IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 49

Court of Appeal / Civil Appeal No 16 of 2024

Between

Theodoros Kassimatis KC

… *Appellant*

And

(1) Attorney-General of the Republic of Singapore
(2) Law Society of Singapore

… *Respondents*

In the matter of Originating Application No 696 of 2023

In the matter of Section 15 of the Legal Profession Act 1966

And

In the matter of Court of Appeal / Civil Appeal No 2 of 2023

And

In the matter of Court of Appeal / Summons No 16 of 2023

And

In the matter of an application by Theodoros Kassimatis, King's Counsel of England

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Between

Theodoros Kassimatis KC

… *Applicant*

And

(1) Attorney-General of the Republic of Singapore
(2) Law Society of Singapore

… *Respondents*

Court of Appeal / Civil Appeal No 17 of 2024

Between

Edward Fitzgerald KC

… *Appellant*

And

(1) Attorney-General of the Republic of Singapore
(2) Law Society of Singapore

… *Respondents*

In the matter of Originating Application No 811 of 2023

In the matter of Section 15 of the Legal Profession Act 1966

And

In the matter of Court of Appeal / Civil Appeal No 2 of 2023

And

In the matter of Court of Appeal / Summons No 16 of 2023

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And

In the matter of an application by Edward Fitzgerald, King's Counsel of England

Between

Edward Fitzgerald KC

… *Applicant*

And

(1) Attorney-General of the Republic of Singapore
(2) Law Society of Singapore

… *Respondents*

JUDGMENT

[Legal Profession — Admission — *Ad hoc*]

Version No 1: 08 Nov 2024 (12:03 hrs)

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Kassimatis, Theodoros KC
v
Attorney-General and another and another appeal

[2024] SGCA 49

Court of Appeal — Civil Appeals Nos 16 and 17 of 2024
Sundaresh Menon CJ, Belinda Ang Saw Ean JCA, Judith Prakash SJ
18 September 2024, 9 October 2024

8 November 2024 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 Mr Theodoros Kassimatis KC ("Mr Kassimatis KC") and Mr Edward Fitzgerald KC ("Mr Fitzgerald KC") (collectively, the "Appellants"), who are both King's Counsel, have applied for *ad hoc* admission to practice as advocates and solicitors of the Supreme Court of Singapore under s 15 of the Legal Profession Act 1966 (2020 Rev Ed) (the "LPA"), for the purposes of representing Mr Jumaat bin Mohamed Sayed ("Jumaat"), Mr Saminathan Selvaraju ("Saminathan"), Mr Datchinamurthy a/l Kataiah ("Datchinamurthy"), and Mr Lingkesvaran Rajendaren ("Lingkesvaran") (collectively, the "Claimants") in CA/CA 2/2023 ("CA 2") and CA/SUM 16/2023 ("SUM 16"). The Claimants' case in CA 2 is that ss 18(1) and 18(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (the "MDA") are incompatible with the presumption of innocence and the Constitution of the Republic of Singapore

(2020 Rev Ed) (the "Constitution"). The Attorney-General (the "AG") and the Law Society of Singapore (the "Law Society") (collectively, the "Respondents") object to the Appellants' admission.

2 In *Kassimatis, Theodoros KC v Attorney-General and another and another matter* [2024] SGHC 24 ("Judgment (HC)"), the General Division of the High Court dismissed the Appellants' applications. The Appellants appealed against this decision.

3 On 25 September 2024, we held in *Kassimatis, Theodoros KC v Attorney-General and another and another appeal* [2024] SGCA 36 ("Judgment (CA) (Preliminary Objection)") that the Appellants could not themselves address the court on the merits of their appeals. We further held that local counsel could nevertheless be engaged to address the court on the other issues in the appeals. Alternatively, the Claimants, who were the real parties in interest, could address us. As it transpired, the Claimants addressed us in person during the oral hearing.

4 This appeal concerns the substantive issue of whether the Appellants should be granted *ad hoc* admission under s 15 of the LPA to represent the Claimants.

Facts

5 The facts have been canvassed in detail in the Judgment (HC) at [6]–[18], and for brevity, we only highlight the material portions necessary to understand the factual backdrop to these appeals.

6 The Claimants were each convicted of an offence under the MDA and sentenced to suffer the death penalty. Their appeals against their convictions

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were also dismissed. The Claimants filed HC/OA 480/2022 ("OA 480") for permission to commence judicial review proceedings, and sought:

> a. A Declaration that the Presumptions contained in Section 18(1) and 18(2) of the [MDA] which were imposed upon the Claimants should be read down and given effect as imposing an evidential burden only in Compliance with Articles 9(1) and 12(1) of the Constitution and the Common law Presumption of innocence.
>
> b. Alternatively, a Declaration that the Presumption upon Presumption contained in Section 18(2) read with Section 18(1) of the MDA which were imposed upon the Claimants are unconstitution [*sic*] for violating Articles 9(1) and 12(1) of the Constitution.
>
> c. A Prohibitory order against the execution of the death sentences upon the Claimants.

7 The General Division of the High Court dismissed the application in *Jumaat bin Mohamed Sayed and others v Attorney-General* [2022] SGHC 291 ("*Jumaat (OA 480)*").

8 The Claimants then filed CA 2 to appeal against *Jumaat (OA 480)*, but the appeal was deemed withdrawn on 14 March 2023 because the Claimants failed to file the requisite documents for the appeal.

9 On 31 March 2023, the Claimants filed CA/SUM 8/2023 ("SUM 8"), seeking that CA 2 be reinstated and that an extension of time be granted for them to file the requisite documents. SUM 8 was dismissed by a single judge sitting in the Court of Appeal on 25 May 2023 in *Jumaat bin Mohamed Sayed and others v Attorney-General* [2023] 1 SLR 1437 ("*Jumaat (SUM 8)*"). The Claimants subsequently filed SUM 16 for the full Court of Appeal to set aside the decision in *Jumaat (SUM 8)* and for CA 2 to be reinstated.

