IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 80

Originating Summons No 807 of 2019

Between

Pannir Selvam a/l Pranthaman

… *Applicant*

And

Attorney-General

… *Respondent*

GROUNDS OF DECISION

[Administrative Law] — [Judicial review] — [Leave to commence judicial review]

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Introduction

1 This was an application by Pannir Selvam a/l Pranthaman ("the Applicant") for leave to commence judicial review proceedings under O 53 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the ROC"). The Applicant sought judicial review of the following:

(a) the decision of the Public Prosecutor ("the PP") not to issue a Certificate of Substantive Assistance ("CSA") to the Applicant under s 33B of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA");

(b) the advice of the Cabinet of the Republic of Singapore ("the Cabinet") to the President of the Republic of Singapore ("the President") that the law should be permitted to take its course in relation to the Applicant; and

(c) the refusal of the Singapore Prison Service ("the SPS") to grant the Applicant permission to interview one Zamri bin Mohd Tahir ("Zamri"), a person in the custody of the SPS.

2 The Applicant originally sought prerogative relief against the PP, the SPS, the Cabinet and the President. However, the Applicant subsequently withdrew his prayers against the President[1] and some of his prayers against the SPS.[2] As of the first day of the hearing on 11 February 2020, the Applicant's prayers were as follows:[3]

(a) a Quashing Order quashing the PP's exercise of discretion in failing to issue a CSA to the Applicant;

(b) a Mandatory Order obliging the PP to issue a CSA to the Applicant;

(c) in the alternative to (b), a Mandatory Order obliging the PP to determine afresh the issue of whether the Applicant had substantively assisted the Central Narcotics Bureau ("the CNB") in disrupting drug trafficking activities within or outside Singapore under s 33B of the MDA;

(d) an Order that the Applicant's case be remitted to the appropriate court to re-consider and pass the appropriate sentence under s 33B(1) of the MDA;

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1 Notes of Evidence ("NE") (19 August 2019) at p 1.

2 Applicant's Skeletal Submissions dated 8 July 2019 ("ASS") at paras 119 – 120.

3 *Ex Parte* Originating Summons, HC/OS 807/2019.

(e) a Quashing Order quashing the action of the SPS in failing to approve the Applicant's request to interview Zamri;

(f) a Quashing Order quashing the Cabinet's action in advising the President that the law should be allowed to take its course in relation to the Applicant; and

(g) a Mandatory Order obliging the Cabinet to issue new advice to the President in relation to the Applicant's sentence.

3 After carefully considering the submissions canvassed before me, I concluded that the Applicant had not succeeded in establishing an arguable case or a *prima facie* case of reasonable suspicion in favour of granting the remedies sought. I therefore dismissed the application for leave to commence judicial review proceedings. The Applicant, being dissatisfied with my decision, has appealed. I set out the full grounds of my decision below.

Background to the application

The Applicant's conviction and clemency petition

4 On 2 May 2017, the Applicant was convicted by the High Court on a capital charge of importing not less than 51.84g of diamorphine into Singapore, an offence under s 7 of the MDA and punishable under s 33(1) of the MDA (see *Pannir Selvam a/l Pranthaman v Public Prosecutor* [2017] SGHC 144 at [38]). The High Court found that the Applicant was a "courier" within the meaning of s 33B of the MDA. However, as the PP did not issue a CSA, the High Court was obliged by law to impose the mandatory death sentence on the Applicant.

5 On 9 February 2018, the Applicant's appeal against his conviction and sentence was dismissed by the Court of Appeal in Criminal Appeal No 21 of

2017 (CA/CCA 21/2017).[4] Subsequently, the Applicant, his siblings, their parents, and the Applicant's then-counsel, Mr Eugene Thuraisingam, submitted petitions for clemency to the President.[5]

6 On 17 May 2019, the Applicant and his next-of-kin were notified, through letters issued by the President's Office, that the President had declined to exercise her power under Art 22P(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution") to commute the Applicant's death sentence.[6] The Applicant's next-of-kin were also informed by the SPS that he would be executed on 24 May 2019.[7]

Events leading up to the current application

7 On 21 May 2019, the Applicant filed Criminal Motion No 6 of 2019 (CA/CM 6/2019), seeking a stay of his scheduled execution on the basis that he intended to challenge the rejection of his clemency petition as well as the PP's refusal to issue a CSA.[8]

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4 Minute Sheet, *Pannir Selvam a/l Pranthaman v Attorney-General* (CA/CCA 21/2017).

5 Pannir Selvam a/l Pranthaman's 1st Affidavit dated 24 June 2019, Tab 5 at pp 86 – 124.

6 Pannir Selvam a/l Pranthaman's 1st Affidavit dated 24 June 2019, Tab 6 at pp 126 – 128.

7 Pannir Selvam a/l Pranthaman's 1st Affidavit dated 24 June 2019, Tab 7 at pp 136 – 137.

8 Pannir Selvam a/l Pranthaman's 1st Affidavit dated 24 June 2019, Tab 8 at pp 142 – 149.

8 On 23 May 2019, the Court of Appeal allowed the criminal motion and granted the Applicant a stay of execution for him to file his intended application.[9]

9 On 24 June 2019, the Applicant filed the present application, Originating Summons No 807 of 2019 (HC/OS 807/2019), as well as a statement and an affidavit under O 53 r 1(2) of the ROC. The next day, on 25 June 2019, the Applicant filed Summons No 3167 of 2019 (SUM 3167/2019) seeking specific discovery and leave to serve interrogatories against the Government of the Republic of Singapore ("the Government"), which was represented by the Attorney-General ("the AG").

