Huang Danmin *v* Traditional Chinese Medicine Practitioners Board
[2010] SGHC 152

Case Number : OS No. 849 of 2008/S

Decision Date : 18 May 2010

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Ismail Hamid (Ismail Hamid & Co) for the Appellant; Rebecca Chew Ming Hsien and Mark Cheng Wai Yuen (Rajah & Tann LLP) for the TCMP Board; Koh Swee Yen (Wong Partnership LLP) as amicus curiae

Parties : Huang Danmin — Traditional Chinese Medicine Practitioners Board

Statutory Interpretation

Administrative Law – Disciplinary Tribunals

18 May 2010

Tay Yong Kwang J:

Introduction

1 This appeal is brought by the Appellant, a Singapore registered Traditional Chinese Medicine ("TCM") practitioner, against the decision of the Respondent, the Traditional Chinese Medicine Practitioners Board ("the Board"), to cancel the Appellant's registration as a TCM practitioner. The Board's decision was made on 19 March 2008 after considering the findings and recommendations of the Investigation Committee No. 2005/1 ("IC 2005/1") in respect of three complaints made against the Appellant.

2 The complaints made against the Appellant were as follows:

(a) The first complaint was by Ms Eileen Tan Hui Kim to the Board on 1 July 2004 concerning allegedly questionable medical treatment rendered by the Appellant on her late father ("the Patient") at the Appellant's clinic in Johor Baru, Malaysia ("the Johor Clinic"). In addition, the first complaint also dealt with the Appellant's conduct in allegedly shouting and yelling at her late father's relatives during the treatment.

(b) The second complaint was submitted by the Health Sciences Authority ("HSA") on 5 January 2007 in respect of the Appellant's conviction under section 5 of the Poisons Act (Cap 234) for possessing scheduled poisons for sale without a valid licence. The Appellant faced seven charges but the HSA proceeded on four out of the seven charges, with the remaining three charges taken into consideration for sentencing. The Appellant pleaded guilty and was convicted and fined a total of $10,000.

(c) The third complaint was made by the Board on 10 August 2007 in respect of the Appellant's failure to keep proper and accurate medical records of the Patient's treatment at the

Appellant's Rochor Clinic in Singapore as required under Regulation 3 of the Traditional Chinese Medicine Practitioners (Practice, Conduct and Ethics) Regulations (Cap. 333A, Section 14(4)).

3 The findings of IC 2005/1 were:

(a) in respect of the first complaint, the Appellant had performed improper treatment on the Patient and was guilty of professional misconduct under section 19(1)(i) of the Traditional Chinese Medicine Practitioners Act (Cap. 333A) ("the TCM Act"). The allegations concerning the Appellant's rude behaviour were not made out.

(b) for the second complaint, the Appellant's conviction under the Poisons Act implied a defect in character which rendered him unfit to practise under section 19(1)(h) of the TCM Act because he had prescribed medicines other than TCM medicines to his patients and deliberately flouted the law by possessing the scheduled poisons for sale, thereby endangering the welfare and safety of patients and members of the public.

(c) concerning the third complaint, the Appellant had admitted during the inquiry hearing that he did not keep proper records of the Patient's treatment at the Rochor Clinic and such conduct fell within section 19(1)(f) of the TCM Act.

4 In the light of its findings, IC 2005/1, in a report dated 28 January 2008 ("the Report"), recommended that the Appellant's registration as a TCM practitioner be cancelled. The Board informed the Appellant of its inclination to accept IC 2005/1's recommendations and invited him to make representations before it on 28 February 2008. After that hearing, on 19 March 2008, the Board informed the Appellant that it was exercising its power under section 19(1) of the TCM Act to cancel his registration as a TCM practitioner.

The appeal

5 The Appellant, who is also a TCM practitioner in Malaysia, accepted the decision of the Board in agreeing with IC 2005/1's findings in respect of the second and third complaints. However, being dissatisfied with the Board's decision to accept IC 2005/1's findings on the first complaint and with the Board's decision to cancel his registration as a TCM practitioner, the Appellant filed this appeal on the following grounds:

(a) The Board erred in taking into account the Appellant's treatment of the Patient at the Johor Clinic in determining if he was guilty of professional misconduct under section 19(1)(i) of the TCM Act;

(b) The Board erred in finding that the Appellant's treatment of the Patient at the Johor Clinic was against TCM practice and that it amounted to professional misconduct under section 19(1)(i) of the TCM Act; and

(c) The Board's decision to cancel the Appellant's registration as a TCM practitioner was

manifestly excessive punishment and he should have been fined or suspended instead.

The facts

6 As the grounds of the Appellant's appeal relate to the Board's findings with regards to the first complaint, I shall start by stating some of the salient facts concerning the Appellant's treatment of the Patient at the Johor Clinic.

7 Essentially, the Patient had been diagnosed with terminal rectal cancer in late 2002 and was being treated by doctors from the Singapore General Hospital. In 2003, these doctors indicated to the Patient and his family that he had only three more months to live.

8 In January 2004, the Patient's family approached the Appellant at his Rochor Clinic located at Block 1 Rochor Road, #02-528 Rochor Centre, Singapore 180001 to seek alternative treatment in order to prolong the Patient's life and to relieve the symptoms of his illness. The Appellant agreed to provide medical services to the Patient.

