IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 112

Originating Summons No 272 of 2015

In the matter of Section 18 of the Supreme Court of Judicature Act (Cap 322)

And

In the matter of Section 33B of the Misuse of Drugs Act (Cap 185)

And

In the matter of Order 53, Rule 1 of the Rules of Court (Cap 322, R 5)

And

In the matter of Articles 9(1) and 12(1) of the Constitution of the Republic of Singapore

And

In the matter of Criminal Case No 23 of 2010 between the Public Prosecutor and Nagaenthran a/l K Dharmalingam

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Between

NAGAENTHRAN A/L K DHARMALINGAM

… *Applicant*

And

ATTORNEY-GENERAL

… *Respondent*

JUDGMENT

[Administrative Law] — [Judicial review] — [Ambit] — [Ouster of review jurisdiction] — [Section 33B(4) Misuse of Drugs Act (Cap 185, 2008 Rev Ed)]

[Administrative Law] — [Judicial review] — [Application for leave to commence judicial review proceedings] — [Public Prosecutor's discretion to certify that person had substantively assisted Central Narcotics Bureau in disrupting drug trafficking activities within or outside Singapore]

[Constitutional Law] — [Judicial power]

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Nagaenthran a/l K Dharmalingam
v
Attorney-General

[2018] SGHC 112

High Court — Originating Summons No 272 of 2015
Chan Seng Onn J
20 November 2017

4 May 2018 Judgment reserved.

Chan Seng Onn J:

Introduction

1 By Originating Summons No 272 of 2015, Nagaenthran a/l K Dharmalingam ("the applicant") applies for leave pursuant to O 53 r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the ROC") to commence judicial review proceedings against the Public Prosecutor ("the judicial review leave application"). The applicant challenges, in particular, the Public Prosecutor's determination not to certify to a court pursuant to s 33B(2)(*b*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA") that the applicant has substantively assisted the Central Narcotics Bureau ("the CNB") in disrupting drug trafficking activities within or outside Singapore ("the non-certification determination"). To this end, the applicant seeks, amongst other things, a quashing order against the non-certification determination and a mandatory order enjoining the Public Prosecutor to reconsider and review his

determination not to grant the applicant a certificate of substantive assistance under s 33B(2)(*b*).[1]

2 The controversy that lies at the very heart of the present application revolves around the ambit of s 33B(4) of the MDA, which reads as follows:

> **Discretion of court not to impose sentence of death in certain circumstances**
>
> **33B.**— …
>
> (4) The determination of whether or not any person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities shall be at the sole discretion of the Public Prosecutor and no action or proceeding shall lie against the Public Prosecutor in relation to any such determination unless it is proved to the court that the determination was done in bad faith or with malice.

In essence, this provision narrowly circumscribes any challenge that may be brought against the Public Prosecutor's determination not to issue a certificate of substantive assistance pursuant to s 33B(2)(*b*) to only the grounds that "the determination was done in bad faith or with malice". Section 33B(4) has also been interpreted to permit a challenge on the ground that the Public Prosecutor's determination was unconstitutional: see *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 ("*Ridzuan*") at [35]; see also *Cheong Chun Yin v Attorney-General* [2014] 3 SLR 1141 ("*Cheong Chun Yin*") at [31].

3 But while this construction of s 33B(4) of the MDA brooks no dispute, an issue that has thus far remained shrouded in uncertainty is the question of whether s 33B(4) permits the judicial review of the Public Prosecutor's determination regarding whether to issue a certificate of substantive assistance

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[1] Agreed Bundle of Cause Papers ("ABCP"), Tab 3, *ex parte* Originating Summons No 272 of 2015 (Amendment No 1) dated 24 October 2017.

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on grounds *beyond* merely bad faith, malice and unconstitutionality. In the High Court decision of *Cheong Chun Yin*, Tay Yong Kwang J (as he then was) held in no uncertain terms that s 33B(4) does *not* permit of a separate ground of judicial review on the basis of a "jurisdictional error of law" (at [31]). But in *Ridzuan*, the Court of Appeal, when urged to review the Public Prosecutor's determination on the ground of procedural impropriety, declined to express concluded views on this issue and opined that whether s 33B(4) effectively limits the court's power of review to only bad faith, malice and unconstitutionality remains an "open question" (at [76]). The apex court also declined to rule conclusively in *Ridzuan* on whether the court is precluded from reviewing the Public Prosecutor's determination where the evidence shows that the Public Prosecutor had disregarded relevant considerations or had considered irrelevant considerations in coming to his decision (at [72]). Further, in *Prabagaran a/l Srivijayan v Public Prosecutor and other matters* [2017] 1 SLR 173 ("*Prabagaran*"), the Court of Appeal, when faced with submissions from the applicants in that case (one of whom was the present applicant) that s 33B(4) is contrary to the rule of law in that it ousts the jurisdiction of the court to review justiciable matters, acknowledged that the scope of this provision has been left open by the court in *Ridzuan* and considered it premature to rule on the constitutionality of s 33B(4) on the ground raised by the applicants (at [98]–[99]).

4 Presently, the applicant indeed seeks to challenge the non-certification determination on grounds of judicial review that extend beyond the grounds provided for under s 33B(4) of the MDA. Accordingly, I reserved judgment following the hearing. I now take this opportunity, as I furnish my decision for this application, to articulate my views on the proper construction of the scope of s 33B(4).

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Background

Facts relating to the offence

5 On 22 April 2009, the applicant was stopped while entering Singapore from Malaysia at about 7.45pm at the Woodlands Checkpoint on a motorcycle together with one Kumarsen, with the applicant riding pillion. They were each taken to an office for a strip search to be conducted by CNB officers. During the strip search, the CNB officers discovered a bundle wrapped in newspaper strapped on the applicant's left thigh. On further inspection, it was revealed that the bundle contained a transparent plastic bag with white granular substance, which was subsequently analysed and found to contain not less than 42.72g of diamorphine. The applicant was arrested and subsequently charged under s 7 of the MDA for importing not less than 42.72g of diamorphine into Singapore.

6 At the time of the applicant's arrest, he claimed in his contemporaneous statement that on that very day, he had met a Chinese man by the name of "King" at a coffee shop in Johor Bahru, Malaysia. He claimed that King had passed him a packet wrapped in brown paper, which he genuinely believed to be a packet of food, together with a transparent plastic packet of curry, and instructed him to deliver those items to a person in Woodlands, Singapore. King gave the applicant a SIM card, and asked him to use the SIM card to contact a hand phone number that King had provided upon entering Singapore. King also told the applicant to wait in front of a designated "7-Eleven" convenience store when at Woodlands, and to pass the items to a Chinese man who would be wearing a blue-coloured pair of spectacles and driving a dark blue Toyota Camry. The applicant claimed that he had agreed to perform this delivery because he had owed King money, and he also wanted to borrow another RM500 from King, which King would lend only after the delivery was complete.

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7 But as part of the applicant's account at trial, he further gave evidence that as he was about to leave to deliver the said items, King brought him into King's car and instructed him to deliver the bundle wrapped in newspaper instead. King apparently told him that the bundle contained "company products" or "company spares", and instructed him to secure the bundle to his thigh for the delivery. When the applicant initially resisted King's request, King slapped him on his face and punched him two to three times on his chest, threatening that if he refused to deliver the Bundle, King would kill one Shalini, who was the applicant's girlfriend. The applicant thus allowed King to strap the bundle to his left thigh with yellow tape. King then arranged for the applicant to return to his apartment to prepare for the delivery. Back at his apartment, the applicant asked Kumarsen to give him a ride on his motorcycle, telling him that he had to take some money to Singapore. The applicant also changed into a bigger pair of trousers, which belonged to one Tamilselvan, who is Kumarsen's nephew and was the applicant's roommate.

Procedural history

8 On 22 November 2010, I found, following a trial, the applicant guilty of the charge, convicted him accordingly, and sentenced him to death as mandated by s 33 read with the Second Schedule to the MDA: see *Public Prosecutor v Nagaenthran a/l K Dharmalingam* [2011] 2 SLR 830. In particular, I rejected the applicant's claim that King had assaulted him and threatened to kill his girlfriend if he had refused to let King strap the Bundle to his thigh and deliver the bundle to the person at Woodlands in Singapore (at [34]). I thus rejected the applicant's defence of duress (at [18]–[19]). I also found that the applicant had actual knowledge of the contents of the Bundle at the time of the offence (at [33]).

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9 The applicant appealed against his conviction and sentence, but his appeal was dismissed by the Court of Appeal on 27 July 2011: see *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2011] 4 SLR 1156 ("*Nagaenthran (CA)*").[2] The apex court affirmed all of the findings that I had made at trial (at [18]–[19]).

10 Subsequently, on 14 November 2012, Parliament passed the Misuse of Drugs (Amendment) Act 2012 (Act No 30 of 2012) ("the Amendment Act"), which came into force on 1 January 2013.[3] The Amendment Act introduced s 33B of the MDA, which provides that the court:

> (a) may sentence an offender convicted of a capital drug charge to life imprisonment with caning, instead of the mandatory death penalty, if the offender proves on a balance of probabilities that his involvement in the offence was merely as a courier as described under s 33B(2)(*a*) and the Public Prosecutor certifies to the court pursuant to s 33B(2)(*b*) that the offender has substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore (s 33B(1)(*a*) read with s 33B(2) of the MDA) ("the substantive assistance provision"); and
>
> (b) shall sentence an offender to life imprisonment, instead of the mandatory death penalty, if the offender proves on a balance of probabilities that his involvement in the offence was merely as a courier described under s 33B(3)(*a*) and he was suffering from an abnormality of mind within the meaning of s 33B(3)(*b*) (s 33B(1)(*b*) read with s 33B(3) of the MDA) ("the abnormality of mind provision").

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2 ABCP, Tab 9, Randeep Singh Koonar's Affidavit dated 30 October 2017 ("Randeep's Affidavit"), para 4.

3 ABCP, Tab 9, Randeep's Affidavit, para 5.

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11 Under the Amendment Act, persons who have been convicted and sentenced to death under the MDA prior to the amendments, and had their appeals dismissed prior to 1 January 2013, may apply to be re-sentenced in accordance with s 33B of the MDA: s 27(6) read with s 27(9) of the Amendment Act. Given that the applicant fell within the criteria specified in s 27(6) read with s 27(9) of the Amendment Act, the applicant was eligible to apply for re-sentencing.

12 On 26 February 2013, the applicant provided information to the CNB in a voluntary statement for the purposes of allowing the Public Prosecutor to make a determination pursuant to s 33B(2)(*b*) of the MDA as to whether the applicant had substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore ("the first set of information").[4]

13 On 22 July 2013, Attorney-General Steven Chong Horng Siong ("AG Chong"), who was the Public Prosecutor at the time, considered the first set of information, additional information pertaining to operational matters, and the views of the CNB in relation to whether, based on the first set of information, the applicant had substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore. On this basis, AG Chong determined that the applicant had *not* substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore (*ie*, the non-certification determination). On 28 August 2013, the Prosecution proceeded to inform the applicant's then-counsel, Mr Amolat Singh ("Mr Singh"), at a pre-trial conference ("PTC") that the Public Prosecutor would not be issuing a certificate of substantive assistance in favour of the applicant.[5]

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4 ABCP, Tab 9, Randeep's Affidavit, para 6.

5 ABCP, Tab 9, Randeep's Affidavit, paras 7–9.

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14 On 11 November 2013, the applicant provided further information to the CNB in a voluntary statement ("the second set of information"). Some portions of the second set of information contained new information that did not form part of the first set of information.[6]

15 On 8 December 2014, Attorney-General V K Rajah ("AG Rajah"), who was the Public Prosecutor at the time, considered the second set of information, additional information pertaining to operational matters, and the views of the CNB in relation to whether, based on the second set of information, the applicant had substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore. On this basis, AG Rajah determined that the applicant had once again *not* substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore. He thus determined that the non-certification determination made by AG Chong should stand. On 10 December 2014, the Prosecution duly informed Mr Singh at a PTC that the non-certification determination made by AG Chong would stand.[7]

16 On 24 February 2015, the applicant filed Criminal Motion No 16 of 2015, seeking to be re-sentenced under the substantive assistance provision pursuant to s 27(6)(*a*) of the Amendment Act ("the re-sentencing application").

17 On 27 March 2015, the applicant filed the judicial review leave application. As required under O 53 r 1(2) of the ROC, the *ex parte* originating summons filed in respect of this application on 27 March 2015 ("the Original OS")[8] was accompanied by a statement setting out the relevant details of the application including the relief sought and the grounds on which the relief is

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6 ABCP, Tab 9, Randeep's Affidavit, para 10.

7 ABCP, Tab 9, Randeep's Affidavit, paras 11–13.

8 ABCP, Tab 1, *ex parte* Originating Summons dated 27 March 2015.

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sought ("the Original Statement"),[9] and an affidavit verifying the facts relied on by the applicant ("the Original Affidavit").[10] Some of the information provided in the Original Affidavit constituted new information that did not form part of either the first or second sets of information ("the third set of information").[11] In the Original OS, the Original Statement and the Original Affidavit, the applicant sought to impugn the non-certification determination solely on the ground that it was made in bad faith.

18 On 10 September 2015, the applicant again provided further information to the CNB in a voluntary statement ("the fourth set of information"). And again, some portions of the fourth set of information contained new information that did not form part of either the first, second or third sets of information.[12]

19 On 11 November 2015, the CNB showed the applicant photographs that had been compiled by the CNB based on what the applicant had stated in the fourth set of information. After viewing the photographs, the applicant provided another voluntary statement to the CNB. But this statement did not contain any new information.[13]

20 On 18 November 2015, AG Rajah, in his capacity as the Public Prosecutor, considered the third and fourth sets of information, additional information pertaining to operational matters, and the views of the CNB in relation to whether, based on the third and fourth sets of information, the applicant had substantively assisted the CNB in disrupting drug trafficking

9 ABCP, Tab 2, Statement filed pursuant to O 53 r 1(2) of the ROC dated 27 March 2015.

10 ABCP, Tab 5, Nagaenthran a/l K Dharmalingam's Affidavit dated 27 March 2015.

11 ABCP, Tab 9, Randeep's Affidavit, para 14.

12 ABCP, Tab 9, Randeep's Affidavit, para 15.

13 ABCP, Tab 9, Randeep's Affidavit, para 17.

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activities within or outside Singapore. On this basis, AG Rajah determined that the applicant had once again *not* substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore. He thus again determined that the non-certification determination made by AG Chong should stand.[14]

21 On 23 November 2015, Mr Eugene Thuraisingam ("Mr Thuraisingam"), who had earlier replaced Mr Singh as counsel for the applicant, wrote to the Attorney-General's Chambers, setting out instructions from the applicant pertaining to a conversation that the applicant allegedly had with "Malaysian police officers" on 27 October 2015.[15]

22 On 24 November 2015, AG Rajah, in his capacity as the Public Prosecutor, considered the contents of the letter sent by Mr Thuraisingam and the views of the CNB in respect of the letter, and determined that the non-certification determination made by AG Chong should stand. On 26 November 2015, the Prosecution duly informed Mr Thuraisingam that the non-certification determination made by AG Chong would stand.[16]

23 On 31 December 2015, the applicant filed a further affidavit in support of the judicial review leave application ("the First Further Affidavit").[17] In the First Further Affidavit, the applicant maintained his original allegation that the Public Prosecutor had made the non-certification determination in bad faith.