10 On 19 July 2019, I dismissed SUM 3167/2019. In my written grounds of decision (see *Pannir Selvam a/l Pranthaman v Attorney-General* [2019] SGHC 217) ("*Pannir Selvam GD 1*"), I held (at [24]) that s 34(1) of the Government Proceedings Act (Cap 121, 1985 Rev Ed) ("GPA") precluded me from making an order for discovery against the Government since it was not a party to the proceedings. In any case, the documents and interrogatories sought by the Applicant did not satisfy the essential prerequisites of relevance and necessity (see [81] to [82] of *Pannir Selvam GD 1*).

11 Dissatisfied, the Applicant filed Summons No 3764 of 2019 (SUM 3764/2019) seeking leave to appeal against my decision in SUM 3167/2019. This application related only to my dismissal of the application for discovery, as the Applicant was barred under s 34(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) from seeking leave to appeal in respect of his

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9 Pannir Selvam a/l Pranthaman's 1st Affidavit dated 24 June 2019, Tab 9 at pp 158 – 159.

application for leave to serve interrogatories. I heard the parties on 19 August 2019 and declined to grant leave to appeal on the basis that the Applicant did not have a real interest in the outcome of the appeal (see *Pannir Selvam GD 1* at [93]).

12 Thereafter, the Applicant filed Originating Summons No 31 of 2019 (CA/OS 31/2019) seeking leave to appeal against my decision in SUM 3764/2019. This application was dismissed by the Court of Appeal on 5 November 2019.[10] Subsequently, the present application was scheduled for hearing before me on 11 and 12 February 2020.

Issues to be determined

13 As a preliminary issue, I had to determine whether the AG was entitled to file reply affidavits at the leave stage, at which proceedings are generally *ex parte* pursuant to O 53 r 1(2) of the ROC.[11]

14 The substantive issues for my determination pertained essentially to whether the Applicant had established any grounds for leave to commence judicial review proceedings against the PP ("the PP challenge"), the Cabinet ("the Cabinet challenge"), and the SPS ("the SPS challenge").

15 I now address the aforementioned issues *seriatim*.

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10 Minute Sheet, *Pannir Selvam a/l Pranthaman* (CA/OS 31/2019).

11 ASS at para 29.

Preliminary issue: Whether the AG was entitled to file reply affidavits

16 When the Court of Appeal allowed the Applicant's application for a stay of execution in CA/CM 6/2019, it directed that the Applicant would have a period of two weeks to file his intended application together with any supporting evidence, and that the Prosecution would have a period of two weeks to respond.[12]

17 With reference to the Court of Appeal's directions, the Applicant argued that the AG was not entitled to file affidavits in response to the present application. First, he contended that having regard to O 53 r 1(2) ROC, the putative respondent in a judicial review proceeding would *not*, in the ordinary course of events, be entitled to file reply affidavits at the *ex parte* leave stage.[13] O 53 r 1(2) ROC provides as follows:

> (2) An application for such leave must be made by *ex parte originating summons* and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by an affidavit, to be filed when the application is made, verifying the facts relied on.
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> [emphasis added]

18 Secondly, the Applicant argued that the Court of Appeal had not actually intended to grant *the AG* leave to respond to an application brought under O 53 r 1 ROC. According to the Applicant, this was supposedly apparent from the fact that the Court of Appeal had (a) granted leave to the "Prosecution", rather than the AG, to respond; and (b) (wrongly) directed for the present application

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12 Minute Sheet, *Pannir Selvam a/l Pranthaman v Public Prosecutor* (CA/CM 6/2019).

13 ASS at para 32.

to be heard before the Court of Appeal instead of the High Court (although this direction was subsequently corrected to state that the matter would be heard before "the appropriate court").[14]

19 Thirdly, the Applicant relied on the case of *Deepak Sharma v Law Society of Singapore* [2017] 2 SLR 672 ("*Deepak Sharma*") for the following proposition (at [36]):

> … When the AG intervenes in private judicial review proceedings in order to carry out his function as the "guardian of the public interest", he does so not because he wishes to advance the interests of any of the named parties to the litigation or desires a particular outcome for any of the parties. Rather, he participates purely on a ***non-partisan basis***. …
>
> [emphasis in original]

The Applicant contended that permitting the AG to file reply affidavits in the present application would allow the AG to venture beyond his non-partisan role as the guardian of the public interest.

20 With respect, the Applicant's arguments were unmeritorious and contrived. The mere fact that the Court of Appeal had granted leave to the "Prosecution" (instead of the AG) to respond did not indicate that it had specifically intended to preclude the AG from filing a response; at the highest, this was an inadvertent mistaken reference to the identity of the putative respondent. Likewise, no particular conclusions could be drawn from the fact that the Court of Appeal had originally directed for the application to be heard before it instead of the High Court. In the circumstances, it was patently clear to me that the Court of Appeal had intended to allow the AG, as the putative

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[14] ASS at para 31.

respondent, leave to respond in these proceedings, and nothing in its directions detracted from this plain and obvious intent.

