# Manjit Singh s/o Kirpal Singh and another *v* Attorney-General
# [2013] SGCA 22

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| **Case Number** | : Civil Appeal No 70 of 2012 |
| **Decision Date** | : 14 March 2013 |
| **Tribunal/Court** | : Court of Appeal |
| **Coram** | : Chao Hick Tin JA; Judith Prakash J; Andrew Ang J |
| **Counsel Name(s)** | : The appellants in person; Low Siew Ling, Asanthi Mendis and Lim Ming Yi (Attorney-General's Chambers) for the respondent. |
| **Parties** | : Manjit Singh s/o Kirpal Singh and another — Attorney-General |

*Administrative Law – Judicial review*

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2012] 4 SLR 81.]

14 March 2013

**Chao Hick Tin JA (delivering the grounds of decision of the court):**

**Introduction**

1 This was an appeal by Manjit Singh s/o Kirpal Singh and Sree Govind Menon ("the 1st Appellant" and "the 2nd Appellant" respectively, and collectively, "the Appellants") against the decision of a High Court judge ("the Judge") dismissing their application for leave to apply for a quashing order in respect of Chief Justice Chan Sek Keong's ("the CJ") decision to appoint Mr G P Selvam ("Mr Selvam") as the chairman of the Disciplinary Tribunal ("DT") constituted to hear disciplinary charges against the Appellants: see the Judge's grounds of decision as reported at Re *Manjit Singh s/o Kirpal Singh and another* [2012] 4 SLR 81 ("the GD").

2 After considering the submissions and hearing both parties, we dismissed the appeal. We now give our reasons for the decision.

**The facts**

3 In December 2010, one Bernadette Rankine ("Ms Rankine") lodged a complaint ("the Complaint") with the Law Society against the Appellants. The contents of the Complaint were not placed on the record before the court, save that it was in relation to a sum of $1.8 million. The Appellants were Ms Rankine's former solicitors.

4 An Inquiry Committee ("IC") was appointed by the Law Society to look into the Complaint. It prepared a report dated 4 October 2011 ("the Report"), a copy of which was furnished to the Appellants on 11 January 2012. On 19 January 2012, the Appellants wrote to the CJ to convey their concerns in relation to the Report.

5 On 3 February 2012, the Law Society wrote to the CJ seeking the appointment of a DT to investigate the Complaint. On 9 February 2012, pursuant to s 90(1) of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("the LPA"), the CJ appointed a DT, with Mr Thean Lip Ping ("Mr Thean") as

president and Mr Tan Chuan Thye as member, to investigate the Complaint.

6 On 13 February 2012, the DT Secretariat notified the Appellants that the CJ had appointed a DT and of the DT's composition. On the same day, the Appellants wrote to the CJ to object to the appointment of Mr Thean. The Appellants' letter stated *inter alia* that:

(a) The Appellants "do not get along with [Mr Thean] at all".

(b) Rajah & Tann LLP ("R&T") and Mrs V K Rajah's ("Mrs Rajah") name "feature" in the Appellants' Joint Written Answer and Joint Executive Summary placed before the IC ("the Appellants' IC Submissions"), Mr K Muralidharan Pillai ("Mr Pillai") from R&T was mentioned in the Appellants' IC Submissions, and Mr Sundaresh Menon SC, who was then the managing partner of R&T, had assigned Ms Rankine's case to Mr Pillai.

(c) Mr Thean was known to have a close relationship with Justice V K Rajah ("Justice Rajah"). Mr Thean was, until recently, with the firm of KhattarWong LLP ("KW"). Counsel for the Law Society, Mr P E Ashokan, was from KW.

The Appellants argued that the president of the DT should be someone who (a) was not connected in any way to R&T and KW, and (b) had no personal friendship with Justice Rajah or Mrs Rajah. The Appellants asked that Mr Thean be replaced with any Senior Counsel who was not in a position of conflict.

7 The DT Secretariat replied in a letter dated 16 February 2012 to inform the Appellants that the CJ had, pursuant to s 90 of the LPA, revoked Mr Thean's appointment as president of the DT and appointed Mr Selvam in his place. This letter stated that the CJ's decision was made without accepting the veracity of the Appellants' contentions.

8 On 27 February 2012, the Appellants wrote two letters to the CJ objecting to Mr Selvam's appointment as president of the DT. The Appellants' letters stated *inter alia* that:

(a) The names of R&T, Mrs Rajah and Mr Pillai "featured" in the Appellants' IC Submissions. The said names also "feature" in the Appellants' Defence filed with the DT Secretariat on 24 February 2012.

(b) Mr Selvam was known to have a close relationship with Justice Rajah. It was open to the CJ to determine when the last communication between Mr Selvam and Justice Rajah was.

(c) Given the context set out in the Appellants' IC Submissions, it was unreal to expect that any ex-judge could exercise his powers in an objective and impartial manner without overlapping into the personal relationships.

(d) The reference in s 90 of the LPA to ex-judges was meant to apply where there were no references or connections with any judicial officer or his spouse. This was not so in this case. Section 90 of the LPA allowed for Senior Counsel to be selected. Mr Selvam should be replaced with a Senior Counsel.

(e) After deleting the Senior Counsel whom the Appellants believed should not be appointed as president of the DT, there were more than ten Senior Counsel available for the CJ to appoint as president of the DT.

9 In these two letters, the Appellants also highlighted events in relation to two separate suits which they "found to be disturbing":

(a) The Appellants acted for Lim Poh Yen ("Ms Lim") who was the defendant in Suit No 781 of 2009 ("S 781/2009"). The plaintiff's lawyer, Mr Tito Isaac ("Mr Isaac"), had attempted on 27 January 2012 to disqualify the Appellants from acting for Ms Lim. Mr Isaac served "Skeletal Submissions – Conflict of Interest" on the Appellants on 30 January 2012 before a hearing in chambers before the judge hearing S 781/2009 to resolve this matter. After a quick review of the bundle outside the chambers, the 1st Appellant informed Mr Isaac that the bundle appeared to be the work of either Mr Selvam or Mr Michael Hwang SC. The 1st Appellant pressed Mr Isaac to indicate whether this was Mr Selvam's work, but Mr Isaac gave no response. On that same day, Mr Isaac withdrew his objections to the Appellants' involvement.

(b) The Appellants were approached on 10 January 2012 by Mr Sivakumar Murugaiyan ("Mr Murugaiyan") from Genesis Law Corporation who stated that he wished to subpoena the Appellants to give evidence in Suit No 89 of 2010 ("S 89/2010"). Mr Murugaiyan was related to Mr Selvam. Eventually on 25 January 2012, Gabriel Law Corporation, which was also acting in S 89/2010, issued a subpoena against the Appellants to give evidence in S 89/2010. All this took place when the Appellants were attending to the second tranche of the trial of S 781/2009, which was from 18 January 2012 to 10 February 2012.

10 On 29 February 2012, the DT Secretariat informed the Appellants that their objections to Mr Selvam were not accepted. On the same day, the Appellants replied stating that they were "shocked" with the CJ's decision not to accede to their request. The Appellants stated *inter alia* that:

(a) Section 90 of the LPA was not meant to apply where there was an association between the person who was to be appointed as president of DT and a serving judge or his spouse. There was an association between Mr Selvam and Mrs Rajah.

(b) Any impartial appointing party would find it rational that the president of the DT should not be someone previously from the bench who had a close relationship with Justice Rajah. Any impartial appointing party would also have regard to the involvement of R&T, Mr Pillai, and Mr Sundaresh Menon SC. The president of the DT should be someone totally unconnected and uninfluenced by any personal relationships or associations.

(c) Because the Appellants' request, which they believed to be reasonable and rational, was denied, the Appellants had to live with the CJ's decision. This would not be in compliance with due process and natural justice.

(d) It was known to the Appellants and to anyone who had an impartial mind that the CJ himself was close to Justice Rajah. It would not be unreasonable to say that the CJ's wife and Mrs Rajah would have met. Certainly, the CJ would have met Mrs Rajah.

(e) Where the CJ was in a position of conflict or in a position where he could be seen to be close to one party, the appointment of the DT should be delegated to the next appropriate person.

(f) The Appellants had no faith in the impartiality of Mr Selvam.

(g) The CJ knew that Mr Selvam and Mr Thean had a close relationship.

The Appellants now even alleged, *inter alia*, that there was apparent bias on the part of the CJ himself.

11 On 2 March 2012, the DT Secretariat informed the Appellants that the CJ had reviewed the matter and had decided that Mr Selvam's appointment as president of the DT would stand.

12 On 2 April 2012, the Appellants attended a pre-hearing conference ("PHC") before the DT. On 25 April 2012, the Appellants wrote to the CJ, enclosing the transcript of the PHC, alleging that what Mr Selvam had said during the PHC showed that he was biased against them and had pre-judged the case.

13 On 27 April 2012, the DT Secretariat informed the Appellants that the CJ had read the Appellants' letter dated 25 April 2012 and had found no basis to replace Mr Selvam as president of the DT.