24 On 8 January 2016, the applicant filed Court of Appeal Criminal Motion No 2 of 2016, seeking to challenge the constitutionality of s 33B(2)(*b*) and s

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14 ABCP, Tab 9, Randeep's Affidavit, para 18.

15 ABCP, Tab 9, Randeep's Affidavit, para 19 and exh RSK-1.

16 ABCP, Tab 9, Randeep's Affidavit, paras 20 and 21.

17 ABCP, Tab 6, Nagaenthran a/l K Dharmalingam's Affidavit dated 31 December 2015.

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33B(4) of the MDA and to set aside the sentence of death imposed on the applicant by me and affirmed on appeal by the Court of Appeal ("the constitutional challenge"). On 2 December 2016, the Court of Appeal dismissed the constitutional challenge: see *Prabagaran*.

25 On 11 April 2017, I heard the re-sentencing application. During the hearing, the parties agreed to proceed on the basis that the applicant was seeking to be re-sentenced to life imprisonment under the abnormality of mind provision. On 7 August 2017, the applicant amended the notice of motion for the re-sentencing application to update the grounds of the re-sentencing application to reflect the same. On 14 September 2017, I dismissed the re-sentencing application: see *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2017] SGHC 222 ("*Nagaenthran (Re-sentencing)*").

26 On 16 October 2017, the applicant filed a notice of its intention to refer to the affidavit of Dr Ung Eng Khean ("Dr Ung"), a psychiatrist from Adam Road Medical Centre, which the applicant had filed in the re-sentencing application. The affidavit exhibited a psychiatric report by Dr Ung dated 22 August 2016 that featured the findings of a psychiatric assessment of the applicant conducted by Dr Ung for the purposes of the re-sentencing application ("Dr Ung's Report"). The applicant also wrote a letter to the court on the same day to indicate his intention to refer to the following reports prepared by expert medical personnel from the Institute of Mental Health ("the IMH"):[18]

(a) A psychiatric report from Dr Koh Wun Wu Kenneth Gerald ("Dr Koh"), a senior consultant from the Department of General and Forensic Psychiatry at the IMH, dated 11 April 2013;

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18 ABCP, Tab 9, Randeep's Affidavit, para 25; *Nagaenthran (Re-sentencing)* at [12].

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(b) A psychological report from Ms Eunice Seah, a psychologist at the Department of Psychology of the IMH, dated 12 April 2013;

(c) A further psychological report from Dr Patricia Yap, the Principal Clinical Psychologist at the IMH, dated 1 February 2017; and

(d) A further psychiatric report from Dr Koh dated 7 February 2017.

(collectively, "the IMH Reports").

27 On 23 October 2017, the applicant filed an amended statement accompanying the Original OS ("the Amended Statement").[19] On 24 October 2017, the applicant filed an amended *ex parte* originating summons ("the Amended OS")[20] and another further affidavit in support of the Amended OS ("the Second Further Affidavit"),[21] which exhibited the IMH Reports.[22] In the Amended OS, the Amended Statement, and the Second Further Affidavit, the applicant further claimed, in addition to the original allegation that the Public Prosecutor had made the non-certification determination in bad faith, that the non-certification determination should be quashed because:

(a) the Public Prosecutor had acted contrary to Arts 9(1) and 12(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution");

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19 ABCP, Tab 4, Statement (Amendment No 1) filed pursuant to O 53 r 1(2) of the ROC dated 23 October 2017.

20 ABCP, Tab 3, *ex parte* Originating Summons (Amendment No 1) dated 24 October 2017.

21 ABCP, Tab 8, Nagaenthran a/l K Dharmalingam's Affidavit dated 24 October 2017.

22 ABCP, Tab 9, Randeep's Affidavit, paras 26 and 27.

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(b) the Public Prosecutor had not made a determination as a matter of precedent fact review; and

(c) the Public Prosecutor had made a decision that was irrational.

28 On 25 October 2017, Attorney-General Lucien Wong Yuen Kai, who was the Public Prosecutor at the time, considered the contents of Dr Ung's Report and the IMH Reports, and determined that the non-certification determination made by AG Chong should stand.[23]

29 On 20 November 2017, I heard submissions from both parties on the judicial review leave application.

The parties' submissions

30 Before me, counsel for the applicant, Mr Thuraisingam submitted that leave should be granted for the non-certification determination to be quashed and for the Public Prosecutor to be enjoined to reconsider and review his decision as to whether a certificate of substantive assistance should be granted to the applicant on the basis that:

(a) the Public Prosecutor had failed to take into account relevant considerations, given that there is no evidence that the information provided by the applicant to the CNB *prior* to the first set of information, which includes material information given at the time of the applicant's arrest in 2009, has been placed before the Public Prosecutor;[24]

(b) the Public Prosecutor had made a determination pursuant to s 33B(2)(*b*) of the MDA in the absence of a precedent fact, in the light of

[23] ABCP, Tab 9, Randeep's Affidavit, paras 28 and 29.

[24] Applicant's Written Submissions dated 17 November 2017, paras 41.1 and 45–54.

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the failure of the CNB to follow up on the information provided by the applicant in 2009, such that it is impermissible for the Public Prosecutor to consider whether the applicant did indeed provide substantive assistance in the disruption of drug activities within or outside Singapore;[25] and

(c) the Public Prosecutor had made the non-certification determination irrationally, given that the applicant had provided "pages and pages of information on every aspect", the respondent has not specifically disputed the veracity of the individuals mentioned in the information provided by the applicant, the applicant's ability to convey information in a cogent manner would have been impacted by the applicant's borderline intellectual functioning, and the information conveyed by the applicant in 2009 is now stale.[26]

31 In support of the proposition that judicial review may in this instance be conducted on those grounds, Mr Thuraisingam argued that s 33B(4) of the MDA does not limit the grounds of judicial review of the non-certification determination to merely whether the Public Prosecutor had made the determination in bad faith, with malice or unconstitutionally for two reasons. First, s 33B(4) is unconstitutional because it is: (a) contrary to Art 93 of the Constitution, which expressly vests judicial power in the courts, (b) contrary to the principle of separation of powers, which forms part of the basic structure of the Constitution, and (c) contrary to the rule of law. Second, s 33B(4) does not apply to oust the court's judicial review of the non-certification determination given that the Public Prosecutor's determination was in fact a nullity or a non-

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25 Applicant's Written Submissions dated 17 November 2017, paras 41.2 and 55–60.

26 Applicant's Written Submissions dated 17 November 2017, paras 41.3 and 61.

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decision, such that s 33B(4) was irrelevant and a declaration that the non-certification determination was void should be granted.[27]

32 Conversely, counsel for the respondent, Senior State Counsel Mr Francis Ng Yong Kiat *SC* ("Mr Ng *SC*"), submitted that the judicial review leave application should be dismissed. First, Mr Ng *SC* argued that it is impermissible for the applicant to rely on the precedent fact principle of review or irrationality as grounds of judicial review of the non-certification determination, given that:

(a) s 33B(4) of the MDA effectively limits the grounds of judicial review of the non-certification determination to merely bad faith, malice and unconstitutionality, as it declares the limits of judicial review in an area of decision-making that is non-justiciable and it is hence not unconstitutional;[28] and

(b) even if s 33B(4) of the MDA does not function as a valid and effective ouster clause: (i) the applicant is not allowed to assert that the Public Prosecutor failed to take into account relevant considerations when making the non-certification determination given his failure to properly include this ground in the Amended Statement; (ii) s 33B(2)(*b*) is not a provision in respect of which the precedent fact principle of review operates, and even if it applies, the non-certification determination is not a non-determination just because the information provided by the applicant has become stale, and (iii) there is no evidence that the non-certification determination was irrational.[29]

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27 Applicant's Written Submissions, paras 11–38.

28 Respondent's Written Submissions dated 17 November 2017, paras 61–82.

29 Respondent's Written Submissions, paras 44–60.

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33 Secondly, Mr Ng *SC* contended that the applicant has failed to establish a *prima facie* case of reasonable suspicion that the Public Prosecutor has acted in bad faith in making the non-certification determination, given that:[30]

(a) the mere good faith cooperation of the applicant with the CNB is not a necessary or sufficient basis for the Public Prosecutor to grant a certificate of substantive assistance;

(b) even if the information provided by the applicant has become stale or outdated, the Public Prosecutor is not precluded from making the non-certification determination; and

(c) any psychiatric condition that the applicant allegedly suffers from is irrelevant to the outcome-centric analysis the underlies the non-certification determination.

34 Finally, Mr Ng *SC* argued that the applicant has failed to establish a *prima facie* case of reasonable suspicion that the Public Prosecutor has acted unconstitutionally in making the non-certification determination, given that the applicant has not shown how the Public Prosecutor has acted in breach of either Arts 9(1) or 12(1) of the Constitution.[31]

Issues to be determined

35 It is well established that the three requirements that have to be satisfied for leave to commence judicial review proceedings to be granted are that:

(a) the subject matter of the complaint must be susceptible to judicial review;

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30 Respondent's Written Submissions, paras 28–35.

31 Respondent's Written Submissions, paras 36–43.

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(b) the applicant must have sufficient interest in the matter; and

(c) the material before the court must disclose an arguable case or a *prima facie* case of reasonable suspicion in favour of granting the remedies sought by the applicant.

See *Ridzuan* at [32] and *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 ("*Kenneth Jeyaretnam*") at [5].

36 Before me, it was common ground between the parties that the requirement that the applicant must have sufficient interest in this matter is met.

37 In respect of the requirement that the subject matter of the complaint must be susceptible to judicial review, the respondent suggests that this is a major bone of contention in these proceedings. According to the respondent, the parties are in disagreement over whether the non-certification determination is susceptible to judicial review, specifically in respect of the grounds of review beyond merely the grounds that the determination had been made in bad faith, with malice, or unconstitutionally. And this dispute arises from the fact that there lies controversy in the correct construction of s 33B(4) of the MDA. In particular, while a plain reading of s 33B(4) suggests that this provision serves to oust the jurisdiction of the courts *vis-à-vis* decisions of the Public Prosecutor not to issue certificates of substantive assistance to the extent as prescribed therein, the applicant mounts arguments against the efficacy and constitutionality of s 33B(4), which in turn impugn its function as an ouster clause (see [31] above).[32]

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[32] Respondent's Written Submissions, para 26.

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38 I disagree that whether the subject matter of the complaint is susceptible to judicial review is a matter in dispute. It is plain that the subject that is presently being referred for judicial review is the Public Prosecutor's decision not to issue a certificate of substantive assistance in favour of the applicant, *ie*, the non-certification determination. As this determination made pursuant to s 33B(2)(*b*) of the MDA is clearly derived from a statutory power, it should therefore ordinarily be amenable to judicial review in the absence of compelling reasons to the contrary which indicate the absence of a public element, flavour or character in the determination such that it falls outside the purview of public law: *Manjit Singh s/o Karpal Singh and another v Attorney-General* [2013] 2 SLR 844 at [28]–[32]; see also *Deepak Sharma v Law Society of Singapore* [2016] 4 SLR 192 ("*Deepak Sharma*") at [24]. Here, there are no reasons whatsoever, let alone compelling ones, that denude the non-certification determination of its public element, flavour or character.

39 But insofar as the respondent is suggesting that Parliament intended, pursuant to s 33B(4) of the MDA, to oust the jurisdiction of the court to review the Public Prosecutor's decision not to issue certificates of substantive assistance on grounds other than bad faith, malice and unconstitutionality, that is strictly speaking an inquiry to be undertaken separately from the consideration of whether the subject matter of a complaint is susceptible to judicial review. As a matter of principle, this makes eminent sense; an act or omission on the part of an administrative body might be susceptible to judicial review, but yet also be statutorily excluded from judicial review by the courts. Indeed, this also seemed to be the approach taken in *Deepak Sharma*, where Woo Bih Li J held that the assessment of the presence or otherwise of any statutory provision that ousts the jurisdiction of the courts to engage in judicial review is an analysis that is *separate from* the assessment of whether there exist compelling reasons that indicate the absence of a public element in a statutory

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power which thereby impugns the amenability of the statutory power to judicial review (at [25]).

40 As for the requirement that the material before the court must disclose an arguable case or a *prima facie* case of reasonable suspicion in favour of granting the remedies sought by the applicant, there is no doubt that this is an element in dispute. In applying this limb of the test, I am cognizant of the fact that it is meant to present "a very low threshold": *Chan Hiang Leng Colin and others v Minister for Information and the Arts* [1996] 1 SLR(R) 294 at [22]. But at the same time, I am mindful that the leave requirement for judicial review applications is ultimately intended to be a means of filtering out groundless or hopeless cases *in limine*, and its aim is to prevent a wasteful use of judicial time and to protect public bodies from harassment that might arise from a need to delay implementing decisions, where the legality of such decisions is being challenged: *Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR(R) 133 at [23]. As aptly put by Vinodh Coomaraswamy JC (as he then was) in *Manjit Singh s/o Kirpal Singh and another v Attorney-General* [2013] 2 SLR 1108 (at [95]), for this test to serve its purpose, it must be given some meaning. In other words, although the threshold for leave to be granted to commence judicial review is indeed low, the need for the applicant to meet this threshold cannot be construed as a mere formality. This entails the applicant placing the fullest evidence and strongest arguments before the court, instead of merely material that is skimpy or vague: *Zheng Jianxing v Attorney-General* [2014] 3 SLR 1100 at [35], citing *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue* [2006] 3 SLR(R) 507 at [24].

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41 Accordingly, the issues that, to my mind, arise for my determination in the present application are:

(a) whether there is a *prima facie* case of reasonable suspicion that the non-certification determination should be quashed on the basis of any of the grounds of judicial review provided for under s 33B(4) of the MDA; and

(b) whether there is a *prima facie* case of reasonable suspicion that the non-certification determination should be quashed on the basis of any ground of judicial review *beyond* those under s 33B(4) of the MDA.

42 I will now proceed to deal with each issue in turn.

My decision

43 In my judgment, the applicant has failed to show that there is a *prima facie* case of reasonable suspicion that the non-certification determination may be quashed on the basis of *any* ground of judicial review, be it those provided for under s 33B(4) of the MDA or otherwise. First, I find that the applicant has failed to show that there is a *prima facie* case of reasonable suspicion that the Public Prosecutor has either acted in bad faith or acted unconstitutionally in making the non-certification determination. Second, however, I find that although s 33B(4) of the MDA is a constitutionally valid ouster clause that expressly ousts the jurisdiction of the courts to review the Public Prosecutor's decision not to issue a certificate of substantive assistance except on the grounds of bad faith, malice or unconstitutionality, the ouster clause in principle does not exclude the review of the Public Prosecutor's determination on the grounds of other jurisdictional errors of law which render the ouster clause inapplicable. Having said that, I find that even if the applicant may avail himself of additional

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grounds of review beyond those provided for under s 33B(4), the applicant has failed to show that there is a *prima facie* case of reasonable suspicion that the Public Prosecutor has failed to take into account relevant considerations, has made a determination in the absence of a precedent fact, or has acted irrationally in making the non-certification determination. I therefore dismiss the judicial review leave application.