21 Further, and in any event, I was of the view that the Applicant's reliance on *Deepak Sharma* was misplaced. As the AG pointed out, *Deepak Sharma* was a case involving *private* judicial review, *ie,* judicial review that does not involve the Government and/or does not seek to challenge any governmental action or decision (*Deepak Sharma* at [2]). The present application was an application for leave to commence *public* judicial review. Where public judicial review is concerned, the AG has a right to attend and to be heard "in the interest of the government in particular and the public in general" (see *Chan Hiang Leng Colin v Minister for Information and the Arts* [1995] 2 SLR(R) 627 at [4], citing *George John v Goh Eng Wah Brothers Filem Sdn Bhd* [1988] 1 MLJ 319 (at 320)). In such cases, courts have readily accepted affidavits filed by the AG (see for example, *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 ("*Muhammad Ridzuan*") at [59], [63], [64] and [66]; *Nagaenthran a/l K Dharmalingam v Public Prosecutor and another appeal* [2019] 2 SLR 216 ("*Nagaenthran*") at [79] and [80]).

Conditions for leave to commence judicial review proceedings

22 Having addressed the preliminary issue, I turned to consider the substantive issues which arose in the present application.

23 The purpose of the leave requirement in judicial review proceedings is to serve as a means of filtering out groundless or hopeless cases at an early stage (*Nagaenthran* at [76]). It is uncontroverted (and undisputed by the parties) that there are three conditions which must be satisfied in order for a court to grant leave to commence judicial review (*Muhammad Ridzuan* at [32]):

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

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

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

24 As there is a presumption that constitutional office holders and other officials make decisions in accordance with the law, a party who seeks to challenge an executive decision will only be granted leave to do so if he can adduce *prima facie* evidence that the relevant standard has been breached (*Muhammad Ridzuan* at [36]). Nevertheless, the threshold of a *prima facie* case of reasonable suspicion is a "very low" one (*Nagaenthran* at [76]).

25 There was no dispute that the first and second conditions were satisfied in the present case. Accordingly, the only question before this court was whether the third condition was satisfied in respect of the three challenges mounted by the Applicant, *viz,* the PP challenge, the Cabinet challenge and the SPS challenge.

The PP challenge

26 The PP challenge hinged on the following contentions:

(a) First, the Applicant alleged that he was not served a notice (hereinafter referred to as "the MDP Notice") informing him of the possibility that he could avoid the death penalty by giving substantive

assistance to the CNB. Accordingly, the PP's decision not to grant a CSA was unconstitutional[15] and/or tainted by procedural impropriety;[16]

(b) Secondly, the Applicant argued that the information which he had provided to the CNB, both before *and* after the conclusion of his trial, factually amounted to substantive assistance. Accordingly, the PP's decision not to grant a CSA was illegal, irrational or both;[17]

(c) Thirdly, the Applicant claimed that the PP incorrectly understood its role under s 33B of the MDA, and its decision not to grant a CSA was therefore infected by an error of law.[18]

27 The AG asserted that these contentions were baseless and misconceived. It also submitted that the application for leave to apply for a Quashing Order against the PP's decision should be dismissed on the basis that it was brought out of time.[19]

Whether the application for leave to apply for a Quashing Order was brought out of time

28 I first considered the issue of whether the application for leave to apply for a Quashing Order was time-barred. In this regard, O 53 r 1(6) of the ROC provides that:

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15 ASS at para 64.

16 ASS at para 59.

17 ASS at para 39.

18 ASS at para 88.

19 AG's Skeletal Submissions dated 8 July 2019 ("AGSS") at paras 14 and 16.

> … [L]eave shall not be granted to apply for a Quashing Order to remove any judgment, order, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made within *3 months* after the date of the proceeding or such other period (if any) as may be prescribed by any written law or, except where a period is so prescribed, *the delay is accounted for to the satisfaction of the Judge to whom the application for leave is made*…
>
> [emphasis added]

29 The three-month period starts to run from the date on which the right to seek relief arises, and not when the applicant learnt of the decision or when he had sufficient evidence to bring the action (*Teng Fuh Holdings Pte Ltd v Collector of Land Revenue* [2007] 2 SLR(R) 568 ("*Teng Fuh Holdings*") at [17]). Therefore, in the present case, time would have started to run on 2 May 2017, which was the date of the Applicant's conviction by the High Court and when he was notified that a CSA would not be issued. The present application was only filed well over two years later, on 24 June 2019. The three-month time bar had clearly been exceeded.

30 Consequently, the Applicant could only seek leave to apply for a Quashing Order against the PP's decision if he could offer an explanation which adequately accounted for his delay (*UDL Marine (Singapore) Pte Ltd v Jurong Town Corp* [2011] 3 SLR 94 ("*UDL Marine*") at [39]). Although this inquiry is necessarily fact-specific, case authorities suggest that courts typically have regard to the applicant's knowledge of the facts underpinning his application for judicial review. For instance, in *UDL Marine*, the applicant's delay was deemed to be satisfactorily accounted for on the basis that the applicant only came to know of certain information which formed its "strongest basis for judicial review" after the three-month time bar had passed (see *UDL Marine* at [46]). Conversely, in *Teng Fuh Holdings*, the Court of Appeal held (at [23]) that the applicant had not satisfactorily accounted for its delay because "it had the

interest, the knowledge and the means to have acquired the information to make its application long before it filed the same".