14 On 9 May 2012, the Appellants filed Originating Summons No 443 of 2012 ("the OS") claiming *inter alia* the following reliefs:

(a) leave to apply for a quashing order of the CJ's decision on 16 February 2012 appointing Mr Selvam as the president of the DT; and

(b) a stay of the DT proceedings against the Appellants pending the determination of their application for a quashing order.

**The statutory provisions**

15 The relevant provisions in the LPA were as follows:

**Appointment of Disciplinary Tribunal**

**90.**—(1) The Chief Justice may from time to time appoint one or more Disciplinary Tribunals, each comprising —

(*a*) a president, who shall be an advocate and solicitor who is a Senior Counsel or who has at any time held office as a Judge or Judicial Commissioner of the Supreme Court; and

(*b*) an advocate and solicitor of not less than 12 years' standing.

(2) A Disciplinary Tribunal shall be appointed in connection with one or more matters or for a fixed period of time or as the Chief Justice may think fit.

(3) The Chief Justice may at any time —

(*a*) revoke the appointment of the Disciplinary Tribunal;

(*b*) remove any member of the Disciplinary Tribunal; or

(*c*) fill any vacancy in the Disciplinary Tribunal.

...

**Restriction of judicial review**

**91A.**—(1) Except as provided in sections 82A, 97 and 98, there shall be *no judicial review in any court* ***of any act done or decision made by the Disciplinary Tribunal*** .

(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; and

(*b*) an application for a declaration or an injunction, or any other suit or action, relating to or arising out of any act done or decision made by the Disciplinary Tribunal.

[emphasis added in italics and bold italics]

**The decision below**

16 The Judge held that the OS was misconceived in law because the CJ's decision was not amenable to judicial review. The Judge gave three reasons for arriving at this finding:

(a) First, the Judge held (at [6] of the GD) that the CJ's decision was made in his judicial capacity. The Judge observed that an application for judicial review was not the appropriate remedy against a decision of the High Court or the Court of Appeal.

(b) Secondly, the Judge accepted the Attorney-General's ("the Respondent") submission based on *Lim Mey Lee Susan v Singapore Medical Council* [2012] 1 SLR 701 ("*Susan Lim*") and held (at [6] of the GD) that even if the CJ's decision was made in his administrative (rather than judicial) capacity, the decision was not amenable to judicial review because it was "ministerial" in nature.

(c) Thirdly, the Judge held (at [7] of the GD) that s 91A of the LPA was evidence that Parliament had intended that the CJ's power under s 90(1) of the LPA should not be amenable to judicial review.

17 In addition to his finding that the OS was legally unsustainable because the CJ's decision was not amenable to judicial review, the Judge also held (at [8] of the GD) that the OS was factually unsustainable because the matters disclosed and/or alleged by the Appellants could not form a basis for inferring any misconduct on the part of Mr Selvam or the CJ. The Judge found that the fact that Mr Selvam was a former judge and would have known the CJ and Justice Rajah was, without more, not a sufficient reason to exclude him from acting as president of the DT.

18 The Judge observed (at [8] of the GD) that if the Appellants were concerned about independence and impartiality, a Senior Counsel would not be any more or less independent or impartial than Mr Selvam because no less than the highest degree of professionalism was expected from each Senior Counsel and ex-judge.

19 The Judge pointed out (at [8] of the GD) that the involvement of Mrs Rajah was not made known until the hearing of the OS itself, and even then what was alleged was merely from the Bar. In any event, the Judge opined that the Appellants' letters and what they stated from the Bar implied impropriety on the part of Mrs Rajah but stopped short of saying exactly what that was, and that no court could read or infer any misconduct from what they narrated from the Bar. The Judge observed (at [10] of the GD) that there was no reason why a judge or his spouse could not recommend a lawyer to a friend.

**The issues before the court**

20 There were essentially three issues in this appeal:

(a) whether leave to appeal against the Judge's decision was required;

(b) whether the CJ's decision to appoint Mr Selvam as president of the DT was amenable to judicial review; and

(c) whether there was sufficient merit on the facts such that leave should be granted to the Appellants to enable them to commence proceedings for judicial review of the decision of the CJ to maintain the appointment of Mr Selvam as the president of the DT.

***Issue 1: Whether leave to appeal against the Judge's decision was required***

21 The Respondent noted that the amendments to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the 2010 amendments"), which took effect from 1 January 2011, raised the question of whether leave was required in order to appeal against a decision of a High Court judge made pursuant to O 53 r 1 of the Rules of Court to grant or deny leave to apply for judicial review. Having carefully considered the 2010 amendments, the Respondent came to the conclusion that "the 2010 amendments were not intended to require leave of court to appeal against a judge's decision to grant or refuse an application for leave made under O 53 r 1". [note: 1]

22 We would also add that by the time of the oral hearing of this appeal on 6 November 2012, the Court of Appeal had decided in an unrelated matter, *viz*, *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* (Summons No 3702 of 2012 filed in Civil Appeal No 81 of 2012) ("*OpenNet*"), that leave was *not* required for an appeal against the decision of a High Court judge to deny leave to apply for judicial review. In the circumstances, we held that leave was not required for the Appellants to appeal against the Judge's decision. As written grounds for the decision in *OpenNet* will be issued by the Court of Appeal in due course, we will say no more on this point.

***Issue 2: Whether the CJ's decision was amenable to judicial review***

*The parties' arguments*

23 The Respondent submitted that the CJ's power under s 90(1) of the LPA was not amenable to judicial review because: (a) the CJ's power was "ministerial" in nature; and (b) serious delays would result in the disciplinary process if the CJ's power were amenable to judicial review. The Appellants took the opposite position.

*Whether the CJ's power was "ministerial" and therefore not amenable to judicial review*

24 The Respondent's first argument, *viz*, that the CJ's power was "ministerial" in nature and therefore not amenable to judicial review, can be broken down into three propositions:

(a) the fact that a power is statutory is not decisive of whether it is amenable to judicial review;

(b) the CJ's power under s 90 of the LPA was merely "ministerial"; and

(c) all "ministerial" powers are necessarily not amenable to judicial review.

Whether statutory powers are necessarily amenable to judicial review

25 The Appellants argued that a statutory power is necessarily amenable to judicial review. The Respondent accepted that the CJ's decision was made in the exercise of a power conferred upon him by statute, and that the courts have frequently considered the source of a power "as an indicator of whether [it] is subject to judicial review". [note: 2] However, the Respondent submitted that the source of a power has "never been held to be the sole determinative factor" of whether a power is amenable to judicial review because the courts have also considered the nature of the power. [note: 3]

26 The Judge accepted the Respondent's argument and held that the CJ's decision was not amenable to judicial review (see [16(b)] above).

27 In modern administrative law, it is well-established that powers which are not conferred by statute may still be amenable to judicial review: see *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] 1 AC 374, *Regina v Panel on Take-overs and Mergers, Ex parte Datafin plc and another* [1987] 1 QB 815 ("*Datafin*"), and *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565. This appeal concerned the opposite question: whether, in some circumstances, a power conferred by statute may not be amenable to judicial review.

28 In our view, just as the courts have accepted that non-statutory powers may in some circumstances be amenable to judicial review, the mere fact that a power stems from statute should not *necessarily* mean that it is amenable to judicial review. Nonetheless, the fact that a particular power stems from statute should *ordinarily* mean that it is amenable to judicial review in the absence of compelling reasons to the contrary. In *Mohit v Director of Public Prosecutions of Mauritius* [2006] 1 WLR 3343 ("*Mohit*"), the Privy Council on an appeal from Mauritius stated (at [20] *per* Lord Bingham of Cornhill):

> 20 In *R v Panel on Take-overs and Mergers, Ex p Datafin plc* [1987] QB 815, 847, Lloyd LJ observed that "If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review". It is unnecessary to discuss what exceptions there may be to this rule, *which now represents the ordinary if not the invariable rule.* Thus the Board should approach the present issue on the assumption that the powers conferred on the DPP by section 72(3) of the Constitution are subject to judicial review, whatever the standard of review may be, *unless there is some compelling reason to infer that such an assumption is excluded.* ... [emphasis added]

29 The Privy Council's observations in *Mohit* were endorsed in Harry Woolf, Jeffrey Jowell & Andrew Le Sueur, *De Smith's Judicial Review* (Sweet & Maxwell, 2007, 6th Ed) ("*De Smith*"). The authors of *De Smith* stated as follows (at paras 3-030 to 3-031):

> The court now operates on the assumption that "If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review" [quoting from *Datafin*]. There must be some "compelling reason to infer that such a presumption is excluded" [quoting from *Mohit*]. *In the large proportion of claims commenced, there is no doubt that the decision in question is susceptible to review because the source of power exercised is statutory.*
>
> Decisions of bodies deriving their power from Private Acts of Parliament ... are not however, for

this reason alone, subject to judicial review. Thus, Lloyd's of London and Cambridge University, both institutions established by Private Act of Parliament, are not for that reason alone susceptible to judicial review; a particular public function must also be identified. If, however, they perform public functions those functions will be reviewable. This approach accords with one of the roles of judicial review which is to ensure decisions are taken lawfully. When applied here this means in accordance with the statutory power and purpose.