Review based on grounds provided for under s 33B(4) of the MDA

44 In my view, the applicant has failed to establish a *prima facie* case of reasonable suspicion that the non-certification determination should be quashed on the basis of any of the grounds provided for under s 33B(4) of the MDA.

45 As stated earlier (at [2] above), s 33B(4) of the MDA permits of judicial review of the non-certification determination on the grounds of bad faith, malice or unconstitutionality. In the Amended OS, the Amended Statement, and the Second Further Affidavit that have been filed by the applicant, the applicant claims that the Public Prosecutor had *both* acted in bad faith and acted contrary to Arts 9(1) and 12(1) of the Constitution. In other words, the amended cause papers filed by the applicant showed that the applicant was seeking to impugn the non-certification determination on the grounds of bad faith and unconstitutionality; no allegation that the Public Prosecutor had made the determination with malice had been made.

46 However, before me, the applicant appeared to have abandoned his arguments premised on any of the grounds of judicial review permitted under s 33B(4) (see [30] above). Insofar as this may be regarded as a concession on the part of the applicant that he is no longer alleging that the Public Prosecutor was acting in bad faith or unconstitutionally, I find that the applicant is not entitled to seek to quash the non-certification determination on either of these two

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specific grounds of judicial review. Be that as it may, I shall, for the sake of completeness, proceed to explain why I do not in any event think that the applicant has shown that there is a *prima facie* case of reasonable suspicion that the Public Prosecutor has acted either in bad faith or unconstitutionally in making the non-certification determination.

Bad Faith

47 First, I find that any suggestion that the Public Prosecutor has acted in bad faith in making the non-certification determination is clearly untenable.

48 In *Ridzuan*, the Court of Appeal held that bad faith within the meaning of s 33B(4) of the MDA requires there to be a *knowing* use of a discretionary power for extraneous purposes, which essentially entails the Public Prosecutor *knowingly* exercising his discretion not to issue a certificate of substantive assistance pursuant to s 33B(2)(*b*) for a purpose other than the intended purpose of the substantive assistance regime under s 33B (at [71]). The intended purpose underpinning the s 33B substantive assistance regime, in turn, is to enhance the operational effectiveness of the CNB in the disruption of drug trafficking. The rationale for this was comprehensively set out by the apex court in *Ridzuan* in the following manner (at [46]):

> … It was thought that providing an incentive for offenders to come forward with information [by issuing certificates of substantive assistance to couriers] would enhance the operational effectiveness of CNB in two ways. First, it would *give CNB an additional source of intelligence to clamp down on drug trafficking activities*. Second, it would *disrupt drug trafficking syndicates' established practices and create an atmosphere of risk for the members of these syndicates as there would be uncertainty as to whether an apprehended courier would reveal all their secrets*. This is evident from the following excerpt of the speech of Mr Teo Chee Hean (*Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89 (Mr Teo Chee Hean, Deputy Prime Minister and Minister for Home Affairs)):

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> As Mr Shanmugam said, we must be clear about what the policy intent is. *The policy intent of this substantive cooperation amendment to our mandatory death penalty regime is to maintain a tight regime – while giving ourselves an additional avenue to help us in our fight against drugs, and not to undermine it.*
>
> Couriers do play a key role in the drug network. In fact, they are often our key point of contact with the drug network. Let me explain why. Illicit drugs are not manufactured or grown in Singapore because of our tough laws and enforcement. All our drugs therefore have to be couriered into Singapore. Thus, *couriers are a key part of the network which has to be vigorously targeted and suppressed in order to choke off the supply to Singapore. And they are the main link to the suppliers and kingpins outside Singapore.*
>
> …
>
> We cannot be sure how exactly couriers or the syndicates will respond to this new provision. But we have weighed the matter carefully, and are prepared to make this limited exception if it *provides an additional avenue for our enforcement agencies to reach further into the networks, and save lives from being destroyed by drugs and hence make our society safer.*
>
> Syndicates may now be forced to re-organise their operations to more tightly compartmentalise the information. Or they may have to stop using experienced couriers who may have, through several trips, gleaned more information about the networks. They may have to look for new couriers, which will make their supply chain less reliable. All in all, it will create an atmosphere of risk and uncertainty in the organisation, because they do not know if one of them gets caught, whether he will reveal secrets that will then cause problems for all of them. Our intent is to make things as difficult as possible for the syndicates and to keep them and drugs out of Singapore.
>
> [emphasis added]

49 The particulars relied upon by the applicant in the Amended Statement to substantiate his original claim that the Public Prosecutor had acted in bad faith in making the non-certification determination are that the Public Prosecutor had made the non-certification decision even though:[33]

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(a) the applicant has cooperated fully with the CNB by providing them with all the circumstances, details, information and evidence regarding the people that he had met and the activities that he had participated in while being involved in the drug trafficking to the best of his information, knowledge and belief; and

(b) the applicant has at all material times been suffering from various psychiatric conditions, including attention-deficit hyperactivity disorder of the inattentive subtype, as well as borderline intellectual functioning, which would all have had a sufficiently material impact on the applicant's ability to communicate his knowledge of relevant information in a cogent manner.

50 I agree with the respondent's submission that none of the foregoing particulars raised by the applicant are sufficient to show that the Public Prosecutor had knowingly made the non-certification determination for an extraneous purpose.

51 First, it is insufficient that the applicant has cooperated fully with the CNB by providing them with all that he genuinely knew about the drug trafficking activities that he had been engaged in to the best of his information, knowledge and belief. In the light of the fact that the intended purpose of the substantive assistance regime under s 33B of the MDA is to enhance the operational effectiveness of the CNB in disrupting drug trafficking, the Public Prosecutor would indeed be acting in accordance with the intended purpose of the substantive assistance regime by deciding to issue a certificate of substantive assistance *only if* the offender in question offers assistance that yields *actual results* in relation to the disruption of drug trafficking: *Ridzuan* at [45]. For

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[33] ABCP, Tab 4, Statement (Amendment No 1), paras 4–6.

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example, if the applicant was fed false information by the drug syndicate and the applicant had cooperated fully with the CNB by providing all that false information in good faith to the CNB, which subsequently led to the CNB's investigations getting nowhere in tracing the identities and the whereabouts of the members of the syndicate, it cannot be said that any substantive assistance was rendered to the CNB. To the contrary, the CNB's operational effectiveness would have been adversely affected despite the applicant's full cooperation as the CNB had been sent on a wild goose chase based on the false information provided.

52 Indeed, the Court of Appeal in *Ridzuan*, when presented with precisely the same argument made by the appellant there, unequivocally rejected the appellant's claim that he should have been issued a certificate of substantive assistance by dint of his good faith cooperation, and held thus (at [47]–[48]):

> 47 The fact that an offender cooperates in good faith with CNB in and of itself does not enhance CNB's operational effectiveness. The Minister for Law explained this point in the following manner (*Singapore Parliamentary Debates, Official Report* (14 November 2012), vol 89 (Mr K Shanmugam, Minister for Law)):
>
> > Some Members have asked, would it be better to say that the courier has done his best, that he has acted in good faith − should he not qualify. …
> >
> > The short answer is that it is not a realistic option because every courier, once he is primed, will seem to cooperate. Remember we are dealing not with an offence committed on the spur of the moment. We are dealing with offences instigated by criminal organisations which do not play by the rules, which will look at what you need, what your criteria are and send it to you. So if you say just cooperate, just do your best, all your couriers will be primed with beautiful stories, most of which will be unverifiable but on the face of it, they have cooperated, they did their best. And the death penalty will then not be imposed and you know what will happen to the deterrent value. Operational effectiveness will not be enhanced. …

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> 48 In the premises, we do not accept the Appellant's first argument. In fact, the PP would be acting *ultra vires* if he were to exercise his discretion under s 33B(2)(*b*) of the MDA in favour of an offender simply on the basis that he was forthcoming in disclosing all he knew to CNB even though the information he gave did not lead to the actual disruption of drug trafficking activities within or outside Singapore.

53 I should also add that at the time when this judgment was being drafted, See Kee Oon J has also issued the grounds of his decision in the High Court case of *Adili Chibuike Ejike v Attorney-General* [2018] SGHC 106 ("*Adili*"), which touches on the same issue being examined here. In *Adili*, the applicant similarly sought to challenge the Public Prosecutor's decision not to issue a certificate of substantive assistance by arguing that the Public Prosecutor had acted in bad faith by declining to issue the certificate even though he had "done whatever he humanly could" to assist the CNB by giving all the information within his knowledge to the CNB to enable them to disrupt, dismantle and smash drug trafficking activities (at [23]). See J accepted that the applicant did furnish information to the CNB, but unequivocally held, for the same reasons set out by the Court of Appeal in *Ridzuan*, that it was irrelevant that the applicant had indeed furnished the CNB with all that he knew; the Public Prosecutor was justified in refusing to issue the certificate of substantive assistance if it had been determined that the information provided did not enhance CNB's operational effectiveness in actually disrupting drug trafficking activities (at [24]–[25]). Hence, I have no doubt that the applicant's suggestion here that the Public Prosecutor had acted in bad faith by making the non-certification determination even after he had revealed all that he knew about his drug trafficking activities is similarly meritless. The applicant is unable to show how the information he provided had in fact yielded some positive assistance (let alone of a substantive nature) to the CNB in disrupting drug trafficking activities either within or outside Singapore.

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54 Secondly, I find it irrelevant that the applicant is suffering from various psychiatric conditions that might have affected his ability to convey useful information to the CNB effectively. At the end of the day, the fact that the applicant's psychiatric condition might have restricted his capacity to offer useful information will not change the fact that the Public Prosecutor should only decide to issue a certificate of substantive assistance if he thinks that the information received had enhanced the CNB's operational effectiveness in disrupting drug trafficking activities. The intended purpose underlying the substantive assistance regime under s 33B of the MDA does not change in accordance with a particular drug offender's individual attributes. It thus matters not that the applicant's psychiatric condition might have affected his ability to properly convey information to the CNB. Therefore, the Public Prosecutor cannot be said to have knowingly acted for an extraneous purpose by making the non-certification determination even though the applicant is suffering from various psychiatric conditions which hindered his ability to provide useful information that would have assisted the CNB in disrupting drug trafficking activities.

55 In any event, I also agree with the respondent that the applicant's suggestion that he was handicapped by his psychiatric ailments in conveying his knowledge of drug trafficking activities of his drug network to the CNB appears to be nothing more than a mere afterthought. Indeed, the IMH Reports, as well as Dr Ung's Report, all show that the applicant was able to communicate clearly and competently with the relevant medical personnel when interviewed for his various psychiatric or psychological assessments for the purpose of the re-sentencing application.

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56 Accordingly, the applicant is unable to establish a *prima facie* case of reasonable suspicion that the Public Prosecutor had acted in bad faith by making the non-certification determination.

Unconstitutionality of the non-certification determination

57 Secondly, I find the applicant's claim that the Public Prosecutor had acted unconstitutionally – specifically, in breach of Arts 9(1) and 12(1) of the Constitution – in making the non-certification determination to be utterly baseless.

58 The non-certification determination may be reviewed on the ground of unconstitutionality because it has been recognised by the Court of Appeal in *Ridzuan* that the doctrine of constitutional supremacy that prevails in Singapore ensures that all governmental powers are ultimately derived from and circumscribed by the Constitution, such that all executive acts must be constitutional and the court is conferred the power to declare void any executive act that is unconstitutional: at [35], citing *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [143]. Indeed, it has also been recognised by Tay J in *Cheong Chun Yin* (at [31]) that unconstitutionality is an available ground of review of the Public Prosecutor's decision not to issue a certificate of substantive assistance, in the light of the observation of the Minister for Law during the Second Reading of the Misuse of Drugs (Amendment) Bill in 2012 that it "goes without saying" that the Public Prosecutor's discretion is subject to judicial review of any unconstitutionality: *Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89 (Mr K Shanmugam, Minister for Law). The observation of Tay J in *Cheong Chun Yin* has in turn been cited with approval by See J in *Adili* (at [21]).

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59 In the Amended Statement, the applicant claimed that the Public Prosecutor had acted in breach of Arts 9(1) and 12(1) of the Constitution given that the making of the non-certification determination caused the applicant to be "denied equal protection guaranteed under the Constitution".[34]

60 In my view, the applicant's reliance on Arts 9(1) and 12(1) of the Constitution is completely without merit. In the decision of *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 ("*Ramalingam*"), the Court of Appeal held that prosecutorial decisions undertaken by the Attorney-General in his capacity as the Public Prosecutor to initiate prosecution against an offender should be presumed to be constitutional or lawful and in the public interest until they are shown to be otherwise, in view of the high constitutional office held by the Attorney-General and the co-equal status of the prosecutorial power and the judicial power enshrined under Art 35(8) and Art 93 of the Constitution respectively (at [43]–[46]). This means that any applicant who seeks to challenge the legality of the decision of the Attorney-General to initiate prosecutions must be able to produce sufficient *prima facie* evidence to rebut the presumption of constitutionality that attaches to prosecutorial decisions. The Court of Appeal in *Ridzuan* affirmed this principle unreservedly (at [36]).

61 Although the decision of the Public Prosecutor, pursuant to s 33B(2)(*b*) of the MDA, to certify to any court that a person has substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore is a decision that does not involve the exercise of a constitutional power *per se*, it is nevertheless a power exercised by an official with constitutional standing. Hence, the presumption of legality that is encapsulated in the maxim o*mnia praesumuntur rite esse acta* (*ie*, all things are presumed to have been done rightly and regularly until the contrary is shown) should still apply with

[34] ABCP, Tab 4, Statement (Amendment No 1), para 7.

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considerable, if not equal, force. Indeed, this was precisely the conclusion I had reached as well in *Lee Siew Boon Winston v Public Prosecutor* [2015] 4 SLR 1184. In that case, in finding that a presumption of legality or regularity applies in relation to the Prosecution's duty of disclosure as set out in the Court of Appeal decision of *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 (at [168]), I held that the presumption of legality that accompanies the office of the Attorney-General as the Public Prosecutor should not be limited to the exercise of only constitutional powers (at [167], citing *Cheong Chun Yin* at [37] and *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2014] 4 SLR 773 at [72]).

62 Here, the applicant provides no particulars whatsoever, be it in the Amended Statement or in any of his three affidavits, to support his allegation that the Public Prosecutor had, by making the non-certification determination, acted in breach of either Art 9(1) or Art 12(1) of the Constitution. It is clear that the applicant has not been able to show anything that could come remotely close to rebutting the presumption of constitutionality apropos the Public Prosecutor's discretion to issue a certificate of substantive assistance.

63 In respect of the applicant's reliance on Art 9(1) of the Constitution in particular, I agree with the respondent that the applicant's reference in the Amended Statement to having been "denied equal protection guaranteed under the Constitution" has no relevance whatsoever to any allegation that the Public Prosecutor has acted in breach of Art 9(1), which provides that "[n]o person shall be deprived of his life or personal liberty save in accordance with law". If anything, it can only possibly be of some relevance to an allegation of a breach of Art 12(1), which provides that "[a]ll persons are equal before the law and entitled to the equal protection of the law".