9 Sometime in 2004, the Appellant informed the Patient and his family that he also operated a clinic in Johor and that he had certain special equipment there that might be able to help the Patient. The Patient agreed to go to the Johor clinic for treatment.

10 On the occasions when the Patient was treated by the Appellant at the Johor Clinic, the Appellant performed the following treatments on him:

(a) On or around March 24 2004, the Appellant applied some form of soft gelatin on the Patient's stomach. He then used an ultra sound therapy machine to sweep over the Patient's stomach.

(b) The Patient's family members testified that the Appellant administered certain injections on the Patient on multiple occasions, including once at the Johor Clinic on 13 May 2004. . Although the Appellant denied having administered these injections, large quantities of syringes and needles were found in the Rochor clinic when a joint inspection was done by the Board with HSA officers on 25 February 2005.

(c) On or around 4 June 2004, the Appellant used an "electro-thermal needle" machine ("the "Machine') on the Patient. This consisted of a machine heated needle that was inserted into the Patient's tumour area.

Should the Board take into account the Appellant's treatment of the Patient at the Johor Clinic

11 Section 19(1) and (2) of the TCM Act state:

(1) The Board may cancel the registration of a registered person if the Board is satisfied that he –

(a) has obtained his registration by a fraudulent or incorrect statement;

(b) has had any of his qualifications by virtue of which he was registered withdrawn or cancelled by the authority through which it was acquired or by which it was awarded;

(c) has had his registration in any other country for the practice of traditional Chinese medicine, or for the prescribed practice of traditional Chinese medicine to which the registration relates, withdrawn, suspended or cancelled;

(d) has ceased to carry on the prescribed practice of traditional Chinese medicine for which he is registered;

(e) has failed to comply with any condition to which his registration is subject;

(f) has contravened any regulation made under this Act relating to the practice and conduct of registered persons that applies to him;

(g) has been convicted of an offence in Singapore or elsewhere involving fraud or dishonesty;

(h) has been convicted of an offence in Singapore or elsewhere implying a defect in character which renders him unfit to remain on the Register;

(i) has been guilty of any professional misconduct or negligence;

(j) has been guilty of any improper act or conduct which renders him unfit to remain on the Register; or

(k) is unable to carry out the prescribed practice of traditional Chinese medicine for which he is registered safely or effectively by reason of mental or physical disability.

(2) Where a registered person is liable to have his registration cancelled on any of the grounds referred to in subsection (1)(e) to (k), the Board may, instead of cancelling his registration, take one or more of the following measures:

(a) caution or censure him;

(b) impose on him a penalty not exceeding $10,000;

(c) order that his registration be subject to such conditions as may be imposed by the Board for a period not exceeding three years;

(d) suspend his registration for a period not exceeding three years.

There is nothing in section 19(1)(i) indicating whether the phrase "professional misconduct or negligence" is confined to acts committed within Singapore by a TCM practitioner.

12 Accordingly, the point of contention between the parties was whether section 19(1) of the TCM Act allows the Board to take into account the Appellant's treatment of the Patient at the Johor Clinic for the purposes of determining whether he was guilty of professional misconduct. Due to the significance of this determination for future cases under section 19(1)(i) of the TCM Act and for disciplinary tribunals constituted under other Acts where similar wording appears, Ms Koh Swee Yen ("Ms Koh") was invited as *amicus curiae* to make submissions on this specific issue.

The parties' submissions

13 The essence of the Appellant's submissions was that section 19(1)(i) of the TCM Act did not apply to acts committed by a TCM practitioner outside Singapore. In support of this, he invoked the following arguments.

(a) It is a well known principle of statutory interpretation that a statute is not to be interpreted as having extra-territorial effect unless the statute expressly so provides (I shall henceforth refer to this as the "presumption against extra-territoriality"). There is no express provision in section 19(1)(i) of the TCM Act that provides for extra-territorial effect.

(b) Furthermore, section 19(1)(c), (g) and (h) of the TCM Act contain phrases such as "in any other country" and "in Singapore or elsewhere", indicating that Parliament expressly intended for these subsections to have extra-territorial effect. The lack of similar phrases in section 19(1)(i) shows that Parliament did not intend for it to have extra-territorial effect.

14 Predictably, the Respondent made the opposite submission that section 19(1)(i) of the TCM Act applied to acts committed by the Appellant outside Singapore. It raised the following arguments in support of this proposition:

(a) Section 9A(1) of the Interpretation Act (Cap. 1, 2002 Rev Ed) ("Interpretation Act") requires the court to interpret a statute in a way that would promote its underlying purpose.

(b) The primary purpose of the Act, as evinced by the record of Parliamentary proceedings relating to the Act, was to regulate the standard of TCM practice in order to ensure the safety and well being of patients in Singapore. This purpose would be frustrated if a TCM practitioner could escape disciplinary action simply by treating his patients in a nearby overseas jurisdiction.

(c) The Appellant had treated the Patient in his capacity as a TCM practitioner registered with the Board. Hence, the Board's power to regulate his activities remains unfettered regardless of where the Appellant chose to treat the Patient.

(d) Courts in other jurisdictions have taken the view that statutes, under which disciplinary tribunals are constituted to investigate instances of professional misconduct, should be interpreted in a way that allows these tribunals to consider misconduct occurring in a foreign jurisdiction.