[emphasis added]

30 In HWR Wade & CF Forsyth, *Administrative Law* (Oxford University Press, 2009, 10th Ed) ("*Wade & Forsyth*"), other instances where statutory powers may not be amenable to judicial review are suggested as follows (at p 534):

... [S]tatutory status without the public element is not by itself conclusive. Statutory powers and duties are possessed by many bodies, for example commercial companies and trustees, which, having no public element, are quite outside the range of judicial review. ...

31 We agree with the commonsense analysis in *De Smith* and *Wade & Forsyth* as set out above. Some local examples of powers and duties conferred or imposed by statute upon bodies (which generally speaking are not and should not be amenable to judicial review) can be found in the powers and duties conferred or imposed upon corporations by the Companies Act (Cap 50, 2006 Rev Ed) and upon trustees by the Trustees Act (Cap 337, 2005 Rev Ed).

32 In *Regina (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233, one of the issues before the English Court of Appeal was whether a decision of a private company limited by guarantee to reject an application by a trout producer to participate in a farmers' market programme was amenable to judicial review. The English Court of Appeal held that it was. Dyson LJ made the following broad observations (at [16]) with which we agree:

16 It seems to me that the law has now been developed to the point where, unless the source of power clearly provides the answer, the question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a *sufficient public element, flavour or character to bring it within the purview of public law*. It may be said with some justification that this criterion for amenability is very broad, not to say question-begging. But it provides the framework for the investigation that has to be conducted. ... [emphasis added]

Where there is a compelling reason which indicates the absence of such a public element in what is nonetheless a statutory power or duty, there would be no good reason to subject the exercise of such a power or duty, which may already be governed by private law obligations and remedies, to public law remedies in judicial review proceedings.

33 We therefore rejected the Appellants' broad submission that all statutory powers are necessarily amenable to judicial review.

Whether the CJ's power under s 90 of the LPA was merely "ministerial"

34 According to *De Smith* at para B-008, the term "ministerial" when used in relation to a power may be used to "describe any duty the discharge of which involves no element of discretion or independent judgment". However, *De Smith* at para B-008 went on to state that "the presence of a minor discretionary element is not enough to deter the courts from characterising a function as

ministerial".

35 In our view, it was unnecessary to consider whether the CJ's power under s 90 of the LPA could properly be characterised as being "ministerial" in nature. Even if the CJ's power under s 90 of the LPA, properly characterised, was "ministerial" in nature, it would not necessarily follow that that power would not be amenable to judicial review. The argument that "ministerial" powers are not amenable to judicial review was clearly anachronistic, given the development of modern administrative law. We will now explain.

Whether ministerial powers are necessarily not amenable to judicial review

36 The Respondent relied on three authorities to support his proposition that ministerial powers are necessarily not amenable to judicial review: (a) *De Smith* at para B-008; (b) *Hetherington v Security Export Company, Limited* [1924] AC 988 ("*Hetherington*"); and (c) *Susan Lim* (cited at [16(b)] above). We were of the opinion that none of these authorities supported the Respondent's proposition.

*(1) De Smith and Hetherington*

37 Para B-008 of *De Smith*, which the Respondent relied upon, stated:

> ... [The term "ministerial"] may describe any duty, the discharge of which involves no element of discretion or independent judgment. Since an order of mandamus will issue to compel the performance of a ministerial act ... it is often of practical importance to determine whether discretion is present in the performance of a statutory function. The cases on mandamus show, however, that the presence of a minor discretionary element is not enough to deter the courts from characterising a function as ministerial. ... *The issue of a warrant for the nonpayment of taxes has been held to be a ministerial act (and therefore not reviewable by certiorari)* although the officer issuing the warrant had discretionary power to take proceedings in the courts for the recovery of the taxes. ... [emphasis added]

38 However, it would have been evident on a reading of that section of *De Smith* that para B-008, written in 1979, was very much out of line with modern jurisprudence. As the present editors of the sixth edition of *De Smith* (published in 2007 and supplemented in 2009) explained, the only reason why para B-008 still existed – as an appendix to the sixth edition – was because they believed that the old classifications may still be relevant to a very limited extent. *De Smith* stated as follows (at paras B-001 to B-003):

> ... [F]or many years the development of English administrative law was impeded by the distinctions made by the courts between functions which were classified as "legislative", "administrative", "judicial", "quasi-judicial" and "ministerial". In particular, natural justice was reserved for decision-making which was "judicial" or "quasi judicial" in nature and judicial review as a whole was not considered appropriate for decisions which were of a "legislative" or "ministerial" character. In the last edition of this work which he edited (in 1973), de Smith was highly critical of the "terminological contortions" produced by these classifications. Although he thought that the conceptual problems associated with the classifications still "appeared to be overwhelming", he regarded them as "analytically erroneous" and detected some hope that "to an increasing extent courts exercising powers of judicial review in administrative law are abandoning servitude to their own concepts and asserting mastery over them" (p.77).
>
> ...

*Servitude to these classifications has now largely been abandoned.* In regard to natural justice, the notion that a fair hearing is reserved to a "judicial" or "quasi-judicial" situation has been firmly "scotched" as a "heresy". *The prerogative remedies of certiorari and prohibition are no longer confined, as they once were, to the "judicial" functions of public bodies.* The sweeping away of this restriction was helped by the common procedure established by RSC, Ord.53 in 1978. *Today both certiorari and prohibition (quashing and prohibiting orders) may be granted in relation to functions which may be regarded as "administrative" or even as "legislative"[.]* In cases regarding prison discipline the House of Lords [in *Leech v Deputy Governor of Parkhurst Prison* [1988] 1 AC 533] has disregarded the "fancied distinctions" between "administrative" and "judicial or quasi judicial" distinctions by upholding the possibility of judicial review of the decisions of prison governors. *Lord Oliver held [at 579F] that "it is not the label ... that determines the existence of [the court's] jurisdiction but the quality and attributes of the decision".*

*The rejection of the classification of functions as determining the existence or scope of judicial review* means it no longer has a place at the start of a book on judicial review. However, its relevance to the history of judicial review is considerable, and it still throws light on the "quality and attributes" of decisions which may render them *more or less* amenable to judicial review. ... To the extent therefore that the classifications are still useful and relevant (*and their relevance should by no means be overrated*), what follows is an abridged version of Chapter 2 of the 4th edition (1979) of this work, edited by J. Evans.

[emphasis added]

39 Paragraph B-008 of *De Smith* formed part of the abridged version of the fourth edition which the present editors referred to. We therefore could not fathom why the Respondent chose to rely on this paragraph of *De Smith* as representing the present state of English administrative law in order to support his argument that the Singapore courts should, in 2012, accept the proposition that all ministerial powers or duties are not amenable to judicial review. [note: 4] It would appear that the Respondent might not have fully appreciated or might have overlooked the background to para B-008 of *De Smith*.

40 We also noted that the Respondent's argument, *viz*, that quashing orders are not available against acts which are not "judicial" or "quasi-judicial", was rejected in Singapore as early as 1969 in *Chief Building Surveyor v Makhanlall & Co Ltd* [1968–1970] SLR(R) 460 ("*Makhanlall*"). One of the issues in *Makhanlall* was whether a quashing order was available against a decision which was purely administrative. The Federal Court sitting in Singapore held that a quashing order was available against such a decision. Choor Singh J (delivering the judgment of the court) stated as follows:

11 ... [I]n *Durayappah v Fernando* [1967] 2 AC 337... the Judicial Committee followed the House of Lords in *Ridge v Baldwin* [1964] AC 40 and ... [held] that *a statutory power does not have to be classifiable as "judicial" or "quasi-judicial" before the rules of natural justice are applicable* ... *The decision in* Durayappah*'s case is most welcome not only in Singapore, but also, we feel certain, in all Commonwealth jurisdictions in which the Privy Council is the final court of appeal*.

12 In *Durayappah*'s case the Judicial Committee made it clear that *nothing external to the power, no "super-added" duty to act judicially, would be necessary for the rules of natural justice to be applicable or for* certiorari *to be available.* ...

...

18 Counsel for the appellant submitted that each of the two orders made by the Magistrate's Court was a purely administrative act and therefore *certiorari* would not lie against the Magistrate's Court. In view of the authoritative opinion expressed by the Judicial Committee in *Durayappah*'s case ... that *a statutory power does not have to be classifiable as "judicial" before the rules of natural justice are applicable and for* certiorari *to be available*, we do not consider it necessary to decide whether or not the two orders were administrative acts. ...