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10 OA 696 was filed by Mr Kassimatis KC to act for Jumaat and Saminathan, while OA 811 was filed by Mr Fitzgerald KC to act for Datchinamurthy and Lingkesvaran, in CA 2 and SUM 16.

Overview of the law on *ad hoc* admission

11 We first set out the law governing *ad hoc* admissions under s 15 of the LPA. As set out in the Judgment (HC) at [40]–[45], there are three pertinent statutory provisions that govern the *ad hoc* admission of foreign counsel: s 15 of the LPA, r 32(1) of the Legal Profession (Admission) Rules 2011, and para 3 of the Legal Profession (Ad Hoc Admissions) Notification 2012.

12 The overarching provision is s 15 of the LPA, which provides:

> **Ad hoc admissions**
>
> **15.**—(1) Despite anything to the contrary in this Act, the court may, for the purpose of any one case, admit to practise as an advocate and solicitor any person who —
>
> (*a*) holds —
>
> (i) His Majesty's Patent as King's Counsel; or
>
> (ii) any appointment of equivalent distinction of any jurisdiction;
>
> (*b*) does not ordinarily reside in Singapore or Malaysia, but has come or intends to come to Singapore for the purpose of appearing in the case; and
>
> (*c*) has special qualifications or experience for the purpose of the case.
>
> (2) The court must not admit a person under this section in any case involving any area of legal practice prescribed under section 10 for the purposes of this subsection, unless the court is satisfied that there is a special reason to do so.
>
> (3) Any person who applies to be admitted under this section must do so by originating application supported by an affidavit of the applicant, or of the advocate and solicitor instructing the applicant, stating the names of the parties and brief particulars of the case in which the applicant intends to appear.

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> …
>
> (6A) The Chief Justice may, after consulting the Supreme Court Judges, by notification in the *Gazette*, specify the matters that the court may consider when deciding whether to admit a person under this section.
>
> …

13 The other two provisions that we have referred to provide further guidance to a court faced with an application under s 15 of the LPA. Under r 32(1) of the Legal Profession (Admission) Rules 2011, constitutional and administrative law is a prescribed area of law for the purposes of s 15(2) of the LPA. The other prescribed areas are criminal law and family law. There is no dispute that the matters for which the Appellants seek admission fall within one or more prescribed areas of law, and hence, it must be shown that their admission would be justified by a special reason. Further, under para 3 of the Legal Profession (Ad Hoc Admissions) Notification 2012, the matters that the court may consider pursuant to s 15(6A) of the LPA are:

(a) the nature of the factual and legal issues involved in the case;

(b) the necessity for the services of a foreign senior counsel;

(c) the availability of any Senior Counsel or other advocate and solicitor with appropriate experience; and

(d) whether, having regard to the circumstances of the case, it is reasonable to admit a foreign senior counsel for the purpose of the case.

14 In the assessment of whether foreign senior counsel should be admitted for the purposes of a given case under s 15 of the LPA, the appropriate legal framework to be applied is as set out in the paragraphs that follow (see *Re Beloff Michael Jacob QC* [2014] 3 SLR 424 ("*Re Beloff*") at [50]–[65]).

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15 First, the court considers whether the foreign counsel satisfies the requirements under s 15(1) of the LPA (the "s 15(1) Requirements Stage").

16 Second, the court considers whether the case that the foreign counsel is seeking admission for involves any area of legal practice prescribed under r 32(1) of the Legal Profession (Admission) Rules 2011. If so, then the court must be satisfied that there is special reason to admit the foreign counsel (the "Special Reason Stage"). The first two stages are mandatory and foreign counsel must satisfy all of the requirements in order to be admitted; if any of the requirements are not met, the application for *ad hoc* admission will fail: see Judgment (HC) at [43]–[44], citing *Re Beloff* at [54].

17 Third, if the mandatory requirements in the first two stages are met, the court will exercise its discretion and determine whether the foreign counsel should be admitted under s 15 of the LPA, having regard to the matters set out in s 15(6A) of the LPA read with para 3 of the Legal Profession (Ad Hoc Admissions) Notification 2012 (the "Notification Matters Stage"). The discretion is to be exercised in accordance with the broad principle that foreign counsel should be admitted only on the basis of "need": see Judgment (HC) at [45], citing *Re Beloff* at [42].

Decision below

18 In the court below, the Judge dismissed the Appellants' applications in OA 696 and OA 811. First, the High Court noted that it was incumbent on the Claimants to show that the Appellants have experience that would aid the Claimants to establish that they are entitled to proceed with a judicial review application to begin with. This is because the threshold issue in OA 480 was whether the Claimants had chosen the wrong route to pursue the reliefs they

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sought, by proceeding with a judicial review application despite the provisions in the Criminal Procedure Code 2010 (2020 Rev Ed) (the "CPC"). While Mr Fitzgerald KC has considerable experience in cases involving judicial review, the Judge thought that the requirement of special qualifications or experience under s 15(1)(*c*) of the LPA was not satisfied in respect of Mr Kassimatis KC: see Judgment (HC) at [47]–[63].

19 Second, there was no special reason to justify the admission of the Appellants, having regard to the requirements of s 15(2) of the LPA. The Appellants contended below (and continue to maintain) that CA 2, which deals with whether the presumptions in ss 18(1) and 18(2) of the MDA are compatible with the Constitution, raises issues of public importance. However, the Judge noted that the mere fact that CA 2 and SUM 16 may raise issues of public importance would not satisfy the special reason requirement. It was also submitted that the Claimants were unable to find local lawyers to represent them. However, the evidence revealed that two local lawyers, Mr Harpreet Singh Nehal SC ("Mr Nehal SC") and Mr Damien Chng ("Mr Chng"), declined to act because they thought the intended application lacked merit. There was also no suggestion that local lawyers did not have adequate knowledge or experience. Further and, in our view, significantly, the Claimants did not elaborate how their challenge on the law would lead to a successful outcome on the facts. In any case, the Judge noted that the Claimants were able to access substantive legal assistance even without being permitted to engage the Appellants for their formal representation: see Judgment (HC) at [64]–[78].