31 The Applicant argued that his delay in bringing the present application was not unreasonable because it was not clear, prior to the issuance of the Court of Appeal's judgment in *Nagaenthran* on 27 May 2019, whether the PP's determination under s 33B of the MDA could be challenged on grounds other than bad faith, malice or unconstitutionality; and/or whether the PP's role under s 33B of the MDA was to make a determination or exercise its executive discretion.[20] The Applicant was only advised to bring his challenge after the Court of Appeal clarified these issues in *Nagaenthran.*

32 I found the Applicant's explanations unconvincing and unmeritorious. First, the Court of Appeal's holding in *Nagaenthran* could not logically have provided the impetus for the Applicant to bring an action for judicial review, when the Applicant filed CA/CM 6/2019 on 21 May 2019, *before* the judgment of the Court of Appeal in *Nagaenthran* was delivered on 27 May 2019.

33 Secondly, it was already clear, prior to *Nagaenthran*, that the PP's power under s 33B of the MDA is not discretionary in nature. The Court of Appeal had explicitly stated in *Prabagaran a/l Srivijayan v Public Prosecutor and other matters* [2017] 1 SLR 173 ("*Prabagaran*") at [65] that the PP is "duty-bound" to issue a CSA if the facts justify it. The Court of Appeal's written judgment in *Prabagaran* was delivered on 2 December 2016, long before the Applicant's conviction on 2 May 2017.

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[20] Bundle of Documents ("BOD"), Vol 1, Tab 2 at para 68.

34 Finally, it cannot be denied that *Nagaenthran* was the first case to *explicitly* clarify that the PP's determination under s 33B of the MDA could be challenged on the usual grounds of judicial review, including illegality, irrationality and procedural impropriety (see *Nagaenthran* at [75]). Be that as it may, it is pertinent to note that the Court of Appeal had previously suggested, in its grounds of decision for *Muhammad Ridzuan* dated 5 October 2015, that it was an "open question" whether the PP's decision to issue a CSA could be challenged on grounds other than bad faith and malice (see *Muhammad Ridzuan* at [76]). It was therefore *open* to the Applicant to seek judicial review on the grounds of illegality, irrationality and/or procedural impropriety. Such a course of action was clearly aligned with the Applicant's interests and would in all likelihood have been within his means, given that he had the benefit of pro bono legal advice at the material time.

35 In the present case, the Applicant and his then-counsel first became aware of the PP's decision not to issue a CSA on 2 May 2017. Moreover, the facts relied on by the Applicant in support of his application for leave to apply for a Quashing Order against the PP's decision, namely the facts pertaining to Zamri's arrest and the alleged conversations between Zamri and the Applicant, had been known to the Applicant since 2015, on his own evidence. Considering the circumstances in their totality, I was of the view that the Applicant had not provided a reasonable explanation for his two-year delay. Accordingly, the application for leave to apply for a Quashing Order against the PP's decision was time-barred under O 53 r 1(6) ROC.

36 Even if the application for leave to apply for a Quashing Order had not been brought out of time, I found that it ought to be dismissed along with the Applicant's other prayers relating to the PP challenge, on the basis that the

Applicant had not discharged his onus of proving a *prima facie* case of reasonable suspicion. I elaborate on the reasons for this below.

Non-service of the MDP Notice

37 I should first point out that the Applicant took inconsistent positions regarding (a) the alleged non-service of the MDP Notice and (b) the substantive assistance which he had allegedly rendered to the CNB. On one hand, the Applicant claimed that the MDP Notice was not served on him at the time of his arrest. Hence, he was not apprised of the potential benefit of immediate cooperation and therefore did not provide any contemporaneous information to assist the CNB.[21] On the other hand, the Applicant argued that he *did* provide substantive assistance which led to Zamri's arrest.[22] This suggested that he did so either because the MDP Notice was served on him, or because he was conscious of the potential benefit of cooperation all along. In my view, this was an inherently contradictory stance which significantly undercut the Applicant's contention that the non-service of the MDP Notice had caused him to suffer substantial prejudice.

38 Nonetheless, I was of the view that the Applicant's arguments pertaining to the issuance of the MDP Notice could not stand even if they were considered in isolation.

39 First, I was not inclined to believe the Applicant's allegations that the MDP Notice had not been served on him. The Applicant relied primarily on three pieces of evidence to support his version of events – (a) the Applicant's

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21 ASS at para 61.

22 ASS at paras 67 – 68.

testimony during trial;[23] (b) the fact that there were "distinct differences" between the signatures on the MDP Notice and the signatures which are found on the Applicant's other statements;[24] and (c) the fact that the Trial Deputy Public Prosecutor ("DPP") withdrew his line of questioning in respect of the MDP Notice after the court directed him to provide a copy of the MDP Notice to the Defence.[25] I was not persuaded that these pieces of evidence gave rise to a *prima facie* case of reasonable suspicion that the MDP Notice had not been served on the Applicant.

40 The Applicant asserted that he had given unchallenged evidence during his High Court trial that the MDP Notice had not been read to him. From my perusal of the relevant transcripts, I was unable to accept that the Applicant could be characterised as having stated on oath that he was never served the MDP Notice, or that he had never seen the notice before. The relevant portion of the transcript which was relied on by the Applicant is reproduced below:[26]

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23 ASS at para 46.