(e) Many disciplinary tribunals in Singapore have taken into consideration acts committed by a member in a foreign jurisdiction.

15 The position taken by Ms Koh was similar to that of the Respondent. However, Ms Koh also challenged the very application of the presumption against extra-territoriality to section 19(1)(i) of the TCM Act. Her arguments were as follows:

(a) The presumption against extra-territoriality applied only to offence creating statutes. This presumption did not apply to section 19(1)(i) of the TCM Act because that section is not an offence creating statute but simply confers upon the Board the disciplinary power to determine whether a person should be permitted to remain as a registered TCM practitioner in Singapore.

(b) Once the presumption against extra-territoriality was out of the picture, it became clear that the purpose of section 19(1)(i) of the TCM Act could only be served by allowing the Board to take into consideration acts committed by a registered TCM practitioner in his capacity as such, even if those acts were committed in a foreign jurisdiction.

General comments

16 Before I proceed with the substantive analysis, I would just make some comments regarding the presumption against extra-territoriality.

17 My first comment relates to Ms Koh's submissions that the presumption against extra-territoriality applies only to "offence creating" statutes and that there is no such presumption when the statute in question is not an "offence creating" one. In support of this proposition, she cited the case of *Public Prosecutor v Pong Tek Yin* [1990] 1 SLR(R) 543, where the court held at [16] that:

> The question is one of construction, and in construing that section it must be borne in mind that there is a well-established presumption that in the absence of clear and specific words to the effect a statute which creates an offence is not intended to make an act taking place outside the territorial jurisdiction of the country an offence triable in the courts here: *Air-India v Wiggins* [1980] 2 All ER 593.

18 While Ms Koh's argument is an attractive one, it may not be easy to determine whether a particular law is an offence creating statute or not. Virtually every law that purports to regulate

behaviour provides for a penalty (either a fine or a jail sentence) in the event that it is breached. For example, in *Mackinnon v Donaldson Lufkin & Jenrette Securities Corp* [1986] Ch. 482, Hoffman J invoked the presumption against extra-territoriality in refusing to interpret section 7 of the Bankers' Books Evidence Act 1879 (UK) (c.11), which allowed a court to order the inspection of entries in a banker's book, as having extra-territorial effect (at 493). Although the said section 7 did not explicitly make a party's refusal to comply with a court inspection order a criminal offence, such refusal would certainly have been regarded as contempt of court and would have attracted a fine or even a jail sentence. In this sense, every statutory instrument can be regarded as an "offence creating" statute by virtue of the state's exercise of its coercive power in enforcing it. In this case, section 19 of the TCM Act relies primarily on the Board's power to cancel a practitioner's registration to ensure compliance with its rules. At first glance, this may seem to be a "non offence" because the penalty of cancellation of registration is different from traditional criminal penalties like a fine or a jail sentence. However, section 19(2)(b) of the TCM Act also allows the Board to impose a penalty of up to $10,000 in lieu of such deregistration. Although the TCM Act refers to it as a "penalty" and not a fine and section 19(4) provides that this penalty is recoverable "as a debt due to the Board", it is difficult to see how this penalty differs conceptually from a fine in its effect.

19 The definition of an "offence creating' statute may be narrowed by making references to traditional notions of what constitutes a crime. Yet even this path is fraught with difficulty. As many academics have pointed out, there is no clear definition of what constitutes a crime (e.g. G. Williams, 'The Definition of Crime' (1955) *Current Legal Problems* 107, at 130; A. Simester and G. Sullivan, *Criminal Law: Theory and Doctrine* (Oxford: Oxford University Press, 3rd edition, 2007), at 3-4.)). The concept of crime can be defined in many ways. One way is to define it to mean all activities that are prohibited by the state and which are enforced by penalties imposed directly by it. Another way to define it is by looking at factors such as the type of proceedings that are brought to enforce it, the type of evidence that can be adduced and the burden of proof that is required. In the absence of any consensus as to what exactly is an "offence creating" statute, I shall proceed on the basis that there is a presumption against extra-territoriality in the construction of all statutes.

20 Secondly, the cases dealing with the presumption against extra-territoriality tend to do so in a way that suggests that there is a strict dichotomy between laws with extra-territorial effect and laws that do not. Of course, reality is more complex than that and it is probably more accurate to speak of degrees of extra-territoriality than to think of extra-territoriality as a discrete category. For example, a law that affects the actions of foreigners in a foreign jurisdiction is clearly more "extra-territorial" than one which only seeks to control the actions of a country's citizens in a foreign jurisdiction, although both can be regarded as having some form of extra-territorial effect. In so far as the presumption against extra-territoriality is based on a hypothetical legislative concern about the problems that extra-territorial effect may create, the strength of the presumption may vary depending on the extent to which extra-territorial effect is claimed, since a law with lesser extra-territorial effect can be expected to present lesser problems.

21 Thirdly, counsel for the Respondent and Ms Koh have cited many cases where the acts of professionals in foreign jurisdictions were taken into consideration in disciplinary proceedings. Strictly speaking, these cases are not of direct relevance to the question of whether section 19(1)(i) of the TCM Act should be construed as having extra-territorial effect since they were based on the interpretation of different statutory instruments. However, insofar as the courts had, in these cases, identified the purpose which the statutes were meant to serve and determined that those purposes could only be fulfilled by interpreting the statutes to have some degree of extra-territorial effect, they provide helpful guidance as to the degree of extra-territorial effect that is required to achieve a certain purpose.