20 Third, the Judge considered it unnecessary to consider the Notification Matters Stage because there was no special reason to admit the Appellants: see Judgment (HC) at [79]–[82].

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Parties' cases on appeal

21 The Appellants appeal against the whole of the Judgment on the following grounds. First, it is submitted that the Judge erred in permitting the opinions of Mr Nehal SC and Mr Chng on the merits of one of the issues in the substantive appeal to assume disproportionate importance in the court's decision. Second, it is said that the Judge erred in taking into account an irrelevant consideration, namely that it appeared that the Claimants in the underlying application were getting some legal assistance in the preparation of written submissions. Granting *ad hoc* admission would not only allow the Appellants to present their arguments in court but would also permit the Appellants to engage with the Claimants as their counsel, and to confer and seek instructions. Without that, the Appellants would be restricted in their ability to speak with the Claimants. Third, in OA 811, the Judge's decision to refuse Mr Fitzgerald KC's application is said to be legally unreasonable because he met all the requirements under the s 15(1) Requirements Stage. CA 2 and SUM 16 are of a level of complexity that make it necessary for the Claimants to be represented by counsel to present their arguments effectively. Leaving the Claimants unrepresented would be so unfairly prejudicial, as to be an affront to justice.

22 The AG contends that these appeals should be dismissed. The AG first argues that the Appellants did not raise any arguments against the finding that Mr Kassimatis KC lacked special qualifications or experience, and had not explained how they would overcome the legal hurdles that stand in the way of the Claimants obtaining the relief they seek in CA 2 and SUM 16. Second, the Judge did not err in considering the reasons behind the unwillingness of local lawyers to take up the Claimants' case, because the merits of the underlying cause is a relevant consideration. Third, the Judge did not err in considering the

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Claimants' ability to access substantive legal assistance. The Claimants were able to contact and liaise with counsel and they cannot be said to be prejudiced simply because the Appellants are not permitted to represent them. Fourth, the threshold for appellate intervention is not "reasonableness" but error. Fifth, there is no special reason to admit the Appellants. The Appellants seemed to have introduced a new reason in the appeals, which is that SUM 16 concerns a novel issue of whether a single judge sitting in the Court of Appeal had the power to dismiss the Claimants' applications in SUM 8. This cannot constitute a special reason because what the Appellants claim to be a novel issue is merely a simple matter of statutory interpretation – a single judge is empowered to do so under s 54(1) read with the Seventh Schedule of the Supreme Court of Judicature Act 1969 (2020 Rev Ed).

23 The Law Society likewise argues that these appeals should be dismissed. First, it highlights that an appellate court will only interfere with the lower court's exercise of discretion in limited circumstances and there is nothing to suggest that there is any basis at all to do so in this case. Second, there is no need to admit the Appellants because there is ultimately no merit in CA 2 and SUM 16. The proper procedure for any such application to be pursued would be by way of criminal review under an application under s 394H of the CPC and that is subject to very strict requirements with narrow grounds on which relief could be founded. The issues in the underlying cause are neither novel nor complex. Third, the Appellants have not demonstrated any special reason to justify application for *ad hoc* admission, and the Judge had taken into account all matters that ought to have been taken into account. Fourth, the Claimants did not approach local lawyers in respect of all the material issues that needed to be addressed raised in CA 2 and SUM 16. There were several other preliminary matters that needed to be addressed first, such as whether the Claimants are

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entitled to bring a judicial review application under s 394H of the CPC to mount a challenge against their convictions. The Claimants failed to show that they had approached local lawyers on such points.

Issues

24 As a preliminary matter, the Appellants suggest that if the Judge was correct that they could not address the court, that would mark the end of Mr Kassimatis KC's appeal. The Appellants explain as follows in their joint reply submissions dated 18 September 2024 at para 6.1:

> At the outset of their submissions, the First Respondent complains that the Appellants have not made any arguments about the judge's finding that Mr Kassimatis did not possess the necessary qualifications and experience to be admitted to represent the Claimants and, therefore, his appeal should be dismissed. The simple explanation for why there are no arguments is that the judge's finding on this issue is not appealed. Since the preliminary issue is appealed, Mr Kassimatis is a party to these proceedings. If the Appellants are successful on the preliminary issue, then the matter would have to be referred back to the High Court, because both Appellants were denied the opportunity of addressing the Court on their substantive applications. In such circumstances, Mr Kassimatis would be able to reassure the Court on any concerns about his qualifications and experience that it might have. *However, if the judge was correct in his conclusion that the Appellants could not address the Court, Mr Kassimatis' appeal ends there.*
>
> [emphasis in original omitted; emphasis added in italics]

25 We earlier ruled that the Appellants could not address this court in these appeals: see Judgment (CA) (Preliminary Objection) at [37]. Based on the Appellants' submissions, this means that Mr Kassimatis KC's appeal had come to an end. During the oral hearing, the Claimants also appeared to confirm this. Nevertheless, we proceed to consider the appeals of both King's Counsel in respect of their respective applications for *ad hoc* admission in *both* CA 16 and CA 17.

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26 The key issue for determination is whether the Appellants have satisfied the requirements to be granted *ad hoc* admission. In our judgment, the dispositive hurdle that the Appellants face is in the Special Reason Stage, and our analysis will primarily focus on this stage. As will be evident, we do not base our decision on the s 15(1) Requirements Stage, and we leave any further legal analysis on the matters relevant to that stage to be considered in a future matter where it is necessary to do so.