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64 But even in respect of the applicant's reliance on Art 12(1) of the Constitution, it is settled law that an executive action would be in breach of the equal protection clause under Art 12(1) if the act amounts to a deliberate and arbitrary discrimination against a particular person (*Ridzuan* at [49], citing *Eng Foong Ho and others v Attorney-General* [2009] 2 SLR(R) 542 at [30] and *Public Prosecutor v Ang Soon Huat* [1990] 2 SLR(R) 246 at [23]). This, when extrapolated to the context of reviewing the constitutionality of the Public Prosecutor's decision to issue a certificate of substantive assistance pursuant to s 33B(2)(*b*) of the MDA, would require the Public Prosecutor to issue certificates of substantive assistance to two co-offenders in a drug syndicate if (a) the level of involvement in the offence of, and the consequence knowledge of the syndicate possessed by, both co-offenders are practically identical, and (b) both co-offenders provide practically the same information to the CNB: *Ridzuan* at [51].

65 In the evidence placed before the court, although the applicant suggests that he has been "denied equal protection guaranteed under the Constitution", he has not even managed to allude to any particular individual who is alleged to be in the same circumstance as the applicant but who has been treated unequally as compared to the applicant. There is thus clearly no basis for making any finding that the non-certification determination was made in breach of Art 12(1).

66 Accordingly, the applicant's claim that the Public Prosecutor had made the non-certification determination in breach of Art 9(1) and Art 12(1) is a bare assertion that should be rejected. The applicant has failed to show that there is a *prima facie* case of reasonable suspicion that the non-certification determination was made unconstitutionally.

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Conclusion on judicial review under s 33B(4) of the MDA

67 For the reasons canvassed above, I find that the applicant has failed to establish a *prima facie* case of reasonable suspicion that the non-certification determination should be quashed on any of the grounds of judicial review provided for under s 33B(4) of the MDA.

Review based on grounds beyond those under s 33B(4) of the MDA

68 Next, I also do not think that the applicant has established a *prima facie* case of reasonable suspicion that the non-certification determination should be quashed on the basis of grounds *beyond* merely bad faith, malice and unconstitutionality.

69 The applicant invites this court to grant it leave to bring a judicial review application against the non-certification determination specifically on the grounds that the Public Prosecutor, in making the non-certification determination, had: (a) failed to take into account relevant considerations, (b) made a determination in the absence of a precedent fact, or (c) acted irrationally. I disagree that leave to bring judicial review should be granted on these grounds. Although I find that s 33B(4) of the MDA is a constitutionally valid ouster clause that expressly precludes judicial review of the non-certification determination on grounds beyond merely bad faith, malice and unconstitutionality, I find that it is in principle possible for the ouster clause to be circumvented when the Public Prosecutor's determination is tainted by a jurisdictional error of law. Having said that, I ultimately find that the applicant is unable to show, on the facts, that there is a *prima facie* case of reasonable suspicion that the three aforementioned grounds of judicial review have been made out.

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Whether s 33B(4) of the MDA is a valid and effective ouster clause

70 In my judgment, s 33B(4) of the MDA is a constitutionally valid ouster clause. However, it remains in principle possible for the ouster clause to be circumvented when the Public Prosecutor's determination is tainted by a jurisdictional error of law. It thus cannot be said that s 33B(4) of the MDA restricts judicial review of the Public Prosecutor's decision not to issue a certificate of substantive assistance to *only* the limited grounds of bad faith, malice and unconstitutionality.

71 I set out s 33B(4) of the MDA once again for easy reference as follows:

> **Discretion of court not to impose sentence of death in certain circumstances**
>
> **33B.**— …
>
> (4) The determination of whether or not any person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities *shall be at the sole discretion of the Public Prosecutor and no action or proceeding shall lie against the Public Prosecutor in relation to any such determination* ***unless it is proved to the court that the determination was done in bad faith or with malice***.
>
> [emphasis added in italics and bold italics]

As alluded to earlier (at [3] above), it is presently an open question as to whether s 33B(4) of the MDA effectively limits the court's power to review the Public Prosecutor's decision not to issue a certificate of substantive assistance only on the grounds of bad faith, malice and unconstitutionality: *Ridzuan* at [76] and *Prabagaran* at [98]–[99].

72 In *Per Ah Seng Robin and another v Housing and Development Board and another* [2016] 1 SLR 1020 ("*Robin Per*"), the Court of Appeal helpfully described ouster clauses in the following succinct manner (at [63]):

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> … Put simply, ouster clauses (also known as privative, preclusive, limitation or exclusion clauses) are statutory provisions which *prima facie* prohibit judicial review of the exercise of the discretionary powers to which they relate (see Mark Elliot *et al*, *Beatson, Matthews and Elliott's Administrative Law*: Text and Materials (Oxford University Press, 4th Ed, 2011) at para 15.6.1). Such clauses may be worded differently and may appear in different guises, but their broad import is clear: they seek to oust the court's jurisdiction to carry out judicial review (see Matthew Groves & H P Lee, *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) at p 346). …

73 The applicant submits that s 33B(4) of the MDA is not a valid and effective ouster clause, and should not oust the court's jurisdiction from reviewing the non-certification determination beyond the grounds of bad faith, malice and unconstitutionality. Specifically, the applicant invites this court to review the non-certification determination on the grounds that the Public Prosecutor had failed to take into account relevant considerations, failed to make a determination for the purpose of the precedent fact principle of review, or had acted irrationally in making the determination. To this end, the applicant advances two principal arguments, which I will now proceed to deal with in turn.

(1) Unconstitutionality of s 33B(4) of the MDA

74 The first argument raised by the applicant is that s 33B(4) of the MDA is unconstitutional for being contrary to Art 93 of the Constitution, the principle of separation of powers, and the rule of law. If this argument prevails, s 33B(4) would be an *invalid* ouster clause, and it would follow that the supervisory jurisdiction of the courts cannot be ousted by s 33B(4): see Chan Sek Keong, "Judicial Review – From Angst to Empathy: A Lecture to Singapore Management University Second Year Law Students" (2010) 22 SAcLJ 469 ("*Judicial Review – From Angst to Empathy*") at para 19. In the context of the

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present application, the applicant would then be able to rely on all three grounds of review that go beyond the limited grounds permitted under s 33B(4).

75 There are three strands to the applicant's arguments in this regard. The applicant first submits that s 33B(4) of the MDA, which provides that the Public Prosecutor shall retain the sole discretion regarding whether to issue a certificate of substantive assistance except where it is proved that he has exercised that discretion in bad faith, with malice (or unconstitutionally), is contrary to Art 93 of the Constitution because s 33B(4) effectively wrests judicial power away from the judiciary. Article 93 of the Constitution provides:

> **Judicial power of Singapore**
>
> **93.** The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force.

76 In the same vein, the applicant also submits that s 33B(4) of the MDA is contrary to the principle of separation of powers because this principle, which is a part of the basic structure of the Constitution, entails the sharing or division of sovereign power between the three organs of state, *viz*, the legislature, the executive and the judiciary (see *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 at [11]), but s 33B(4) curtails the judicial power of the judiciary to review the executive's exercise of discretion.

77 The final strand of the applicant's arguments is that s 33B(4) of the MDA is contrary to the rule of law. To this end, the applicant relies on the famous holding in *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR(R) 525 ("*Chng Suan Tze*") that (at [86]):

> … the notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power. …

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The applicant thus suggests that s 33B(4) severely circumscribes the court's purview to declare legal limits on the Public Prosecutor's exercise of discretionary power, save for the limited grounds of bad faith, malice and unconstitutionality.

78 These arguments appear to stem from the *obiter* suggestions of the Court of Appeal in *Robin Per* (at [65]), which read as follows:

> We further note that arguments have been made by academics and other commentators against enforcing ouster clauses on the ground that in so far as such clauses seek to oust the court's jurisdiction to review *justiciable* matters (as opposed to non-justiciable matters, for which ouster clauses merely declare accepted existing limits on judicial review (see Hilaire Barnett, *Understanding Public Law* (Routledge-Cavendish, 2009) at p 194)), they may be regarded as being incompatible with the rule of law because it should be within the court's purview to declare the legal limits of discretionary powers (see Thio Li-ann, "Law and the Administrative State" in *The Singapore Legal System* (Kevin Y L Tan ed) (Singapore University Press, 2nd Ed, 1999) ch 5 at p 195). Some commentators have also suggested that ouster clauses, in seeking to take away the judicial power of the court where its supervisory jurisdiction is concerned, are in violation of Art 93 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution") as well as the principle of separation of powers (see Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) at para 10.218 and Chan Sek Keong, "Judicial Review – From Angst to Empathy: A Lecture to Singapore Management University Second Year Law Students" (2010) 22 SAcLJ 469 at para 19). … [emphasis in original]

79 As a starting position, it is well established that our courts have always accorded a presumption in favour of the constitutionality of a statute because the courts generally presume that Parliament, when enacting legislation, would comply with constitutional requirements: *Ramalingam* at [48], citing *Lee Keng Guan v Public Prosecutor* [1977–1978] SLR(R) 78 at [19] and *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 ("*Taw Cheng Kong (CA)*") at [60] and [79]–[80]. Indeed, it is worth noting that this presumption, while

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rebuttable in principle, has empirically been shown to be a difficult one to rebut in practice; put another way, our courts have always been scrupulous in according the presumption of constitutionality its due weight when dealing with challenges seeking to impugn the constitutionality of statutory provisions. As far as I am aware, the only instance in Singapore when a statutory provision has been struck down by the High Court for being unconstitutional was the decision of *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR(R) 78, where M Karthigesu JA held that s 37(1) of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) was in constitutional violation of Art 12(1) of the Constitution, and even on that particular occasion, the High Court's decision was subsequently overturned on appeal in *Taw Cheng Kong (CA)*.

80 With that in mind, I turn now to address the arguments raised by the applicant in this regard.

81 In my judgment, s 33B(4) of the MDA is *not* unconstitutional. It is true that Art 93 of the Constitution vests judicial power of Singapore in the judiciary and one of the aspects of judicial power is to review the legality of executive action, but s 33B(4) excludes from the province of judicial power the review of the legality of the Public Prosecutor's determination regarding whether to issue a certificate of substantive assistance under s 33B(2)(*b*). However, I do not agree that s 33B(4) of the MDA is in contravention of Art 93, the principle of separation of powers, or indeed, the rule of law.

(A) THE APPLICABLE PRINCIPLES

82 Before turning to evaluate the constitutionality of s 33B(4) of the MDA *per se*, it would be prudent for me to first set out the relevant principles that necessarily underpin a finding that an ouster clause is constitutionally valid. In this regard, I take the view that an ouster clause would be constitutionally valid

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as long as the determination that the ouster clause seeks to exclude from the province of judicial power is non-justiciable. Where the court finds that a particular determination made in the exercise of a statutory function is non-justiciable, the court is in fact exercising its judicial power pursuant to Art 93 of the Constitution and acknowledging the legitimate curtailment of judicial power by the legislature pursuant to Art 38, which vests the legislative power of Singapore in the legislature. And the executive, pursuant to Art 23, which vests the executive authority of Singapore in the President and makes it exercisable by the President and the cabinet, is merely exercising the power that has been legislatively allocated to it instead of the judiciary in respect of that particular determination. In this way, the enactment of an ouster clause in respect of a non-justiciable determination would *not* infringe Art 93, the principle of separation of powers or the rule of law.

83 I begin first with the applicant's sweeping suggestion that the vesting of the judicial power in the judiciary by Art 93 of the Constitution must mean that the judiciary should accordingly be vested with the jurisdiction to hear and decide disputes arising out of the legality of the Public Prosecutor's decision not to issue a certificate of substantive assistance pursuant to s 33B(2)(*b*) of the MDA. To this end, he relies on the following passage from the Court of Appeal decision of *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 ("*Yong Vui Kong (CA)*") (at [31]):

> Where Singapore is concerned, I am of the view that by virtue of the judicial power vested in the Supreme Court under Art 93 of the Singapore Constitution, the Supreme Court has jurisdiction to adjudicate on every legal dispute on a subject matter in respect of which Parliament has conferred jurisdiction on it, including any constitutional dispute between the State and an individual. In any modern State whose fundamental law is a written Constitution based on the doctrine of separation of powers (ie, where the judicial power is vested in an independent judiciary), *there will (or should) be* ***few****, if any, legal disputes*

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> *between the State and the people from which the judicial power is excluded.* … [emphasis added in italics and bold italics]

84 I do not agree with the applicant that the foregoing extract from *Yong Vui Kong (CA)* necessarily points towards the conclusion that the applicant is urging upon this court. In my view, the mistake in the applicant's submission lies in his insistence on reading the requirements of Art 93 of the Constitution in the strict and uncompromising fashion that he has done. In doing so, he has missed the point underlying the proper application of Art 93. That is that while the Supreme Court in principle has jurisdiction to adjudicate on all legal disputes between the State and the people, there are ultimately some legal disputes between the State and the people that should properly be *excluded* from the province of judicial power. This proposition is in fact evident from not only the last sentence of the extract in *Yong Vui Kong (CA)* that he has cited, but also the following extract in *Yong Vui Kong (CA)* (at [31]–[32]), which flows on immediately from where the previous extract ends:

> 31 … In this regard, the following comment by Melville Fuller Weston in his article "Political Questions" (1924–1925) 38 Harv L Rev 296 ("Weston's article") is pertinent (at 299):
>
> > The word 'justiciable' … is legitimately capable of denoting almost any question. That is to say, the questions are few which are intrinsically incapable of submission to … an adjudication from which practical consequences in human conduct are to follow.
>
> 32 ***The matters which are "intrinsically incapable of submission to … an adjudication" (per Weston's article at 299) may vary greatly in different legal contexts***. For instance, in *Chandler v Director of Public Prosecutions* [1964] AC 763 ("*Chandler*"), Viscount Radcliffe expressed the view that the question of whether it was in the interests of the UK to acquire, retain or house nuclear armaments was "not … a matter for judge or jury" (at 799) because it involved "an infinity of considerations, military and diplomatic, technical, psychological and moral" (at 799) which were not within the province of the courts to assess. …
>
> [emphasis added in bold italics]

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85 The correct proposition for the purposes of the present analysis, to my mind, is therefore not that Art 93 of the Constitution dictates that *all* legal disputes between the State and the people must be adjudicated by the judiciary, but that *most* legal disputes should, given that there may be some matters that are "intrinsically incapable of submission to an adjudication".

86 The notion that there are matters in respect of which the judiciary is not properly able to exercise its judicial power over is by no means a novel one. In *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 ("*Tan Seet Eng*"), the Court of Appeal, in the course of reviewing whether the Minister for Home Affairs had properly exercised his discretion to subject the appellant in that case to detention without trial under s 30 of the Criminal Law (Temporary Provisions) Act (Cap 67, 2000 Rev Ed), held thus (at [99]):

> Where the Executive is acting within the ambit of the powers that have been vested in it by Parliament, then the court's concern is not with whether it agrees with the way in which the powers have been exercised. *To suggest otherwise is to displace the choice that has been made by Parliament as to which branch of the government is to be entrusted with the powers in question.* The court's role in judicial review which engages the manner in which the power is exercised will then be limited to such things as illegality, irrationality, and procedural impropriety. *This perspective is premised on a proper understanding of the role of the respective branches of government – especially, in this context, the Executive and the Judiciary – in a democracy where the Constitution reigns supreme.* [emphasis added]

Similarly, in the High Court decision of *Lee Hsien Loong v Review Publishing Co Ltd and another and another suit* [2007] 2 SLR(R) 453 ("*Review Publishing*"), Sundaresh Menon JC (as he then was) unequivocally held, following a compendious survey of various foreign authorities in this regard, that (at [95]):

> … The first point to be made is that there are clearly provinces of executive decision-making that are, and should be, immune from judicial review. This comes as no surprise and is merely a

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> reflection of the constitutional doctrine of the separation of powers. The doctrine of the separation of powers … undoubtedly informs the constitutional structure of the Westminster model of governance, on which our own constitutional framework is based.