Purpose, enforceability and comity

22 Section 9A of the Interpretation Act requires the court to interpret a written law in a way that would promote the purpose or object underlying the written law. One of the ways to determine the underlying purpose or object of a statute is by looking at the Parliamentary debates. During the second reading of the Traditional Chinese Medicine Practitioners Bill on 14 November 2000 (Singapore Parliament Debates, Official Report (14 November 2000), Volume 72, sitting number 11), the Parliamentary Secretary to the Minister for Health, Mr Chan Soo Sen, informed Parliament that:

> In July 1994, the Ministry of Health appointed a Committee to look into the regulation of TCM. The Committee recommended a phased approach, (ie a step by step approach) to the regulation of TCM practitioners in order **to safeguard patients' interest and safety, as well as to enhance the standard of training and professionalism of TCM practitioners in Singapore** …
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> …
>
> [S]tatutory regulation of TCM practice is necessary **to safeguard patients' interest and safety** . We have to ensure that TCM practitioners are properly trained and qualified before they are allowed to practise. There should also be a framework to raise the professional standard of TCM practitioners in Singapore…
>
> (emphasis added]

23 It is clear from the above that the overriding purpose of the TCM Act is to ensure the safety and well being of patients by ensuring a minimum standard of professionalism among the TCM practitioners. The legislative intent of the TCM Act is reinforced by the Ethical Code and Ethical Guidelines for TCMP (January 2006) ("Ethical Code"), which provides at page 5 that:

> This "Ethical Code and Ethical Guidelines for TCM Practitioners" represents the fundamental tenets of conduct and behaviour expected of TCM practitioners practising in Singapore, and elaborates on their applications. They are intended as a guide to all TCM practitioners as to what the Board regards as the minimum standards required of all TCM practitioners in the discharge of their professional duties and responsibilities in the practice of TCM in Singapore.

In fairness, the Ethical Code does mention "practising *in Singapore*" and "the practice of TCM *in Singapore*", thus implying that it accepts the presumption against extra-territoriality.

24 Having determined the purpose of the TCM Act, the next step is to select an interpretation of section 19(1)(i) of the TCM Act that would best serve that purpose. In doing this, it is important to remember that the number of ways which a statute can be interpreted depends on the number of factors which the interpreter regards as being legally significant. Hence, if a court finds that a statute ought to be interpreted as having extra-territorial effect in a particular factual situation, it should also highlight the legally significant factors that form the basis for its decision.

25 A survey of the cases suggests that there are two main problems associated with interpreting a statute to have extra-territorial effect. The first is the problem of enforceability while the second is that of comity among nations. In *Parno v SC Marine Pte Ltd* [1999] 3 SLR(R) 377, the Court of Appeal held at [41] that Parliament could not have intended the provisions of the now defunct Factories Act (Cap 104, Rev Ed 1998) to apply to factories abroad because:

> …enforcement of the Act would be impossible without infringing on the sovereignty of another

state, let alone the practical difficulties associated with such enforcement worldwide. The main object of the Act is clearly to protect and ensure the safety of the many workmen who work on industrial premises in Singapore. To hold that the Factories Act is applicable to the case at hand, when there is no doubt that the *Sumpile 8* was at the material time within the territorial waters of Myanmar, would be to intrude into the jurisdiction of another state.

26 The Court in *Carson v Secretary of State for Work and Pensions* [2002] 3 All E.R. 994 explained the rationale behind the presumption against extra-territoriality in terms of enforceability and comity thus:

> The comity of nations is doubtless one basis for this presumption: one state should not be taken to interfere with the sovereignty of another state by enacting legislation extending to its territory. Another is practicality: most legislation cannot practically be applied to those present in another state.

27 As mentioned at [20] above, there are different degrees of extra-territoriality and correspondingly varying degrees of problems with enforcement and comity issues. The question of enforcement is essentially a practical one and depends largely on whether the penalty that is sought to be imposed on the party who has infringed the statute can be done so effectively. Where the party against whom enforcement is sought has substantial links to the domestic jurisdiction (either because he is a citizen of that jurisdiction or has substantial property there), enforcement is more likely to be more successful. Finally, to use an example that is more relevant to the case at hand, where the penalty sought to be imposed involves the cancellation of a licence that allows the infringer to engage in some regulated activity in the domestic jurisdiction, there is certainty of successful enforcement for obvious reasons. This probably explains why many courts in different jurisdictions have been willing to find that disciplinary tribunals are entitled to consider the acts of their members that were committed overseas when determining if disciplinary action should be taken against them. (See *Marinovich v General Medical Council* [2002] UKPC 36; *Re Legault and Law Society of Upper Canada* (1975) 58 DLR (3D) 641; *Ewachniuk v Law Society (British Columbia)* [1998] Carswell BC 358].

