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

[2024] SGHC 24

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

Between

Theodoros Kassimatis KC

… *Applicant*

And

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

… *Respondents*

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

And

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

Between

Edward Fitzgerald KC

… *Applicant*

And

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

… *Respondents*

JUDGMENT

[Legal Profession — Admission — *Ad hoc*]

TABLE OF CONTENTS

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

[2024] SGHC 24

General Division of the High Court — Originating Application Nos 696 and 811 of 2023
Woo Bih Li JAD
16 October, 23 November 2023, 15 January 2024

30 January 2024 Judgment reserved.

Woo Bih Li JAD:

Introduction

1 These are separate applications by two King's Counsel for *ad hoc* admission to practise as advocates and solicitors of the Supreme Court of Singapore. In HC/OA 696/2023 ("OA 696"), Mr Theodoros Kassimatis KC ("Mr Kassimatis KC") seeks *ad hoc* admission to act for two persons, Jumaat bin Mohamed Sayed ("Jumaat") and Saminathan Selvaraju ("Saminathan"), in the matters of CA/CA 2/2023 ("CA 2") and CA/SUM 16/2023 ("SUM 16"). In HC/OA 811/2023 ("OA 811"), Mr Edward Fitzgerald KC ("Mr Fitzgerald KC") seeks *ad hoc* admission to act for other two persons, Datchinamurthy a/l Kataiah ("Datchinamurthy") and Lingkesvaran Rajendaren ("Lingkesvaran"), in the same matters of CA 2 and SUM 16. I will refer to both King's Counsel as

the "Applicants" or individually the "Applicant", and their applications as the "Applications" or individually the "Application".

2 The respondents in each Application are the Attorney-General ("AG") and the Law Society of Singapore ("LSS"). I will refer to them collectively as the "Respondents".

3 Each of the four persons whom the Applicants seek to act for was accused of an offence under the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) although their current attempt to seek relief is in respect of the present version of the Misuse of Drugs Act 1973 (2020 Rev Ed). As there is no difference in the relevant provisions in either version, I will refer to both versions simply as the "MDA". Each of the four persons was convicted at trial and sentenced to suffer the death penalty, and their respective appeals against their convictions have been dismissed. Various civil applications were then filed by one or more of the four persons. In particular, the four persons filed HC/OA 480/2022 ("OA 480") for permission to commence judicial review proceedings as elaborated later. I will refer to the four persons collectively as the "Claimants".

4 Written submissions were filed by the Applicants and the Respondents in respect of the Applications. The Respondents took a preliminary objection that the Applicants were not entitled to address the court on the Applications, given that they had not yet been admitted to practise as advocates and solicitors of the Supreme Court of Singapore (the "Preliminary Objection"). On 16 October 2023, after hearing arguments on the Preliminary Objection, I upheld that objection.

5 Although the Claimants could then have sought an adjournment to seek the assistance of local counsel, *ie*, an advocate and solicitor practising in

Singapore, to make submissions on the Applications, this avenue was not pursued. This avenue was available even though the Claimants say that they have not been able to obtain the services of local counsel to act for them in respect of CA 2 and SUM 16, which I elaborate on later. Instead, I was informed that the Claimants wished to address the court on the Applications, which they were entitled to do. I was also informed that their submissions would be substantively the same as those of the Applicants save for the part which addressed the Preliminary Objection. I gave directions for their submissions to be filed and served by 6 November 2023. The Claimants duly filed their submissions and orally addressed me through Datchinamurthy on the Applications at the hearing on 23 November 2023. The Respondents' written submissions had already been tendered and they too made oral submissions on 23 November 2023. Thereafter, I invited further submissions on a point which I elaborate on later. I now provide the reasons for my decision on the Preliminary Objection and my judgment on the Applications.

Facts

The parties

6 Mr Kassimatis KC was admitted as a barrister and solicitor of the Supreme Court of Victoria, Australia in 2001 and his principal practice area is criminal law at the trial and appellate level. He was appointed Senior Counsel in November 2016 and Queen's Counsel in March 2017. Mr Fitzgerald KC was called to the Bar of England and Wales in November 1978 and practiced almost exclusively criminal law. He was appointed Queen's Counsel in January 1995.

7 Following the death of Queen Elizabeth II on 8 September 2022, the designations of Mr Kassimatis KC and Mr Fitzgerald KC were automatically changed from Queen's Counsel to King's Counsel.

8 As already noted, the Claimants were convicted of offences under the MDA and sentenced to suffer the death penalty, as follows:

(a) On 7 May 2018, Jumaat was convicted of trafficking in diamorphine under s 5(1)(*a*) read with s 5(2) of the MDA and was sentenced to the mandatory death penalty (see *Public Prosecutor v Jumaat bin Mohamed Sayed* [2018] SGHC 176 at [1]–[4]). His conviction was upheld by the Court of Appeal on 3 July 2019.

(b) On 12 March 2018, Saminathan was convicted of trafficking in diamorphine under s 5(1)(*a*) of the MDA and was sentenced to the mandatory death penalty (see *Public Prosecutor v Zulkarnain bin Kemat and others* [2018] SGHC 161 at [5]–[7]). On 8 May 2020, the Court of Appeal upheld his conviction and dismissed his application to adduce fresh evidence (see *Mohammad Rizwan bin Akbar Husain v Public Prosecutor and another appeal and other matters* [2020] SGCA 45 at [6] and [119]).