87 For myself, I find the following summary of the justificatory principles underlying the traditional account of judicial review that was set out by the Court of Appeal in *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598 ("*Starkstrom*") (at [58]) to be a succinct distillation of the various key concepts at play in this discussion:

> (a) First, under the constitutional doctrine of separation of powers, the court's limited role in judicial review is "premised on a proper understanding of the role of the respective branches of government – especially, in this context, the Executive and the Judiciary – in a democracy where the Constitution reigns supreme": *Tan Seet Eng* at [99]. In short, the judiciary's task is limited to reviewing the *legality* of administrative action.
>
> (b) Second, and related to that, is the need to uphold *Parliament's intention* (as expressed in statute) to vest certain powers in the *Executive*: *Tan Seet Eng* at [64] and [99].
>
> (c) Finally, there is also the pragmatic concern about *institutional competence*. In *Tan Seet Eng* at [93], we recognised that "courts and judges are not the best-equipped to scrutinise decisions which are laden with issues of policy or security or which call for polycentric political considerations. Courts and judges are concerned rather with justice and legality in the particular cases that come before them".
>
> [emphasis in original]

88 In my view, while the foregoing principles were meant to justify the Court of Appeal's refusal in *Starkstrom* to decide (at [59]) whether to recognise the doctrine of substantive legitimate expectations as a part of Singapore administrative law, they can and should apply with equal force to justify the upholding of the constitutionality of ouster clauses that have been enacted by the legislature. The only significant difference in the context of the present application, however, lies in the branch of government to whom the judiciary

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exercises due deference: whereas the courts in *Tan Seet Eng*, *Review Publishing* and indeed *Starkstrom* were espousing the need for suitable judicial deference to the *executive*, the present case calls for suitable judicial deference to the *legislature*. As a matter of logic, this makes good sense given that this particular aspect of the present application involves the challenge of the constitutionality of a *legislative provision*, instead of the challenge of the constitutionality of an *executive action*. Accordingly, I would summarise the foregoing discussion thus: in evaluating the constitutionality of an ouster clause, the judiciary, in recognition of its limited role in judicial review by dint of the constitutional doctrine of the separation of powers, ought to defer to the intention of the *legislature* in the vesting of certain powers in the executive and respect the relative institutional competence of the executive in respect of decisions that concern issues that judges are ill-equipped to adjudicate.

89 How then should the legal disputes that ought to be regarded as falling outside the province of the judicial power as prescribed under Art 93 be identified? In my judgment, the appropriate guidance may be sought from the High Court decision in *Review Publishing*, which was cited with affirmation by the Court of Appeal in *Tan Seet Eng* in respect of its observations on the issue of justiciability and judicial deference to executive action (at [100]). In *Review Publishing*, Menon JC held thus (at [98]):

> … In my judgment, the correct approach is not to assume a highly rigid and categorical approach to deciding which cases are not justiciable. Rather, … the intensity of judicial review will depend upon the context in which the issue arises and upon common sense, which takes into account the simple fact that there are certain questions in respect of which there can be no expectation that an unelected judiciary will play any role. In this regard, the following principles bear noting:
>
> > (a) Justiciability depends, not on the source of the decision-making power, but on the subject matter that is in question. Where it is the executive that has access to the best materials available to resolve the issue, its

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> views should be regarded as highly persuasive, if not decisive.
>
> (b) Where the decision involves matters of government policy and requires the intricate balancing of various competing policy considerations that judges are ill-equipped to adjudicate because of their limited training, experience and access to materials, the courts should shy away from reviewing its merits.
>
> (c) Where a judicial pronouncement could embarrass some other branch of government or tie its hands in the conduct of affairs traditionally regarded as falling within its purview, the courts should abstain.
>
> (d) In all cases of judicial review, the court should exercise restraint and take cognisance of the fact that our system of government operates within the framework of three co-equal branches. Even though all exercise of power must be within constitutional and legal bounds, there are areas of prerogative power that the democratically elected Executive and Legislature are entrusted to take charge of, and, in this regard, it is to the electorate, and not the Judiciary, that the Executive and Legislature are ultimately accountable.

90 This approach in evaluating the constitutionality of an ouster clause has also been adopted in two recent High Court decisions where the court had affirmed the validity of the ouster clauses in question.

91 In the decision of *Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 ("*Borissik*"), the applicant was dissatisfied with the decision of the Urban Redevelopment Authority ("the URA") to reject the application that she had submitted for the demolition of her semi-detached house and for its replacement with a detached bungalow. Although s 22(1) of the Planning Act (Cap 232, 1998 Rev Ed) provides for a procedure for an appeal to the Minister for National Development, the applicant did not bring such an appeal, and instead directly brought a judicial review application against the URA's rejection. Unfortunately for her, s 22(7) of the Planning Act provides that "[t]he decision of the Minister shall be final and shall not be challenged or

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questioned in any court". Tan Lee Meng J (as he then was) held that the ouster clause enshrined under s 22(7) was effective in precluding the application for judicial review brought by the applicant. In so concluding, Tan J quoted the following passage from *De Smith's Judicial Review* (Sweet & Maxwell, 6th Ed, 2007) (at para 4-051) and affirmed it as proper reflection of the "modern approach" towards ouster clauses (at [28]):

> In situations where the jurisdiction of the courts is ousted or limited, *the courts now take account not the concept of jurisdictional error, but a number of practical matters. These include the need in the circumstances for legal certainty and the need for finality on which the affected person may rely; the degree of expertise of the decision-making body; the esoteric nature of the traditions or legal provisions decided by the decision-making body; and the extent to which interrelated questions of law, fact and degree are best decided by the body which hears the evidence at first hand, rather than the courts on judicial review. In particular, account will be taken as to whether there has been previous appropriate opportunity for the claimant to challenge the relevant decision.* The House of Lords considered whether the validity of a decision by the Secretary of State for Social Security on the question of a maintenance assessment under the Child Support Act 1995 could be challenged in a magistrates' court. Section 33(4) of the Act provides that 'the court … shall not question the maintenance assessment'. It was held that since the Secretary of State's decision could be challenged by way of appeal to an appeal tribunal, the scheme 'provided an effective means' to challenge the Secretary of State's decision: 'Given the existence of this statutory right of review and appeal, it would be surprising and undesirable if the magistrate's court were to have parallel jurisdiction to adjudicate upon the same question'. In other cases where challenge to the courts is precluded but challenge to an appropriate tribunal is provided, the courts have upheld the preclusive clause on the ground that the statutory scheme provides 'proportionate and adequate protection to the rights of the litigant'. [emphasis added]

Tan J then held that s 22(7) shows that the legislature had intended that the courts should not interfere with issues of planning permission as those involve "interrelated considerations of fact, law, degree and policy, which are better

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dealt with by an appeal procedure to the Minister" as provided for under the Planning Act (at [29]).

92 In the decision of *Tey Tsun Hang v Attorney-General* [2015] 1 SLR 856 ("*Tey Tsun Hang*"), the applicant brought judicial review proceedings against the Immigration and Checkpoints Authority of Singapore ("the ICA"), seeking to challenge the cancellation of his and his daughter's application for the renewal of his and his daughter's re-entry permits under the Immigration Act (Cap 133, 2008 Rev Ed). Section 39A of the Immigration Act, however, provides as follows:

> **Exclusion of judicial review**
>
> **39A.**—(1) There shall be no judicial review in any court of any act done or decision made by the Minister or the Controller under any provision of this Act except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision.
>
> (2) In this section, 'judicial review' includes proceedings instituted by way of —
>
> > (*a*) an application for a Mandatory Order, a Prohibiting Order or a Quashing Order;
> >
> > (*b*) an application for a declaration or an injunction;
> >
> > (*c*) an Order for Review of Detention; and
> >
> > (*d*) any other suit or action relating to or arising out of any decision made or act done in pursuance of any power conferred upon the Minister or the Controller by any provision of this Act.

Quentin Loh J upheld the validity of s 39A of the Immigration Act as an ouster clause. To this end, Loh J held that it is not wrong *per se* to oust the jurisdiction of the court in the manner specified under s 39A, given that there are "good and self-evident reasons" why *matters relating to national policy*, good examples of which are matters relating to land planning, immigration or defence, are "best left to the executive arm and not the courts which are ill-equipped to make such

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decisions", and this reading of s 39A is consistent with the parliamentary intention underlying the enactment of this provision (at [44]). Next, Loh J also observed that s 39A does not purport to oust the jurisdiction of the court in relation to *all* matters under the Immigration Act, and specifically left matters involving compliance with any procedural requirements of the Immigration Act or the relevant regulations to the courts – this was held to be "a reasonable balance" (at [45]). Ultimately, Loh J found that s 39A operated to oust the court's jurisdiction to review the ICA's decision to cancel the applicant's applications for the renewal of his and his daughter's re-entry permits because none of the grounds of review permitted under s 39A were relied on, and the grounds of review that the applicant actually relied on were precluded by s 39A (at [46]).

(B) THE PRINCIPLES APPLIED

93 I turn now to address s 33B(4) of the MDA in particular. In my judgment, the presumption of constitutionality of s 33B(4) has not been rebutted, and it should be construed as a constitutionally valid ouster clause. To this end, I take the view that the Public Prosecutor's discretion not to issue certificates of substantive assistance pursuant to s 33B(2)(*b*) is a determination that is non-justiciable, such that the judicial power to scrutinise such determinations is not wrongfully curtailed pursuant to s 33B(4).

94 In my view, the decision of the Public Prosecutor not to issue a certificate of substantive assistance pursuant to s 33B(2)(*b*) of the MDA is one that is clearly non-justiciable. In this regard, it has been recognised by the Court of Appeal on multiple occasions that the courts are ill-equipped to consider whether an offender has rendered substantive assistance in disrupting drug trafficking activities, given that such a determination involves a holistic inquiry

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premised on a panoply of extra-legal factors, including in particular the operational considerations of the CNB in the disruption of drug trafficking activities. In the decision of *Ridzuan*, the Attorney-General submitted (at [56]) that:

> … courts are ill-placed to consider whether an offender had rendered substantive assistance in disrupting drug trafficking activities because that determination involved a "multi-faceted enquiry" engaging a "multitude of extra-legal factors". What seemed like a minor difference, could, when viewed in light of operational considerations, turn out to be a determinative consideration in deciding whether an offender had rendered substantive assistance. The PP was best-placed to make this determination. …

The Court of Appeal in *Ridzuan* accepted this submission, finding (at [66]) that:

> … Having regard to what was clear Parliamentary intention underlying the scheme set out in s 33B of the MDA …, and in order to ensure that the effectiveness of CNB is not undermined, we are in agreement with the Respondent that if we were to treat the issue of the grant of a certificate of substantive assistance as if it were a matter to be proven and justified at trial, our entire battle against drug trafficking, which we have relentlessly pursued for more than 40 years, would be seriously jeopardised and along with it so would the general interest of society. It is for this reason (the need to avoid jeopardising the operational capability of CNB) that we accept the submission of the Respondent (referred to at [56] above) that the Judge is not the appropriate person to determine the question of whether a convicted drug trafficker has rendered substantive assistance. Section 33B expressly confers upon the PP the discretion to make the decision on substantive assistance. …

95 This particular holding in *Ridzuan* also found favour with the Court of Appeal in *Prabagaran* (at [52], [78] and [80]), with the court in that case further observing (at [52]) that the fact that it is the Public Prosecutor who should be left to make the determination regarding whether an offender had substantively assisted the CNB in disrupting drug trafficking activities was fully borne out by the parliamentary debates during the Second Reading of the Misuse of Drugs

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(Amendment) Bill. To illustrate this point, the following remarks of the Minister for Law during the Second Reading of the Bill warrant being set out at length (*Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89 (Mr K Shanmugam, Minister for Law):

> Next, on the issue of who decides cooperation and by what criteria. The Bill provides for the Public Prosecutor to assess whether the courier has substantively assisted CNB.
>
> I think Ms Sylvia Lim, Mr Pritam Singh, Mrs Chiam and Ms Faizah Jamal have concerns here. Their view is: it is an issue of life and death – the discretion should lie with the courts to decide on cooperation.
>
> First, the cooperation mechanism is neither novel nor unusual. Other jurisdictions, like the US and UK, have similar provisions, operated by prosecutors, to recognise cooperation for the purposes of sentencing. …
>
> The Courts decide questions of guilt and culpability. *As for the operational value of assistance provided by the accused, the Public Prosecutor is better placed to decide.* The Public Prosecutor is independent and at the same time, *works closely with law enforcement agencies and has a good understanding of operational concerns.* An additional important consideration is protecting the confidentiality of operational information.
>
> *The very phrase "substantive assistance" is an operational question and turns on the operational parameters and demands of each case.* Too precise a definition may limit and hamper the operational latitude of the Public Prosecutor, as well as the CNB. It may also discourage couriers from offering useful assistance which falls outside of the statutory definition.
>
> [emphasis added]

96 Further, and in the same vein, the Public Prosecutor has also been expressly recognised by the Court of Appeal to possess the unique qualities that render that office most suited to conduct the assessment under s 33B(2)(*b*): *Prabagaran* at [78]–[80]. It is thus clearly appropriate for review by the courts of the Public Prosecutor's determination under s 33B(2)(*b*) to be circumscribed in the manner as reflected under s 33B(4).

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97 Hence, for the reasons I have given earlier (at [82]–[92] above), far from contravening Art 93 of the Constitution or the principle of separation of powers, s 33B(4) is in fact an exemplar of the separation of powers principle in action. In the same vein, the applicant's objection that s 33B(4) is in contravention of the rule of law also lacks any merit, given that it has been amply demonstrated that s 33B(4) in fact imposes appropriate limits on the discretion of the Public Prosecutor in issuing certificates of substantive assistance by allowing for limited judicial review, such that it cannot be said that the Public Prosecutor has unfettered discretion in this regard.

98 Finally, I should also add that another reason why s 33B(4) of the MDA should be considered constitutionally valid is that, even though the Public Prosecutor's determination under s 33B(2)(*b*) is one that is non-justiciable, Parliament has notably still elected to provide for limited review of the Public Prosecutor's determination on the grounds of bad faith and malice. In other words, s 33B(4) is not a *complete* ouster clause, but a mere *partial* ouster clause. It thus appears fair, in the circumstances, to find that Parliament has in fact legislated to provide the same "reasonable balance" that Loh J had determined was achieved in respect of the ouster clause examined in *Tey Tsun Hang* (at [45]).