28 Comity is a more controversial concept. Unlike enforceability which is usually a pure question of fact, the idea of comity is affected both by customary international law and legal history. For example, the interpretation of a statute to cover acts committed by a country's nationals in a foreign jurisdiction is regarded as less harmful to comity than if that statute were interpreted to cover acts committed by foreigners in that foreign jurisdiction. This is so despite the fact that in both situations, the state is seeking to punish an individual for acts committed in a foreign jurisdiction. The reason is probably because historically, law was regarded as personal and it was only until the advent of the territorial state that it became more fixed to the territory over which the state had effective control (Brierley, James L., 'The Lotus Case', *Law Quarterly Review* 44 (1928): 155-156). Furthermore, states do claim some form of jurisdiction over acts committed by their citizens in foreign jurisdictions (see for example, section 8A of the Misuse of Drugs Act (Cap. 185, 2008 Rev Ed) and section 37 of the Prevention of Corruption Act (Cap. 241, 1993 Rev Ed)).

29 Both Ms Koh and counsel for the Respondent have cited the case of *Re Wong Sin Yee* [2007] 4 SLR(R) 676 to show that a statute should be interpreted as having extra-territorial effect if doing so would serve its underlying purpose. In that case, the High Court had to determine whether section 30 of the Criminal Law (Temporary Provisions) Act (Cap. 67, 2000 Rev Ed) ("CLTPA"), which allows the Home Affairs Minister to detain individuals without trial for up to 12 months, could be used to authorize the detention of a person for criminal activities committed outside Singapore. The detainee relied on the presumption against extra-territoriality to support his case for a narrow

interpretation of section 30 of the CLTPA.

30 The detainee's argument was rejected by Tan Lee Meng J who held that section 30 of the CLTPA allowed the Minister to take into consideration activities committed outside Singapore in determining whether the detention order was required in the interests of public safety, peace and good order in Singapore. He stated, at [21]:

> While the Minister must be satisfied that a detention order is required in the interests of public safety, peace and good order in Singapore, it does not follow that the threat to public safety, peace and good order must result from criminal activities in Singapore. Otherwise, a person who is believed to be a threat to public safety, peace and good order in Singapore because of his criminal activities abroad must be given some time to become involved in criminal activities in Singapore before he can be detained under s 30 of the CLTPA. The applicant's first ground for challenging the Detention Order thus fails.

No doubt this decision was fully justified because of the obvious purpose of the CLTPA. However, it is worth mentioning that the detainee in that case was a Singaporean, hence the abovementioned problems of enforcement and comity did not feature there.

31 Accordingly, I find that the question of whether a statute should be interpreted as having any degree of extra-territorial effect depends on the extent to which its purpose would be served by such an interpretation and whether this interpretation would result in problems relating to enforcement and international comity.

Analysis

32 Having regard to the fact that the overriding purpose of the TCM act is to ensure the safety and well being of patients by ensuring a minimum standard of professionalism among TCM practitioners, I must now choose an interpretation of section 19(1)(i) that will best achieve this purpose.

33 I accept the Board's submission that to hold that section 19(1)(i) of the TCM Act does not apply in the present case would undermine its underlying purpose. Registered TCM practitioners who wish to perform unauthorized and possibly unsafe treatments on their patients will have a ready mechanism: they can simply cross the Causeway and perform those treatments there with seeming impunity. This is a loophole that cannot be accepted. Accordingly, an interpretation of section 19(1)(i) of the TCM Act that covers the facts of the present case would better serve its underlying purpose.

34 What are the legally significant factors that form the basis of this decision? In this respect, the case of *Re Linus Joseph* [1990] 2 SLR(R) 12 ("*Re Linus Joseph*") provides useful guidance. In that case, the defendant was an advocate and solicitor of both the Singapore bar and the Brunei bar. The defendant had allegedly dishonestly withheld professional fees from his employers, a Brunei firm of advocates and solicitors, whilst in the employment of that firm in Brunei. The issue in that case was whether the Disciplinary Committee could take this alleged misconduct into consideration when determining whether the defendant was guilty of grossly improper conduct under section 80(2)(*b*) of the Legal Profession Act (Cap 161, 1985 Rev Ed).

35 The Court held that the words "guilty of fraudulent or grossly improper misconduct in the discharge of his professional duty" under section 80(2)(*b*) of the Legal Profession Act referred to the discharge of a solicitor's duty in his capacity as an advocate or solicitor of the Supreme Court of

Singapore. Since it was clear that the defendant's acts had been committed in his capacity as a Brunei solicitor, they did not fall within section 80(2)(*b*) of the Legal Profession Act. More significantly, the Court considered that if a solicitor had acted improperly in his capacity as a Singapore solicitor, such conduct would fall under section 80(2)(*b*) of the Legal Profession Act notwithstanding that it took place in a foreign jurisdiction.

36 The Court in *Re Linus Joseph* chose the capacity in which the defendant solicitor acted as the legally significant factor for determining the jurisdictional ambit of section 80(2)(*b*) of the Legal Profession Act. In my opinion, an interpretation of section 19(1)(i) of the TCM Act to cover all sorts of professional misconduct committed by a registered practitioner in his capacity as such, regardless of where those acts were committed, best serves the underlying purpose of the TCM Act and does not result in an overreaching effect.

37 This interpretation will not create any substantial problem with enforcement or comity. As mentioned above at [27], there is unlikely to be any problem with the enforcement of statutes relating to professional disciplinary bodies regardless of the extent of extra-territorial effect that is claimed because the mode of enforcement (i.e., the cancellation of registration) is one that can be effected easily.