(c) In April 2015, Datchinamurthy was convicted of trafficking in diamorphine under s 5(1)(*a*) of the MDA and was sentenced to the mandatory death penalty (see *Public Prosecutor v Christeen d/o Jayamany and another* [2015] SGHC 126 at [44] and [88]). His conviction was upheld by the Court of Appeal in CA/CCA 8/2015 ("CCA 8") on 5 February 2016, and his attempt to bring a review application in respect of CCA 8 was dismissed by the Court of Appeal

on 5 April 2021 (see *Datchinamurthy a/l Kataiah v Public Prosecutor* [2021] SGCA 30 at [1]).

(d) On 15 October 2018, Lingkesvaran was convicted of trafficking in diamorphine under s 5(1)(*a*) of the MDA and was sentenced to the mandatory death penalty (see *Public Prosecutor v Lingkesvaran Rajendaren and another* [2018] SGHC 234 at [3]–[4]). His conviction was upheld by the Court of Appeal on 27 March 2019.

Background to the proceedings

9 Following the dismissal of the respective appeals set out above, various civil applications were filed. These are set out in the table below:

Date	Description
13 August 2021	Jumaat, together with 16 other inmates, filed HC/OS 825/2021 ("OS 825") seeking declarations that the AG had acted arbitrarily against them as persons of Malay ethnicity, had discriminated against them, and had exceeded his powers when prosecuting them for capital drugs offences under the MDA.
11 October 2021	Jumaat, together with the same inmates in OS 825, filed HC/OS 1025/2021 ("OS 1025") seeking leave to commence contempt of court proceedings against the Minister for Law and Home Affairs.
16 November 2021	A Judge of the General Division of the High Court granted the AG's application in HC/SUM 4742/2021 to strike out OS 1025.
2 December 2021	A Judge of the General Division of the High Court dismissed OS 825. The Judge found that OS 825 was brought in abuse of process as it was manifestly groundless and without foundation (see *Syed Suhail bin Syed Zin and others v Attorney-General* [2022] 4 SLR 934 at [104]–[106]).

Date	Description
1 August 2022	The Claimants, together with 20 other inmates, filed HC/OC 166/2022 ("OC 166") seeking (a) a declaration that the costs provisions in ss 356, 357 and 409 of the Criminal Procedure Code 2010 (2020 Rev Ed) ("CPC") were inconsistent with the Constitution of the Republic of Singapore (2020 Rev Ed) (the "Constitution"); and (b) damages from the AG and the Government of Singapore for breach of statutory duty to facilitate access to justice and/or access to counsel or legal advice.
3 August 2022	A Judge of the General Division of the High Court granted the AG's application in HC/SUM 2858/2022 to strike out OC 166.
4 August 2022	The Court of Appeal upheld the Judge's decision to strike out OC 166 for having no chance of success on the face of the pleadings (see *Iskandar bin Rahmat and others v Attorney-General and another* [2022] 2 SLR 1018 ("*Iskandar bin Rahmat*") at [46]).

10 Shortly after the Court of Appeal's decision in *Iskandar bin Rahmat*, the Claimants filed another civil application, *ie*, OA 480 on 22 August 2022 for permission to commence judicial review proceedings. The Claimants sought the following reliefs:

> 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.

11 The crux of the Claimants' case in OA 480 was that ss 18(1) and 18(2) of the MDA, which provide for the double presumptions of possession and knowledge respectively, were incompatible with the presumption of innocence that is protected under the Constitution. Sections 18(1) and 18(2) of the MDA state:

> **Presumption of possession and knowledge of controlled drugs**
>
> **18.**—(1) Any person who is proved to have had in his or her possession or custody or under his or her control —
>
> (*a*) anything containing a controlled drug;
>
> (*b*) the keys of anything containing a controlled drug;
>
> (*c*) the keys of any place or premises or any part thereof in which a controlled drug is found; or
>
> (*d*) a document of title relating to a controlled drug or any other document intended for the delivery of a controlled drug,
>
> is presumed, until the contrary is proved, to have had that drug in his or her possession.
>
> (2) Any person who is proved or presumed to have had a controlled drug in his or her possession is presumed, until the contrary is proved, to have known the nature of that drug.

12 One of the arguments raised by the AG in response was that OA 480 effectively sought a reconsideration of the Claimants' convictions, and the correct procedure for the Claimants to do so was to file a review application under s 394H of the CPC. Further, under O 24 r 5(2) of the Rules of Court 2021, an application for judicial review must be made within three months from the date of the final determinations in each of the Claimants' respective criminal proceedings, and that time had since lapsed.

13 On 25 November 2022, Valerie Thean J dismissed OA 480 (see *Jumaat bin Mohamed Sayed and others v Attorney-General* [2022] SGHC 291

("*Jumaat (HC)*") at [2]). One of her reasons was that the subject matter of OA 480 was not susceptible to judicial review. She accepted the AG's submission that if there was a valid reason to reconsider the Claimants' convictions, the proper manner of doing so was a review application under s 394H of the CPC and not by way of judicial review. However, the Claimants would not have been able to meet the requirements under s 394J of the CPC for commencing a review application (see *Jumaat (HC)* at [20]–[22]). The Claimants had also exceeded the three-month timeframe for filing a judicial review application (see *Jumaat (HC)* at [17]). In any event, the materials before the court did not disclose an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought by the Claimants, which would justify the granting of permission (see *Jumaat (HC)* at [15] and [78]).