24 ASS at para 58.

25 ASS at para 47.

26 Notes of Evidence, HC/CC 18/2017, 1 March 2017, 29/13-27.

> Q: … How did you---why did you know that you were going to die?
>
> A: This is after I was arrested, Sir. When the IO read to me the charge and he told me the punishment, then I know---I know, Sir, I going to die because of the punishment.
>
> Q: You were arrested before the mandatory death penalty notice was read to you, correct?
>
> A: Yes.
>
> Q: Okay. Now, the mandatory death penalty notice, all right, actually tells you that you can---you might be able to avoid the death penalty if you give information. Is that correct?
>
> A: He just read it to me the punishment that, Sir, when he read the charge.
>
> Q: No, it's the mandatory death penalty notice.
>
> (Counsel conferring)
>
> A: *He didn't read me that.*
>
> [emphasis added]

41 I agreed with the AG that the sentence "He didn't read me that" did not necessarily mean that the MDP Notice had not been served on the Applicant. Reading the sentence in its proper context, the word "He" referred to the Investigation Officer ("IO"), Lee Tien Shiong Herman. The word "that" referred to the MDP Notice. Thus, the sentence "He didn't read me that" simply meant that the IO had not read the MDP Notice to the Applicant. It did not preclude the possibility that the MDP Notice had been served or that it had been read to the Applicant by a *different* officer. Indeed, it was the AG's case that the MDP Notice had been read to the Applicant by a CNB Officer, Khairul Faiz bin Nasaruddin ("Khairul"), rather than the IO.[27] Khairul had given evidence in his

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[27] BOD, Vol 2, Tab 6 at para 7.

affidavit dated 1 July 2019 that he had read the MDP Notice to the Applicant, who indicated that he understood the same, and then declined to say anything in response.[28]

42 I was also unable to place weight on the fact that there were purportedly "distinct differences" between the signatures on the MDP Notice and the signatures which are found on the Applicant's other statements. For a start, my visual examination of the signatures did not clearly reveal any obvious or distinct differences. Even if such differences could be said to exist, it would be far-fetched to suggest, on that basis alone, that the MDP Notice had not been served on the Applicant. The Applicant's reliance on the conduct of the Trial DPP was likewise speculative and unsubstantiated. I thus found, on the totality of the evidence before me, that the MDP Notice been served on the Applicant and read to him, and he was made aware of it.

43 Secondly, taking the Applicant's case at its highest and assuming that the MDP Notice had not been served on him, I agreed with the AG that the service of the MDP Notice could not be characterised as a *compulsory* procedural prerequisite. In this regard, I drew guidance from the Court of Appeal's observation in *Muhammad bin Abdullah v Public Prosecutor and another appeal* [2017] 1 SLR 427 ("*Abdullah*") at [54] that the MDP Notice is typically served "[a]s a matter of practice". The Court of Appeal did not state that the service of the MDP Notice was mandated by law, and the Applicant was unable to point me to any statutory provision to that effect. Further, as the AG correctly pointed out, accused persons who commit offences in Singapore are in effect presumed to be aware of what the law states, including the alternative

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[28] BOD Vol 2, Tab 6 at paras 7 – 10.

sentencing regime under s 33B of the MDA, as ignorance of the law is not a defence.[29] Thus, the non-service of the MDP Notice could not be said to be a fatal omission which operated to prejudice the Applicant.

44 The Applicant also argued that it was significant that s 258 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") had been amended in 2012 to incorporate the following explanation:

> Explanation 2 — If a statement is otherwise admissible, it will not be rendered inadmissible merely because it was made in any of the following circumstances:
>
> …
>
> (aa) where the accused is informed in writing by a person in authority of the circumstances in section 33B of the Misuse of Drugs Act (Cap. 185) under which life imprisonment may be imposed in lieu of death;

The Applicant submitted that this explicit reference to the MDP Notice indicated that it was a prerequisite for the imposition of the death penalty, and not merely a matter of practice.

45 I was unable to agree with this submission. If Parliament had intended to make service of the MDP Notice compulsory, it would have expressly legislated for this instead of indirectly incorporating a reference to the MDP Notice under Explanation 2(aa) to s 258 of the CPC. Indeed, Parliament had explicitly codified other notices, such as the notice which must be read to an accused under s 23(1) of the CPC prior to the recording of his cautioned statement. It is telling that Parliament had not chosen to do so here.

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[29] AGSS at para 45.

46 Accordingly, I was satisfied that non-service of the MDP Notice would not have given rise to a *prima facie* case of reasonable suspicion that the PP's decision was tainted with procedural impropriety.

47 For completeness, I also briefly address the Applicant's contention that non-service of the MDP Notice infringed his right to equality under Article 12 of the Constitution. I preface this discussion with the caveat that my observations below are *obiter dicta*, given my finding above that the MDP Notice had in fact been served on the Applicant.

48 In the context of executive actions, Art 12(1) is breached if there is "deliberate and arbitrary discrimination against a particular person" and where "[a]rbitrariness implies the lack of rationality" (*Muhammad Ridzuan*) at [49]). This test was applied in *Eng Foong Ho and others v Attorney-General* [2009] 2 SLR(R) 542, where the Court of Appeal held (at [31]) that the Collector of Land Revenue's act of gazetting a temple property for acquisition did not infringe Art 12 because "[t]here was no allegation of arbitrary action on the part of the Government: indeed, it is conceded that the acquisition was proceeded with in good faith".