38 Neither will there be comity problems if the basis of the jurisdiction under section 19(1)(i) of the TCM Act is linked to the TCM practitioner acting in his capacity as a Singapore registered practitioner. After all, the cancellation of the practitioner's registered status only prevents him from practising TCM in Singapore. He is still free to practise TCM in other jurisdictions. Hence, the foreign jurisdictions' power to regulate the type of treatments that may be performed within their territory is unaffected. Furthermore, jurisdiction that is linked to the capacity in which the TCM practitioner acts is quite similar to the type of nationality-based jurisdiction mentioned in paragraph [28] above. Just as nationality-based jurisdiction is justified on the ground that a citizen who enjoys the protection of his state should accept the restrictions imposed on him, the jurisdiction of section 19(1)(i) of the TCM Act extends to a TCM practitioner whenever he conducts himself as a Singapore registered TCM practitioner.

39 According, I find that section 19(1)(i) of the TCM Act extends to a TCM practitioner whenever and wherever he conducts himself as a Singapore registered TCM practitioner.

40 It is not disputed that the Appellant had met the patient in his Singapore Rochor Clinic and was treating him in his capacity as a Singapore registered TCM practitioner. Neither is there any doubt that when the Appellant performed the treatment on the patient at the Johor clinic, he was doing so in that same capacity. Accordingly, the Board was right in taking into account these acts when considering whether the Appellant was guilty of a charge under section 19(1)(i) of the TCM Act.

41 Although I have held that section 19(1)(i) of the TCM Act applies whenever a person acts in his capacity as a Singapore registered TCM practitioner, this does not necessarily mean that everything he commits outside of his capacity as a Singapore registered TCM practitioner cannot be taken into consideration under another provision of the TCM Act. It bears noting that in *Re Linus Joseph*, the Court expressly left open the question of whether the defendant's conduct would have rendered him liable to disciplinary proceedings under a different provision in the Legal Profession Act. Using the same reasoning set out earlier for section 19(1)(i), it may be difficult to argue that section 19(1)(j) of the TCM Act should not be interpreted to include improper acts or conduct committed by a TCM practitioner anywhere outside of his capacity as a Singapore registered TCM practitioner.

Did the Board err in finding that the Appellant's treatment of the Patient at the Johor Clinic

was against TCM practice and amounted to professional misconduct under section 19(1)(i) of the TCM Act?

42 In his second ground of appeal, the Appellant alleged that the Board erred in its decision that the administration of injections and the use of the Machine on the Patient were not established TCM practice. The basis of this allegation is that no expert witnesses were called to ascertain whether or not such practices were established TCM practice.

Established TCM practice

43 Section 2 of the TCM Act defines "practice of traditional Chinese medicine" as meaning the various acts or activities set out in the definition and "prescribed practice of traditional Chinese medicine" as any type of practice of TCM that has been declared as such prescribed practice by the Minister under section 14(1). The TCM Act does not state that a failure by any TCM practitioner to adhere to established TCM practice amounts to professional misconduct or negligence under section 19(1)(i). According, questions such as whether a particular practice amounts to established TCM practice and whether a failure to adhere to established TCM practice amounts to professional misconduct can only be answered by referring to the particular norms of TCM as well as general legal principles.

44 The Ethical Code is a helpful starting point for this inquiry. Paragraph (e) at section 4.1.1 of the Ethical Code states that:

> A TCM practitioner shall only **use appropriate and generally accepted methods of TCM treatment when attending to his patient** . He shall not use unorthodox TCM treatment or any treatment that may tarnish the reputation of the TCM profession. Where a TCM practitioner has any doubt as to whether any treatment is unorthodox or may tarnish the reputation of the TCM profession, the TCM practitioner shall obtain clarifications from the Board in writing before proceeding with such treatment.

45 Accordingly, a TCM practitioner's failure to use appropriate and generally accepted methods of TCM treatment would be a breach of the Ethical Code and may amount to professional misconduct or negligence. In addition, the Ethical Code also suggests that the question whether a particular practice is an established TCM practice depends on whether the treatment is generally accepted as an appropriate treatment for a particular ailment. The purpose of ensuring that TCM practitioners use only established TCM treatments to treat their patients is no doubt to ensure that patients do not suffer the unpredictable effects of unorthodox treatments.

46 In *Gobinathan Devathasan v Singapore Medical Coucil* [2010] SGHC 51 ("*Devathasa"*), the Court of three Judges had the opportunity to decide how a tribunal should determine whether a particular medical practice was a generally accepted one. It accepted (at [46]) the expert witnesses' testimony that the following factors were essential:

(a) there had to be at least "one good study";

(b) the results of the study can be replicated and reproduced under the same sort of like treatment parameters and conditions;

(c) the study had been written up in publications and presented at meetings;

(d) the study had received peer review;

(e) the study had to have "clear-cut results" and the sample had to be "statistically significant"; and

(f) the study had to have some form of controls, such as randomised double-blind trials.

47 In my opinion, the requirements that have to be satisfied in order for a medical practice to be an accepted one should not be transplanted wholesale to TCM practice. There are distinctions between the medical profession and the TCM profession and it may be unfair to judge them according to a single standard. While medical advances are usually subject to intensive clinical trials and heavily documented in medical journals, TCM practices are often developed through experience and shared through more informal settings. This is not to suggest, of course, that TCM is in any way inferior to general medical treatment. Ultimately, the question whether a particular TCM practice is an established one is a purely factual question and depends substantially on how generally accepted it is among the TCM practitioners in Singapore and elsewhere.