99 Accordingly, I find that s 33B(4) of the MDA is a constitutionally valid ouster clause which properly circumscribes judicial review of the Public Prosecutor's decision not to issue certificates of substantive assistance under s 33B(2)(*b*) to the limited grounds of bad faith, malice and unconstitutionality. The applicant's reliance on the failure of the Public Prosecutor to take into account relevant considerations, the precedent fact principle of review and the irrationality head of review is therefore unsustainable on the basis of the argument from the unconstitutionality of s 33B(4), given that s 33B(4) validly

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ousts the jurisdiction of the court to review the non-certification determination on all these grounds.

100 Having said that, the common law has, in the face of ouster clauses validly enacted by the legislature, devised "a very sophisticated judicial technique" to circumvent such clauses, thereby rendering them ineffective: *Judicial Review – From Angst to Empathy* at para 17. The applicant relies on this very judicial technique in his second argument. It is thus to this argument that I now turn.

(2) Inapplicability of s 33B(4) of the MDA to nullities resulting from jurisdictional errors of law

101 The applicant submits that s 33B(4) of the MDA should in any event be incapable of ousting the court's jurisdiction to review the non-certification determination on the ground that the Public Prosecutor's determination has been tainted by an error of law that thereby renders the determination a non-decision or a nullity.

102 This argument essentially involves the application of the principles laid down in the seminal decision of *Anisminic Ltd v Foreign Compensation Commission and Another* [1969] 2 AC 147 ("*Anisminic*"). The ouster clause in question was s 4(4) of the Foreign Compensation Act 1950 (c 12) (UK), which states that: "[t]he determination by the commission of any application made to them under this Act shall not be called in question in any court of law". The House of Lords, by a majority of three to two, held that the Board had made a jurisdictional error of law by misconstruing the applicable legislation, and hence this ouster clause did *not* preclude the court from reviewing the order of the Foreign Compensation Commission. To that end, the majority law lords – Lord Reid, Lord Pearce and Lord Wilberforce – reasoned that an administrative

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decision that was tainted by a jurisdictional error of law (as defined within their respective judgments) would be a purported determination that was in fact no determination at all (*ie*, a nullity), such that an ouster clause would be inapplicable to oust the jurisdiction of the courts to review the purported determination. Given that the determination by the Commission that the appellant did not qualify for any compensation was indeed such an error of law, the determination was found to be a nullity and was hence quashed.

103 As alluded to earlier, however, in respect of the specific question of how an error of law may be classified as a jurisdictional error of law (in contradistinction with a non-jurisdictional error of law), the three learned law lords in the majority adopted different strands of reasoning. Lord Reid reasoned in the following manner (at 171):

> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly. I understand that some confusion has been caused by my having said in *Reg. v. Governor of Brixton Prison, Ex parte Armah* [1968] A.C. 192, 234 that if a tribunal has jurisdiction to go right it has jurisdiction to go wrong. So it has, if one uses 'jurisdiction' in

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> the narrow original sense. If it is entitled to enter on the inquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law. …

Lord Pearce, on the other hand, held thus (at 195):

> Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the tribunal may depart from the rules of nature justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.

Finally, Lord Wilberforce held as follows (at 207):

> In every case, whatever the character of a tribunal, however wide the range of questions remitted to it, however great the permissible margin of mistake, the essential point remains that the tribunal has a derived authority, derived, that is, from statute: at some point, and to be found from a consideration of the legislation, the field within which it operates is marked out and limited. There is always an area, narrow or wide, which is the tribunal's area; a residual area, wide or narrow, in which the legislature has previously expressed its will and into which the tribunal may not enter. Equally, … there are certain fundamental assumptions, which without explicit restatement in every case, necessarily underlie the remission of power to decide such as … the requirement that a decision must be made in accordance with the principles of natural justice and good faith. … The question, what is the tribunal's proper area, is one which it has always been permissible to ask and answer, and it must follow that examination of its extent is not precluded by a clause conferring conclusiveness, finality, or unquestionability upon its decisions. These clauses in their nature can only relate to decisions given within the field of operation entrusted to the tribunal. They may, according to the width and emphasis of that formulation, help to ascertain the extent of that field, to narrow it or to enlarge it, but unless one is to deny the statutory

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> origin of the tribunal and of its powers, they cannot preclude examination of that extent.

104 To my mind, it is evident from the foregoing passages that the majority law lords in *Anisminic* had arrived at different conclusions regarding: (a) when an error of law should be considered a jurisdictional error of law; and (b) whether administrative decisions would be rendered a nullity only if the error committed was a jurisdictional error of law. Put simply, Lord Reid accorded a narrow construction to the concept of a jurisdictional error of law, but effectively held that administrative decisions could be rendered a nullity even if other errors of law that were not traditionally considered jurisdictional errors of law have been committed. Conversely, Lord Pearce accorded a wide construction to the concept of a jurisdictional error of law, but retained the traditional principle that administrative decisions would be rendered a nullity only if jurisdictional errors of law have been committed. Finally, Lord Wilberforce adopted a construction of the concept of a jurisdictional error of law that was somewhere in between that of Lord Reid's and Lord Pearce's, and echoed Lord Pearce in holding that administrative decisions would be considered nullities only if jurisdictional errors of law have been committed.

105 Accordingly, a critical difficulty that arises in the application of the principle in *Anisminic* to circumvent the legislature's enactment of statutory ouster clauses is the true *scope* of the application of this principle. This ambiguity in the ambit of the principle afflicts, in particular, the questions of: (a) when should an error of law be considered a jurisdictional error of law; and (b) whether an error of law should render a decision a nullity only if the error was a jurisdictional error of law. This difficulty, however, was subsequently resolved in the UK by the UK courts' interpretation of the *Anisminic* decision in a series of subsequent decisions in a manner such that the House of Lords in *Anisminic* was taken to have completely obliterated the distinction between

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jurisdictional and non-jurisdictional errors of law, with the result that effectively *any* error of law in the exercise of an administrative decision could be considered to render the decision a nullity: see *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56 *per* Lord Denning MR, *In re Racal Communications Ltd* [1981] AC 374 *per* Lord Diplock, *O'Reilly and Others v Mackman and Others* [1983] 2 AC 237 *per* Lord Diplock, *R v Lord President of the Privy Council, ex parte Page* [1993] AC 682 and *R (Cart) v Upper Tribunal (Public Law Project and another intervening)* [2012] 1 AC 663.

106 The upshot of the foregoing discussion is that there are in fact two aspects to the *Anisminic* decision that the applicant is urging this court to apply to this analysis, each of which respectively calls for closer scrutiny:

(a) First, whether an administrative determination should be considered a nullity to which an ouster clause is inapplicable when a jurisdictional error of law is committed in the making of the determination. If the answer is in the affirmative, then ouster clauses would be considered ineffective in precluding judicial review of an administrative determination where the determination has been tainted by a jurisdictional error of law. In the present application, this would mean that even though s 33B(4) of the MDA is held to be a constitutionally valid ouster clause, the applicant would still be able to rely on the precedent fact principle of review, which is the only ground of review raised by the applicant here that indisputably involves a jurisdictional error of law, to challenge the non-certification determination.

(b) Second, whether all errors of law are jurisdictional errors of law which would cause administrative determinations tainted by them to be

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considered nullities. If the answer is in the affirmative, then the applicant would effectively be permitted to rely on all three grounds of review raised here in order to challenge the non-certification determination.

107 At this point, I should pause to note that whereas the applicant has briefly raised arguments concerning the application of the judicial technique employed in *Anisminic* to circumvent the enactment of ouster clauses (albeit only in his written submissions), the respondent has not, beyond bringing to my attention in oral submissions the High Court decision in *Cheong Chun Yin*, addressed in any significant way the arguments raised by the applicant in this regard. Given that *Cheong Chun Yin* is a decision that addresses, albeit very cursorily, the issue concerning whether an administrative determination should be considered a nullity that renders an ouster clause ineffective when a jurisdictional error of law is committed in the making of the determination, I consider it appropriate for me to proceed to make a finding in respect of this particular issue. As for the question as to whether all errors of law should be considered jurisdictional errors of law, however, given the myriad complexities raised by the existing academic literature in this regard, in the absence of any arguments made by the respondent in this regard, I refrain from coming to a firm conclusion on this issue.

108 Accordingly, in my judgment, in respect of the first question, an administrative determination should indeed be considered a nullity to which an ouster clause is inapplicable when a jurisdictional error of law is committed in the making of the determination. And for the purposes of the present application, the applicant should thus in principle be able rely on at least the precedent fact principle of review, which is the only ground of review raised by the applicant beyond the limited grounds permitted under s 33B(4) of the MDA that clearly involves a jurisdictional error of law. As for the second question, I

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make no finding, but will simply proceed with the subsequent analysis of whether the individual grounds raised by the applicant have been satisfied on the facts *on the assumption* that *all* errors are jurisdictional errors of law.

(A) WHETHER JURISDICTIONAL ERRORS OF LAW RESULTING IN NULLITIES EFFECTIVELY PRECLUDE RELIANCE ON OUSTER CLAUSES

109 In my view, when a jurisdictional error of law has been committed in the making of an administrative determination, the tainted determination should indeed be considered a nullity, with the effect that the ouster clause is ineffective in ousting the jurisdiction of the courts in reviewing the determination on the basis of that particular error of law. The effect is thus that the applicant here should not be precluded from relying on at least the precedent fact principle of review in seeking to quash the non-certification determination.

110 This, as I have briefly alluded to earlier, is a conclusion that is readily obtainable from the current local jurisprudence in this regard. Admittedly, the Court of Appeal has, to my knowledge, thus far not had the occasion to grapple with this particular principle. Perhaps the closest that the apex court has come towards providing some form of indication on how the principle should be treated was in the decision of *Robin Per*, where the court made the following *obiter* observation (at [64]):

> Our courts have viewed ouster clauses with circumspection and have declined to give effect to them on several occasions (see, *eg*, *Re Application by Yee Yut Ee* [1977–1978] SLR(R) 490 at [18] and [31], *Stansfield Business International Pte Ltd v Minister for Manpower* [1999] 2 SLR(R) 866 at [21]–[22], *Re Raffles Town Club Pte Ltd* [2008] 2 SLR(R) 1101 at [5] and [8] and *Teng Fuh Holdings* (cited earlier at [50] above) at [37]–[38]; but *cf Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 at [29]).

While no express reference was made to the principle that jurisdictional errors of law can render administrative decisions a nullity such that ouster clauses

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would not apply, the Court of Appeal, in observing that ouster clauses have on occasion been viewed with circumspection, referred to two High Court decisions, *viz*, *Re Application by Yee Yut Ee* [1977–1978] SLR(R) 490 ("*Yee Yut Ee*") and *Stansfield Business International Pte Ltd v Minister for Manpower (formerly known as Minister for Labour)* [1999] 2 SLR(R) 866 ("*Stansfield*"), which *did* address this principle in their respective discussions.

111 In *Yee Yut Ee*, the applicant brought a judicial review application seeking to quash a decision made by the Industrial Arbitration Court pursuant to the Industrial Relations Act (Cap 124, 1970 Rev Ed), in which the applicant was found personally liable as a director of a company for the payment of retrenchment benefits owed by the said company to three employees of the company. An issue that arose in the proceedings was the effect of s 46 of the Industrial Relations Act, which provides as follows:

> Subject to the provisions of this Act an award shall be final and conclusive, and no award or decision or order of a Court or the President or a referee shall be challenged, appealed against, reviewed, quashed, or called in question in any court and shall not be subject to certiorari, prohibition, mandamus or injunction in any court on any account.

Choor Singh J held that this provision was not effective in depriving the applicant of her right to bring a judicial review application, given that the Industrial Arbitration Court had committed a patent error on the face of the record which had caused the Court to exceed its jurisdiction. Given the significance of *Yee Yut Ee* as a clear example of a local authority that applies the judicial technique employed in *Anisminic* to circumvent ouster clauses, I set out Singh J's astute analysis as follows *in extenso* (at [20]–[30]):

> 20 Provisions similar to s 46 have been labelled "no *certiorari*" clauses or "ouster clauses" and have been dealt with in many reported cases. The cases show that when the right to *certiorari* had been expressly taken away by statute the courts

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rely upon the proposition that Parliament could not have intended a tribunal of limited jurisdiction to be permitted to exceed its authority without the possibility of direct correction by a superior court. It has been held that ***certiorari would issue, notwithstanding the presence of words taking away the right to apply for it, if the inferior tribunal was improperly constituted or if it lacked or exceeded jurisdiction, or failed to comply with essential preliminaries, or if a conviction or order had been procured by fraud or collusion or where there has been a breach of the rules of natural justice***.

21 The courts have, however, always been careful to distinguish their intervention whether an excess of jurisdiction or error of law from an appellate function. Their jurisdiction over inferior tribunals is supervision, not review:

> … that supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise. (*R v Nat Bell Liquors Ltd* [1922] 2 AC 128 at 156.)

22 In *Ex parte Bradlaugh* (1877–78) 3 QBD 509, there was an ouster clause, but Cockburn CJ said at 513:

> I am clearly of the opinion that the section does not apply when the application for *certiorari* is on the ground that the inferior tribunal has exceeded the limits of its jurisdiction.

23 And Mellor J added:

> It is well established that the provision taking away the *certiorari* does not apply where there was an absence of jurisdiction. The consequences of holding otherwise would be that a metropolitan magistrate could make any order he pleased without question.

24 This case has been treated as a leading authority that ***"no certiorari" clauses do not oust the courts where there is an absence of jurisdiction*** (Lord Parker CJ in *R v Hurst*, *Ex parte Smith* [1960] 2 QB 133 at 142) ***or an excess of jurisdiction*** (Denning LJ in *R v Medical Appeal Tribunal*, *Ex parte Gilmore* [1957] 1 QB 574 at 586).

25 In *Gilmore*'s case, in dealing with "no *certiorari*" clauses, Lord Denning observed, at 586:

> I would like to say a word about the old statutes which used in express terms to take away the remedy by certiorari by saying that the decision of the tribunal "shall not be removed by *certiorari*." Those statutes were

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> passed chiefly between 1680 and 1848 in the days when the courts used certiorari too freely and quashed decisions for technical defects of form. In stopping this abuse the statutes proved very beneficial but the courts never allowed those statutes to be used as a cover for wrongdoing by tribunals. If tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end.

26 And Romer LJ added:

> … it would be deplorable if we were constrained to hold that the decision of a medical appeal tribunal, however wrong in law, and however obviously wrong, was immune from review by Her Majesty's courts … it is not in the public interest that inferior tribunals of any kind should be ultimate arbiters on questions of law.

27 In the New Zealand case of *New Zealand Waterside Workers' Federation Industrial Association of Workers v Frazer* [1924] NZLR 689, s 96(2) of Industrial Conciliation and Arbitration Act 1908 of New Zealand provided that "no award, order, or proceeding of the court (of arbitration) shall be liable to be reviewed, quashed, or called in question by any court of judicature on any account whatsoever". It was held by the Supreme Court of New Zealand that the section must be read subject to the proviso that ***the award, order or proceeding so protected from examination was an award, order or proceeding within the jurisdiction of the Arbitration Court, and that certiorari would go to bring into the Supreme Court an industrial award in respect of an excess of jurisdiction***.