[emphasis added]

41 We agreed with this finding in *Makhanlall*. As *De Smith* observed (at para 18-003):

... [B]efore the modern era of judicial review, the limits of the High Court's supervisory jurisdiction were defined by placing restrictions on the situations in which the particular remedies of certiorari, prohibition and mandamus could be granted. ... [T]he approach today is a much broader one: the boundaries of the court's supervisory powers are determined by focusing on the source of legal authority and the character of the function, and whether the subject-matter of the claim is justiciable. *Little of the old case law on the reach of each remedy is of much practical relevance. The question to be addressed is therefore no longer, "does certiorari lie against such a decision?" but rather whether the impugned decision is one made by a public authority in the exercise of a public function and is justiciable. Today it can be said that the remedial orders at the disposal of the court perform the subsidiary role of giving practical effect to the judgment of the court.* [emphasis added]

42 Indeed, as *Wade & Forsyth* explained, the notion that quashing orders were not available against mere administrative acts or decisions was founded on an erroneous interpretation of the law. *Wade & Forsyth* stated as follows (at pp 516–517):

In [*The King v Electricity Commissioners* [1924] 1 KB 171 ("*Electricity Commissioners*")] the Court of Appeal cited a long series of precedents where a quashing order or a prohibiting order or both, had issued to administrative authorities such as the Board of Education, the Poor Law Commissioners, the Tithe Commissioners, inclosure commissioners, and licensing justices. Plenty of other authorities could be added to this list including ministers of the Crown. *The truth was that quashing and prohibiting orders were general remedies for the judicial control of both judicial and administrative decisions*, and could be invoked just as freely where a minister made an invalid clearance order or a local authority wrongfully granted a licence or planning permission, as where justices of the peace convicted without jurisdiction. *But the courts failed to give candid expression to this truth. At two different times they threw themselves into confusion by forgetting that in this context they had made 'judicial' a synonym for 'administrative', and by drawing the false inference that an act which was administrative could not be judicial in the sense required.*

The first occasion was in the late nineteenth century, when it was suddenly held that the decisions of liquor licensing authorities, since they were administrative, were not subject to certiorari. This fallacy was soon corrected, and the House of Lords explained how licensing functions, though administrative in nature, are subject to certiorari. ...

Confusion again began to reign about 1950 in [various] erroneous decisions on natural justice ... By overlooking the fact that these remedies had long been used to control administrative functions, the courts relapsed into a profound muddle. The Court of Appeal went so far as to suggest that the quashing order might not lie in matters determined by policy and expediency. Yet the *Electricity Commissioners* case itself arose out of a question of pure policy and

expediency: how best to organise the electricity companies in London. Policy and expediency play a dominant role in licensing functions, but there is abundant authority for the control of licensing authorities by a quashing order.

The law was once again saved from its own backsliding in [*Ridge v Baldwin and others* [1964] AC 40], where Lord Reid reinterpreted Atkin LJ's words [in *Electricity Commissioners*] about 'the duty to act judicially'. ... Lord Reid ... explained how 'judicial' had been made a stumbling-block in earlier cases which had treated it as a superadded condition. *In the correct analysis it was simply a corollary, the automatic consequence of the power 'to determine questions affecting the rights of subjects'. Where there is any such power, there must be the duty to act judicially. ... Thus the law was for the second time brought back onto its course. Quashing and prohibiting orders were once again recognised as general remedies for the control of administrative decisions affecting rights, simply giving effect to the principle that powers of decision must be exercised lawfully.*

[emphasis added]

43 Apart from the weight of authority, it was in our view untenable in principle to argue that quashing orders should not be available against administrative or ministerial acts or decisions. Even if the Respondent had accepted that *mandatory* orders are available against such acts or decisions, as his reliance on para B-008 of *De Smith* (see [37] above) seemed to indicate, there are some circumstances in which a mandatory order would not be of much practical utility to an applicant who has succeeded in establishing a ground for judicial review. As Michael Supperstone QC, James Goudie QC and Sir Paul Walker, *Judicial Review* (LexisNexis Butterworths, 2005, 3rd Ed) stated (at para 15.23.1):

A mandatory order will be granted ordering to be done that which a statute requires to be done. If a power or discretion only (as distinct from a duty) exists, the order will not be granted by the court except to secure performance of a duty to exercise the discretion when the occasion arises, or a duty to exercise a genuine discretion or a discretion based on proper legal principles.

*Wade & Forsyth* astutely observed (at p 525) that "[o]bligatory duties must be distinguished from discretionary powers. With the latter a mandatory order has nothing to do ...". As the courts have frequently reiterated, the rule of law requires that all legal powers be subject to limits and it is the courts' constitutional role to ensure that those limits are observed: see, for instance, *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR(R) 525 ("*Chng Suan Tze*") at [86] and *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 at [17(a)]. Accepting the Respondent's argument would emasculate the courts' ability to grant effective relief to applicants who succeed in establishing a ground or grounds for judicial review.

44 In the circumstances, we found that the Respondent's reliance on para B-008 of *De Smith* was misplaced as it did not support the Respondent's argument that the CJ's power under s 90(1) of the LPA was not amenable to the quashing order for which leave was sought by the Appellants in the OS.

45 We noted that the Respondent also relied on *Hetherington* (cited at [36] above). But that case was even more dated than para B-008 of *De Smith*, having been decided by the Privy Council in 1924 on an appeal from Canada. The question in *Hetherington* was whether a quashing order could issue in respect of a warrant signed by the Provincial Secretary-Treasurer of New Brunswick. The Privy Council held that (a) a minor element of discretion did not detract from the essentially ministerial nature of the signing of the warrant, and (b) it was well-established that a quashing order could not issue in respect of ministerial acts. For the same reasons as those stated in respect of para B-008 of

*De Smith* above, *Hetherington* is no longer good law.

*(2) Susan Lim*

46 In *Susan Lim*, Dr Susan Lim Mey Lee ("Dr Lim") applied by way of Originating Summons No 1252 of 2010 ("OS 1252/2010") for leave to apply for, *inter alia*, a quashing order against the decision of the Singapore Medical Council ("SMC") appointing a second Disciplinary Committee ("the Second DC") to hear various disciplinary charges against her. The Court of Appeal affirmed the High Court judge's decision to dismiss Dr Lim's application.

47 The Respondent advanced the following arguments in reliance on *Susan Lim*:

(a) The CJ's role under s 90(1) of the LPA is similar to that of the SMC in appointing members of a DC. Once the CJ has decided to appoint a DT, the only element of discretion which he has is in respect of the selection of the members of the DT.

(b) A holding that the CJ's power is not amenable to judicial review does not mean that the dissatisfied party has no recourse. Any allegation of bias should properly be made to the DT. If the relevant DT member refuses to disqualify himself, the aggrieved party may then raise this matter before the courts.

(c) Any allegation of bias against the CJ himself would be irrelevant having regard to the fact that the only discretion which the CJ has is in relation to the selection of the members of the DT.

We were unable to accept these arguments.

48 One of the grounds for Dr Lim's application in *Susan Lim* was that the Director of Medical Services ("DMS"), who was a statutory member of the SMC, had (a) "formed a personal view" on the charges against Dr Lim, and (b) effectively acted as complainant, investigator and prosecutor in the disciplinary process: see *Susan Lim* at [41(a)]. The Court of Appeal rejected this argument for the following reasons:

> 46 In our view, the Appellant was attempting to cast a cloud of suspicion over the conduct of Prof Satku by alleging that he either administered or endorsed an unfair disciplinary process for the formal inquiry into the Complaint. *In our view, the Appellant attacked the wrong target.* While s 5 of the MRA vests the SMC with authority to regulate the ethical standards of registered medical practitioners, *the SMC is not responsible for establishing the disciplinary framework applicable to registered medical practitioners. The framework has instead been established by Parliament via ss 38–43 of the MRA. The SMC's duties under these provisions are all "ministerial" or administrative in nature.* ***The SMC has no discretion in the matter once it receives a complaint*** *(whether from the DMS, MOHS or other sources) against a registered medical practitioner (see s 39(1) of the MRA).* ***The SMC merely acts as a conduit in such circumstances, and, therefore, no issue of bias can arise with respect to the SMC discharging its statutory duties. This is also the case when the SMC appoints a Disciplinary Committee upon receiving a Complaints Committee's order that a formal inquiry into a complaint should be held by a Disciplinary Committee*** (see s 41(3) of the MRA).
>
> 47 Early cases on administrative law referred to duties of the kind outlined above as "ministerial" duties because they did not involve the exercise of any discretion or judgment. Reference may be made to ... [*De Smith*] ... at para B-008 for an explanation of the use of the term "ministerial" to describe statutory duties or functions which do not involve the exercise of

any discretion or judgment.