14 On 23 December 2022, the Claimants filed CA 2 to appeal against Thean J's decision. Under the applicable rules of court, the Claimants were required to file the requisite documents for the appeal by 14 March 2023. As they did not do so, CA 2 was deemed withdrawn on 14 March 2023.

15 Subsequently, on 31 March 2023, the Claimants filed CA/SUM 8/2023 ("SUM 8") for CA 2 to be reinstated and for an extension of time to file the requisite documents no later than eight weeks following the date on which an application for Mr Kassimatis KC and Mr Fitzgerald KC to be admitted was decided and all consequential matters addressed.

16 SUM 8 was dismissed by Steven Chong JCA on 25 May 2023 (see *Jumaat bin Mohamed Sayed and others v Attorney-General* [2023] 1 SLR 1437 ("*Jumaat (CA)*") at [40]). He agreed with Thean J that OA 480 (and consequently, CA 2) was in essence a challenge against the Claimants'

respective convictions. The correct procedure was therefore for the Claimants to commence a review application under the relevant provisions of the CPC, but the Claimants did not satisfy any of the cumulative requirements mandated under s 394J of the CPC (see *Jumaat (CA)* at [25]–[29]). He also noted that the intended applications for the admission of the Applicants had not yet been filed (see *Jumaat (CA)* at [37]).

17 On 6 June 2023, the Claimants filed SUM 16 for the full court of the Court of Appeal to set aside the decision of Chong JCA, for CA 2 to be reinstated and for consequential orders. On 30 June 2023, the Claimants filed their written submissions for SUM 16. They contended that Chong JCA did not have jurisdiction as a single judge to dismiss SUM 8, and that he had applied the wrong legal principles and did not have a full appraisal of the facts in dismissing SUM 8. It is important to note that their written submissions for SUM 16 state that they will seek a review of the prior decisions of the Court of Appeal (on their convictions) if their current proceedings are successful. This means that they acknowledge that a review application under the CPC is necessary but they contend that they may proceed with an application for judicial review first.

18 On 11 July 2023, the Applicants filed OA 696. They were directed that there should be one application for each Applicant. Subsequently, OA 696 was amended to remove Mr Fitzgerald KC as an applicant, and he then filed OA 811 on 11 August 2023 as a separate application for *ad hoc* admission.

The Preliminary Objection

19 As mentioned above, the Respondents took the Preliminary Objection that neither of the Applicants was allowed to argue his own application. The

provisions of the Legal Profession Act 1966 (2020 Rev Ed) (the "LPA") are relevant. The LPA provides a statutory scheme for the admission of advocates and solicitors of the Supreme Court of Singapore.

20 Under s 32(1) of the LPA, a person must not practise as an advocate and solicitor in Singapore unless his name is on the roll of advocates and solicitors, and he has a practising certificate in force. Without these qualifications, he is referred to as an unauthorised person.

21 Under s 29(1) of the LPA and subject to any written law, advocates and solicitors have the exclusive right to appear and plead in all courts of justice in Singapore.

22 Section 15 of the LPA provides for the admission of a Queen's Counsel to practise as an advocate and solicitor for the purpose of any one case. This is often referred to as an *ad hoc* admission. It is not disputed that the reference to Queen's Counsel will also refer to King's Counsel.

23 Section 33 of the LPA makes it an offence for any unauthorised person to act as an advocate and solicitor. However, the Applicants relied on an exception in s 34(1)(*e*) which states that s 33 does not extend to "any person acting personally for himself or herself only in any matter or proceeding to which he or she is a party" (the "Exception"). In other words, the Applicants accepted that if they addressed the court on the merits of the Applications, they would be acting as advocates and solicitors of the Supreme Court of Singapore before being admitted as such. Their position was that they may nevertheless act as such because they come within the Exception.

24 The AG argued that if the Applicants can argue the Applications, they would in effect be arguing as advocates and solicitors before being admitted to do so. This was especially since they would be arguing on the merits of the case in SUM 16 in order to persuade the court to grant the Applications.

25 Second, the Exception refers to litigants-in-person, which the Applicants are not. The Applicants have no substantive legal interest or right to protect, unlike litigants-in-person.

26 The LSS's argument was similar to the AG's. The LSS argued that the Applicants would be acting as advocates and solicitors if they made submissions on the Applications. This would circumvent the codified process of *ad hoc* admission. In practice, even a person who applies for general admission as an advocate and solicitor in Singapore would require a mover to assist him as the applicant would not have the right of audience. The LSS also argued that the Applicants have no substantive rights to protect and the phrase "in any matter or proceeding to which he or she is a party" in the Exception refers to the underlying matter. In this case, the underlying matters are CA 2 and SUM 16.

27 The Applicants argued that they were acting personally for themselves in the Applications. The matter before the court was neither CA 2 nor SUM 16, but only the Applications for *ad hoc* admission. While an applicant might be represented by a locally qualified advocate and solicitor, nothing in the LPA compels that position. That construction is supported by observations made by the court in *Re Nicholas William Henric QC and another application* [2002] 1 SLR(R) 751 ("*Re Henric*").

The court's decision and reasons

28 I upheld the Preliminary Objection and ruled that the Applicants do not come within the Exception. Hence, they were not entitled to address the court on the merits of the Applications. I elaborate on my reasons below.

