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

[2021] SGHC 285

Originating Summons No 947 of 2021

In the matter of the suspension of The Online Citizen Pte Ltd's Class Licence by the Info-communications Media Development Authority

And

In the matter of Sections 12(1)(*a*), 12(1)(i) and 9 of the Broadcasting Act (Cap 28, 2012 Revised Edition)

And

In the matter of Order 53, Rule 1 of the Rules of Court (2014 Revised Edition)

Between

The Online Citizen Pte Ltd

… *Applicant*

And

Info-communications Media Development Authority

… *Respondent*

JUDGMENT

[Administrative Law] — [Judicial review] — [Leave]
[Administrative Law] — [Judicial review] — [Illegality]

[Administrative Law] — [Judicial review] — [Substantive legitimate expectations]
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Valerie Thean J:

Introduction

1 The Broadcasting Act (Cap 28, 2012 Rev Ed) ("the Act") sets out a class licensing regime which allows the Info-communications Media Development Authority ("the IMDA") to regulate persons who provide licensable broadcast services. By this application, The Online Citizen Pte Ltd ("TOCPL") seeks leave to commence judicial review proceedings against the IMDA under O 53 r 1 of the Rules of Court (2014 Rev Ed) ("the ROC"). TOCPL seeks to challenge various notices and orders given by the IMDA in its letter dated 14 September 2021 ("the Letter") relating to the suspension of TOCPL's class licence to provide licensable broadcasting services under s 9 of the Act.

Background

2 TOCPL is a local media outlet providing services and carrying out activities on various platforms,[1] including its main English websites ("www.theonlinecitizen.com" and "www.onlinecitizenasia.com"); its Chinese website ("zh.theonlinecitizen.com"); and social media channels such as its Facebook page and Twitter account. It is owned by Mr Terry Xu ("Mr Xu"), who is also its Chief Editor.[2]

3 In 2020, TOCPL failed to comply with the requirement to make an annual declaration of its funding sources, and was given an opportunity to show cause by a notice from the IMDA on 6 September 2021.[3] TOCPL failed to do so to the IMDA's satisfaction. On 14 September 2021, in its Letter, the IMDA informed TOCPL of the following:[4]

> (a) Pursuant to s 12(1)(*a*) read with s 12(1)(i) of the Act, TOCPL's class licence under s 9 of the Act to provide licensable broadcasting services – such as those provided on its websites, any of its social media and broadcast channels, pages and/or accounts (which I refer to collectively as its "social media platforms"), and any mobile applications operated by TOCPL – was suspended with immediate effect.

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1 Applicant's Statement pursuant to Order 53 rule 1(2) of the Rules of Court dated 17 September 2021 at para 2; Affidavit of Xu Yuan Chen @ Terry Xu affirmed on 17 September 2021 ("Mr Xu's 1st Affidavit") at Tab A, p 2 (at footnotes 2 and 3).

2 Affidavit of Xu Yuan Chen @ Terry Xu affirmed on 1 November 2021 at para 1; Applicant's Written Submissions ("AWS") at para 10.

3 Mr Xu's 1st Affidavit at Tab A, pp 1–2 (at paras 1–7).

4 Mr Xu's 1st Affidavit at Tab A, p 2 (at paras 8–9).

(b) TOCPL was required to stop posting further articles on these websites and social media platforms with immediate effect, and to disable access to all of its licensable broadcasting services by 3.00pm on 16 September 2021.

(c) TOC was prohibited from providing any new licensable broadcasting services on any other websites and social media platforms.

(d) Any non-compliance with this notice of suspension would be a contravention of s 8(1) of the Act, and the IMDA might take steps to restrict access to the aforesaid broadcasting services. Operating a licensable broadcasting service without a valid licence would also be a criminal offence punishable under s 46 of the Act.

4 As TOCPL did not complete and submit its declaration of funding sources to the IMDA by the stipulated deadline, the IMDA cancelled TOCPL's class licence.[5]

5 TOCPL does not challenge the IMDA's suspension and cancellation of its class licence, although it does not admit to the correctness of that decision.[6] By this originating summons, TOCPL seeks leave under O 53 r 1 of the ROC to apply for four quashing orders and ten declarations in relation to the IMDA's orders against its *Chinese website* and its *social media platforms*, and the IMDA's prohibition against TOCPL providing any *new* broadcasting services.[7] In its written and oral submissions, TOCPL also referred to its Malay website,

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5 Mr Xu's 1st Affidavit at Tab A, p 3 (at para 10); Notes of Argument, 22 November 2021.

6 AWS at para 5; Notes of Argument, 22 November 2021.

7 AWS at paras 6–7; Notes of Argument, 22 November 2021.

although the quashing orders prayed for referred only to its Chinese website. I therefore refer only to TOCPL's Chinese website in the analysis that follows, although this analysis would apply by parity of reasoning to TOCPL's Malay website.