48 In the present case, *the only discretion which the SMC has in the chain of ministerial duties or functions set out in ss 38–43 of the MRA is in respect of the selection of the members of a Disciplinary Committee. In the context of this statutory framework, the allegation that Prof Satku (the DMS at the material time) was biased against the Appellant, had formed an adverse opinion on the Appellant's charges and had multiple roles to play in the disciplinary process* ***could not give rise to any unfairness or perception of unfairness*** *in the disciplinary process.* In the present case, *the* ***critical*** *issue is not the role of the DMS as a member of the SMC, but whether there was a reasonable apprehension that Prof Satku caused the SMC to appoint, as members of the Second DC, persons in respect of whom there was a reasonable suspicion that they would or might, for whatever reason, be biased against the Appellant. Neither the DMS nor the SMC has any role to play in* ***the disciplinary proceedings before the Second DC or the outcome of those proceedings, both of which are entirely matters for the Second DC*** *. Hence, any allegation of bias (or other grounds of disqualification) should have been directed against the members of the Second DC.* However, no allegation of this nature has been made by the Appellant thus far. When asked by this court whether the Appellant would be making any allegation of bias against the members of Second DC, counsel for the Appellant did not wish to commit his client to any position ... *Until the Appellant takes a position on this issue, there is* ***no legal basis on which a court can consider granting the Quashing Order*** *sought by the Appellant.*

49 In short, the Appellant's case before the Judge and on appeal *vis-à-vis* the Quashing Order was, in our view, entirely misconceived.

[emphasis added in italics and bold italics]

49 In *Susan Lim*, what Dr Lim had sought to quash was the SMC's decision *to appoint the Second DC* (*ie*, the SMC's decision to convene the Second DC): see *Susan Lim* at [1(a)], [21], [22] and [41]. This was confirmed by the wording of the application which Dr Lim filed, *viz*, OS 1252/2010, which stated as follows:

Let all parties concerned attend … on the hearing of an application on the part of [Dr Lim] for the following orders that:-

1. Leave be granted to [Dr Lim] to apply for judicial review in the form of:

    a. A Quashing Order against the decision of the Singapore Medical Council ("SMC") under section 42 of the Medical Registration Act (Cap. 174) *in appointing a second Disciplinary Committee* on or around 16 September 2010 to hear the disciplinary proceedings relating to the purported overcharging of fees by [Dr Lim].

…

[emphasis added]

50 However, in challenging the SMC's decision to convene the Second DC, Dr Lim was found (at [46] of *Susan Lim*) to have "attacked the wrong target". The SMC simply had no discretion to refuse to complete the disciplinary proceedings because it was *obliged* under the provisions of the Medical Registration Act (Cap 174, 2004 Rev Ed) to appoint a DC: see *Susan Lim* at [24], [27] and [46].

51 That was why the Court of Appeal commented (see *Susan Lim* at [48]) that the "critical" issue was whether Dr Lim was alleging bias on the part of any member of the Second DC: while the SMC's decision to convene the Second DC could not be impugned because it was obliged to do so, its decision *to appoint particular persons* to constitute the Second DC could possibly be. However, Dr Lim did not seek leave to quash the SMC's decision *to appoint particular members to* the Second DC. No allegation was made by Dr Lim in OS 1252/2010 that there was apparent bias on the part of any member of the Second DC: see *Susan Lim* at [21] and [22]. Because there was no allegation of bias against any particular member of the Second DC, the Court of Appeal observed (see *Susan Lim* at [48]) that "there was no legal basis" to "consider granting the Quashing Order sought by the Appellant". It was implicit in this observation that *if* an allegation of bias against the members of the Second DC had been made by Dr Lim, and if there had been a proper basis, the Court of Appeal *would have* considered granting the quashing order which she sought. In other words, the Court of Appeal implicitly affirmed that the SMC's decision to *appoint particular persons* to constitute the Second DC *was* in principle amenable to judicial review. In our view, therefore, *Susan Lim* undermined the Respondent's argument that the CJ's power under s 90(1) of the LPA was not amenable to judicial review.

52 Furthermore, we saw no reason why, in principle, the exercise of a statutory power to appoint members of a tribunal should not be amenable to judicial review. It may well be that the possibility to mount such a challenge would in reality be limited. But that is not to say that such a challenge is not available. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power: *Chng Suan Tze* at [86] (cited at [43] above). While it was true that the scope of the CJ's discretion under s 90(1) of the LPA was limited to the selection of the particular members of a DT, this fact *per se* does not preclude availability of judicial review in appropriate circumstances.

53 We also could not accept the Respondent's argument that the CJ's power under s 90(1) of the LPA should not be amenable to judicial review because even if an exercise of this power was tainted by alleged illegality, procedural irregularity or irrationality, it may not necessarily lead to actual prejudice being suffered by the Appellants in the DT proceedings. This argument missed the point. In principle, the amenability of particular decisions or types of decisions to judicial review does not hinge on whether an applicant has in fact suffered harm as a result of the alleged illegality, procedural irregularity or irrationality. In *Teo Soh Lung v Minister for Home Affairs and others* [1988] 2 SLR(R) 30, Lai Kew Chai J stated (at [24]–[25]):

> 24 ... A correct perception of the true basis and nature of judicial review will ensure that a court of law will properly keep within the limits of judicial review over a decision-making process to ensure that there has been no unlawfulness in the decision-making process and will also prevent a court from becoming an appellate court and thereby wrongly deciding whether a decision is right or wrong or in either affirming or substituting its decision for the decision of the authority vested with the discretionary power.
>
> 25 ... Judicial review is concerned with the legality of any aspect or any decision made in the exercise of executive discretionary powers. *In looking at any such aspect or any such decision, courts do not look at the merits of the decision. They do not ask whether the decision is "right or wrong" because that decision has been entrusted to another authority.* In a judicial review, courts should only ask whether a decision made in the exercise of an executive discretionary power is "lawful or unlawful". ...
>
> [emphasis added]

A decision-maker would have overstepped the limits of his power if he had, for instance, been influenced by irrelevant considerations, even though he may well have reached the same decision if not influenced by such considerations. This follows from the nature of judicial review, which generally speaking is only concerned with the reasoning process and not the actual decision made. Thus, proof of actual harm to the applicant or anyone else as a result of the particular impugned decision is not an essential prerequisite to the amenability of that decision to judicial review. If a decision-maker has exceeded the legal limits of his powers, that would be the basis upon which the courts would intervene by judicial review (see [43] above).

*Whether serious delay of disciplinary proceedings resulting from judicial review of the CJ's power should render such power not amenable to judicial review*

54 The Respondent advanced two points in support of this argument:

(a) It would be impossible for the CJ to consider and assess the merits of any claim of possible bias or apparent bias on the part of appointees to the DT because he would then have to conduct a hearing each time to determine whether a nominee was disqualified for any reason.

(b) If applications for judicial review were permitted in respect of the CJ's decision to appoint members of the DT, that would undoubtedly lead to serious delays. In 2008, Parliament had specifically enacted s 91A of the LPA to reduce delays in the disciplinary process caused by applications for judicial review. This appeal illustrated the problem because Ms Rankine's complaint against the Appellants was lodged two years ago in December 2010. Allowing the CJ's decision to be subject to judicial review would in effect condone the Appellants' intentional circumvention of s 91A of the LPA and undermine the rationale for the 2008 amendment to the LPA.

55 We did not think the Respondent's first point was really that forceful. It would not be "impossible" for the CJ to determine whether each nominee is disqualified for any reason from being a member of a DT – it would merely be onerous. In any event, the *content* of the obligations imposed by public law principles of good governance and administration may vary according to context, and one relevant factor will be the CJ's role as a mere appointing body without any involvement in the disciplinary proceedings proper. In the context of the rules of natural justice, Lord Bridge of Harwich observed in *Lloyd and others v McMahon* [1987] 1 AC 625 ("*McMahon*") as follows (at 702H):

> My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. ...

This statement was quoted with approval by the Court of Appeal in *Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR(R) 340 ("*Komoco Motors*") at [69].

56 If the information which is considered by the CJ in deciding whom to appoint as president or member of the DT does not disclose a possibility that a possible appointee is biased or apparently biased, we saw no reason why the CJ should, as a rule, be obliged to go further to make his own inquiries bearing in mind his limited role in disciplinary proceedings under s 90(1) of the LPA. Furthermore, the CJ may remove a member of a DT pursuant to s 90(3)(*b*) of the LPA. If a challenge is subsequently brought against a particular member of the DT, the CJ would then be able to reassess the suitability of that member in the light of the material put before him by the person who brought the challenge.