29 The argument of the Applicants on the scope of the Exception meant that it should be construed broadly. So long as counsel was an applicant, he would come within the Exception.

30 The arguments of the AG and the LSS meant that the Exception should be construed more narrowly, *ie,* the court should consider the underlying matter of an application for *ad hoc* admission, and the applicant must have a substantive legal interest or right that he seeks to protect in the underlying matter. On this point, it was not disputed that each of the Applicants was not making an application to protect his own substantive right but only to act as an advocate and solicitor for someone else. This much was clear even on the face of the respective Applications which seek an order to be admitted to act for the persons named in each Application. Likewise, ss 15(1) and 15(3) of the LPA make it clear that an *ad hoc* application to be admitted is for the purpose of acting for someone else in any one case.

31 In my view, the court should consider the underlying matter of the Applications. The "matter or proceeding" in the Exception is not just the immediate application. I agreed that to adopt the argument of the Applicants would be to circumvent s 33 of the LPA. It is clear that each Application is for the Applicant to act for someone else. In that sense, neither Applicant is acting "personally for himself" within the meaning of the Exception.

32 *Re Henric* was a case in which a litigant had executed an affidavit in support of an application for *ad hoc* admission of a Queen's Counsel. It appears that one of the arguments raised was that he could not do so, and that the affidavit had to be executed by an advocate and solicitor who was instructing the applicant. There, Tay Yong Kwang JC (as he then was) said that the litigant could do so. I set out the relevant part of his judgment:

> 44 I shall now address the points raised by the Attorney-General. I agree that s 21 [of the Legal Profession Act (Cap 161, 2001 Rev Ed)] contemplates an application by a QC and not the litigants in the case in question. It also assumes that there is an instructing solicitor on record but does not make that a necessary feature of every application. There is no requirement in our law that QC must appear only on instructions from a solicitor. Indeed, a QC is admitted under s 21(1) 'to practise as an advocate *and* solicitor'. The Legal Profession Act does not prohibit a litigant from acting in person (*see s 34(e)*). Accordingly, if a litigant chooses to act in person, he or the QC in question may affirm the affidavit specified in s 21(3). The litigant acting in person may also address the court in the way an instructing advocate and solicitor may. If the litigant chooses to affirm the affidavit, he cannot claim to have no or insufficient knowledge of what is required of him in *ad hoc* admissions.
>
> [emphasis added]

33 I would mention that the current s 15 of the LPA is the equivalent of s 21 of the Legal Profession Act (Cap 161, 2001 Rev Ed), which was considered in *Re Henric*. In my view, that decision did not assist the Applicants. Arguably, it assisted the Respondents instead.

34 First, the court in *Re Henric* did not say that because an instructing solicitor is not necessary, an applicant may address the court in an application for *ad hoc* admission. On the contrary, the court said that the litigant acting in person may also address the court in the way an instructing solicitor may. No mention was made of an applicant being able to address the court on the application. The LSS submitted that this was consistent with the Respondents'

position that it was the litigants in the underlying matter (*ie*, the Claimants in the present case) who should be addressing the court, rather than the Applicants. I agreed with the LSS that this was not an inadvertent omission. It suggests that the applicant may not address the court.

35 Second, this is reinforced by the last sentence of the extract which warns a litigant-in-person that if he chooses to affirm the affidavit, then he cannot claim to have no or insufficient knowledge of what is required of him in such an application. This warning would have been unnecessary if the applicant himself could address the court on the application.

36 Third, it is significant that when the court said that the LPA does not prohibit a litigant from acting in person, the court referred to s 34(*e*) of the Legal Profession Act (Cap 161, 2001 Rev Ed). The substance of that provision is the same as the Exception. In other words, the court construed that provision to refer to a litigant-in-person. That was the point of the Respondents, *ie,* that the provision refers to a litigant-in-person and not an applicant for *ad hoc* admission.

37 In fairness to the Applicants, I mention that the issue of the scope of s 34(*e*) was not argued in *Re Henric* and the court had proceeded on the premise that the provision applies to a litigant-in-person. Furthermore, the Applicants did not dispute that the Exception applies to litigants-in-person. The question was whether it also applied to the Applicants.

38 At the hearing of the Preliminary Objection, Mr Kassimatis KC also submitted that the Claimants were not entitled to address the court on the Applications as they were not parties to the same since it was the Applicants who were the litigants-in-person for the purpose of the Applications. However,

this was contrary to the holding in *Re Henric*. As already mentioned, the court in *Re Henric* acknowledged that the litigant in the underlying matter may address the court on an application for *ad hoc* admission. Significantly, the Applicants did not argue that the Exception allowed both the Claimants and the Applicants to submit on the Applications. In my view, the Exception would have to be amended if that effect was intended.

39 For the reasons mentioned, I was of the view that the Exception did not apply to the Applicants. I therefore upheld the Preliminary Objection.

Whether the applicants should be granted *ad hoc* admission

The applicable law

40 I turn to address the substantive Applications. As mentioned, the *ad hoc* admission of foreign counsel is provided for in s 15 of the LPA, which states as follows:

> **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) Her Majesty's Patent as Queen'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.
>
> …
>
> (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.
>
> …

I will refer to the requirements under s 15(1) of the LPA as the "s 15(1) Requirements".