Summary of parties' positions and issues

6 It is not disputed that TOCPL requires leave under O 53 r 1(1)(*b*) to pursue the quashing orders and declarations it seeks in relation to the Letter. There are three requirements for leave to commence judicial review proceedings (*Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 at [32] and, more recently, *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [9]):

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

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

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

7 In addition, as a threshold issue, an applicant seeking judicial review must, as a general rule, exhaust all alternative remedies before invoking the jurisdiction of the court for judicial review: *Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 ("*Borissik*") at [25], affirmed by the Court of Appeal in *Comptroller of Income Tax v ACC* [2010] 2 SLR 1189 at [13].

8 The dispute between the parties concerns both the procedural requirement for TOCPL to have exhausted all of its alternative remedies, and the substantive requirement for TOCPL to establish a *prima facie* case of reasonable suspicion in favour of granting the orders it seeks.

Parties' positions

9 With regard to the exhaustion of alternative remedies, the IMDA submits that TOCPL has failed to satisfy this procedural requirement because it has not appealed to the Minister under either s 12(2) or s 59(1)(*b*) of the Act, as it was entitled to do.[8] TOCPL, on the other hand, argues that neither of these statutory provisions applies to the present case.[9]

10 With regard to TOCPL's substantive grounds for seeking relief, TOCPL makes three submissions:

(a) First, as to the scope of the class licence, TOCPL submits that only TOCPL's main English websites were covered by the class licence. This was made clear by the IMDA when it asked TOCPL to register with it for a class licence.[10] The IMDA's Registration Form C for Class Licensable Broadcasting Services ("Form C"), which TOCPL submitted for its main English websites, plainly only relates to websites, and the IMDA never asked TOCPL to apply for a class licence or submit Form C in respect of its Chinese website.[11] Moreover, the IMDA's press statement dated 30 September 2014 ("the Press Statement") clearly

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8 Respondent's Written Submissions ("RWS") at paras 7–8.

9 AWS at paras 12–14; Notes of Argument, 22 November 2021.

10 AWS at para 8.

11 AWS at paras 9 and 15.

stated that TOCPL's class licence covered only "www.theonlinecitizen.com", one of its main English websites. In Mr Xu's communications with the IMDA's senior officers over the years, it was never represented or suggested to him that the class licence covered TOCPL's social media platforms, which TOCPL's predecessor was already operating on in 2014.[12] TOCPL's social media platforms do not fall within the meaning of "computer on-line services".[13]

(b) Second, TOCPL submits that it has a substantive legitimate expectation that the class licence covered only licensable broadcasting services on its main English websites. The IMDA's representatives had represented to Mr Xu in correspondence that the class licence covered only the main English websites registered by TOCPL. By relying on these representations as well as Form C, TOCPL suffered loss, damage and harm in now having to shut down its social media platforms as a result of the IMDA's suspension of TOCPL's services and activities on the same. Had TOCPL known that the class licence also covered its social media platforms, it would not have registered for a class licence and would have altered its business model to rely solely on social media.[14]

(c) Third, TOCPL submits that the class licence only covers access to TOCPL's broadcasting services in and from Singapore, and that the IMDA has no legal basis for prohibiting TOCPL from offering its

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12 AWS at para 10.

13 AWS at para 22.

14 AWS at paras 23–26.

broadcasting services and activities from outside Singapore if TOCPL wishes to do so, as the Act has no extra-territorial reach.[15]

11 In response to TOCPL's submissions on the scope of the class licence, the IMDA contends that TOCPL has fundamentally misunderstood the licensing regime under the Act, as *all* computer on-line services provided by TOCPL are automatically subject to a class licence by operation of law, and it follows that the suspension of TOCPL's class licence and IMDA's directions in the Letter applied to *all* computer on-line services provided by TOCPL.[16] The ordinary meaning of the phrase "computer on-line services" would include TOCPL's main English websites, its Chinese website and its social media platforms.[17] Further, the IMDA argues that TOCPL's allegations that the IMDA asked TOCPL to register for a class licence and made clear that only TOCPL's main English websites were covered by the class licence are false.[18]

12 As for TOCPL's argument based on the doctrine of substantive legitimate expectations, the IMDA argues that this doctrine should not be recognised or applied by the court, and that it is in any event inapplicable in the present case because the IMDA did not make any unequivocal or unqualified representation that TOCPL's class licence covered only its main English websites. In addition, the doctrine of substantive legitimate expectations is irrelevant in this case because the issues of whether TOCPL's class licence

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15 AWS at para 33; Notes of Argument, 22 November 2021.