57 The Respondent's second point was based on s 91A of the LPA (see [15] above). During the second reading of the Legal Profession (Amendment) Bill (Bill No 16 of 2008) which introduced s 91A into the LPA with effect from 1 December 2008, the Minister for Law stated (*Singapore Parliamentary Debates, Official Report* (26 August 2008) vol 84 col 3187 *et seq*):

> There are a range of amendments to streamline the entire disciplinary process. I will only outline the key changes here. Specific timelines are stipulated for each step of the disciplinary process. To deter frivolous complaints, it will be mandated that every complaint against a lawyer be made in writing and be supported by a statutory declaration, except when the complaint is made by a public officer. A limitation period of six years, in line with the general limitation in law, will be introduced to prevent stale complaints. The powers of the Inquiry Committee and Disciplinary Tribunal to order costs will be enhanced. Sentencing options will also be enhanced. *Judicial review* ***of the Disciplinary Tribunal's decision*** *can only be applied for after the conclusion of the Disciplinary Tribunal's deliberations.*
>
> ***(ii) Disciplinary Tribunal***
>
> There is one change to the recommendations earlier made by the Committee [to Develop the Singapore Legal Sector headed by Justice V K Rajah]. The Committee found that the average time taken by the Disciplinary Committee to complete their cases doubled from 7.5 months in 2002 to 15.4 months in 2006. To address the serious problem of delays, the Committee proposed to shorten the disciplinary process by replacing the Disciplinary Committee with a Disciplinary Tribunal. ...
>
> ...
>
> Mr Sin Boon Ann asked why do we have clause 36 [which introduced s 91A of the LPA] which restricts judicial review. In fact, he said "ousted" judicial review. "It is an important constitutional safeguard. Why are we doing this?" I would clarify that judicial review is not "ousted". *What we are doing is deferring it, because what has happened in the past is that even before the tribunal proceedings and disciplinary proceedings are over, there were repeated applications for judicial review, which then dragged on and delayed the entire proceedings, vastly contributing to delays. So, the approach has been to finish with the process, then you go for judiciary* [sic] *review. Anyway, when you go before the Court of Three Judges, you can raise all the arguments that you could have raised during the judicial review.* So the lawyer is, to that extent, not in any worse-off position but what he cannot do now is to try and interrupt or delay the ongoing proceedings.
>
> [emphasis added in italics and bold italics]

58 In our view, the CJ's decision to appoint members of the DT did not fall within the ordinary meaning of s 91A of the LPA because the CJ's decision was not "an act" or "a decision" of the DT. Furthermore, the Minister's speech indicated that s 91A of the LPA was intended to exclude judicial review of "the Disciplinary Tribunal's decision". There was thus no indication that s 91A of the LPA was intended by Parliament to exclude judicial review of decisions by persons other than the DT. As a matter of statutory interpretation, therefore, a decision of the CJ under s 90(1) of the LPA does not fall within the ambit of s 91A of the LPA. Thus, it was inaccurate for the Respondent to characterise the Appellants' application for leave for judicial review as an attempt to circumvent s 91A of the LPA.

59 We would add that our finding that the CJ's power under s 90(1) of the LPA was amenable to judicial review did not undermine the purpose of s 91A of the LPA because the latter provision was

not intended to apply to acts or decisions other than those of the DT.

60 While we agreed with the Respondent that the Appellants' application for leave to apply for a quashing order had the effect of delaying the disciplinary proceedings against them arising out of Ms Rankine's complaint, this could not *per se* constitute a sufficient basis to hold that the CJ's power under s 90(1) of the LPA was not amenable to judicial review. Although persons who lodge complaints against their lawyers or former lawyers will understandably wish for a speedy resolution of their complaints, there is also a public interest in ensuring that statutory powers are exercised lawfully. This is the very object of judicial review.

61 We also noted that although Parliament had expressed its intention in 2008 to reduce delays in disciplinary proceedings, it had chosen to give effect to this intention by, *inter alia*, replacing the Disciplinary Committee with a Disciplinary Tribunal (see [57] above) and by enacting s 91A of the LPA in those terms. The scope of s 91A of the LPA is very precise. That was the extent of Parliament's intention. Parliament did not, for example, go on to prescribe that there shall be no judicial review of the disciplinary process once a request is made by the Council of the Law Society to the CJ to appoint a DT pursuant to s 89(1) of the LPA.

62 For the above reasons, we respectfully differed from the Judge, who held (at [7] of the GD) that s 91A of the LPA was evidence that Parliament had intended that the CJ's power under s 90(1) of the LPA should not be amenable to judicial review.

*Whether the CJ's decision was made in his judicial capacity*

63 One of the grounds for the Judge's finding that the CJ's power under s 90(1) of the LPA was not amenable to judicial review was that this power was conferred upon the CJ in his judicial capacity (see [16] above).

64 The Respondent quite rightly did not take this position before us. It is our respectful opinion that the learned Judge had erred. First, while the expression "Chief Justice" in s 90(1) of the LPA is not defined in the LPA, it is defined by s 2(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) as "the Chief Justice of Singapore", *without reference to his judicial role* as a Judge of the Supreme Court. The CJ wears many hats, only some of which relate to his judicial role. One example where the CJ acts in a *non-judicial* capacity is when he acts as the President of the Legal Service Commission under Art 111(2)(*a*) of the Constitution of the Republic of Singapore (1999 Rev Ed). There is nothing in the context of s 90(1) of the LPA to suggest that the power contained therein is conferred upon the CJ in his judicial capacity.

65 Secondly, there is some oblique indication that the power under s 90(1) of the LPA was *not* conferred upon the CJ in his judicial capacity. Although s 2 of the LPA *prima facie* defines "court" as "the High Court or a judge thereof when sitting in open court", and "judge" as "a judge of the High Court sitting in Chambers", these two terms, *viz*, "court" and "judge", are absent from s 90(1) of the LPA. While the CJ is the head of the judiciary and would normally exercise his functions in a court of law, it does not follow when a power is conferred upon the CJ that an exercise of that power will necessarily be an exercise in his judicial capacity. The nature of the function in respect of which the power is conferred upon the CJ is critical. In the context of the function entrusted to the CJ, the power conferred by s 90 of the LPA is clearly administrative and no different from what the position would be if the power to appoint the DT were, say, to be vested in (of course most unlikely in reality) the Attorney-General. This indicated that the power under s 90(1) of the LPA was not conferred upon the CJ in his judicial capacity.

***Issue 3: Whether there was sufficient merit such that leave should be granted***

***Issue 3: Whether there was sufficient merit such that leave should be granted***

66 We now turn to the third issue. In *Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR(R) 133 ("*Linda Lai*") at [20]–[23], the Court of Appeal stated that all that an applicant had to show to satisfy the merits test at the leave stage was (a) that there was a *prima facie* case of reasonable suspicion that he will obtain the remedies which he seeks, or (b) that there appears to be a point which might, on further consideration, turn out to be an arguable case in favour of granting the remedies sought. Having set out these two formulations, the Court of Appeal further queried whether there was in substance any difference between them.

67 The Appellants made various factual allegations to support their contention that leave should be granted for them to apply for a quashing order in respect of the CJ's decision to appoint Mr Selvam as the president of the DT. Based on the record before the court, we were of the opinion that none of these allegations had satisfied the merits test (at the leave stage) as set out in *Linda Lai*.

68 The Appellants' principal objections to the CJ's decision were (a) that there was bias and/or apparent bias on Mr Selvam's part, (b) that there was apparent bias on the CJ's part, and (c) that the CJ had failed to comply with the rules of natural justice.

*Bias or apparent bias on Mr Selvam's part*

Bias

69 The Appellants' contention that there was bias on Mr Selvam's part was based on the following extract from the transcript of the PHC on 2 April 2012:

> 1st Respondent: I take very strong---a strong position on that, you know, Mr President; understand my position, please. *I'm here as an innocent person. Please treat me as an innocent person until you have the material that proves otherwise. Is that an unreasonable requirement, Mr President?*
>
> President: *I think it is unreasonable* but all the same, I would allow you to send the documents tomorrow and---hearing Wednesday afternoon 2.30.
>
> [emphasis added]
>
> [In the above minutes, the reference to the 1st Respondent is the 1st Appellant in this appeal]

The Appellants argued that this remark showed that Mr Selvam had pre-judged the charges against them.

70 On the other hand, the Respondent argued that when this exchange was examined in its proper context, it was clear that Mr Selvam did not, and did not intend to, suggest that the Appellants were guilty until proven innocent. The Respondent suggested that what Mr Selvam was merely stating was that it was unreasonable for the Appellants to refuse to place on affidavit the allegations on which they were relying to ask Mr Selvam to withdraw from the DT. The Respondent pointed out that at the same PHC, the 1st Appellant had declared, "We are innocent until otherwise proven guilty" and Mr Selvam's immediate reply was an unqualified "Absolutely".

71 To better appreciate the context of the allegedly objectionable remark made by Mr Selvam, it is necessary for us to set out a fuller extract of the transcript of the PHC:

1st Respondent: I don't think I'm going to get a fair hearing from you, Mr GP Selvam, President of the Disciplinary Tribunal.

President: Yes.

1st Respondent: So I want to take you through the material now and then you, the President, can act as you see fit, I have protected myself. ...

...

President: ... if you feel that I'm---I'm in---I'm in a position which, according to you, means that I shouldn't be hearing this matter, you---you can and you should raise the objections before me.