Special Reason Stage

Historical development of the legislation governing the Special Reason Stage

27 The historical development of the legislation governing the Special Reason Stage was canvassed in detail by the High Court in *Re Caplan Jonathan Michael QC* [2013] 3 SLR 66 at [36]–[45] ("*Re Caplan 2013*") (see also, *Re Andrews Geraldine Mary QC* [2013] 1 SLR 872 at [20]–[32]). Briefly, the Legal Profession Act 1966 (Act 57 of 1966) provided that foreign counsel may only be admitted, "*for one or more special reasons* and for the purposes of any one case" [emphasis added]. The *ad hoc* admission regime was then amended in 1970 pursuant to the Legal Profession (Amendment) Act 1970 (Act 16 of 1970), when the phrase "for one or more special reasons" was deleted. However, the admission regime was revised again after the Legal Profession (Amendment) Act 1991 (Act 10 of 1991), pursuant to which foreign counsel could only be admitted, "for the purpose of any one case *where the court is satisfied that it is of sufficient difficulty and complexity*" [emphasis added].

28 In 1997, the Legal Profession (Amendment) Act 1996 (Act 40 of 1996) came into effect, which led to a divergence between the *ad hoc* admission of foreign counsel in criminal cases and civil cases. For criminal cases, there was

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now an additional requirement that the court was not to admit foreign counsel in any criminal case unless it was satisfied that there was a special reason to do so. The reason behind this, as explained by then-Minister for Law, Prof S Jayakumar during the Second Reading (see *Singapore Parliamentary Debates*, *Official Report* (10 October 1996) vol 66 at cols 633–634 and 643–646), was that the Criminal Bar had grown in terms of numbers, advocacy skills, experience and expertise, and there was no shortage of criminal lawyers in the local Bar with the ability to undertake criminal cases without the need to rely on Queen's Counsel. Further, Singapore's criminal law and process, which are based on Indian law, are quite different from English criminal law and process.

29 The position for *ad hoc* admission of foreign counsel remained the same until further amendments were made pursuant to the Legal Profession (Amendment) Act 2012 (Act 3 of 2012) and the Legal Profession (Admission) (Amendment) Rules 2012. These two pieces of legislation amended the *ad hoc* admission regime in two important aspects. First, the requirement that the case be of "sufficient difficulty and complexity" before foreign counsel could be admitted (see [27] above) was removed. Second, the cases to which the "special reason" qualification applied was extended beyond criminal cases to two other areas of law, family law and constitutional and administrative law. The Minister for Law, Mr K Shanmugam explained during the Second Reading that it was intended that the legal services sector be liberalised to some degree, but only for commercial cases, and not with respect to the three restricted areas of law: see *Singapore Parliamentary Debates*, *Official Report* (14 February 2012) vol 88.

Case law

30 Having set out the historical development of the legislation governing the Special Reason Stage, we turn to consider the cases that have delved into

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the interpretation and application of the term "special reason" in the context of applications for *ad hoc* admission by foreign counsel.

31 An early case that considered the requirement of "special reason" in the context of *ad hoc* admission is the decision of the High Court in *Re Caplan Jonathan Michael QC* [1997] 3 SLR(R) 404 ("*Re Caplan 1997*"). There, the applicant applied under the Legal Profession Act (Cap 161, 1994 Rev Ed) for admission to appear in an appeal for a Japanese national who had been convicted of abetting another in fraudulently using a forged document. Yong Pung How CJ held that there was no special reason to admit the Queen's Counsel, with one of the reasons being that this was "a fairly standard sort of cheating case": see *Re Caplan 1997* at [23]. Yong CJ also held that examples where there may be a "special reason" to admit foreign counsel include criminal cases that involve important constitutional law issues, or where the verdict holds significant repercussions not just for the individual accused but for the way in which an entire section or number of the population might order their daily lives or conduct their business activities: see *Re Caplan 1997* at [13]–[16].

32 In *Re Seed Nigel John QC* [2003] 3 SLR(R) 407 ("*Re Seed*"), the applicant sought *ad hoc* admission under s 21 of the Legal Profession Act (Cap 161, 2001 Rev Ed) to appear on behalf of a Roman Catholic priest who was charged with criminal breach of trust under the Penal Code (Cap 224, 1985 Rev Ed). The applicant argued that the criminal case was complex and the priest's defence counsel had to have an understanding of ecclesiastical practice and the Code of Canon Law 1983 promulgated by the Vatican. The High Court held that there was no special reason to admit the Queen's Counsel. Tay Yong Kwang J (as he then was) observed that there would be no problem for local counsel to understand the precepts of canon law, especially with the assistance of experts: see *Re Seed* at [28] and [31]. Further, while the criminal trial would

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attract much attention, and the integrity of the priest would be tested publicly, these factors did not warrant the admission of a Queen's Counsel. There was also no evidence that priests generally were in any doubt or confusion as to what they could or could not do with church funds, or that the case would have serious repercussions beyond its immediate facts: see *Re Seed* at [33].

33 In *Re Lasry Lex QC* [2004] 1 SLR(R) 68 ("*Re Lasry*"), the applicant sought *ad hoc* admission under s 21 of the Legal Profession Act (Cap 161, 2001 Rev Ed) to appear on behalf of the accused, who was charged with a capital offence under the Misuse of Drugs Act (Cap 185, 2001 Rev Ed). The applicant first applied to the High Court for *ad hoc* admission to represent the accused at trial, but this was dismissed by Tay Yong Kwang J (as he then was): see *Re Lasry* at [1]. The applicant then made another application to Choo Han Teck J in the High Court, seeking leave to be admitted for the purposes of arguing an application for the trial to be permanently stayed on the basis that the punishment, should the accused be found guilty, would be death, and that punishment was unconstitutional. The applicant referred to *Re Caplan 1997* and argued that there were "special reasons" to admit him because there was a constitutional point concerning the mandatory nature of the death penalty: see *Re Lasry* at [2]. Choo J first dismissed the application on the basis that the matter was *res judicata*; while the applicant was entitled to appeal the decision of Tay J, he could not make a second application for *ad hoc* admission before another judge: see *Re Lasry* at [3]. However, the court went further and held that there was in any event no special reason to admit the Queen's Counsel. In particular, Choo J observed that the case "does not appear to be unusually complex", and that even if the question raised was a novel one, "novelty alone is hardly a justifiable reason for admission": see *Re Lasry* at [4].