16 RWS at paras 20, 21(a) and 21(e).

17 RWS at para 26.

18 RWS at paras 20 and 21(c).

suspension applied to its Chinese website and social media platforms are purely questions of law to be determined by the court.[19]

13 Lastly, in response to TOCPL's submission on the extra-territoriality of the Act, the IMDA emphasises that nothing in its Letter purports to prohibit TOCPL from providing computer on-line services from outside Singapore.[20]

Issues arising

14 From the parties' positions as outlined above, the following issues arise:

(a) First, do s 12(2) and/or s 59(1)(*b*) of the Act provide alternative remedies which TOCPL should have exhausted before invoking the court's judicial review jurisdiction to challenge the IMDA's orders in relation to its Chinese website and social media platforms?

(b) Second, has TOCPL established a *prima facie* case of reasonable suspicion, based on the materials before the court, in favour of granting the orders sought? This, in turn, raises three questions:

(i) What was the scope of TOCPL's class licence, and are the services provided by TOCPL on its Chinese website and social media platforms "computer on-line services" subject to the class licence?

(ii) Does TOCPL have a substantive legitimate expectation that only its main English websites were subject to its class licence?

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19 RWS at para 50.

20 Notes of Argument, 22 November 2021.

(iii) Has the IMDA purported to prohibit TOCPL from offering its broadcasting services and activities from outside Singapore?

Decision

15 For the reasons that follow, I hold that TOCPL ought to have first exhausted its statutory remedies by appealing to the Minister. In any event, there is no *prima facie* case of reasonable suspicion in favour of granting the orders sought by TOCPL.

Regulation of licensable broadcasting services

The automatic licensing regime and the registration regime

16 The present case necessitates a close examination of the licensing regime under the Act and the Broadcasting (Class Licence) Notification (GN No S 306/1996, 2004 Rev Ed) ("the Notification") made thereunder. The starting point in analysing the statutory scheme that regulates the provision of licensable broadcasting services is s 8(1) of the Act, which provides that "[n]o *person* shall provide any licensable broadcasting service in or from Singapore without a broadcasting licence granted by the [IMDA]" [emphasis added]. The term "licensable broadcasting services" includes "[c]omputer on-line services" (item 20 of the Second Schedule to the Act).

17 The Act also provides for a *class* licensing regime. Under s 9(1) of the Act, the IMDA "may, by notification published in the *Gazette*, determine a class licence … for the provision of such subscription broadcasting services and other licensable broadcasting services as the [IMDA] may specify". Paragraph 3 of the Notification then states that the provision of certain specified licensable

broadcasting services, including "computer on-line services that are provided by Internet Content Providers and Internet Service Providers" (para 3(*f*)), is subject to a class licence. The terms "Internet Content Provider" ("ICP") and "Internet Service Provider" ("ISP") are defined in para 2 of the Notification.

18 The apparent breadth of these provisions is curtailed by para 1(*f*) of the Broadcasting (Exemption) Order (GN No S 307/1996, 2004 Rev Ed). That provision exempts any person providing computer on-line services *other than computer on-line services subject to a class licence under the Notification* from ss 8 and 9 of the Act. Thus, the licensing regime under ss 8 and 9 of the Act effectively only applies where the computer on-line services in question are provided by ICPs or ISPs. However, in such cases, the design of the statutory scheme is such that the provision of computer on-line services by all ICPs and ISPs is *automatically* subject to a class licence. Class licences need not be applied for by these ICPs or ISPs; instead, they are "determine[d]" by the IMDA under s 9(1) of the Act, as has been done *via* the Notification.

19 This leads me to the crucial distinction to be drawn between the two distinct regulatory regimes contained in the Act and the Notification: a licensing regime and a registration regime. The provision of computer on-line services by an ICP is subject to a class licence *by operation of law* under para 3(*f*) of the Notification. All such ICPs providing "computer on-line services" are automatically class licensees. Where the ICP in question is (or is determined by the IMDA to be) "a body of persons engaged in the propagation, promotion or discussion of political or religious issues relating to Singapore" through the Internet, the ICP is *additionally* required to register with the IMDA within 14 days after the commencement of its service. This is pursuant to condition 4 of the Schedule to the Notification, which sets out the conditions *of class licences* under para 3 of the Notification.