49 In the present case, the Applicant was not able to point to any factual circumstances to support his contention that there had been a breach of Art 12 premised on the *Muhammad Ridzuan* standard. Merely putting forward a bare assertion that he was "treated differently from all other accused persons in similar circumstances"[30] was not enough – the Applicant had to raise a *prima facie* case of reasonable suspicion that such alleged differentiated treatment had

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30 ASS at para 64.

been carried out *deliberately* and *arbitrarily* against him in particular. As the Applicant had failed to discharge this evidentiary burden, his challenge under Article 12 was bound to fail.

Whether the Applicant had provided substantive assistance

50 The Applicant's next contention in relation to the PP challenge is that he *did*, in any event, provide assistance amounting to "substantive assistance" under s 33B(2)(b) of the MDA. As mentioned at [37] above, this argument contradicted the Applicant's assertion that the MDP Notice had not been served on him. In any case, I was of the view that the evidence before me did not give rise to a *prima facie* case of reasonable suspicion that the Applicant had rendered substantive assistance, whether before or after the conclusion of his trial in the High Court.

Prior to the conclusion of the Applicant's trial

51 It was the Applicant's case that he had provided information to the CNB which ultimately led to the arrest of Zamri, a drug trafficker whom the Applicant purportedly knew as "Jimmy". The information which the Applicant had allegedly given to the CNB could be summarised as follows:[31]

(a) "Jimmy" was the person to whom the Applicant had been intending to deliver the bundles which were found on him when he was arrested;

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[31] ASS at para 69.

(b) "Jimmy" was a male Malay working as a security guard at Blk 1004 Lorong 8 Toa Payoh Industrial Park in or around August and September 2014;

(c) "Jimmy" was dark-skinned, had short hair, and did not wear glasses;

(d) "Jimmy" contacted the Applicant through the phone number +6581752012;

(e) The Applicant delivered bundles to "Jimmy" on three occasions prior to his arrest, the first being on 27 August 2014;

(f) On that first occasion, the Applicant had placed a plastic bag containing three bundles into the basket of a bicycle chained to a tree at Blk 1004 Toa Payoh Lorong 8 Industrial Park. From the overhead bridge overlooking Blk 1004 Toa Payoh Lorong 8 Industrial Park, the Applicant had observed "Jimmy" looking around for 15 to 20 minutes before collecting the plastic bag from the bicycle.

52 It was not disputed that the above information had been conveyed by the Applicant to the CNB through various investigative statements which had been recorded prior to the conclusion of the Applicant's trial.[32]

53 I reiterate at the outset that a court can only examine the *legality* of the PP's determination, as opposed to its merits (*Nagaenthran* at [51]). In the present case, the Applicant contended that the PP's decision not to issue a CSA despite the fact that he had allegedly provided substantive assistance was

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32 AGSS at para 18.

irrational, illegal or both.[33] Thus, in order to succeed in his application on this ground, the Applicant had to establish a *prima facie* case of reasonable suspicion that the PP's decision was:

> (a) illegal, because it had failed to exercise its discretion in good faith according to the statutory purpose for which the power was granted, or because it had taken into account irrelevant considerations or failed to take account of relevant considerations; and/or
>
> (b) irrational, because it was so unreasonable or outwardly defiant of logic that no sensible person would have arrived at the impugned decision.

(See *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 at [79] to [80].)

54 In my view, the Applicant had not established a *prima facie* case of reasonable suspicion that the strict threshold of irrationality had been met in the present case. Rather, I was satisfied, based on the evidence before me, that the PP had acted reasonably in refusing to grant the CSA. Crucially, although the Applicant had provided information relating to "Jimmy" in his statements, it subsequently transpired that the person whom the Applicant had identified from a photo-identification as "Jimmy" on 24 September 2014 was not in fact Zamri.[34] Whether this was due to the Applicant's genuine mistake or otherwise, it would have been of scant assistance to the CNB, and would instead have led

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33 ASS at para 39.

34 BOD, Vol 1, Tab 2 at para 26.

them down the wrong path in attempting to trace the said "Jimmy", calling for further intelligence-gathering and investigation.

55 The Applicant only revealed that he had identified the wrong person as Zamri four years later, on 24 September 2018.[35] This was long after the Applicant's conviction on 2 May 2017, and more than seven months after the dismissal of his appeal on 9 February 2018. Further, Zamri had already been convicted on 31 March 2017, more than a year before 24 September 2018. In the circumstances, it was difficult to see how it could be reasonably inferred that the Applicant had provided substantive assistance leading to Zamri's arrest in *October 2014*.

56 I next considered the question of illegality. It was clear that the burden lay on the Applicant to raise a *prima facie* case of reasonable suspicion that the PP had acted for improper purposes, taken irrelevant considerations into account, or failed to take relevant considerations into account (see *Nagaenthran* at [78]). However, the Applicant did not adduce any evidence to discharge this burden. As pointed out in *Prabagaran* (at [97]), the question of whether an offender has provided substantive assistance involves a "multi-faceted inquiry" taking into account a "multitude of factors", such as the upstream and downstream effects of any information provided, the operational value of any information provided to existing intelligence, and the veracity of any information provided when counterchecked against other intelligence sources.