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34 The three cases (*Re Caplan 1997*, *Re Seed* and *Re Lasry*) were decided before the amendments to the Legal Profession Act (Cap 161, 2009 Rev Ed) in 2012, and the wide-ranging nature of these amendments means that those cases are likely to be of limited assistance in the context of the current regime for *ad hoc* admission of foreign counsel: see *Re Caplan 2013* at [53]. In particular, the first example provided by Yong CJ in *Re Caplan 1997* (see [31] above) is unlikely to be of any assistance today because it would lead to the odd outcome that if a case involving criminal law happened to raise a constitutional or administrative law issue, it would likely satisfy the "special reason" requirement, while a similar case that raised the same or similar issues, but arose outside a criminal law context, may not: see *Re Caplan 2013* at [53]. The short point is that *Re Caplan 1997* was decided at a time when there was no requirement for special reason to be shown in applications for *ad hoc* admission in respect of cases involving constitutional law. As noted above at [29], this changed in 2012, after which, such matters too became subject to this requirement.

35 After the amendments to the *ad hoc* admission regime in 2012, the question of what amounts to a "special reason" was considered in *Re Caplan 2013*. There, an accused person was charged with six charges of criminal breach of trust and four charges of falsification of accounts. For various reasons, two Senior Counsel who had previously been engaged by the accused person were discharged. It was also claimed that other Senior Counsel had been approached unsuccessfully and, in the circumstances, an application was made seeking the applicant's *ad hoc* admission to represent the accused person. The High Court concluded that there was no special reason to admit the Queen's Counsel, and rejected the submission that the fact the case was a matter of public interest would suffice to establish a special reason: see *Re Caplan 2013* at [55] and [75].

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36 In *Re Lord Goldsmith Peter Henry PC QC* [2013] 4 SLR 921 ("*Re Lord Goldsmith*"), two persons sought declarations that s 377A of the Penal Code (Cap 224, 2008 Rev Ed) was unconstitutional. Their application failed in the High Court, and they appealed against that decision. They then sought the *ad hoc* admission of Queen's Counsel to argue the appeal. The High Court dismissed the application for *ad hoc* admission and found that there was no special reason to justify the admission of the Queen's Counsel. V K Rajah JA held that even though the application was likely to have wider implications beyond the immediate facts of the case, this was likely to be true of almost all matters concerning issues of constitutional law. Further, the issues in the case were not of such a peculiarly complex nature that they presented a case that was out of the ordinary from a legal perspective: see *Re Lord Goldsmith* at [63]–[64].

37 After *Re Lord Goldsmith*, the Special Reason Stage was next considered in some detail by the High Court in *Re Fordham, Michael QC* [2015] 1 SLR 272 ("*Re Fordham*"). In *Re Fordham*, a complaint was made to the Law Society against two lawyers, alleging that they were guilty of professional misconduct in seeking grossly excessive party-and-party costs. A Review Committee dismissed the complaint. The complainant subsequently sought a written opinion from a Queen's Counsel, who identified possible grounds for quashing the Committee's decision based on alleged errors of law. The complainant then sought leave to commence judicial review proceedings against the Committee's decision and sought the admission of the Queen's Counsel to represent the complainant. Steven Chong J (as he then was) dismissed the application on the basis that the Queen's Counsel had no special qualifications or experience for the purpose of the case: see *Re Fordham* at [60]. In *obiter*, the court commented that there was no special reason to admit the Queen's Counsel on the basis that

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there was nothing particularly difficult or complex about the issues that would potentially arise in the judicial review proceedings: see *Re Fordham* at [84]. The foreign counsel could also provide substantial input by assisting in crafting and/or drafting written submissions which could be ventilated orally in court by competent local counsel: see *Re Fordham* at [86]. Given that the application did not attract complex or difficult issues, the pool of available local counsel would be substantial, and the "special reason" requirement was not satisfied: see *Re Fordham* at [87] and [89].

38 This court in 2014 also weighed in on the Special Reason Stage in *Re Beloff*, noting that the areas of law which require a "special reason" to be shown before foreign counsel may be admitted are all areas with a "critical domestic content", which must be developed with particular regard to the social, political and economic context of our society. Thus, it would *presumptively* be the case that in these areas, the court would be best assisted by local counsel, save where special reasons, over and above those applicable in other cases, are shown to justify the admission of foreign counsel: see *Re Beloff* at [49]. However, because the matter did not involve the ring-fenced areas of law under r 32(1) of the Legal Profession (Admission) Rules 2011, and it was not argued by parties what a "special reason" would entail, we did not go further to elaborate on what would satisfy the Special Reason Stage: see *Re Beloff* at [50].

Analysis

39 A common theme running through the cases is that the term "special reason" is one that should be assessed on a case-by-case basis, and the cases have therefore not provided an exhaustive definition of this requirement: see *Re Lord Goldsmith* at [46]–[48] and *Re Fordham* at [68]–[69]. As the High Court observed in *Re Caplan 2013* at [51], the term "special reason" is an

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"etymological chameleon" that takes colour from its context, and the interpretation of this phrase would vary greatly between different statutes due to their different contexts.

40 While we broadly agree that what amounts to a "special reason" may be highly fact-specific and that it may be inappropriate to be unduly prescriptive as to what would meet this requirement, we think that it is appropriate to highlight three pertinent points in relation to the Special Reason Stage.