20 The automatic nature of the class licensing scheme, as distinct from the registration scheme under the Schedule to the Notification, was confirmed in Parliament in the Minister's oral answers to questions regarding the criteria for registration under the Broadcasting (Class Licence) Notification framework in January 2014 (*Singapore Parliamentary Debates, Official Report* (20 January 2014) vol 91 (Lawrence Wong, Senior Minister of State for Communications and Information):

> …
>
> There are three forms of licences for ICPs under MDA's licensing framework: (i) an individual licence; (ii) an *automatic* class licence; and (iii) an automatic class licence with the requirement to register with the MDA. Let me elaborate on these three categories.
>
> First, the individual licences are issued to content providers which offer a television service through the Internet. …
>
> *The second category of licensing applies to the rest of the ICPs which are regulated under the Automatic Class licensing regime that has been in place since 1996. These licensees do not need to apply to MDA for individual licences, but they are automatically class-licensed once they operate their websites.* This remains the primary route through which the vast majority of websites on the Internet are licensed.
>
> …
>
> Finally, the third category would apply to certain types of ICPs to which class licences are granted automatically, but with the condition that they register with the MDA. Paragraphs three to five of the Schedule of the Broadcasting (Class Licence) Notification spell out the types of ICPs that need to register with MDA. They include ICPs who are political parties registered in Singapore providing any programme through the Internet, and ICPs who are "a body of persons engaged in the propagation, promotion or discussion of political or religious issues relating to Singapore through the Internet".
>
> …
>
> So, these are provisions already provided for and spelt out clearly in the Schedule. *The need to move from automatic class licence to class licence by registration only occurs when an individual or body meets these criteria which are spelt out in the Schedule.*

> …
>
> [emphasis added]

21 More recently, the Minister for Law confirmed the automatic nature of the licensing regime in his remarks on the Protection from Online Falsehoods and Manipulation Bill (*Singapore Parliamentary Debates, Official Report* (7 May 2019) vol 94 (K Shanmugam, Minister for Law)):[21]

> …
>
> The Internet revolution took off in the 1990s. 1996 – the Class Licensing Scheme under the Broadcasting Act for Internet Content Providers was put in. *The Internet Content Providers (ICPs) are automatically licensed. All have to comply with guidelines under the Class Licence Conditions and the Internet Code of Practice.* IMDA has power to take down content that goes against "public interest, public order, national harmony", amongst other grounds.
>
> …
>
> [emphasis added]

22 Thus, an ICP's registration with the IMDA is independent of the scope of its services that are subject to its class licence. In that sense, the statutory scheme is such that the licensing and registration regimes are asymmetric. The provision of computer on-line services by *all* ICPs and ISPs is automatically subject to a class licence (and therefore the class licence conditions set out in the Schedule to the Notification) by operation of law. In contrast, only *some* ICPs and ISPs are required to register with the IMDA. Furthermore, pursuant to condition 6 of the Schedule to the Notification, ICPs which are required to register shall register "in such form and manner as the [IMDA] may determine", and shall "provide the [IMDA] with such particulars and undertakings as the [IMDA] may require in connection with the provision of the [ICP's] service".

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[21] RWS at para 33(b); Respondent's Bundle of Authorities at Tab 17.

The regulator, in this framework, is not enjoined to regulate the registration of all computer on-line services that an ICP operates, but rather, to require registration "in such form and manner" as it sees fit.

"Computer on-line services"

23 The central question in determining which services provided by an ICP are subject to a class licence is, therefore, whether they are "computer on-line services". The phrase "computer on-line services" is not statutorily defined, and there appear to be no local authorities providing guidance on its meaning. The IMDA therefore submits, with reference to the dictionary definitions of "computer" and "online", that the ordinary meaning of "computer on-line services" is wide enough to include *services provided* via *an electronic device (or system of electronic devices)* by a person, business or organisation engaged in creating content for publication on the Internet or content accessible or made available by connection to a central processor or network.[22]

24 It should be borne in mind, however, that for the purposes of both ss 8(1) and 9(1) of the Act, computer on-line services are a *subset* of licensable "broadcasting services" as defined in s 2(1) of the Act. The ordinary meaning of the phrase "computer on-line services" must therefore be circumscribed by the following statutory definition of "broadcasting service" (and, in turn, the statutory definition of "programme"):

> **Interpretation**
>
> **2.**—(1) In this Act, unless the context otherwise requires —
>
> …
>
> *"broadcasting service"* means a service whereby signs or signals transmitted, whether or not encrypted, comprise —

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22 RWS at para 26; Notes of Argument, 22 November 2021.

> (*a*) any *programme* capable of being received, or received and displayed, as visual images, whether moving or still;
>
> (*b*) any sound *programme* for reception; or
>
> (*c*) any *programme*, being a combination of both visual image (whether moving or still) and sound for reception or reception and display,
>
> by persons having equipment appropriate for receiving, or receiving and displaying, as the case may be, that service, irrespective of the means of delivery of that service;
>
> …
>
> *"programme"*, in relation to a broadcasting service, means —
>
> (*a*) any matter *the primary purpose of which is to entertain, educate or inform all or part of the public*; or
>
> (*b*) any advertising or sponsorship matter, whether or not of a commercial kind,
>
> but *does not include any matter that is wholly related to or connected with any private communication*, that is to say —
>
> (i) any communication between 2 or more persons that is of a private or domestic nature;
>
> (ii) any internal communication of a business, Government agency or other organisation for the purpose of the operation of the business, agency or organisation; and
>
> (iii) communications in such other circumstances as may be prescribed;
>
> …
>
> [emphasis added]

25 Therefore, apart from being services provided *via* electronic devices, the "primary purpose" of the relevant computer on-line services must be to "entertain, educate or inform all or part of the public" (limb (*a*) of the definition of "programme"). Alternatively, the computer on-line services must comprise "advertising or sponsorship matter[s], whether or not of a commercial kind"

(limb (*b*) of the definition of "programme"). In any event, "computer on-line services" would not include "any matter that is wholly related to or connected with any private communication". This definition of "computer on-line services" is narrower than that proposed by the IMDA.