28 The Privy Council held more than a hundred years ago in *The Colonial Bank of Australasia and John Turner v Robert Willan* (1874) LR 5 PC 417 that *certiorari* would issue in the face of a privative clause purporting to preclude review by *certiorari*, but only for a manifest defect of jurisdiction in the authority that made the order or for manifest fraud in the party procuring it. ***A decision which is manifestly outside jurisdiction therefore cannot be protected by such a privative clause***.

29 And in the recent case of *Anisminic Ltd v Foreign Compensation Board* [1969] 2 AC 147 the House of Lords held that ***a purported determination made by the Commissioner outside its jurisdiction was not a "determination" at all but a nullity; hence the privative clause was irrelevant, and a declaration that the "determination" was void could be granted***.

30 Numerous other authorities can be cited which support the well–established doctrine that ***when there is a defect in***

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> ***jurisdiction, the High Court will intervene***. It would be quite intolerable if in such a case as this, there was no means of correcting the error. The control which the High Court exercises over inferior tribunals in a supervisory capacity extends not only to seeing that the inferior tribunals keep within their jurisdiction but also to seeing that they observe the law.
>
> [emphasis added in bold italics]

112 It is clear beyond peradventure from the foregoing extract, in my view, that our courts have not shied away from refusing to enforce ouster clauses when an administrative decision is tainted by a jurisdictional error of law which, in the words of the House of Lords in *Anisminic*, would cause the purported determination to be a nullity. This judicial technique of circumventing ouster clauses has long been incorporated as a feature of our local administrative law jurisprudence. Further, the fact that Singh J in *Yee Yut Ee* managed to put together a lengthy survey of the relevant Commonwealth authorities that have embraced this position shows that this principle was probably the prevailing position in numerous Commonwealth jurisdictions in as far back as 1978. There is accordingly no compelling reason not to adopt this principle now.

113 In *Stansfield*, the applicant company brought an application for judicial review under s 14 of the Employment Act (Cap 91, 1996 Rev Ed) against the decision of the Minister for Labour (now known as Minister for Manpower) that the applicant had dismissed an employee without just cause, for which payment was ordered to be made by the applicant company to the employee. Section 14(5) of the Employment Act contains an ouster clause, which states that: "[t]he decision of the Minister on any representation made under this section shall be final and conclusive and shall not be challenged in any court". Warren Khoo J held that notwithstanding s 14(5), the court had the jurisdiction to review the process by which the decision of the Minister had been reached (at [22]). To this end, Khoo J observed that (at [21]):

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> … senior state counsel concedes, properly in my view, that if the process by which the Minister reaches his decision is in breach of the rules of natural justice, s 14(5) would not be effective to oust the jurisdiction of the court. The broad principle was stated in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. It was re-stated in *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363; [1980] 2 MLJ 165 as follows:
>
> > … when words in a statute oust the power of the High Court to review decisions of an inferior tribunal by *certiorari*, they must be construed strictly … they will not have the effect of ousting that power if the inferior tribunal has acted without jurisdiction or if it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity … But if the inferior tribunal has merely made an error of law which does not affect its jurisdiction, and if its decision is not a nullity for some reason such as breach of the rules of natural justice, then the ouster will be effective.

114 In my view, *Stansfield* is once again a clear indication of the willingness of our courts to disapply an ouster clause when an administrative decision is tainted by a jurisdictional error of law. Indeed, in the light of the relevant holdings of the majority law lords in *Anisminic* reproduced earlier (at [103]–[104] above), it is also evident that Khoo J was in fact relying on the holding in *Anisminic* that the breach of the rules of natural justice could be considered a jurisdictional error of law that accordingly rendered the Minister's decision a nullity, such that the ouster clause under s 14(5) of the Employment Act should not apply to oust the jurisdiction of the court to review the Minister's decision.

115 Finally, I turn to consider the recent decision of *Cheong Chun Yin*, which Mr Ng *SC* had brought to my attention during oral submissions. *Cheong Chun Yin* involves, like the present application, an application for leave to commence judicial review proceedings against the Public Prosecutor's refusal to issue a certificate of substantive assistance under s 33B(2)(*b*) of the MDA. There, the

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applicant sought to challenge the Public Prosecutor's decision by arguing that the ouster clause under s 33B(4) does not oust the court's power to review a decision that has been made in excess or lack of jurisdiction, and in making this submission, the applicant relied on the decisions of *Yee Yut Ee* and *Stansfield* (*Cheong Chun Yin* at [17]). The applicant submitted in particular that: (a) the Public Prosecutor had failed to make an "allowance" when assessing whether the applicant had substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore to make up for the fact that the information that the applicant had provided was not adequately investigated at that time and was now rendered worthless by the passage of time, and (b) the Public Prosecutor had failed to give consideration to what value might have been obtained from the information if it had been utilised (at [18]). Tay J rejected the applicant's attempt to rely on the "doctrine of jurisdictional error of law", and held that there is "no separate ground of jurisdictional error of law available" to the applicant (at [28] and [31]). In arriving at this finding, Tay J simply observed that a plain reading of s 33B(4) shows that the only available grounds of review against the Public Prosecutor's determination under s 33B(2)(*b*) are bad faith, malice and unconstitutionality, and that this is supported by the comments made by the Minister for Law during the Second Reading of the Misuse of Drugs (Amendment) Bill (at [31]). Although the "doctrine of jurisdictional error of law" is most probably a reference to the judicial technique referred to in *Anisminic* – as well as in both *Yee Yut Ee* and *Stansfield*, which the applicant had explicitly cited in his submissions – employed to circumvent an ouster clause by finding that a jurisdictional error of law renders the tainted administrative decision a mere nullity, Tay J made no reference to this principle in dismissing the submissions.

116 In my view, notwithstanding that *Cheong Chun Yin* is a decision of greater recency and relevancy in subject matter as compared to *Yee Yut Ee* and

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Stansfield, I do not find it to be persuasive authority for refusing to apply the principle that jurisdictional errors of law would render tainted administrative decisions nullities, such that ouster clauses cannot apply. I so find for three main reasons. First, Tay J did not engage with the authorities and propositions that were raised in the decisions of *Yee Yut Ee* and *Stansfield*. It is thus difficult to appreciate, on the face of the decision in *Cheong Chun Yin*, the merits of the position adopted by Tay J therein as compared to that adopted in *Yee Yut Ee* and *Stansfield*. Second, as I have observed earlier (at [3] above), the Court of Appeal in *Ridzuan* has suggested, albeit in *obiter*, that where it has been shown that the Public Prosecutor has disregarded relevant considerations and/or failed to take relevant considerations into account, it intuitively appears inconceivable that the aggrieved person would be left without a remedy and that the Public Prosecutor's decision should stand (at [72]). This appears to me to be a not insignificant reflection of the apex court's inclination in favour of the view that it is permissible to disapply an ouster clause when an administrative decision is tainted by a jurisdictional error law, which I would agree with as a matter of principle. Finally, it is in fact also possible to infer from the relevant parliamentary debates that there is indeed a need to adopt the principle of circumventing ouster clauses by construing administrative decisions as a nullity when the decision has been tainted by a jurisdictional error of law. During the Second Reading of the Misuse of Drugs (Amendment) Bill, the Minister for Law, Mr K Shanmugam, stated thus (*Singapore Parliamentary Debates, Official Report* (14 November 2012), vol 89):

> … I think Ms Lim, Mr Singh, Mrs Chiam and Ms Jamal, raised or implied the possibility of abuse, or at any rate that the Public Prosecutor may refuse to issue a certificate even though substantive assistance has indeed been provided.
>
> As I said earlier, I accept that the risk identified of course exists.
>
> What we have to assess is: overall, are we better off, if we reduce this risk and the issue is transferred to the Courts? That is a

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> judgment call that is to be made. Is society better off? Which route has greater risks? And take into account the fact that the Public Prosecutor's discretion is not unfettered. It is subject to judicial review, either on bad faith or malice, which is expressly provided for, and of course, unconstitutionality, which goes without saying.
>
> There are also significant institutional incentives for the Public Prosecutor to exercise his discretion properly. Over time, if the Public Prosecutor consistently recognises cases where substantive assistance has been provided, that will obviously encourage more cooperation by couriers. On the other hand, ***if the Public Prosecutor acts capriciously or inconsistently, the system cannot work***. So, over and above the judicial checks, it is really in the Public Prosecutor's interest to operate the system with integrity.
>
> [emphasis added in bold italics]

This suggests that the Minister himself acknowledges that the Public Prosecutor has to act predictably and consistently in order for the substantive assistance regime to work. Hence, insofar as the grounds of bad faith, malice and unconstitutionality alone are insufficient to ensure the desired level of predictability and consistency in the exercise of the Public Prosecutor's discretion under s 33B(2)(*b*), there would accordingly be a strong argument in favour of the recognition of additional grounds of review when jurisdictional errors of law have been committed. Indeed, this segment of the Minister's remarks during the Second Reading of the Bill has also specifically been noted by the Court of Appeal in *Ridzuan* when stating that the question as to the scope of review permissible under s 33B(4) was being left open (at [76]).

117 For the above reasons, I find that an administrative determination that has been tainted by a jurisdictional error of law should indeed be considered a nullity, with the effect that an ouster clause is ineffective in ousting the jurisdiction of the courts in reviewing the determination on the basis of that particular error of law. Accordingly, the applicant here should *not* be precluded

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from relying on at least the precedent fact principle of review in seeking to quash the non-certification determination.

(B) WHETHER ALL ERRORS OF LAW ARE JURISDICTIONAL ERRORS OF LAW

118 I turn now to address, albeit rather briefly, the second question raised, which concerns whether all errors of law should be considered jurisdictional errors of law which would cause administrative determinations tainted by them to be considered nullities. The implication of answering this question in the affirmative would be that *all* errors of law would cause administrative determinations tainted by them to be considered nullities, and hence the applicant would be permitted to rely on all three grounds of review that fall outside the scope of s 33B(4) which he has raised in challenging the non-certification determination.

119 As I have mentioned earlier (at [107]–[108] above), in the light of the lack of submissions from the respondent regarding this issue, I make no finding in this regard. Having said that, I pause to offer the following provisional views.

120 First, as a matter of precedent, the two High Court decisions that were cited earlier do not offer instructive guidance in respect of whether the courts in Singapore currently regard all errors of law as jurisdictional errors of law.

121 In *Yee Yut Ee*, Singh J held that that the Industrial Arbitration Court had committed a patent error of law on the face of the record by ordering the applicant to be personally liable even though she was not a party to the proceedings in which the order had been made (at [15]–[17]). Given that a patent error of law on the face of the record is an error that would traditionally be considered a jurisdictional error (see *R v Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1952] 1 KB 338), the question of whether what

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is traditionally considered a non-jurisdictional error (*eg*, a failure to take into account relevant considerations) was considered a jurisdictional error (in the wide *Anisminic* sense) was never engaged on the facts. Moreover, even though Singh J had cited *Anisminic* (at [29]), the decision was cited only for the proposition that a jurisdictional error of law would render a purported determination a nullity such that an ouster clause would be inapplicable; *Anisminic* was not cited for the proposition that effectively all errors of law are now jurisdictional errors of law.

122 As for *Stansfield*, I had earlier observed (at [114] above) that Khoo J, by holding that the breach of the rules of natural justice committed by the Minister was an error the review of which could not be ousted by the ouster clause under s 14(5) of the Employment Act, was in fact relying on the holding in *Anisminic* that the breach of the rules of natural justice should be considered a jurisdictional error of law. And indeed, Khoo J cited the *Anisminic* decision as standing for the "broad principle" explaining the ineffectiveness of s 14(5) in ousting the court's jurisdiction to review the Minister's decision (at [21]). However, while this appears to suggest that Khoo J was wholeheartedly endorsing the principle laid down in *Anisminic* that essentially all errors of law should be considered jurisdictional errors of law, this impression falls away when one considers his subsequent reliance, in the same paragraph of his judgment, on the decision of the Judicial Committee of the Privy Council in *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union and Others* [1981] AC 363 ("*Fire Bricks*"). Although Khoo J seemed to suggest that *Fire Bricks* was a mere restatement of the *Anisminic* decision, the converse is in fact true. In *Fire Bricks*, the Privy Council sought to preserve, contrary to the holding of the majority in *Anisminic*, the traditional distinction between jurisdictional and non-jurisdictional errors of law, and accordingly held that s 29(3)(*a*) of the Malaysian Industrial Relations

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Act 1967, which provided that an award of the Industrial Court in Malaysia shall be "final and conclusive" and that "no award shall be challenged, appealed against, reviewed, quashed or called in question in any court of law" was *effective* in precluding judicial review if the inferior tribunal "made an error of law which does not affect its jurisdiction". Accordingly, it is evident that no clear conclusion may be drawn from *Stansfield* in respect of the specific question of whether all errors of law should now be regarded as jurisdictional errors of law.

123 Second, as a matter of principle, if the principle in *Anisminic* that all errors of law should now be considered jurisdictional errors of law is indeed affirmed in the context of Singapore administrative law, this would effectively be facilitating the judicial review of administrative actions tainted by *all* errors of law, even when a relevant ouster clause has been enacted. The Court of Appeal has in recent years affirmed what has been referred to extra-judicially by Chan CJ in *Judicial Review – Angst to Empathy* (at para 29) as the "green-light" approach towards administrative law: *Kenneth Jeyaretnam* at [48]. This entails the seeking of good government through the political process and public avenues rather than the seeking of redress for bad government through the courts, with courts operating not as the first line of defence against administrative abuses of power, but merely as supporting members in a tripartite government by helping to articulate clear rules and principles which the government may abide by and conform to: *Judicial Review – Angst to Empathy* at para 29. Seen in this light, therefore, a situation where *any* administrative decision, when tainted by an error of law, can easily be construed as a nullity would not appear to be aligned with the "green-light" approach towards administrative law, which is presently the most accurate reflection of the socio-political attitude in the existing Singapore milieu.

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124 Once again, however, I do not express a conclusive view in this regard. Rather, I will simply take the applicant's case at its highest by proceeding *on the assumption* that *all* errors of law should be regarded as jurisdictional errors of law and analysing whether, on the facts, the individual grounds of review that have been raised by the applicant – beyond the limited grounds expressly provided for under s 33B(4) of the MDA – have been satisfied.

Whether judicial review on grounds beyond s 33B(4) of the MDA can be established on the facts

125 I now turn finally to analyse whether the additional grounds of review (beyond the limited grounds of bad faith, malice and unconstitutionality), which the applicant claims to be able to rely on, can be established on the facts. Specifically, the applicant argues that the Public Prosecutor has: (a) failed to take into account relevant considerations in making the non-certification determination; (b) made the non-certification determination in the absence of a precedent fact; and (c) acted irrationally in making the non-certification determination. In my judgment, the applicant is not able to establish even a *prima facie* case of reasonable suspicion on the facts in respect of any of these grounds of judicial review.

(1) Failure to take into account relevant considerations

126 First, the applicant argues that the Public Prosecutor had failed to take into account relevant considerations, given that there is no evidence that the information provided by the applicant to the CNB *prior* to the first set of information, which includes material information given at the time of the applicant's arrest in 2009, has been placed before the Public Prosecutor.