41 First, when determining whether there is a "special reason" to admit foreign counsel, the factors that the court considers should not be the *same factors* that are referred to in the other two stages (namely the s 15(1) Requirements Stage and the Notification Matters Stage). In our view, this is what Rajah JA had in mind in *Re Caplan 2013* at [49] and *Re Lord Goldsmith* at [41] when he considered an "overlap" between the Special Reason Stage and the Notification Matters Stage. In *Re Lord Goldsmith*, Rajah JA went on to hold that "[whilst] there may be some degree of overlap, it was clear to me then, and still is now, that the requirement of a 'special reason' must present some criterion over and above the … factors [in the Notification Matters Stage]. Otherwise, the word 'special' would be emptied of meaning": see *Re Lord Goldsmith* at [41]. We agree with this.

42 We add that this view is entirely sensible because each of the three stages deals with different considerations (see [15]–[17] above). Some impose mandatory considerations, while others affect the exercise of discretion. Some apply to *all* matters while others apply only to *certain* matters. Furthermore, each stage is concerned with somewhat different issues. The first stage is primarily concerned with the skills, expertise and qualifications of the applicant; the second with further restricting the admission of such counsel in certain areas

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of law of a quintessentially local nature; and the third with other considerations such as the complexity of the matter or the availability of local counsel. We therefore think it is appropriate that each be addressed separately. It follows that to demonstrate "special reason" an applicant would have to show something that is independent of the matters to be considered in the s 15(1) Requirements Stage and in the Notification Matters Stage. As to what precisely this might entail, this is developed at [43]–[53] below.

43 We note that the High Court in *Re Fordham* appeared to have applied the *factors* that are to be considered in the Notification Matters Stage, at the Special Reason Stage: see *Re Fordham* at [73]–[89]. We respectfully disagree with this approach for the reasons we have outlined in the previous paragraph. We also note that the court's analysis in *Re Fordham* in relation to the Special Reason Stage was made *in obiter* (since the applicant in *Re Fordham was* not able to satisfy the s 15(1) Requirements Stage and the case was decided on that basis: see *Re Fordham* at [66]).

44 Second, we agree with the Judge below that the fact that a case raises issues of public importance would not, without more, satisfy the special reason requirement: see Judgment (HC) at [65]. We echo the observations made in *Re Lord Goldsmith* at [47]:

> Conversely, not all cases of a macro nature may be enough to qualify as a "special reason". This applies *a fortiori* in constitutional matters. It is possible to argue, in criminal cases, that the only person affected is the accused, because it is the accused's life and liberty at stake, and it is the exact circumstances of his act which will determine the appropriate conviction and sentence. In almost all constitutional matters, however, the challenge mounted will be a challenge to the law at large as the law will have been drafted in a general manner and targeted either at the population at large or at a section of the population. If a "special reason" could be made out simply because it held significant repercussions beyond the individual

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> concerned, then almost invariably every constitutional case would necessarily engage a "special reason". This would wholly defeat Parliament's aim in adding the area of constitutional and administrative law to the list of restricted areas. As I have already observed, the statutory framework necessitates that a more restrictive approach should be taken towards any of the three areas named in s 32(1) of the Admission Rules. A "special reason" must thus be a reason that is unique to the circumstances of that case rather than one which is inherent in the nature of all constitutional cases. Otherwise, the "special reason" requirement would not *restrict* the *ad hoc* admission of foreign senior counsel in constitutional and administrative cases, but would *expand* the scope for such admission.
>
> [emphasis in original in italics]

45 Third, the mere fact that a question of law is *complex* will not satisfy the Special Reason Stage. If framed appropriately, most, if not, all, constitutional and administrative law questions will have significant complexity to them. Given that Parliament intended to ringfence areas of law with a critical domestic content, it seems contrary to this intention if those areas of law can satisfy the Special Reason Stage by reason of their inherent complexity. In *Re Beloff*, this court also recognised that complexity should not be the focus at the Special Reason Stage after the legislative amendments to the LPA in 2012: see *Re Beloff* at [44]. This, in fact, accords with what we have said at [41]–[42] above.

46 In our judgment, it is pertinent to emphasise a point we have alluded to at [38] above, and to recognise that the need for special reason to be shown arises in respect of areas of law that have a very significant domestic content. Presumptively, in those cases, local counsel would be best placed to assist the court. In our judgment, and following from this, at least in cases like the present, where a foreign counsel seeks *ad hoc* admission to argue a point of law on which there has already been *extensive litigation and case law*, and *where the merits of the underlying cause have already been ventilated*, we think that *materiality* will be a key consideration in determining whether special reason can be shown.

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This would typically require that some explanation be offered of what it is that has not been raised previously, that suggests that the admission of the foreign counsel is likely to lead to a line of argument not previously canvassed, that suggests that the state of the law as it has developed is wrong in some significant way, ***and*** that points to how this may reasonably have a bearing on the outcome of the matter for which admission is sought. We explain this in further detail below.