Exhaustion of remedies

26 With this regulatory scheme in mind, I turn to consider the two statutory appeal procedures which the IMDA argues that TOCPL should first have utilised: the appeal procedures in ss 12(2) and 59(1)(*b*) of the Act.

27 It is undisputed that TOCPL has not appealed to the Minister under either s 12(2) or s 59(1)(*b*). No reasons were given in either of Mr Xu's two affidavits for not using these statutory appeal procedures.[23] TOCPL relied solely on legal submissions as to the inapplicability of these provisions in the present case.

Appeal under s 12(2) of the Act

28 Section 12 of the Act provides as follows:

> **Suspension or cancellation of broadcasting licence, etc.**
>
> **12.**—(1) If the Authority is satisfied that —
>
> (*a*) a broadcasting licensee is contravening, or has contravened, any of the conditions of its licence, any relevant Code of Practice, any of the provisions of this Act or the regulations or any direction issued by the Minister or the Authority to, or applicable to, the licensee;
>
> (*b*) a broadcasting licensee has gone into compulsory or voluntary liquidation other than

[23] RWS at para 11.

> for the purpose of amalgamation or reconstruction;
>
> (*c*) a broadcasting licensee has made any assignment to, or composition with, its creditors; or
>
> (*d*) the public interest or the security of Singapore so requires,
>
> the Authority may, by notice in writing and without any compensation, do either or both of the following:
>
> (i) cancel the licence or suspend the licence for such period as the Authority thinks fit and, in the case of a class licensee, cancel or suspend the application of the class licence in respect of the class licensee for such period as the Authority thinks fit;
>
> (ii) require the payment of a fine of such amount as the Authority thinks fit.
>
> (2) Any person who is aggrieved by any decision of the Authority under this section may, within 14 days of the receipt by him of the notice referred to in subsection (1), appeal to the Minister whose decision shall be final.
>
> …

29 Section 12(1) empowers the IMDA to make two types of decisions: decisions to cancel or suspend the application of a class licence in respect of a class licensee for such period as the IMDA thinks fit (under s 12(1)(i)), and decisions to require the payment of a fine (under s 12(1)(ii)). The IMDA argues that s 12(2) applies because the decision that TOCPL is aggrieved by relates to the suspension of its class licence.[24] TOCPL's argument is that it is not challenging the IMDA's decision *to suspend or cancel* its class licence, but rather the IMDA's interpretation that such cancellation would affect TOCPL's

[24] Notes of Argument, 22 November 2021.

other services and activities, such as the operation of its Chinese website and social media platforms.[25]

30 TOCPL's argument arises out of its interpretation of the scope of its class licence, and therefore the scope of the cancellation. However, the present application arises out of the cancellation of TOCPL's class licence, as communicated to TOCPL by the IMDA's Letter, and it remains the cancellation of the class licence that is the essential issue. On a proper understanding of the statutory scheme for the regulation of licensable broadcasting services, TOCPL would have needed to appeal against the suspension and cancellation of its class licence in order to challenge the *legal effect* of this cancellation on its Chinese website and social media platforms. TOCPL is therefore "a person aggrieved by any decision of the [IMDA] under [s 12]", and the appeal procedure in s 12(2) of the Act is an alternative remedy which TOCPL ought to have exhausted.

*Appeal under s 59(1)(*b*) of the Act*

31 Section 59 of the Act provides as follows:

> **Appeal to Minister**
>
> **59.**—(1) Any licensee aggrieved by —
>
> (*a*) any decision of the Authority in the exercise of any discretion vested in it by or under this Act; or
>
> (*b*) *anything contained in any* Code of Practice or *direction issued by the Authority*,
>
> may appeal to the Minister.
>
> …

[25] AWS at paras 13–14; Notes of Argument, 22 November 2021.