1st Respondent: If I do that and I'm prepared to do that and Mr [Sree Govind] Menon is prepared to do that, we will need to put the correspondence before you, what was placed before the Chief Justice.

President: That is up to you.

...

2nd Respondent: ... The material has been placed before the Chief Justice. But for some reason, he thinks that you can carry on as the President. We still main---I still maintain my position that you are not capable of giving us a fair hearing.

President: Why?

2nd Respondent: It's in the correspondence.

...

1st Respondent: ... without waiving my rights to review of the Chief Justice's decision, I would welcome an opportunity tomorrow to take you through the correspondence ...

...

President: ... I would like the documents, whatever documents you---you say you want to rely on to be sent tomorrow.

...

*President: But if you are relying on matter of facts, not submissions, it may be necessary to put them on---on an affidavit, you know?*

*1st Respondent: Er, no. I think that is different. If you're asking me now to put things on affidavit, Mr President, that's different. I was under the impression you wanted to---me to take you through the material and the material are signed documents we placed before, no less, the Chief Justice.*

*President: Yes.*

*1st Respondent: I don't see why I have to put that on affidavit.*

*President: How do I know that what---what you are saying is the truth?*

*1st Respondent: This is very curious. I sent it to the Chief Justice.*

*President: Yes?*

*1st Respondent:* *I've sent it to the Chief Justice.*

*President:* *Because you sent it to Chief Justice, the contents are true?*

1st Respondent: I'm not saying the contents are true. I'm saying whatever I put there are things we have already taken the position on, Mr President. So I'm a bit--- I'm a bit concerned now by the adjustment. Now you are saying "I will hear you, Mr Singh, but you go and do an affidavit". That's not what you told me a few minutes ago, Mr President.

President: Yes, so what?

1st Respondent: I beg your pardon?

President: I'm telling you now.

*1st Respondent:* *I take very strong---a strong position on that, you know, Mr President; understand my position, please. I'm here as an innocent person. Please treat me as an innocent person until you have the material that proves otherwise. Is that an unreasonable requirement, Mr President?*

*President:* *I think it is unreasonable but all the same, I would allow you to send the documents tomorrow and---hearing Wednesday afternoon 2.30.*

1st Respondent: Is there any other aspect I can assist the member?

President: No, not really.

1st Respondent: Mr [Sree Govind] Menon, anything?

2nd Respondent: Nothing.

President: Your---you joined---you mean(?) making the statement?

2nd Respondent: Yes, I do.

President: But you---you're not agreeable to filing an affidavit?

1st Respondent: Let me explain, Mister---

President: Now I ask you this, what about an affidavit saying that "the allegations on the factual matters that I have stated"---you have stated, both of you, in the---in the---in---"in the correspondence are true"?

1st Respondent: So you still want your affidavit, is it?

President: No, I'm not asking you; I'm asking you to consider.

1st Respondent: Then let's be consistent, Mr President. If your position---

President: I'm asking you to consider doing that.

...

[emphasis added]

[In the above minutes, the references to the 1st and 2nd Respondents are the 1st Appellant and 2nd Appellant in this appeal respectively]

72 Having read this transcript in its entirety, we had no doubt in our mind that the word

"unreasonable" was used by the president of the DT in relation to the 1st Appellant's refusal to put what he asserted against the president in an affidavit. We agreed with the Respondent's arguments on this issue. In the circumstances, we found that there was no basis at all to claim that there was a *prima facie* case of reasonable suspicion that Mr Selvam had pre-judged the charges against the Appellants. While we acknowledge that the threshold for the granting of leave is a low one, there is nevertheless a threshold and bare assertions without any credible basis would not satisfy even that low threshold.

Apparent bias

73 The Appellants' allegation that there was *apparent* bias on Mr Selvam's part was based on (a) what Mr Selvam had said during the PHC on 2 April 2012, and (b) Mr Selvam's alleged links to Mrs Rajah and various other persons.

74 The test of apparent bias is whether a reasonable and fair-minded person sitting in court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the litigant concerned was not possible: see *Tang Liang Hong v Lee Kuan Yew and another and other appeals* [1997] 3 SLR(R) 576 at [46]. There must be credible grounds for raising the challenge, as otherwise the rule could become a charter for abuse by manipulative advocates or their clients: see *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [148]. In other words, a line must be drawn between genuine and fanciful cases: see *Wade & Forsyth* at p 385.

75 Having scrutinised the record placed before the court, we had no hesitation in holding that, for the reasons put forward by the Respondent, a reasonable and fair-minded person observing the PHC and knowing all the relevant facts would *not* have had a reasonable suspicion that a fair trial for the Appellants was not possible.

76 The Appellants' second string to their bow was just as unmeritorious. Based on the record before the court, Mr Selvam's alleged links to Mrs Rajah and various other persons were as follows (see [8]–[9] above):

(a) The names of R&T, Mrs Rajah and Mr Pillai "featured" in the Appellants' IC Submissions and their Defence filed with the DT Secretariat on 24 February 2012.

(b) Mr Selvam was known to have a close relationship with Justice Rajah.

(c) Submissions which were filed by Mr Isaac in S 781/2009 appeared to be the work of either Mr Selvam or Mr Michael Hwang SC.

(d) Mr Murugaiyan told the Appellants that he intended to subpoena them to give evidence in S 89/2010. Mr Murugaiyan was "related to" Mr Selvam.

77 Although a central plank of the Appellants' objection to Mr Selvam was that R&T, Mrs Rajah and Mr Pillai had "featured" in the Appellants' IC Submissions and their Defence before the DT, the Appellants had failed to place these documents before the Judge and before this court. As a result, all that was on the record before the court was a bare allegation that R&T, Mrs Rajah and Mr Pillai "featured" in the documents, without any particulars as to how these persons were even involved in the DT proceedings or in the Complaint. While it appeared that the Appellants had placed these documents before the CJ on 19 January 2012 (see [4] above), they had not placed these documents before the court to support their OS. In the circumstances, we were of the view that a reasonable and fair-minded person in possession of only the facts which were placed before this court would not

have had a reasonable suspicion that a fair trial for the Appellants was not possible.

78 We were also of the view that the Appellants' allegation that Mr Selvam was known to have a close relationship with Justice Rajah was neither here nor there. Given that the Appellants had not placed before the court the documents in which Mrs Rajah "featured", a reasonable and fair-minded observer could not even begin to consider how (assuming that this was true) a close relationship between Mr Selvam and Justice Rajah would or would be likely to adversely affect the Appellants in the DT proceedings. Without any particulars, this alleged apparent bias on Mr Selvam's part is nothing more than a fanciful claim. In this regard, we noted that Mr Selvam had specifically invited the Appellants to raise their objections against him sitting as the president of the DT. At a later PHC on 4 April 2012, Mr Selvam had clearly clarified that he did not have any kind of relationship with Justice Rajah. By the time Justice Rajah was appointed to the Bench, Mr Selvam had already retired from the Bench. Mr Selvam also said that he did not know Mrs Rajah.

79 As regards the allegations involving Mr Isaac and Mr Murugaiyan, we could not see any merit to the Appellants' arguments. The Appellants did not specify the contents of the submissions allegedly drafted by Mr Selvam (assuming it was Mr Selvam and not Mr Michael Hwang SC) in a wholly unrelated matter in S 781/2009. Moreover, even if the submissions contained damaging allegations about the Appellants, it would have been based on instructions by clients. Furthermore, as the Respondent pointed out, Mr Isaac had confirmed that the submissions in S 781/2009 were prepared solely by his firm, and Mr Murugaiyan had intended to subpoena the Appellants in S 89/2010 on a discrete question of fact within their knowledge.

80 We noted that the Appellants had made, from the Bar, various factual allegations at the hearing before the Judge which were not supported by affidavit. The Judge had recorded these factual allegations in the GD at [5] and found that even if these allegations were true the Appellants had failed to satisfy the merits test at the leave stage. We agreed.

*Apparent bias on the CJ's part*

81 The Appellants alleged that there was apparent bias on the CJ's part because the CJ knew Justice Rajah and that it was likely that the spouses of both judges would have met before. Without explaining Mrs Rajah's involvement in Ms Rankine's complaint against the Appellants (see [76]–[77] above), this whole argument is absurd. Naturally, being brothers on the Supreme Court Bench, the CJ and Justice Rajah would have a close working relationship and their spouses would have met socially. The Appellants had simply failed to show how such contact would give rise to apparent bias on the part of the CJ in appointing Mr Selvam as the president of the DT to hear disciplinary proceedings against the Appellants.

82 As observed in *Wade & Forsyth* at p 385, a line must be drawn between genuine and fanciful cases. The allegations of bias against both the CJ and Mr Selvam fell squarely in the latter category. The whole issue about bias or apparent bias was the creation of a fertile mind and not based on adequate objective facts.