47 It is undisputed that the case that the Appellants are seeking admission for involves constitutional law, which is one of the areas of law that requires "special reason" for their admission. The Appellants say that they seek admission to argue in the Claimants' appeal in CA 2 that ss 18(1) and 18(2) of the MDA are incompatible with the presumption of innocence and the Constitution. This is notwithstanding the various precedents that run against the Claimants' contentions. In *Ong Ah Chuan v Public Prosecutor* [1979-1980] SLR(R) 710 ("*Ong Ah Chuan*"), the Privy Council held that a provision in the Misuse of Drugs Act 1973 (Act 5 of 1973) (which is the equivalent of the presumption concerning trafficking under s 17 of the MDA), which shifted the burden of proof to the accused upon proof of certain facts, was not contrary to Articles 9(1) and 12(1) of the Constitution of the Republic of Singapore (1980 Reprint). This point was considered by Valerie Thean J in the High Court decision in *Jumaat (OA 480)* at [42]–[47], which the appeal in CA 2 arises from, as well as by Steven Chong JCA in this court's decision in *Jumaat (SUM 8)* at [28]), which the application in SUM 16 arises from. In *Jumaat (OA 480)* at [47], Thean J held that the presumptions in ss 18(1) and 18(2) of the MDA are not unconstitutional based on the decision in *Ong Ah Chuan*. In *Jumaat (SUM 8)* at [28], Chong JCA noted that the Claimants' argument that ss 18(1) and 18(2) of the MDA violate the presumption of innocence was "neither new nor novel",

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and was first examined in *Ong Ah Chuan*. Further, in *Zainal bin Hamad v Public Prosecutor and another appeal* [2018] 2 SLR 1119 ("*Zainal*") at [46], even though this court did not consider the express question of the constitutionality of ss 18(1) and 18(2) of the MDA, we expressly referenced Parliamentary intent and held that it was permissible to invoke the two presumptions in ss 18(1) and 18(2) of the MDA together. Reference was also made to *Zainal* in *Jumaat (OA 480)* at [33] and [47].

48 Further, while the Claimants seek a declaration that ss 18(1) and 18(2) of the MDA should be "read down and given effect as imposing an evidential burden only" (see [6] above), it should be noted that this court had already made clear in *Gobi a/l Avedian v Public Prosecutor* [2021] 1 SLR 180 at [41] and *Adili Chibuike Ejike v Public Prosecutor* [2019] 2 SLR 254 at [66] and [98] that the presumptions under ss 18(1) and 18(2) of the MDA are evidential tools that operate to presume specific facts.

49 The presumptions in ss 18(1) and 18(2) of the MDA have also been used together in several past decisions: see for instance, *Mohammad Farid bin Batra v Public Prosecutor and another appeal and other matters* [2020] 1 SLR 907 at [19]–[20], [32], [111]–[114]; *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [38], [46] and [51]; and *Muhammad Ridzuan bin Md Ali v Public Prosecutor and other matters* [2014] 3 SLR 721 at [70]–[84]. Evidently, these decisions which precede this appeal are suggestive of a marked difficulty in the Claimants' arguments, and any argument pursued by the Appellants on behalf of the Claimants in CA 2 would necessarily have to demonstrate that these decisions were all wrongly decided and/or somehow overlooked a major and material point.

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50 We emphasise that this is not to say that the Claimants' case is bound to fail simply because the courts have previously applied ss 18(1) and 18(2) of the MDA together. After all, the courts are charged to administer justice according to law, and it is in our interest to ensure that our decisions are correct and accord with the law. Where there is reason to think that previous decisions may be wrong, it would be in the interests of justice for the court to correct them. But another aspect of the function of justice is finality. As we have explained in several cases (see *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 at [47]; *Public Prosecutor v Pang Chie Wei and other matters* [2022] 1 SLR 452 at [1]–[2]; and *Xu Yuanchen v Public Prosecutor* [2024] 1 SLR 635 at [1]), it would be impossible to have a functioning legal system if all legal decisions were open to unceasing challenge. This explains why, for this court to grant permission and exercise its power of review under ss 394H and 394I of the CPC, there are stringent requirements which require that the Claimants adduce sufficient material on which the court may conclude that there has likely been a miscarriage of justice in their respective criminal matters: see *Kreetharan s/o Kathireson v Public Prosecutor and other matters* [2020] 2 SLR 1175 at [17].

51 It is with this balance in mind, between finality on the one hand and ensuring that there is no miscarriage of justice on the other, that we consider a key threshold for showing a special reason, at least in this type of case, to be *materiality* and what that entails. In our judgment, in a case such as the present, where the merits of the underlying cause have already been ventilated, and where there is extensive case law dealing with the relevant provisions, while it is not necessary to show at the Special Reason Stage that the Claimants are sure to succeed in their appeals if the Appellants were permitted to appear on their behalf, the Appellants must at least show how they would be able to provide assistance to the Claimants in the way that local lawyers may not be able to.

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This would typically require them, as foreign counsel, to show that they have some special insight that has not been reflected in the case law, and that this would likely be *material* to the Claimants' case, in the sense that their *ad hoc* admission as foreign counsel *could* make a difference to the Claimants' case. For the avoidance of doubt, they would even then have to go on and establish that they also meet the elements of the Notification Matters Stage, but that is a separate consideration.

52 The Appellants face two main obstacles in establishing a special reason on the material they have advanced. First, they will need to show how the many prior decisions on ss 18(1) and 18(2) of the MDA may be wrong. Second, they will also need to explain how, even if they are right that ss 18(1) and 18(2) of the MDA are unconstitutional, it could lead to the outcome that they are seeking, which is essentially to review or reopen the underlying concluded appeals: see *Jumaat (SUM 8)* at [33]. They have done neither. In the judgment below, Woo Bih Li JAD similarly noted the following (see Judgment (HC) at [73]):

> … While the affidavits of the Applicants and the submissions of the Claimants proceed on the premise that there is merit in the challenge on the constitutionality of the presumptions, it is important to bear in mind that the challenge will have to be applied in the present circumstances. The Claimants say that their case relies on the interpretation of the MDA and the Constitution, a comparison of similar legislation and appropriate case law, and the application of the law to the facts in each individual case. However, their written submissions for the Applications do not elaborate on those facts. Likewise, while each of the Applicants asserts in his respective affidavit that each of the Claimants' cases involves a number of complex legal issues in respect of the MDA, *neither of them asserts that if the issues are resolved in favour of the Claimants, this will likely lead to a successful outcome on the facts. While the Claimants suggest that a review application will be made later, there should at least be some elaboration on the eventual outcome to persuade the court that it will not be academic to grant the Applications, especially at such a late stage when the appeals have already been disposed of.*

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[emphasis added]

53 Mr Kassimatis KC and Mr Fitzgerald KC have each averred in their separate affidavits that they were "satisfied that there is an issue to be tried in this appeal… [and each] of the [Claimants'] cases involves a number of complex legal issues". However, as we have highlighted in the foregoing paragraphs, the mere fact that the case may be complex is insufficient and would not in itself amount to a special reason to admit foreign counsel. They need to show that their admission would be *material* to the Claimants' case. But despite the court repeatedly noting the legal hurdles that the Claimants face in *Jumaat (OA 480)*, *Jumaat (SUM 8)*, and the Judgment (HC), the Appellants still do not explain how they would attempt to overcome them; in their submissions in these appeals, the Appellants merely repeat the point that the proceedings would be complex. But this is beside the point for the reasons we have already canvassed.