41 Pursuant to r 32(1) of the Legal Profession (Admission) Rules 2011, the prescribed areas of law for the purposes of s 15(2) of the LPA are as follows:

> (*a*) constitutional and administrative law;
>
> (*b*) criminal law;
>
> (*c*) family law.

It is important to bear in mind that the special reason requirement under s 15(2) of the LPA is different from the requirement under s 15(1)(*c*) that an applicant for *ad hoc* admission must have special qualifications or experience for the purpose of the case.

42 Further, pursuant to para 3 of the Legal Profession (Ad Hoc Admissions) Notification 2012 (the "Notification"), the court may consider the following matters in an *ad hoc* admissions application:

> **Matters specified under section 15(6A) of Act**
>
> **3.** For the purposes of section 15(6A) of the Act, the court may consider the following matters, in addition to the matters specified in section 15(1) and (2) of the Act, when deciding whether to admit a person under section 15 of the Act for the purpose of any one case:
>
> (*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.

43 In *Re Beloff Michael Jacob QC* [2014] 3 SLR 424 ("*Beloff*"), the Court of Appeal held at [54] that a court dealing with an application for *ad hoc* admission had to first apply its mind to the s 15(1) Requirements, as well as the threshold requirement under s 15(2) of the LPA of whether a special reason must be shown and if so, whether it has been.

44 Indeed, all these requirements are considered mandatory. Hence, if any of these requirements are not met, then the application for *ad hoc* admission must fail. It is only if all these requirements are met that the court will proceed to consider the further matters specified in the Notification (collectively, the "Notification Matters"): *Beloff* at [54].

45 With regard to the Notification Matters, consideration of the Notification Matters is necessarily a "fact-dependent" exercise and there is no particular order of precedence among the factors (*Beloff* at [59]). Overall, it should be remembered that the broad proposition underlying the *ad hoc* admissions regime is that foreign senior counsel will only be admitted on the

basis of *need*. This connotes a fairly stringent standard which is not satisfied merely by showing that the admission of foreign counsel is desirable or convenient or sought as a matter of choice: *Beloff* at [42].

The s 15(1) Requirements

*The formal requirements of ss 15(1)(*a*) and 15(1)(*b*) of the LPA*

46 The first and second requirements in s 15(1) of the LPA are that the Applicants must hold a patent as King's Counsel, and ordinarily reside outside of Singapore or Malaysia but intend to come to Singapore for the purposes of appearing in the case (pursuant to ss 15(1)(*a*)–15(1)(*b*) of the LPA). The Respondents accept that these requirements are met.

Whether the Applicants have special qualifications or experience

47 The third requirement in s 15(1) is that the Applicants must have special qualifications or experience for the purpose of the case (pursuant to s 15(1)(*c*) of the LPA). As the Claimants acknowledge in their submissions, the mere fact of being King's Counsel is insufficient to satisfy this requirement; instead, "[m]ore is required". The Court of Appeal observed in *Beloff* at [56] that the foreign counsel's qualifications must be *relevant* to the case which he seeks to be admitted for:

> 56 … As Rajah JA explained in *Re Andrews* at [39], *what this requirement entails is that the foreign senior counsel's qualifications or experience must be relevant to the issues in the case for which he seeks to be admitted;* if, for example, a case involves areas of law that call for specialised learning such as arbitration, insolvency or intellectual property, the foreign counsel must have demonstrable expertise in these areas of law. It follows that when a case involves an area of law in which the jurisprudence is uniquely local, such as where the case turns on the meaning of legislation that has no analogue elsewhere or at least where the counsel concerned has no direct

> experience with that body of law, it will ordinarily be difficult to satisfy the court that foreign counsel has 'special qualifications or experience' for the purpose of that case.
>
> [emphasis added]

48 The Claimants submit that CA 2 raises questions of whether the presumptions in ss 18(1) and 18(2) of the MDA undermine the presumption of innocence that is protected under the Constitution, and whether the presumptions in the MDA should be read to impose a legal or evidentiary burden on the accused.

49 SUM 16 likewise raises issues of statutory construction and natural justice. The Claimants contend that the Applicants possess "specialised experience" for the purpose of their case. This would mean criminal law and constitutional law. The focus is on the experience, rather than the qualifications, of the Applicants. Specifically, Mr Kassimatis KC stated on affidavit that he has the following experience:

> [7] Since commencing practice as a barrister, my principal practice area has been in the criminal law at the trial and appellate levels. I have appeared in over 230 criminal appeals and quasi-criminal appeals and in numerous criminal trials. Further, I have been appeared in cases involving statutory construction, and with the intersection of the criminal law and procedure and fundamental constitutional rights.

50 As for Mr Fitzgerald KC, he stated that he has the following experience:

> [3] On 21 November 1978, I was called to the Bar of England and Wales and become [*sic*] a member of Counsel practicing almost exclusively in criminal law. In addition, in September 1986 I passed the New York Bar, in the United States.
>
> …
>
> [5] Since commencing practice as a barrister, I have appeared as counsel in appeals in the European Court of Human Rights, the House of Lords and its successor court the Supreme Court of the United Kingdom, the Court of Appeal for England and

> Wales, the Grand Court of the Cayman Islands, and before the Judicial Committee of the Privy Council in appeals – including appeals involving the imposition of the death penalty – from appellate courts in the Caribbean.

51 On the other hand, the Respondents argue that even if the Applicants have special experience in criminal and constitutional matters, they do not have special experience with the MDA or with foreign law that is similar in substance to the MDA.