*Breach of natural justice*

Absence of reasons

83 We now move to another point raised by the Appellants. They argued that the CJ should have provided reasons for his decision not to accede to their requests as a matter of fairness because their reputations and livelihoods were at stake. The Appellants relied on *Marta Stefan v General Medical*

*Council* [1999] 1 WLR 1293 ("*Marta Stefan*") at 1300–1301 to support this argument.

84 The Respondent pointed out that there was no general common law duty to give reasons: see *Regina v Secretary of State for the Home Department, Ex parte Doody* [1994] 1 AC 531 ("*Doody*"). While the Respondent accepted that DT proceedings were serious because they involved the professional lives and reputations of the affected lawyers, he submitted that a distinction should be drawn between, on the one hand, the CJ's appointment of the members of the DT pursuant to s 90(1) of the LPA, and, on the other, the DT's decision on the disciplinary charges. The Respondent observed that apart from the selection of the members of the DT, the CJ had no role in the disciplinary proceedings before the DT.

85 We agreed with the Respondent's arguments. In *Marta Stefan*, the Privy Council (at 1300H) affirmed the proposition in *Doody* that there was no general duty to give reasons for administrative decisions. Lord Clyde (delivering the judgment of the court) observed that exceptions may be made to this rule where, for instance, the decision appeared aberrant or the decision involved matters of special importance such as personal liberty. Both these circumstances did not exist on the facts of the present appeal. While the Privy Council in *Marta Stefan* indicated (at 1300G–1301C) that the common law rule in *Doody* could be open to re-examination in the future, we were of the view that any such re-examination in Singapore would not likely be of assistance to the Appellants in this appeal bearing in mind the CJ's limited role in disciplinary proceedings under s 90(1) of the LPA. Moreover, as we have earlier found, the bases upon which the Appellants sought to have the CJ remove Mr Selvam as the president of the DT were absolutely tenuous.

Absence of hearing or consultation

86 The Appellants also argued that the CJ should have given them a hearing before turning down their request. On the other hand, the Respondent submitted that what fairness demands in a particular case will depend on its context. The Respondent reiterated that while the CJ's appointment of a DT was of concern to the Appellants, this exercise of the power of appointment by the CJ was not of a judicial or quasi-judicial nature. The Appellants already had a hearing before the IC. The appointment of the members of the DT by the CJ was merely the next step in the disciplinary process. The CJ made no inquiry or determination in respect of Ms Rankine's complaint against the Appellants. This aspect of the matter would be the task of the DT.

87 The Respondent highlighted that in *Subbiah Pillai v Wong Meng Meng and others* [2001] 2 SLR(R) 556 ("*Subbiah Pillai*"), the Court of Appeal held (at [57]) that the requirements of natural justice in relation to the IC, whose function was only to determine if the complaint should proceed further, were less stringent than those which applied to the DT. Thus, the Court of Appeal further held (at [59]) that it was not wrong for the IC to have interviewed witnesses in the absence of the lawyer. The Respondent argued that *a fortiori* the requirements of natural justice would be even less stringent in relation to the CJ's power of appointment under s 90(1) of the LPA. In any event, the Respondent pointed out that the Appellants were accorded the right to be heard through their various letters. Because of these representations, the CJ had revoked the appointment of Mr Thean as president of the DT, though he refused to do so in relation to Mr Selvam.

88 We agreed with the Respondent's arguments. We would reiterate that an essential feature of natural justice is fairness, which also encompasses the right to be heard. What fairness demands will depend on the subject matter and the context. As Lord Bridge of Harwich stated in *McMahon* at 702, "the so-called rules of natural justice are not engraved on tablets of stone" and much would depend "on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates". What is fair must depend on the object of the process at

the stage in question: see *Subbiah Pillai* at [58]. The right to be heard need not be oral: see *De Smith* at para 7-062, *Najar Singh v Government of Malaysia & Anor* [1976] 1 MLJ 203 (a decision of the Privy Council) at 205, *Komoco Motors* at [69]. Thus a "hearing" in writing could very well suffice (see also [55] above).

Pre-judgment

89 The Appellants also alleged that the CJ had made up his mind not to accede to their objections to Mr Selvam because the CJ's responses to their letters were so speedy and the CJ had not even asked the Appellants for further particulars or clarification.

90 We rejected this allegation as being wholly spurious and frivolous. The mere fact that the CJ's responses were prompt did not necessarily mean that he had made up his mind before even considering what the Appellants had stated in their written representations. The shortest interval between the Appellants' various letters and the replies from the Supreme Court Legal Directorate or the DT Secretariat on the CJ's behalf was two days. Efficiency had simply been turned on its head by the Appellants.

*Acting without jurisdiction*

91 The Appellants argued that as a matter of statutory interpretation, the CJ must in general only appoint Senior Counsel to be the president of a DT because lawyers are meant to be judged by their peers. The Appellants submitted that the reference in s 90(1) of the LPA to ex-judges or ex-judicial commissioners was intended by Parliament to apply *only* where there were no available Senior Counsel who could be appointed as president of the DT without being in a position of conflict.

92 In our view, this argument was completely without merit. The only basis for the Appellants' suggested interpretation was that Senior Counsel were mentioned before ex-judges and ex-judicial commissioners in s 90(1) of the LPA (see [15] above). There was no indication in the Parliamentary debates that this was the legislature's intention. There was, in fact, some indication to the contrary. When the LPA was amended in 2008 to, *inter alia*, replace the Disciplinary Committee with the DT, the Minister for Law stated in Parliament as follows (*Singapore Parliamentary Debates, Official Report* (26 August 2008) vol 84 col 3187 *et seq*):

> There is one change to the recommendations earlier made by the Committee. ... The Tribunal was to be appointed by the Chief Justice and comprised only one member – a Senior Counsel, or a retired Judge or Judicial Commissioner. Clause 34 now revises this to a two-man Disciplinary Tribunal, consisting of a President, who will be a Senior Counsel, a retired Judge or Judicial Commissioner, *and a second member, who will be an advocate and solicitor of at least 12 years' standing.* Under clause 35, the President will have the casting vote.
>
> ***This change is in response to strong feedback*** *from the Law Society which had raised concerns about disciplinary matters being decided on by only one person*, ***without the element of "judgement by peers", which is in the current process*** *.* ...
>
> [emphasis added in italics and bold italics]

To the extent that s 90(1) of the LPA provides for a second member of the DT who must be an advocate and solicitor, the Appellants' argument that they should be judged by their peers had already been dealt with by Parliament. Indeed, the concern expressed by the Law Society with regard to the proposal that the DT should only consist of one member who was either a Senior Counsel, an

ex-judge or an ex-judicial commissioner does not suggest that the Law Society thought that the CJ was required to give priority to appointing Senior Counsel as president of the DT. The contrary was probably in the mind of the Law Society. We also note that Parliament did not clarify, if that was indeed its intention, that the CJ should give priority to appointing Senior Counsel as president of a DT except where all available Senior Counsel were in a position of conflict. This would have addressed the Law Society's concern. However, that was not the approach which Parliament eventually adopted. Instead, a second member of the DT, who must be an advocate and solicitor of not less than 12 years' standing, was added. As s 90(1) of the LPA is presently worded, there is nothing to suggest that priority should be given by the CJ to appointing a Senior Counsel as president of the DT. There is no rule of interpretation that the order of listing in a statutory provision like s 90(1) of the LPA also means that that is the order of priority as to the persons or things on the list. There is simply no basis for the Appellants to suggest that the CJ' power of appointment should be circumscribed in that manner.

*Unlawful fettering of discretion*

93 The Appellants alleged that the CJ had unlawfully fettered his discretion by selecting the president of the DT from a limited pool of ex-judges (*excluding* Senior Counsel) despite the wording of s 90(1) of the LPA which did not so limit the pool of possible candidates for appointment.

94 This was again another argument which was wholly without merit and in a sense ran contrary to the earlier argument that the CJ should give priority to the appointment of Senior Counsel as president of the DT. The list of persons from whom the CJ could appoint as the president of the DT is clearly set out in s 90(1) of the LPA. So long as the person appointed as the president of the DT falls within the list, the appointment would be proper unless bad faith could be shown. There was simply no basis for the Appellant to allege bad faith against the CJ. It was plain to us that the Appellants wanted the CJ to appoint the president of the DT from a list of 13 Senior Counsel of their choice. That was an attempt at curtailing the discretion vested in the CJ. While the CJ did select two ex-judges, *viz*, Mr Thean and Mr Selvam, as president of the DT, that was something he was entitled to do. We failed to see how that fact *per se* could give rise to a *prima facie* case of reasonable suspicion.

**Conclusion**

95 For the reasons given above, we dismissed the appeal. As the Appellants have succeeded on the issue of whether the CJ's power under s 90(1) of the LPA was amenable to judicial review, we ordered that only half the costs of the appeal should be paid by the Appellants to the Respondent.

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[note: 1] See Respondent's Case at [48].

[note: 2] See Respondent's Case at [58].

[note: 3] See Respondent's Case at [59].

[note: 4] See Respondent's Case at [59] and [67].