> (4) The decision of the Minister in any appeal shall be final.
>
> [emphasis added]

32 Within the schema of the Act, s 59(1)(*b*) comes after many provisions setting out the various powers exercisable by the IMDA, and provides a wide remedy for an aggrieved licensee to appeal to the Minister against "*anything contained in any … direction issued* by the [IMDA]" [emphasis added]. This provision is much more broadly worded than s 12(2) and would cover the acts of the IMDA that TOCPL seeks to challenge. TOCPL did not address the applicability of s 59(1)(*b*) in its written submissions. When invited to respond to the IMDA's submissions on this provision during the hearing, counsel for TOCPL made arguments which focused on s 59(1)(*a*) of the Act, instead of s 59(1)(*b*).[26] Counsel for TOCPL further contended that the IMDA's orders in the Letter could not be decisions made "in the exercise of any discretion vested in it by or under [the] Act" because they were *ultra vires*.[27] However, decisions that are *ultra vires* would, on a plain reading of the provision, fall within the scope of s 59(1)(*b*) so long as they are "contained in any … direction issued by the [IMDA]". Section 59 therefore applies, in addition to s 12. Its breadth serves to reiterate that all decisions made by the IMDA should first be appealed to and reviewed by the Minister.

33 In such cases, where a statutory remedy is available, "… it is the cardinal principle that save in the most exceptional circumstances, [the courts' judicial review] jurisdiction will not be exercised where other remedies were available and have not been used": *R v Secretary of State for the Home Department, ex parte Swati* [1986] 1 WLR 477 at 485D, cited in *Borissik* at [25].

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26 Notes of Argument, 22 November 2021.

27 Notes of Argument, 22 November 2021.

34 During the hearing, counsel for TOCPL appeared to suggest that a further reason that ss 12 and 59 did not provide alternative remedies was that both provisions made clear that the Minister's decision on appeal was final and thereby ousted judicial review (see ss 12(2) and 59(4)).[28] Such an argument was roundly rejected at [30] of *Borissik*, where s 22(7) of the Planning Act (Cap 232, 1998 Rev Ed) provided that "[t]he decision of the Minister shall be final and shall not be challenged or questioned in any court". In that case, the court stressed that the existence of such a clause was not a valid reason for failing to appeal to the Minister, who was required to accord the applicant a fair hearing under the statutory process.

35 In *Borissik,* Tan Lee Meng J made the point that s 22(7) of the Planning Act showed that "the legislature intended that the courts should not interfere with issues of planning permission as these involve interrelated considerations of fact, law, degree and policy, which are better dealt with by an appeal procedure to the Minister" (*Borissik* at [29]). This reasoning is equally applicable to the present case. The regulation of broadcasting services, similar to the issue of planning permission, concerns wider issues of policy and its implementation and administration. In a statutory appeal to the Minister, all matters, whether substantive or procedural, would be fully and fairly considered. In the present case, parties did not discuss the scope of the court's power on judicial review on the proper construction of ss 12(2) and 59(4) (see, for instance, the discussion in *Nagaenthran a/l K Dharmalingam v Public Prosecutor and another appeal* [2019] 2 SLR 216 at [43], [47] and [73], and *Per Ah Seng Robin and another v Housing and Development Board and another* [2016] 1 SLR 1020 at [64]–[65]). Such an assessment is not necessary at the

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[28] Notes of Argument, 22 November 2021.

leave stage. Whatever the scope of judicial review might be, the point remains that *Borissik* at [29] gives insight into why the statutory regime gives good order to the reconsideration of any decision. A statutory appeal ensures that the full merits are considered by the relevant Minister who is charged with the policy in issue. An aggrieved person is not well served by ignoring such a route for reconsideration save in exceptional circumstances which justify such a course.

Conclusion on the threshold issue

36 I therefore find that, by not appealing to the Minister under s 12(2) or s 59(1)(*b*) of the Act, and by not adducing any exceptional circumstances to justify its omission to do so, TOCPL failed to exhaust its alternative remedies prior to invoking the court's judicial review jurisdiction.

***Prima facie* case of reasonable suspicion**

37 I turn now to the substantive question of whether the materials before the court disclose a *prima facie* case of reasonable suspicion in favour of granting the remedies sought by TOCPL. The burden of proof "lies squarely on the applicant" to satisfy the court that this requirement is met: *AXY v Comptroller of Income Tax* [2018] 1 SLR 1069 at [33]. Moreover, while the threshold of proof is "very low", this does not mean that the evidence and arguments placed before the court can be either skimpy or vague, and bare assertions will not suffice: *Gobi a/l Avedian and another v Attorney-General and another appeal* [2020] 2 SLR 883 at [54].

Whether TOCPL's Chinese website and social media platforms are "computer on-line services"

38 The main issue in dispute between the parties is the scope of TOCPL's class licence, and thus the scope of the IMDA's suspension and cancellation of

the same. It is undisputed that TOCPL is an ICP even when it is using social media platforms.[29] The effect of the statutory scheme, as I have explained above, is that TOCPL's provision of *all* of its "computer on-line services" is subject to a class licence by operation of law, and that the suspension and cancellation of its class licence would bar TOCPL from providing all such services. The question for the court is therefore whether *only* the services provided on TOCPL's main English websites are "computer on-line services" whose provision is subject to the class licence (as TOCPL argues); or whether (as the IMDA contends) the services provided by TOCPL on its Chinese website and social media platforms are *also* "computer on-line services" subject to the class licence.