52 The LSS also argued that the Applicants do not have special experience in criminal and constitutional matters that cannot be found among local counsel.

53 I address the latter point first. It is true that, ordinarily, foreign counsel is admitted on the basis that such a counsel has experience which is not found among local counsel and that such experience is required in view of the complexity of the case. In the present case, the Claimants do not suggest that the case is so complex that the experience of local counsel is not adequate. However, they say that they cannot obtain the services of local counsel, as I will elaborate later. I am of the view that the requirement for the Applicants to have special experience should be considered in this context and hence the fact that there is local counsel who have adequate experience in the matters in question does not in itself mean that the Applicants do not meet the special experience requirement. Otherwise, a claimant may be denied the services of foreign counsel when local counsel will not act. However, the reason why local counsel will not act for the Claimants needs to be considered and I will address that in the next section when dealing with the question of whether there is a special reason to allow the Applications.

54 As for the argument that the Applicants should have special experience with the MDA or similar foreign law, I am of the view that to require the Applicants to have experience in dealing with the MDA specifically, or similar foreign law, would be too high a threshold to impose. As observed by the Court of Appeal in *Re Harish Salve and another appeal* [2018] 1 SLR 345 at [37], it is not necessary for the foreign counsel to have had previous experience with the actual issue under consideration before the Singapore court, as it may otherwise be practically impossible for an application for *ad hoc* admission to succeed.

55 Thus, although the Court of Appeal in *Beloff* did refer at [56] to an example where foreign counsel has no direct experience with a body of law in which the jurisprudence is uniquely local to suggest that such a counsel would not ordinarily meet the requirement of "special qualifications or experience", this does not mean that foreign counsel must have direct experience with the MDA or with a similar foreign law.

56 However, it is important to first understand the issues actually raised by CA 2 and SUM 16. As explained at [13] and [16] above, the threshold issue with the Claimants' case in OA 480 was whether the Claimants had chosen the wrong route to pursue the reliefs they sought. For the purpose of SUM 16 and/or CA 2, the Claimants will have to persuade the court that they are entitled to proceed with a judicial review application in the circumstances notwithstanding the provisions of the CPC. Otherwise, the Claimants' case may fail at the outset, and the issue of whether the presumptions in ss 18(1) and 18(2) of the MDA are constitutionally sound will not even arise for the court's determination.

57 In that light, while I accept that the Applicants have special experience to make submissions on the constitutionality of the presumptions in the MDA, the Claimants' submissions skip a step. The Claimants have to *first* show that the Applicants also have experience that would aid the Claimants to establish that they are entitled to proceed with a judicial review application to begin with. Only then would it be relevant to consider whether the Applicants have the expertise that is related to the constitutionality of the presumptions in s 18 of the MDA.

58 The Claimants' initial submissions, however, did not specifically address the question of experience with judicial review applications. Based on the affidavits filed by the Applicants, it appeared that the Applicants' expertise is primarily in *criminal and constitutional law*, rather than administrative law or judicial review matters. In his affidavit, Mr Kassimatis KC stated that his "principal practice area" is criminal law at the trial and appellate levels. While he did mention having appeared in cases involving "the intersection of the criminal law and procedure and fundamental constitutional rights", no details of these cases were provided nor was it stated that these cases involved judicial review proceedings. Likewise, Mr Fitzgerald KC stated in his affidavit that he practises "almost exclusively" criminal law, although he did also say that he has appeared as counsel in appeals in various courts. No specific mention was made of experience with administrative law or judicial review proceedings.

59 The initial submissions of the Respondents also did not specifically address the question of the Applicants' experience with judicial review applications.

60 The question of whether the Applicants have special experience on the issue of whether the Claimants are correct to proceed with a judicial review application (instead of a review application under the CPC) was also not addressed specifically by the parties at the hearing on 23 November 2023. Therefore, I subsequently invited submissions on that question.

61 In response, the Respondents submit that the Applicants have not established that they have special experience in judicial review cases.

62 However, from the Claimants' submissions in response to the court's invitation, I am satisfied that Mr Fitzgerald KC has special experience in cases involving judicial review. He has acted in cases before the House of Lords such as *Regina v Secretary of State for the Home Department, Ex parte Venables* [1998] AC 407, which concerned the lawfulness of the Home Secretary's act of fixing minimum periods of detention to be served by young offenders sentenced to detention at the Queen's pleasure, and *Secretary of State for the Home Department v JJ and others* [2008] 1 AC 385, which was a case where a statutory provision providing for certain restrictions on terrorism suspects was declared incompatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969). Mr Fitzgerald KC has also acted for judicial review cases in the Caribbean before the Privy Council. On the other hand, I am unpersuaded that Mr Kassimatis KC has special experience in cases involving judicial review. Indeed, the Claimants' submissions do not argue that he has such experience. The Claimants' submissions state that he has regularly appeared in cases on appeal to the Victorian Court of Appeal and the High Court of Australia relating to the interpretation and construction of statutes. But that is different from judicial review applications. It is also telling that the Claimants say that his professional

experience "differs from that of Mr Fitzgerald" but they argue that the collective experience of the Applicants complement each other.