57 The Applicant was in no position to speculate as to how the CNB had conducted its investigations or how it might have acted on the various sources

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35 BOD, Vol 1, Tab 2 at para 43.

of information it obtained. This was especially so in view of the fact that Superintendent Tan William of the CNB had affirmed two affidavits categorically stating that the information provided by the Applicant did not assist in Zamri's arrest.[36]

After the conclusion of the Applicant's trial

58 The Applicant also contended that after the dismissal of his appeal, he had provided the CNB with detailed and credible information about the person named "Anand" who had instructed him to bring the parcels from Malaysia into Singapore, as well as other suspected drug traffickers.[37] The Applicant alleged that this information could not have been furnished any earlier as it was only uncovered post-appeal, through the efforts of the Applicant's family members who had "pounded the streets of Johor Bahru to investigate the matter".[38]

59 It is clear that the latest time at which an accused may provide information to assist the CNB (and avail himself of the sentencing regime under s 33B of the MDA) is *during his trial* (*Abdullah* at [59]). The Court of Appeal in *Abdullah* explained the rationale behind this requirement as follows:

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36 BOD, Vol 2, Tab 8 at paras 6-7; Tab 12 at para 7.

37 ASS at para 89.

38 ASS at para 90.

> If he withholds all or some information before and/or during the trial, he cannot fault anybody if the PP decides not to issue the Certificate when the time comes for the trial court to consider the issue of sentence. It is also beneficial to the accused that he should furnish relevant and useful information as soon as possible because the longer he delays, the more likely the information would lose its usefulness.

60 Thus, I found that the post-appeal assistance rendered by the Applicant could not be taken into consideration for the purposes of determining whether the PP should have issued him a CSA. Further and in any event, the Applicant had not adduced any evidence to challenge IO Neo Zhan Wei's evidence[39] that the Applicant's post-appeal assistance was not useful to the CNB.

Whether the PP incorrectly understood its role under s 33B

61 The Applicant's final contention pertaining to the PP challenge is that the PP had misunderstood its role under s 33B of the MDA and had failed to act lawfully as a result. There were two limbs to this argument. First, the Applicant took issue with the fact that it was the former AG, namely AG V K Rajah ("AG Rajah"), who had decided not to issue a CSA to the Applicant, more than a year before the Applicant's trial had even begun. Secondly, the DPPs involved in the Applicant's trial had allegedly adopted a "cavalier approach" towards the issuance of the CSA.

62 In my judgment, there was no merit in either of these assertions. The Applicant was not able to produce any authorities to support his proposition that the CSA had to be specifically and personally reviewed by the AG who was in office at the time he was due to be sentenced, namely AG Lucien Wong. A considered decision had been made by AG Rajah on the evidence which had

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[39] Neo Zhan Wei's 1st Affidavit dated 1 July 2019 at para 11.

been available to him before the trial commenced. Nothing new or material had emerged at trial to warrant a reappraisal of AG Rajah's decision not to issue a CSA. In any event, the Applicant had not offered any novel information to the CNB up to the point when he was due to be sentenced.

63 I was also unable to agree with the Applicant's assertions about the attitudes and/or conduct of the DPPs involved in the Applicant's High Court trial. These assertions were exclusively premised on the fact that DPP Wuan Kin Lek, Nicholas ("DPP Wuan") had used the words "discretion" and "determination" interchangeably in an affidavit which he had filed in CA/CM 6/2019. I was unable to draw any inferences from this fact which, in my view, may simply have been occasioned by an oversight on DPP Wuan's part. In view of the paucity of evidence to support the Applicant's contentions, I found that his submissions on this point were bound to fail.

The Cabinet challenge

64 Turning to the Cabinet challenge, the Applicant's main contention was that there was a *prima facie* case of reasonable suspicion that the Cabinet had, when advising the President not to commute the Applicant's death sentence, failed to consider the substantive assistance he had rendered.[40]

65 In this regard, the Applicant relied on the fact that the State had refused to confirm:[41]

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40 ASS at para 121.

41 ASS at paras 122 – 123.

(a) when the Cabinet had advised the President to reject the Applicant's petition for clemency, save for saying that it was "prior to 7 May 2019"; and

(b) when the President was advised as to when the Applicant ought to be executed.

66 The Applicant also took issue with the State's refusal to disclose the materials that were considered by the Cabinet in advising the President.[42]

67 In my judgment, this challenge was completely devoid of evidential foundation. The Applicant had merely raised bare and speculative assertions without attempting to buttress his contentions with any form of substantiation. As the onus lay on the Applicant to prove a *prima facie* case of reasonable suspicion, his inability to furnish any supporting evidence was necessarily fatal to this application.

The SPS challenge

68 I now turn to the Applicant's final challenge, *viz,* his challenge against the SPS's refusal to grant him permission to interview Zamri, a fellow inmate.

69 The facts relating to this challenge may be summarised as follows:[43]

(a) On 10 June 2019, the Applicant's solicitors applied, through the online booking system on the SPS website, to interview Zamri on 14 June 2019. The stated reason, selected from an online drop-down menu,

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42 ASS at para 125.

43 BOD Vol 1, Tab 2 at paras 75-89; BOD Vol 2, Tab 9 at paras 20 – 21.

was "interview inmate who may become a defence witness". By this time, Zamri had been convicted on a capital charge and was awaiting his execution.

(b) By a letter dated 11 June 2019, the Attorney-General's Chambers ("the AGC") wrote to the Applicant's solicitors, requesting for "full particulars as to how, and why, any evidence that Zamri may provide would be relevant to your client's intended application".