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127 It is clear that the failure to take into account relevant considerations is essentially an aspect of the review of the legality of an administrative decision. In *Tan Seet Eng*, the Court of Appeal stated that (at [80]):

> … illegality serves the purpose of examining whether the decision-maker has exercised his discretion within the scope of his authority and the inquiry is into whether he has exercised his discretion in good faith according to the statutory purpose for which the power was granted, and whether he has taken into account irrelevant considerations or ***failed to take account of relevant considerations*** (Harry Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 7th Ed, 2013) at para 5–001). … In short, illegality examines the source and extent of the Minister's power and whether the power has been informed by relevant and *only relevant considerations*, [original emphasis in italics; emphasis added in bold italics]

Accordingly, the failure to take into account relevant considerations is a facet of one of the established grounds of judicial review (*ie*, review on the ground of illegality): *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374 ("*GCHQ*") *per* Lord Diplock, affirmed in *Chng Suan Tze* at [119] and *Tan Seet Eng* at [79].

128 Having considered the contents of the Amended OS, the Amended Statement and all of the affidavits tendered by both parties, I reject the applicant's submission and find that the applicant has not established a *prima facie* case of reasonable suspicion that the Public Prosecutor has failed to take into account relevant considerations.

129 First, I accept the respondent's submission that the applicant ought to have included in the Amended OS, the Amended Statement as well as his affidavits the ground of review relating to a failure of the Public Prosecutor to take into account relevant considerations, as well as the relevant particulars regarding this ground of review. It is well established that an applicant is under a duty to disclose in his application for leave all material facts which he knew

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or would have known had he made the appropriate inquiries. And it is critical for an applicant to ensure that his statement sets out fully the remedies being sought and the basis for such remedies and that the affidavit filed in support of his application discloses all material facts, because the court can only decide on the leave application with all the materials and facts before it, and the court may refuse leave on grounds of non-disclosure. See *Singapore Civil Procedure 2018* vol I (Foo Chee Hock JC gen ed) (Sweet & Maxwell, 2018) at para 53/1/7.

130 I find that the applicant has failed to fulfil his duty to disclose all the materials and facts in respect of this particular ground of review, and that this failure is exacerbated by the fact that he has had ample opportunity since the filing of the Original OS, the Original Statement and the Original Affidavit on 27 March 2015 to furnish all the relevant information regarding the judicial review leave application, and has also had the opportunity to amend his originating summons and accompanying statement as well as to tender additional affidavits in support of his application in October 2017. The applicant's drip-feeding of the grounds on which he seeks to rely for his judicial review leave application prejudices both himself and the respondent: his own application is prejudiced because he has not included the relevant material in his accompanying statement and affidavits to support this new ground he is now relying on (as will be demonstrated below), while the respondent is prejudiced because it is ambushed by this new ground and is deprived of the time needed to respond to the applicant by way of introducing the relevant evidence and arguments. Such practice should thus be discouraged. On this basis alone, I would disallow the applicant's attempt to introduce the Public Prosecutor's failure to take into account relevant considerations as a fresh ground of judicial review.

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131 In any event, even assuming that I were to allow the applicant to rely on the failure to take into account relevant considerations as a ground of review in the present application, I find that the applicant simply has not furnished sufficient information in support of this ground of review. The applicant asserts that the Public Prosecutor has failed to consider information that the applicant had provided since his arrest in 2009 up till 26 February 2013, which was the date when the applicant had provided the first set of information to the CNB. This information that predates the first set of information, the applicant claims, constitutes the relevant considerations that the Public Prosecutor has failed to take into account in making the non-certification determination.

132 In *Ridzuan*, the Court of Appeal held (at [39]) that when an applicant takes out an application to commence judicial review proceedings to challenge the Public Prosecutor's decision not to issue a certificate of substantive assistance, he must establish a *prima facie* case of reasonable suspicion that the Public Prosecutor has breached the relevant standard before the Public Prosecutor is even required to justify his decision. This is a normatively sensible position because of the presumption of legality that applies to the actions of the Public Prosecutor by dint of the doctrine of separation of powers (at [36]), and because it is operationally not feasible to require the Public Prosecutor to disclose his reasons for not issuing a certificate of substantive assistance all the time, which might over time be severely detrimental to the CNB's enforcement capabilities (at [39]). Also, the applicant does *not* have to produce evidence *directly impugning* the propriety of the Public Prosecutor's decision-making process; it is sufficient for the applicant to highlight circumstances that establish a *prima facie* case that the Public Prosecutor's decision was made in breach of the relevant standards, with the court being left to make the necessary inferences from the objective facts (at [40]–[43]).

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133 In my view, the applicant has not even managed to meet this low burden that has been placed on him. In the first place, at the hearing before me, counsel for the applicant, Mr Thuraisingam, pointed to *Nagaenthran (CA)* at [5]–[9] as an indication of the information that pre-dates the first set of information which the Public Prosecutor ought to have considered when making the non-certification determination. To my mind, while those paragraphs of the judgment highlighted by Mr Thuraisingam do indeed contain information about King, there is nothing in the applicant's evidence that shows that the information that he claims to have provided to the CNB in the entire period between his arrest up till 26 February 2013 (including the facts stated in *Nagaenthran (CA)* at [5]–[9]) is any different from the information that he had given to the CNB on 26 February 2013 as part of the first set of information. For me to be able to infer that there is in fact something relevant in the information pre-dating the first set of information that has not been included in the first set of information, the applicant should at least be able to describe what is it that is distinct about the earlier information that he had provided to the CNB. This, he absolutely failed to do. There is accordingly no basis for me to make any inference that the Public Prosecutor has failed to take into account relevant considerations in making the non-certification determination.

134 Next, the applicant suggests that there is no evidence that the CNB had followed up on the information that he had provided back in 2009 but that the information subsequently led to a dead end; if there had been such evidence, then the Public Prosecutor would have been correct not to take those information into account. The lack of such evidence, according to the applicant, shows that the Public Prosecutor has failed to consider the information provided prior to 26 February 2013. I disagree for two main reasons. First, placing the burden on the respondent to disclose how exactly the CNB has followed up on the previous information provided is precisely the sort of analysis that the

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presumption of legality that applies to the actions of the Attorney-General in his capacity as the Public Prosecutor seeks to avoid. When information collected in an investigation has been provided first to the CNB and subsequently to the Public Prosecutor, it should be presumed that the CNB and indeed the Public Prosecutor would act within the scope of their powers and responsibilities to follow up on any reliable leads. It is not for the court to question the propriety of their actions, unless the applicant has furnished sufficient evidence to rebut the presumption of legality. Second, another reason why the evidence that the applicant seeks cannot be disclosed is that disclosing such information would risk jeopardising the CNB's operational capabilities. The burden should thus instead be on the applicant to produce sufficient evidence to show the Public Prosecutors failure to take into account relevant considerations, and not the other way around.

135 Finally, the applicant takes issue with the fact that on the basis of the respondent's affidavit filed in response to all of the applicant's affidavits filed in the present application, the respondent has not made any mention of the information provided by the applicant pre-dating the first set of information. The applicant thus suggests that on the respondent's own evidence alone, the Public Prosecutor can be shown to have failed to consider the information pre-dating the first set of information. I also reject this argument. In my view, all that the respondent has done in his affidavit is to respond to the grounds and materials raised by the applicant in his own statements and affidavits filed in support of this application. Given the applicant's failure to even raise this ground of review in the Original OS and the Original Statement or even in the Amended OS and the Amended Statement, it lies ill in his mouth to now point an accusatory finger at the respondent for failing to address in its response affidavit how the information provided by the applicant pre-dating the first set of information was dealt with.

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136 Accordingly, I find that the applicant is not able to show even a *prima facie* case of reasonable suspicion that the Public Prosecutor has failed to take into account relevant considerations in making the non-certification determination.

(2) Precedent fact review

137 Next, the applicant argues that the Public Prosecutor had made a determination pursuant to s 33B(2)(*b*) of the MDA in the absence of a precedent fact. Specifically, in the light of the failure of the CNB to follow up promptly on the information provided by the applicant in 2009, it is impermissible for the Public Prosecutor to now determine whether the applicant did indeed provide substantive assistance in the disruption of drug activities within or outside Singapore. In other words, the applicant claims that the precedent fact is that the information provided by him to the CNB must not have become stale through the passage of time since his arrest, and it is only if this precedent fact exists (*ie*, that the information provided remains usable) that the Public Prosecutor would be able to make a determination regarding whether to issue a certificate of substantive assistance in favour of the applicant.

138 In the decision of *Chng Suan Tze*, the Court of Appeal held that the precedent fact principle of review involves the review of the exercise of an executive power on the basis of whether an objective fact that the exercise of the executive power depends on has been satisfied as a precedent requirement (at [110]). Whether a particular discretionary power is subject to any precedent fact depends on the construction of the legislation conferring that power; if the exercise of the discretionary power is subject to a precedent fact, then the scope of review may extend to determining whether the evidence is sufficient to establish that precedent fact (at [108]). However, where Parliament decides to

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entrust all the relevant decisions – including the determination of the facts as well as the application to the facts of the relevant rules and any necessary exercise of discretion – to the decision maker, then there would be no room for the application of the precedent fact principle of review, and the scope of review of the executive power would be limited to the traditional principles governing judicial review (at [108]). See also *Tan Seet Eng* at [53].

139 In my judgment, s 33B(2)(*b*) of the MDA is not a provision in respect of which the precedent fact principle of review operates. This is because the presence of the terms "in his determination" in s 33B(2)(*b*) of the MDA clearly demonstrates Parliament's intent to entrust the Public Prosecutor with the task of determining whether a person has substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore: see *Ridzuan* at [66] and *Prabagaran* at [52]. The exercise of the Public Prosecutor's discretion under s 33B(2)(*b*) to issue a certificate of substantive assistance therefore does not depend on any precedent fact. Indeed, this conclusion is fairly similar to that reached by the Court of Appeal in *Chng Suan Tze*. There, it was found that ss 8(1) and 10(1) of the Internal Security Act (Cap 43, 1985 Rev Ed) fell outside the precedent fact category because a construction of those provisions revealed Parliament's intent to entrust the decisions regarding whether, on the available evidence, a detention or revocation order was necessary to the President and the Minister for Home Affairs respectively (at [117]). I therefore find the applicant's reliance on the precedent fact principle of review to be misguided.

140 Accordingly, the applicant has clearly not established a *prima facie* case of reasonable suspicion that the Public Prosecutor had made the non-certification determination in the absence of a precedent fact.

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(3) Irrationality

141 Finally, the applicant submits that the Public Prosecutor had made the non-certification determination irrationally.

142 Irrationality is a head of judicial review that entails a substantive enquiry that seeks to ascertain the range of legally possible answers and evaluate if the impugned decision is one that, though falling within that range, is so absurd that no reasonable decision-maker could have come to it: *Tan Seet Eng* at [80]. The irrationality head of review has commonly been taken to refer also to unreasonableness in the sense as framed by Lord Greene MR in *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223 ("*Wednesbury*"), such that an irrational decision is one that is so "outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it": *GCHQ*, cited in *Chng Suan Tze* at [119] and *Tan Seet Eng* at [79].

143 Based on the legal test as set out above (at [142]), it is evident that the standard that must be met in order for the Public Prosecutor's determination to be found to be irrational is very high. And this is especially so in the light of the fact that the Public Prosecutor has been recognised to be *duty-bound* to issue a certificate of substantive assistance if the facts justify a finding that the offender has indeed rendered substantive assistance to the CNB in disrupting drug trafficking activities within or outside Singapore: *Prabagaran* at [65], citing *Public Prosecutor v Chum Tat Suan* [2016] SGHC 27 at [9]. Given that the courts have gone as far as to frame the Public Prosecutor's discretion to issue certificates of substantive assistance under s 33B(2)(*b*) of the MDA as a duty of sorts, this must surely mean that there would be very few instances where the

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Public Prosecutor's exercise of his discretion in this regard can be construed as being unreasonable in the *Wednesbury* sense.

144 Here, the applicant submits that it is irrational that the Public Prosecutor had decided not to issue a certificate of substantive assistance in favour of the applicant even though: (a) the applicant had provided copious amounts of information to the CNB; (b) the veracity of the individuals mentioned in the information provided by the applicant have not been disputed; (c) the applicant's ability to convey information in a cogent manner was likely affected by his borderline intellectual functioning; and (d) the information conveyed by the applicant in 2009 is now stale. In my judgment, all of the factors that the applicant is relying on to buttress his submission that the Public Prosecutor has acted irrationally in making the non-certification determination are woefully insufficient. This is especially so, given the outcome-driven approach that underlies the entire substantive assistance edifice in general and the Public Prosecutor's discretion under s 33B(2)(*b*) of the MDA in particular: see *Ridzuan* at [45] and *Prabagaran* at [64]. None of the factors raised by the applicant is capable of impugning the non-certification determination for irrationality when the Public Prosecutor has determined that the information proffered by the applicant is unhelpful in contributing towards the disruption of drug trafficking activities. I thus find that the applicant has not established a *prima facie* case of reasonable suspicion that the Public Prosecutor acted irrationally in making the non-certification determination.

Conclusion on judicial review beyond s 33B(4) of the MDA

145 Accordingly, I find that the applicant has ultimately failed to establish a *prima facie* case of reasonable suspicion that the non-certification determination should be quashed on any of the grounds of judicial review beyond the limited

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grounds provided for under s 33B(4) of the MDA, which the applicant has raised in this application.

Conclusion

146 For all the reasons aforesaid, I find that the applicant is unable to show that there is a *prima facie* case of reasonable suspicion that the non-certification determination made by the Public Prosecutor should be quashed, regardless of the ground of judicial review relied on. Specifically, in relation to the grounds of review permitted under s 33B(4) of the MDA, the applicant has failed to establish a *prima facie* case of reasonable suspicion that the Public Prosecutor has acted either in bad faith or unconstitutionally in making the non-certification determination. As for the grounds of review beyond those provided for under s 33B(4), the applicant is precluded from relying on any of them. Although s 33B(4) is a constitutionally valid statutory provision that ousts the jurisdiction of the courts to review the Public Prosecutor's decision not to issue a certificate of substantive assistance, except on the limited grounds of bad faith, malice, or unconstitutionality, it is in principle possible for the Public Prosecutor's decision to be reviewed on the grounds of other jurisdictional errors of law. Having said that, the applicant has failed to establish a *prima facie* case of reasonable suspicion that the Public Prosecutor has failed to take into account relevant considerations in making the non-certification determination, has made the non-certification determination in the absence of a precedent fact, or has acted irrationally in making the non-certification determination.

147 At the end of the day, while the legal arguments canvassed by the applicant have raised jurisprudentially intriguing issues for discussion, they have not been accompanied by suitably cogent evidence in support of the grounds of review that the applicant seeks to rely on. Accordingly, the applicant

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has, in my judgment, presented a hopeless case for the judicial review of the Public Prosecutor's decision not to issue a certificate of substantive assistance in his favour. In the result, I dismiss the judicial review leave application.

148 I shall now hear the parties on costs.

Chan Seng Onn
Judge

Eugene Singarajah Thuraisingam, Suang Wijaya and Genevieve Pang (Eugene Thuraisingam LLP) for the applicant;
Francis Ng Yong Kiat *SC*, Randeep Singh Koonar and Andre Chong (Attorney-General's Chambers) for the respondent.

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