63 Accordingly, I find that Mr Fitzgerald KC has met all the s 15(1) Requirements, but Mr Kassimatis KC has not.

Whether there is a special reason to admit the Applicants

64 The Claimants accept that CA 2 and SUM 16 fall within the prescribed areas of law set out in r 32(1) of the Legal Profession (Admission) Rules 2011, *ie*, constitutional and administrative law as well as criminal law, and that there must therefore be a special reason for the admission of the Applicants. The Claimants advance two arguments. First, they contend that there is a special reason as CA 2 and SUM 16 concern issues of public importance that extend beyond the facts of their respective cases. Specifically, the Claimants rely on the fact that CA 2 concerns questions of whether the presumptions in ss 18(1) and 18(2) of the MDA are compatible with the Constitution.

65 However, as noted by V K Rajah JA in *Re Lord Goldsmith Peter Henry PC QC* [2013] 4 SLR 921 ("*Re Lord Goldsmith*"), the mere existence of "macro" issues is insufficient, as otherwise special reason would exist in every constitutional case (at [47]):

> 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 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]

Thus, the fact that CA 2 and SUM 16 raise issues of public importance does not, without more, satisfy the special reason requirement.

66 I turn to the second argument advanced by the Claimants. This is that a special reason exists as the Claimants have been unable to find local counsel to represent them. Indeed, this is the main point to support the argument that the special reason requirement has been met. The Claimants submit that they have taken all reasonable steps to secure local counsel but have been unsuccessful, and the matters in CA 2 and SUM 16 are complex and require the assistance of experienced counsel. It may be noted that the availability of counsel is also one of the Notification Matters, and there is therefore an overlap between the special reason requirement and the Notification Matters. However, as the special reason requirement is mandatory, I consider the availability of local counsel under this requirement.

67 In *Re Caplan Jonathan Michael QC* [2013] 3 SLR 66 ("*Re Caplan*"), V K Rajah JA observed that special reason *may* exist where an individual shows that he cannot find any competent local counsel to represent him (at [54]):

> 54 In my view, the phrase 'special reason' in s 15(2) of the current LPA envisages an exceptional case. What is exceptional should be decided based on the facts and circumstances of each case. Ms Kam's position was that a case must invariably raise significant matters of a macro nature before it can be considered exceptional. While Ms Kam's suggested approach is likely to be the norm in practice, I would go further. There could well be cases where the interests of an individual or issues pertaining solely to that individual are so out of the ordinary that they require special consideration and, hence, qualify as a 'special reason'. *For example, an individual may be able to establish that his case is exceptional if he can prove that despite all reasonable efforts conscientiously made, he cannot find any competent local counsel to represent him. …*
>
> [emphasis added]

68 However, Rajah JA's statement in *Re Caplan* did not go so far as to say that foreign counsel will be admitted in every instance where an individual is unable to find local counsel to represent him. Rather, the individual must show that there have been *reasonable* efforts that were *conscientiously made*. This suggests that the individual who seeks the admission of foreign counsel must detail his/her efforts to secure local counsel with some particularity. As Rajah JA observed in *Re Caplan* at [23]:

> 23 Having clarified who should file affidavits in support of *ad hoc* admission applications, I turn now to another important procedural practice point pertaining to the details of the contents of such affidavits. It is important for the court to have the fullest possible picture of all the relevant facts. In particular, the full details of the party's efforts in securing local counsel should be presented to the court for the purposes of facilitating the court's consideration of: (a) the necessity for the services of a foreign senior counsel; and (b) the availability of local Senior Counsel or other local advocate and solicitor with appropriate experience (see [66]–[68] below). The details to be provided should include the nature of the contact between the party and the local counsel who was approached (whether personally or through a third party), the mode of contact (whether in writing, orally over the telephone or in person), the date(s) and duration(s) of the call(s) and/or meeting(s), the venue(s) of the meeting(s), as well as a summary of the discussion(s) held. In addition, the date of the local counsel's refusal to take on the

> party's case and the reasons given should also be set out in detail. This list is by no means exhaustive, and solicitors should endeavour to ensure that all relevant details are presented to the court and are supported by relevant documentary evidence.

69 Further to this requirement, the *reasons* why the party's efforts in securing local counsel have been unsuccessful are also relevant in determining whether the case is one where foreign counsel should be admitted. When the Claimants say that they could not get local counsel to act for them, this might give the impression that there is merit in their overall case, but local counsel are either afraid to act for the Claimants or are not prepared to do so *pro bono*, unlike the Applicants, or that local counsel are otherwise uninterested in assisting the Claimants. However, this impression would be misleading if the reason why the Claimants have not been able to engage local counsel is because there is no merit in the overall case. If this is so, I agree with the LSS that it would be incongruous to allow foreign counsel to be admitted when local counsel are of the view that there is no merit on the facts.

70 In the present case, Datchinamurthy's sister ("Rani") contacted 15 lawyers from 11 different law firms via e-mail. Based on the e-mails exhibited in the Claimants' affidavit, it appears that Rani had contacted these lawyers in September 2022. Six lawyers responded stating that they were unable to act for the Claimants. Two of these lawyers explained that they were unable to act due to a lack of capacity, while one stated that he was of the view that the first prayer in OA 480 "may well be moot" as the Court of Appeal had already held in *Gobi a/l Avedian v Public Prosecutor* [2021] 1 SLR 180 that the presumptions in s 18 of the MDA are evidential rather than legal presumptions. In any event, that lawyer stated that he was unable to act due to a lack of capacity. The remaining nine lawyers (out of the 15 lawyers contacted) did not respond.