39 Applying the interpretation of "computer on-line services" that I have set out at [24]–[25] above, the services provided on TOCPL's Chinese website and social media platforms clearly fall within the meaning of this term, as their primary purpose is undoubtedly to entertain, educate or inform all or part of the public.

40 TOCPL makes two arguments to the contrary. First, TOCPL contends that it is fallacious to suggest that its class licence covered its social media platforms because "[n]o social media user in Singapore has had to be licensed by the [IMDA]".[30] Related to this is the argument that if TOCPL had known that its class licence covered its social media platforms, it would not have "registered with [the IMDA] for a [c]lass [l]icence" for its main English websites and would instead have altered its business model to rely purely on social media.[31] My

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29 Notes of Argument, 22 November 2021.

30 AWS at paras 21–22.

31 AWS at paras 23–24.

analysis of the statutory provisions above makes clear that, even if TOCPL's services and activities had been confined to its social media platforms, their provision would still have been subject to TOCPL's class licence by operation of law in view of their nature and purpose.

41 Second, TOCPL argues that the IMDA made clear on various occasions that only its two main websites were subject to the class licence: when the IMDA "asked [TOCPL] to register with it for a [c]lass [l]icence";[32] in Form C; and in the Press Statement. This argument reveals the more fundamental misunderstanding of the licensing regime that underpins TOCPL's case.

42 TOCPL's case is premised on the assumption that its class licence was *conferred* by registration, and that the scope of its computer on-line services subject to the class licence is therefore delimited by the scope of its registration. However, for the reasons I have explained above, TOCPL's registration of its two main websites was in fact independent of, and irrelevant to, the scope of its computer on-line services that were subject to the class licence. The registration requirement is a class licence condition that is imposed on the ICP *by virtue of its status as a class licensee*. Counsel for TOCPL acknowledged this during the hearing when he accepted that the relevant conditions are imposed on the *operator* of the website, rather than on the website itself.[33]

43 TOCPL relied on the fact that Form C refers throughout to "the website" being registered for the purpose of the Notification.[34] In particular, Annex B1 to Form C1 (which is submitted with Form C for the purposes of registration)

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32 AWS at para 8.

33 Notes of Argument, 22 November 2021.

34 AWS at para 16.

provides for an undertaking and statutory declaration to be made by "the Authorised Signatory for the class licensee of the computer on-line service(s) residing at the URL … described in Form C ('the website')".[35] Based on this, TOCPL argues that "computer on-line services" is defined in Form C itself as being limited to websites.[36] I disagree. It is clear on the face of Form C that it is a form used for the *registration* of class licensable broadcasting services by individuals, groups or organisations providing political or religious content, and that it is to be completed and submitted *by the relevant class licensee*.[37] The wording used in Annex B1 to Form C1 that I have reproduced above does not, on a plain reading, purport to define "computer on-line services" as including only websites. The more natural reading of those words is that the specific website being registered is simply the relevant *type* of computer on-line service for the purposes of Form C. The fact that Form C only requires the particulars of a *website*, and not other channels such as social media platforms, should not be read as confining the definition of "computer on-line services" to websites. As the relevant regulatory authority, the IMDA was entitled to decide on the form and manner of registration, as well as the particulars or undertakings it required, under condition 6 of the Schedule to the Notification.

44 As for the Press Statement, this stated that the Media Development Authority (the IMDA's predecessor) had notified The Opinion Collaborative Ltd (TOCPL's predecessor) "to *register*" under the Notification [emphasis added].[38] TOCPL claims that the IMDA "clearly stated" in the Press Statement that TOCPL's class licence covered only the website

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35 Mr Xu's 1st Affidavit at Tab B (in particular, at p 11).

36 Notes of Argument, 22 November 2021.

37 Mr Xu's 1st Affidavit at Tab B (in particular, at pp 1 and 6–14).

38 Mr Xu's 1st Affidavit at Tab C.

"www.theonlinecitizen.com" and no other.[39] However, nowhere in the Press Statement was it said or suggested that only TOCPL's main English websites were subject to the class licence. Indeed, the Press Statement explained that the Media Development Authority had "assessed that the TOC website engages in the propagation, promotion or discussion of political issues relating to Singapore", and that its registration requirement "seeks to uphold the principle that politics must remain a matter for Singapore and Singaporeans alone".[40] This wording makes plain that the registration referred to in the Press Statement was registration under condition 4 of the Schedule to the Notification, and not the class licensing regime in s 9(1) of the Act.