(c) The Applicant's solicitors replied saying that they were unable to provide the information requested because (i) they had not yet interviewed Zamri, (ii) they were unable to disclose the Applicant's instructions as they were confidential, and (iii) the contents of their interview with Zamri would be protected by litigation privilege.

(d) The AGC replied that no privilege attached to the information sought, and repeated their demands for the Applicant's solicitors to explain how Zamri's evidence would be relevant.

(e) As of 14 June 2019, the request to interview Zamri still had not been approved and thus, the Applicant's solicitors did not manage to interview him on that date.

(f) After the court agreed to grant the Applicant an extension of time to file the present application, the Applicants again wrote to the AGC on 19 June 2019, setting out the relevance of Zamri's potential evidence (as per the AGC's earlier demands), and requesting once more for an urgent interview with Zamri.

(g) By a letter dated 20 June 2019, the AGC replied, again refusing the request to interview Zamri on the basis that the Applicant was already able to plead his case.

(h) On 25 June 2019, the AGC informed the Applicant that, in view of the fact that the Applicant had filed HC/OS 807/2019 and had stated on affidavit what his case in relation to Zamri was, the SPS had no objections to the Applicant's solicitors interviewing Zamri.

(i) The Applicant's solicitors subsequently interviewed Zamri on 26 and 28 June 2019.

70 Although the Applicant alleged that the SPS's actions were illegal, irrational and procedurally improper,[44] he only sought to substantiate the claim concerning illegality. In this regard, his primary contention was that the SPS had no lawful right to deny him access to Zamri because (a) the Applicant had given sufficient notice of the purpose of the visit (*ie,* to interview Zamri as a potential witness), (b) the SPS had no business demanding for the relevance of Zamri's evidence in respect of contemplated litigation against other government departments, (c) Zamri had consented to be interviewed, (d) there were no pending cases against Zamri, and (e) there was no property in witnesses.[45] The SPS' actions were "all the more unlawful" because the information sought by the AGC (acting on behalf of the SPS) was protected by both legal advice privilege *and* litigation privilege.[46]

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44 BOD Vol 1, Tab 2 at para 93.

45 ASS at para 103.

46 ASS at para 104.

71 The Applicant further averred that the SPS's denial of access was motivated by improper purposes, namely its desire to seek the premature disclosure of otherwise privileged information, and frustrate the Applicant's attempt to prepare for his case.[47]

72 In my judgment, the Applicant's challenge against the SPS was plainly unmeritorious as it was evident that he did not seek any substantive or practical relief through this challenge. The Applicant had originally sought three prayers against the SPS: (a) a Quashing Order against the SPS for its refusal to grant access to Zamri, (b) a Mandatory Order obliging the SPS to approve future requests of the Applicant's solicitors to interview Zamri, and (c) a Prohibiting Order prohibiting the SPS from carrying out the execution of Zamri's sentence until the final determination of his OS, including any appeals. In view of the fact that the SPS had consented to the Applicant's solicitors interviewing Zamri subsequent to the filing of the present application, the Applicant withdrew his prayers for the Mandatory Order and the Prohibiting Order.[48] Only the prayer for the Quashing Order remained. To account for the continued necessity of pursuing this prayer, the Applicant stressed that the SPS's actions had serious ramifications for the conduct of defence proceedings in Singapore and rationalised that there was a need to pre-empt possible future challenges of a similar nature.

73 I was unable to accept the Applicant's submission. As the AG pointed out, the facts of this case were unique – Zamri was a prisoner who was awaiting capital punishment, and the Applicant's offence was not directly correlated to

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47 ASS at para 116.

48 ASS at paras 119 – 120.

his. Further, prisoners are deemed to be in the legal custody of the Superintendent of the prisons they are confined in (s 33 of the Prisons Act (Cap 247, 2000 Rev Ed)), and there are no legal provisions which confer a right of access to any prisoner in legal custody for the purposes of an interview. As such, the Quashing Order – even if ultimately granted – would be of zero or very limited utility, whether to the Applicant or to the criminal Bar as a whole.

74 Nevertheless, I proceed to deal with the Applicant's other arguments for completeness. First, the Applicant's point that the SPS had no lawful right to deny him access to Zamri simply could not stand since the Applicant and his solicitors were not legally entitled to obtain access to Zamri in the first place. The Applicant's contention pertaining to litigation privilege and legal advice privilege was likewise misconceived. Even if I were to find, taking the Applicant's case at its highest, that the information sought was protected by litigation and/or legal advice privilege, the SPS's act of *requesting* for such information was not *ipso facto* unlawful. Finally, I was not satisfied that the Applicant had raised a *prima facie* reasonable suspicion that the SPS was acting in bad faith or for improper purposes. These were serious allegations and it was not open to the Applicant to cast aspersions on the SPS without concrete evidence to shore up his suspicions.

Conclusion

75 In summary, I found that the evidence before me did not disclose an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought by the Applicant. Accordingly, I dismissed the application.

76 As the AG agreed that each party should bear their own costs, I made no order as to costs.

See Kee Oon
Judge

Too Xing Ji (BMS Law LLC) and Lee Ji En (Ascendant Legal LLC) for the applicant;
Francis Ng Yong Kiat SC, Adrian Loo Yu Hao and Teo Siu Ming (Attorney-General's Chambers) for the respondent.