71 Significantly, the Claimants' friends had approached two lawyers from another law firm, Mr Harpreet Singh Nehal SC ("Mr Nehal SC") and Mr Damien Chng ("Mr Chng"), who stated that they were unable to act as they were of the view that "the facts of the [Claimants'] cases are such that the pending challenge has no merit". The important part of the lawyers' response states:

> We are firmly of the view that, while there is a good arguable case that the use of double presumptions to secure a conviction under the Misuse of Drugs Act impermissibly infringes upon the presumption of innocence, on the facts of the 4 cases, the double presumption was either not used or did not need to be used by the Court to secure the convictions.
>
> … to make it absolutely clear - it is not our position that we will only be prepared to act if the merits are '*strong*'. In our view, the facts of the 4 cases are such that the pending challenge has no merit. We do not think it is even fairly arguable that the convictions in the 4 pending cases were based upon the use of double presumptions. Even if one could argue that the High Court did use the double presumption, the admissions/ totality of the evidence in the cases also persuades us that the Court did not in fact need to use the double presumption and that a conviction could safely have been made on the evidence without the use of the double presumptions.
>
> As we advised during the recent call, we see no prospect of the Court granting any meaningful relief unless the applicants can show that their convictions cannot be upheld without the use of the double presumption.
>
> …
>
> If the legal validity of double presumptions is to be effectively challenged, one has to find a case where the Court had to necessarily rely upon the double presumptions to secure the conviction.
>
> [emphasis in original]

72 It is clear from Mr Nehal SC and Mr Chng's response that they did not think the matter had any merits on the facts in any event. There is also no suggestion that these local counsel, especially Mr Nehal SC, do not have adequate experience on the issues in question.

73 While the views of Mr Nehal SC and Mr Chng do not necessarily represent the views of other local counsel, the reason that they have provided – the lack of merit on the facts explains why they, as local counsel, are unavailable. 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.

74 Furthermore, in the case of Datchinamurthy, he has already brought an unsuccessful application for review under the CPC and hence he would have to surmount this obstacle. There was no elaboration by the Claimants or in the affidavits of the Applicants as to how he would overcome this specific hurdle.

75 For completeness, I would mention that to the extent that some local counsel had said that they were not available at the time of inquiry, the Claimants do not appear to have investigated whether these counsel would now be available as the Claimants appear to have done with Mr Kassimatis KC. Apparently at one time, he was not able to act for them but he has become available.

76 Furthermore, the Claimants have been able to access substantive legal assistance, even without formal representation. The AG highlights that the Claimants indicated at a case conference that the originating application, statement of claim and affidavit for OA 480 had been drafted by a Malaysian lawyer. The submissions filed by the Claimants in SUM 8 and SUM 16 were likewise drafted with legal terms and arguments. Clearly, the Claimants were able to contact and liaise with counsel, whether local or foreign, even though they are behind bars. In the circumstances, even if the Claimants are not formally represented by the Applicants, they have access to legal resources. This holds true whether or not the Applications are granted.

77 As was observed in *Re Lord Goldsmith* at [29] and [37], the appellate process in Singapore has evolved to focus more on *written* advocacy than oral advocacy, such that there is less reason to admit foreign counsel for the purpose of orally presenting a case after trial. There is nothing to prevent the participation of foreign counsel in the preparation for the *written* submissions

for an appeal. I am of the view that these observations also apply to CA 2 and SUM 16.

78 In all the circumstances, I am not persuaded that there is a special reason to grant the Applications.

The Notification Matters

79 Given that there is no special reason to grant the Applications, it follows that there is no need to consider the Notification Matters. I note that the AG submits that it is not reasonable to admit the Applicants, as doing so would allow the Claimants to further prolong proceedings in an abuse of the court's process.

80 The AG submits that the Claimants' conduct thus far suggests that they commenced CA 2 and SUM 16 in an abuse of process. As noted earlier at [3] and [9], unsuccessful civil applications were filed after the dismissal of their respective appeals, and OA 480 (and consequently, CA 2) was not the first of such applications. In the case of Datchinamurthy, he has already exhausted the remedy of filing a review application under s 394H of the CPC. Also, the Claimants have not provided any explanation as to why they did not raise their arguments in OA 480 earlier.

81 I note also that no explanation has been given as to why the issues in respect of the MDA were raised so late when each of the Claimants was represented by counsel at trial and on appeal.

82 That said, I need not decide whether CA 2 and SUM 16 constitute an abuse of process. Furthermore, for the avoidance of doubt, nothing that I have

said in respect of the Applications is to affect the substantive merits of CA 2 or SUM 16.

Conclusion

83 For the above reasons, I dismiss the Applications. To recapitulate, I find that Mr Fitzgerald KC has met all the s 15(1) Requirements but not Mr Kassimatis KC. In any event, there is no special reason to admit the Applicants.

84 The Applicants have paid the requisite fees under r 32(2) of the Legal Profession (Admission) Rules 2011 of $1,000 to the AG and the LSS respectively. The Respondents do not seek any order for costs.

Woo Bih Li
Judge of the Appellate Division

The applicants in HC/OA 696/2023 and HC/OA 811/2023 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 HC/OA 696/2023 and HC/OA 811/2023;
Christopher Anand s/o Daniel, Yeo Yi Ling Eileen and Saadhvika Jayanth (Advocatus Law LLP) for the second respondent in HC/OA 696/2023 and HC/OA 811/2023.