45 This is further supported by the IMDA's letter to Mr Xu dated 9 February 2018, in which it stated that TOCPL "is an Internet Content Provider licensed under the Broadcasting (Class Licence) Notification", and that pursuant to condition 4 of the Schedule to the Notification, the website "www.theonlinecitizen.com" had to be registered with the IMDA using Form C. Failure to comply "would be a contravention of the Class Licence, in which event IMDA may have to take appropriate action, including the cancellation of [TOCPL]'s Class Licence".[41] This letter makes clear that TOCPL was *already* a class licensee, and that this was separate from and independent of TOCPL's registration of its website using Form C.

46 In any event, as counsel for IMDA rightly argued, the IMDA is not in a position to amend the law by their correspondence or forms[42] (or, for that matter,

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39 Mr Xu's 1st Affidavit at para 12; AWS at para 10.

40 Mr Xu's 1st Affidavit at Tab C.

41 Affidavit of Chia Aileen affirmed on 22 October 2021, CA-4 at p 36.

42 Notes of Argument, 22 November 2021.

their press statements). Save in cases where these give rise to substantive legitimate expectations (which I deal with in the next section), such statements cannot override the legal effect of the applicable statutory framework.

Substantive legitimate expectations

47 TOCPL raises a secondary argument based on the doctrine of substantive legitimate expectations. As both parties acknowledged,[43] notwithstanding the acceptance of the doctrine as a stand-alone head of judicial review in *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 ("*Chiu Teng*") at [119], the legal status of this doctrine in Singapore is an open question following the Court of Appeal's decisions in *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598 and *Kardachi, Jason Aleksander v Attorney-General* [2020] 2 SLR 1190.

48 These proceedings, which concern TOCPL's application for leave to commence judicial review, are not the appropriate forum for a detailed discussion of the applicability of the doctrine of substantive legitimate expectations in our law. For present purposes, what is critical is that even if that doctrine were to be applied in the form articulated in *Chiu Teng*, it would require TOCPL to prove that the IMDA made a statement or representation that was "unequivocal and unqualified" (*Chiu Teng* at [119(a)]).

49 In this case, TOCPL has not provided evidence of any unequivocal and unqualified representation by the IMDA that *only* the services provided on its two main websites were "computer on-line services" whose provision was subject to the class licence. TOCPL alleges that the IMDA's representatives

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[43] AWS at paras 27–29; RWS at para 50(a).

represented to Mr Xu that the class licence covered only the websites registered by TOCPL, relying on correspondence between Mr Xu and the IMDA in February 2018 and May and September 2020.[44] However, as the IMDA rightly pointed out,[45] a perusal of this correspondence discloses no representation to that effect. During the hearing, counsel for TOCPL also suggested that the representations made by the IMDA in Form C were unequivocal and left "absolutely no room for doubt" in this regard.[46] For the reasons I have given at [43] above, I am wholly unable to accept this assertion. As TOCPL has failed to establish any unequivocal representation that the class licence covered only its registered websites, its argument on substantive legitimate expectations may be dismissed on this basis.

Territorial scope of the class licence suspension and cancellation

50 Finally, TOCPL contends that it was *ultra vires* for the IMDA to prohibit TOCPL from providing any new broadcasting services or activities on any other websites or social media platforms because the class licence only covers access to TOCPL's broadcasting services and activities *in Singapore*, and the IMDA has no legal basis to prohibit TOCPL from offering its broadcasting services and activities from outside of Singapore.[47]

51 In my view, this objection is premised on a misreading of the Letter. In so far as TOCPL (being an ICP) might seek to provide computer on-line services which are subject to a class licence under the Notification, "*in or from* Singapore" [emphasis added], this would no longer be permitted under s 8(1) of

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44 AWS at para 25; Mr Xu's 1st Affidavit at para 16 and Tab D.

45 RWS at para 42; Notes of Argument, 22 November 2021.

46 Notes of Argument, 22 November 2021.

47 AWS at paras 32–33.

the Act in view of the cancellation of TOCPL's class licence. The Letter merely suspended TOCPL's class licence; it did not purport to prohibit the provision of services from other countries.

52 I therefore find that the material adduced and arguments made by TOCPL regarding the scope of the class licence do not cross the threshold of disclosing a *prima facie* case of reasonable suspicion in favour of granting the remedies sought. Its application for leave thus fails on this substantive ground as well as the procedural ground that it has failed to exhaust its alternative remedies.

Conclusion

53 For these reasons, I dismiss TOCPL's application for leave to apply for the quashing orders and declarations set out in its originating summons. I shall hear the parties on costs.

Valerie Thean
Judge of the High Court

Lim Tean (Carson Law Chambers) for the applicant;
Khoo Boo Jin, Du Xuan and Lim Toh Han (Attorney-General's Chambers) for the respondent.