48 The Court in *Devathasan* also set out how the burden of proof should be discharged where a medical professional was charged with having given treatment that was not generally accepted by the medical profession as a form of clinical treatment. Essentially, the Disciplinary Council bore the burden of showing that the particular practice was not generally accepted by the medical profession as a form of clinical treatment. However, this fact merely created a presumption that the treatment, because of its lack of general acceptance, was not appropriate. The medical professional in question could still defend himself by showing some evidence that the treatment may do some good but will do no harm to the patient. As the Court held at [62]:

> [W]here the charge is for inappropriate treatment because that treatment is not indicated for that condition and not generally accepted by the profession, then the *evidential* burden is on the defending doctor to prove that safety of the patient is a reason to negative an assumption of inappropriate treatment on the analogy of "off-label" treatment. We are of the opinion that where a doctor embarks on a treatment that is not indicated or generally accepted in the profession, but the doctor is of the view that his novel treatment may do some good, but will do no harm to the patient, placing such a burden on him to establish that no harm will come to that patient strikes a correct balance between two important considerations in medicine, *viz*, promoting innovation and progress, provided that the patient's well-being is not compromised.

49 The Court's approach in *Devathasan* strikes a proper balance between the promotion of scientific progress in medicine and the protection of the patient's well being. This approach should also be used in determining whether a particular TCM practice is an appropriate and generally accepted one.

The injections

50 The Board found that the Appellant had administered injections on the Patient on multiple

occasions. This finding of fact was based on witness testimony from the family members of the Patient to the effect that they saw the Appellant inject clear and red fluids into the Patient's body. The fact that large amounts of syringes and needles were discovered at the Appellant's Rochor Clinic during a joint inspection by the Board and HSA also provided strong circumstantial evidence that the Appellant had the practice of administering injections on his patients. The Appellant's attempts to explain the presence of these needles and syringes in his Rochor Clinic were not credible and were unsupported by any evidence. In the light of this, I could see no reason to disagree with the Board's finding of fact that the Appellant did administer injections on the Patient.

51 There is no doubt that the Appellant's administration of injections was contrary to established TCM practice. Indeed, as Counsel for the Board correctly pointed out, the Appellant himself had admitted in his Affidavit of Evidence In Chief ("AEIC") that TCM practitioners were not allowed to administer injections on patients. The Appellant stated at paragraph 97 of his AEIC:

> I am a qualified TCM practitioner and was in the first batch of accredited acupuncturists and TCM physicians in Singapore. I am aware of what falls within the scope of my role as a TCM practitioner and am fully aware that I am not trained to administer injections.

52 Having regard to the Appellant's own admission that he was not trained to administer injections, there was no need for the Board to call expert witnesses to testify on this issue. Accordingly, the Board was fully justified in finding that the Appellant's acts of administering injections on the Patient amounted to a breach of the Ethical Code and constituted professional misconduct under section 19(1)(i) of the TCM Act.

The use of Machine on the Patient

53 With respect to the Appellant's use of the Machine on the Patient to cure or alleviate his rectum cancer, IC 2005/1 found that this treatment was not in accordance with established TCM practice. The Appellant's argument that IC 2005/1 should not have come to this conclusion without the aid of expert evidence is not correct. It is well established that expert evidence is only required if the tribunal is unable to come to its conclusion without the aid of specialized knowledge. In *Chou Kooi Pang and another v Public Prosecutor* [1998] 3 SLR(R), the Court of Appeal held at [16]

> [I]t is well established that **expert opinion is only admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge** . If, on the proven facts, a judge can form his own conclusions without help, the opinion of an expert is unnecessary: *Regina v Turner (Terence)* [1975] QB 834. Thus, a psychiatrist's evidence was held inadmissible where its purpose was, in effect, to tell a jury how an ordinary person, not suffering from any mental illness, was likely to react to the strains and stresses of life: *R v Weightman* (1991) 92 Cr App R 291. In *R v Masih* [1986] Crim LR 395, the court expressed the view that in the case of an IQ which, though low, was within the range of normality as understood by psychologists, the adducing of expert evidence was not justified

54 In this case, most of the members of the investigation committee in IC 2005/1 were experienced TCM practitioners. Mr Ng Cheong Kim, the Chairman of the tribunal, and Mr Ang Liang, a member, had 31 years of practice experience each. Two other members, Mr Chew Wee Heong and Ms Tan Siew Buoy, had 29 and 28 years of practice experience respectively. The fifth member was not a TCM practitioner. The 4 TCM practitioner members were undoubtedly experts in TCM practice. I therefore doubt the utility of having an experienced TCM practitioner testify to something which was already well within the experience and knowledge of four out of five members of IC 2005/1. Under these circumstances, IC 2005/1 was clearly justified in reaching the conclusion that the Appellant's

use of the Machine on the Patient was not in accordance with established TCM practice.

55 Under the principles propounded in *Devathasan*, the Appellant could still have justified his use of the Machine on the Patient by providing some evidence to show that such treatment may do some good but will do no harm to the patient. Unfortunately, the objective evidence suggested that the Appellant himself had no idea what exactly the Machine could do for the patient. In fact, he could not even say that the use of the Machine on the Patient would not do any harm to him. During the inquiry, the Appellant admitted that:

> The machine is new. I don't know the effectiveness of this machine. The main feature is the needle when it is pierced in the tumour, it won't burn but it will be like a fire needle to burn the tumour away. So it would improve his cancer symptoms and prolong his life.