54 For completeness, we observe that while the Appellants argued in the High Court that the Special Reason Stage was satisfied because the Claimants' cases raise issues of public importance, this was not pursued in these appeals. However, even if the Appellants had raised this, we do not think that this would amount to a "special reason" for the reasons stated at [44] above.

Notification Matters Stage

55 Given that the Appellants could not satisfy the mandatory Special Reason Stage, it is, strictly speaking, not necessary for us to consider the Notification Matters Stage. In the judgment below, the Judge likewise considered it unnecessary to consider this stage because there was no special reason to admit the Appellants: see Judgment (HC) at [79]–[82]. In any case, this is where regard will be had to the complexity of the case, the availability of local lawyers and the necessity for senior counsel to be engaged. This will

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inevitably be a fact-sensitive consideration. Nonetheless, we make some brief observations on one factor of the matters to be considered at this stage namely, the availability of local lawyers.

56 The Appellants in their written submissions say that they reached out to numerous local lawyers to represent the Claimants, but these lawyers either did not respond or did not agree to represent the Claimants. Since the "availability of any Senior Counsel or other advocate and solicitor with appropriate experience" is a factor to be considered at this stage, the Appellants argue that given the lack of available local lawyers, this factor applies in their favour. To recapitulate, the Judge had noted that amongst the local lawyers contacted by the Claimants, Mr Nehal SC and Mr Chng declined to act because of their view that there was a lack of merit in CA 2: see Judgment (HC) at [73]. The Judge thought that it would be incongruous to allow foreign counsel to be admitted when their local counterparts were of this view: see Judgment (HC) at [69]. The Appellants in reply submit that the Judge erred in placing undue weight on the views of Mr Nehal SC and Mr Chng, since they were just the views of two local lawyers and could not be determinative of the question of merit. In their submissions, the Claimants also placed considerable emphasis on the supposed difficulties they faced in sourcing counsel while they were in prison.

57 We note that the Claimants reached out to 17 local lawyers to seek representation. Datchinamurthy's sister said she contacted 15 lawyers from 11 law firms while the Claimants' friends approached two lawyers from one law firm. But even if some local lawyers could not represent the Claimants due to possible conflicts (both in the sense of scheduling and possible conflicts of interests), it was not apparent to us why not a *single* local lawyer was willing to appear on behalf of the Claimants. There was no suggestion, certainly no evidence, that this was because they were fearful to act. Any such suggestion

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would have been fanciful. To the extent that lawyers may be held to account for abusing the process of the court by taking manifestly bad or ill-conceived points, that is simply a consequence of their status as officers of the court, having the corresponding duties of integrity and honesty: see *Miya Manik v Public Prosecutor and another matter* [2021] 2 SLR 1169 at [74]–[82]. This leaves us then with the alternative explanation, which is that the local lawyers who were approached and who were not conflicted by reason of scheduling difficulties or conflicts of interests, reached the view that there was no merit to the case (as alluded to by Mr Nehal SC and Mr Chng). In their written submissions, the Appellants assert the contrary.

58 We are somewhat puzzled by this. If the Appellants believed that local lawyers were *mistaken* in their views on the merits of the case, then the *Appellants* should not only have explained this when seeking to establish that there was "special reason" to warrant their admission, but they could have attempted to persuade their local counterparts that, in fact, there were merits in the case, and that the local lawyers should therefore take up the engagement to represent the Claimants. The Claimants' cases in CA 2 and SUM 16 hinge primarily on points of law; there was no need for the Claimants personally to brief local lawyers on why their views on CA 2 and SUM 16 were mistaken; nor was there any realistic possibility of this happening, if, as was suggested, this turned on complex points of law. If that were the case, then plainly, the Appellants would be better placed to explain to local lawyers why their assessment of the Claimants' case was wrong. However, there is nothing to suggest that this was done, and they have not explained why.

59 In these circumstances, even if the Appellants could satisfy the Special Reason Stage such that we had reached the Notification Matters Stage, this factor would not have been a cogent one in favour of the Claimants.

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Conclusion

60 For these reasons, we uphold the decision of the Judge below and dismiss the appeals.

61 The Respondents have sought costs. Even though the applications and appeals were taken out under the names of the Appellants, the real parties in interest are the Claimants, and ordinarily, they should bear the costs: see *Re De Lacy Richard QC* [2003] 4 SLR(R) 23 at [26]–[27]. However, in the present circumstances, we make no order as to costs.

Sundaresh Menon
Chief Justice

Belinda Ang Saw Ean
Justice of the Court of Appeal

Judith Prakash
Senior Judge

The appellants in CA/CA 16/2024 and CA/CA 17/2024 in person;
The claimants in HC/OA 480/2022 in person;
Hay Hung Chun, Theong Li Han and Poh Hui Jing Claire (Attorney-General's Chambers) for the first respondent in CA/CA 16/2024 and CA/CA 17/2024;
Christopher Anand s/o Daniel and Saadhvika Jayanth (Advocatus Law LLP) for the second respondent in CA/CA 16/2024 and CA/CA 17/2024.

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