The *Syed Suhail* approach, especially the second limb, is therefore more favourable to the Applicants, and given that the Court of Appeal left it open as to which approach ought to be preferred (*Tan Seng Kee* at [329]), it is this approach which I turn to consider in determining whether their case discloses a reasonable cause of action.

61 As noted above at [59], under the *Syed Suhail* approach, the first limb is simply concerned with identifying the purported criterion for the differential treatment in question (*Tan Seng Kee* at [318]). Here, the Applicants argue that the PACC Act "singles out and prescribes further restrictions on PACPs filing applications above and over the existing law that govern post-appeal applications before the PACC Act was enacted, and that apply generally to all post-appeal applications". The differentia which the Applicants identify therefore appears to be that of prisoners awaiting capital punishment, as opposed to all other prisoners, amongst those wishing to take out post-appeal applications.[21] In this regard, there is no real difference between the parties. Even if the more stringent first limb of the *Lim Meng Suang* approach were to be applied, for very much the same reasons set out at [63] below about PACPs, I do not think this differentia is unintelligible, either because it is incapable of being apprehended by the intellect or understanding, or because it is so unreasonable no reasonable person would ever contemplate the differentia concerned as being functional as an intelligible differentia.

62 As for the second limb of the reasonable classification test under the *Syed Suhail* approach, the AG's position is that the legislative object of the PACC Act is to prevent abuse of process by PACPs when making PACC

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[21] AWS, para 45.

applications.[22] This being the case, the PACC Act is consistent with Art 12(1) as there is not only a rational relation but a "complete coincidence" with the differentia of "PACPs seeking to make a PACC application".[23] In response, the Applicants argue that the AG's framing of the object of the PACC Act is tantamount to saying that the object of that law is to introduce the differentia that it embodies.[24] They argue that the legislative object is more appropriately framed as the prevention of abuse of the court's processes, generally.[25] The PACC Act is therefore "under-inclusive by virtue of singling out PACPs", and such singling out "cannot be reasonably justified in relation to other post-appeal cases".[26]

63 In my view, it is clear that the object of the PACC Act, whether as framed by the AG or by the legislature, is not tantamount to being to introduce the very differentia it embodies. Given the grave and final nature of the sentences which PACPs face, they are a class of prisoners who have an incentive to file last minute applications to re-litigate matters which have already been decided, aimed at delaying or frustrating the carrying out of their scheduled sentences. Also, there have been recent instances of them doing so, as compared to other prisoners facing non-capital sentences. Far from being to introduce the differentia for the sake of it, it is clear from the Explanatory Statement to the Bill, as well as the second reading by SPS Rahayu (see [5]-[6] above), that there have been such last-minute applications by PACPs in recent years, and that the purpose of the PACC Act is to address the matter. Be that as it may, taking the

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22 RWS, para 39.

23 RWS, paras 40 and 41.

24 AWS, para 44.

25 AWS, para 45.

26 AWS, para 45.

Applicants' case at the highest, even if the legislative object were to prevent abuse of process *generally*, it need not enjoy a "perfect relation" or "complete coincidence" with the differentia in question to pass muster under the reasonable classification test. The fact that PACPs have been prone to file the applications with which the PACC Act is concerned, suffices to render the relationship more than capable of withstanding scrutiny (see *Tan Seng Kee* at [325]).

64 Accordingly, the Art 12 challenge has no chance of success.

Conclusion

65 For the foregoing reasons, I find that there is no basis to sustain the constitutional challenge against the impugned provisions which are not in force. The Applicants have no *locus standi* to do so. Further, the claim is not viable, and has no chance of success. As there is no reasonable cause of action disclosed by OA987, I strike it out under O 9 r 16(1)(*a*) of the ROC.

Hoo Sheau Peng
Judge of the High Court

The applicants in person;
Chew Shi Jun James, J Jayaletchmi and Lim Tze Etsuko (Attorney-General's Chambers) for the respondent.