When asked by IC 2005/1 whether he was aware of the consequences of using the Machine, the Appellant answered that he had only seen and heard of the Machine and was not sure of the consequences of using it.

56 It is therefore clear that the use of the Machine was not established TCM practice and the Appellant's use of the Machine on the Patient was against established TCM practice and amounted to an act of professional misconduct.

Whether the Board's decision to cancel the Appellant's registration as a TCM practitioner is manifestly excessive punishment

57 An appellate court that hears an appeal from the decision of a disciplinary committee should afford a measure of deference to it. As Lord Hailsham stated in *Julius Libman v General Medical Council* [1972] AC 217 at 221, a finding or order of the disciplinary committee should be not displaced:

> ... unless it can be shown that something was clearly wrong either (i) in the conduct of the trial or (ii) in the legal principles applied or (iii) *unless it can be shown that the findings of the committee were sufficiently out of tune with the evidence to indicate with reasonable certainty that the evidence had been misread*.

58 The reason for this deference lies in the fact that the disciplinary committee has specialized knowledge of the seriousness of the particular act of misconduct and is better placed than the appellate court in determining what kind of measure is required to deal with it. Hence, Lord Millet held in *Ghosh v General Medical Council* [2001] 1 WLR 1915 at [34]:

> In *Evans v General Medical Council* (unreported) 19 November 1984 the Board [of the Privy Council] said:
>
> > The principles upon which this Board acts in reviewing sentences passed by the Professional Conduct Committee are well settled. It has been said time and again that a disciplinary committee are the best possible people for weighing the seriousness of professional misconduct, and that the Board will be very slow to interfere with the exercise of the discretion of such a committee ... The committee are familiar with the whole gradation of seriousness of the cases of various types which come before them, and are peculiarly well qualified to say at what point on that gradation erasure becomes the appropriate sentence. This Board does not have that advantage nor can it have the same capacity for judging what measures are from time to time required for the purpose of maintaining professional standards.

59 These principles have been adopted by our Court of Appeal in *Low Cze Hong v Singapore Medical Council* [2008] 3 SLR(R) 612 ("*Low Cze Hong*") at [40] to [43]. The present approach of the court is to give a measure of deference to the decisions reached by a disciplinary committee but not in a way that will effectively render nugatory the appellate powers granted to the court under respective statutes. In *Low Cze Hong*, the Court of Appeal indicated that it would adopt the approach stated by Lord Phillips in Council for the *Regulation of Health Care Professionals v General Medical Council and Ruscillo* [2005] 1 WLR 717 (at [78]):

> Where all material evidence has been placed before the disciplinary tribunal and it has given due consideration to the relevant factors, the council and the court should place weight on the expertise brought to bear in evaluating how best the needs of the public and the profession should be protected.

60 When the appeal from the Disciplinary Committee's decision concerns an issue of sentencing, the appellate court is unlikely to overturn the sentence unless there has been a misapprehension of facts, a misdirection of facts or if the sentence is out of line with other precedents dealing with acts of misconduct that are of equivalent severity: *Tan Sek Ho* v *Singapore Dental Board* [1999] 2 SLR(R) 70; *Ho Paul v Singapore Medical Council* [2008] 2 SLR(R) 780.

61 In the present case, IC 2005/1's recommendation to cancel the Appellant's registration as a TCM practitioner was based on the three complaints against him as stated at [2] above. While the Appellant's prescription of medicines that were not TCM medicines (under the second complaint) as well as his failure to keep proper records of his patients (under the third complaint) were serious, these acts might not have warranted a cancellation of his registration as a TCM practitioner. However, the Appellant's conduct in respect of the first complaint was extremely serious because it reflected a disregard of the Patient's safety, as well as a deliberate intent to flout the Ethical Code. The Appellant's administration of injections on the Patient was prohibited and could have caused serious consequences for the Patient. The Appellant's use of the Machine on the Patient also caused severe pain and there was simply no evidence that this treatment had any beneficial effect on the Patient at all despite the Appellant's claim that it had prolonged the Patient's life. These two acts amounted to a high degree of professional misconduct under section 19(1)(i) of the TCM Act.

62 In these circumstances, I am unable to say that IC 2005/1 and the Board erred when they came to the conclusion that the cancellation of the Appellant's registration was the appropriate sanction on the facts.

63 Accordingly, I dismissed the appeal with costs. By virtue of section 19(5) of the TCM Act, the cancellation of the Appellant's registration took effect from the date of my decision.

64 I would like to record my deep appreciation for the efforts put in by all counsel involved in contacting other professional disciplinary bodies to enquire about their experience concerning the issue of extra-territoriality and for their immense assistance in presenting the arguments in a clear and fair manner. I thank Ms Koh especially for having agreed to assist in this appeal at short notice and for her clear and crisp thoughts on the issue assigned to her as *amicus curiae*. I also thank the following professional bodies for providing the information sought:

(a) Law Society of Singapore;

(b) Institute of Certified Public Accountants;

(c) Singapore Medical Council;

(d) Singapore Dental Council;

(e) Singapore Pharmacy Council;

(f) Singapore Nursing Board; and

(g) Opticians and Optometrists Board.