IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 57

Criminal Motion No 6 of 2022

Between

(1) Roslan bin Bakar
(2) Pausi bin Jefridin
(3) Lawyers for Liberty

… *Applicants*

And

Public Prosecutor

… *Respondent*

Civil Appeal No 6 of 2022

Between

(1) Roslan bin Bakar
(2) Pausi bin Jefridin

… *Appellants*

And

Attorney-General

… *Respondent*

In the matter of Originating Summons 139 of 2022

In the matter of
Order 53, Rule 1 of the Rules of Court (Cap 322, R5)

And

In the matter of
Articles 9 and 12 of the Constitution of the Republic of Singapore

And

In the matter of
CA/CCA 26/2018, CA/CCA 59/2017 and CA/CCA 61/2017

Between

(1) Roslan bin Bakar
(2) Pausi bin Jefridin

… *Plaintiffs*

And

Attorney-General

… *Defendant*

JUDGMENT

[Criminal Procedure and Sentencing — Compensation and costs]
[Civil Procedure — Costs]

Roslan bin Bakar and others
v
Public Prosecutor and another appeal

[2022] SGCA 57

Court of Appeal — Criminal Motion No 6 of 2022 and Civil Appeal No 6 of 2022
Judith Prakash JCA, Belinda Ang Saw Ean JAD and Woo Bih Li JAD
29 March 2022, 27 June 2022

27 July 2022 Judgment reserved.

Judith Prakash JCA (delivering the judgment of the court):

Introduction

1 This judgment is given in relation to the costs incurred in respect of the application filed as CA/CM 6/2022 ("CM 6") and the appeal filed as CA/CA 6/2022 ("CA 6").

2 CM 6 was a criminal motion filed under s 394H of the Criminal Procedure Code 2010 (2020 Rev Ed) ("the CPC"). CM 6 was filed on 14 February 2022. It was heard and dismissed by this Court on 15 February 2022. That very evening, the firm of L F Violet Netto ("LFVN") filed HC/OS 139/2022 ("OS 139") on behalf of the first and second applicants in CM 6. OS 139 was an application for leave to commence judicial review proceedings. It was heard before a judge of the General Division of the High Court ("the Judge") on the morning of 16 February 2022. Dissatisfied with the

Judge's dismissal of OS 139, the appellants immediately filed CA 6 which this Court then heard.

3 CM 6 was brought by three persons, namely, Roslan bin Bakar ("the first applicant"), Pausi bin Jefridin ("the second applicant") and Lawyers for Liberty ("LFL"), the third applicant. They sought leave to file an application asking this Court to review its earlier decisions in CA/CCA 59/2017 ("CCA 59") and CA/CCA 26/2018 ("CCA 26") which were given in relation to the criminal cases against, respectively, the first and second applicants. The Public Prosecutor was the respondent in CM 6.

4 At the hearing on 15 February 2022 ("the CM 6 hearing), all the applicants were represented by the same counsel, Mr Charles Yeo Yao Hui ("Mr Yeo"). Mr Yeo was then, as he informed us, a salaried partner of the firm of LFVN, the solicitors for the applicants, having just been admitted as such. Mr Yeo had also filed an affidavit in support of the application. It should be noted that Ms L F Violet Netto ("Ms Netto") was the sole proprietor of LFVN.

5 CM 6 was the first step in an attempt to set aside the death sentences that had been passed on the first and second applicants after their respective convictions for drug trafficking. As mentioned, we dismissed the application. In respect of the first and second applicants, we were of the view that they were not able to meet the threshold requirements for a review set down by s 394H of the CPC and had no material with which to do so. In respect of LFL, our judgment was that it had no standing to be a party to CM 6 and we therefore dismissed the application in respect of LFL as a preliminary matter. Our full grounds of decision can be found in *Roslan bin Bakar & anor v Public Prosecutor* [2022] SGCA 18 ("the CM 6 Judgment").

6 OS 139 and CA 6 constituted the second step in the first and second applicants' attempts to set aside the death sentences passed upon them. The Attorney-General, the respondent in the proceedings, opposed both the application and the appeal. Mr Yeo had filed an affidavit in support of OS 139 and represented the applicants at the hearing on 16 February 2022 ("the OS 139 hearing"). He also acted for them in respect of CA 6, their appeal against the decision in OS 139. CA 6 was dismissed because there was no merit in the arguments raised in support of the appeal before us or in the originating application before the Judge. Our full grounds for that decision can be found in *Roslan bin Bakar and another v Attorney-General* [2022] SGCA 20 ("the CA 6 Judgment").

7 The respondents in both CM 6 and CA 6 applied thereafter for orders for costs to be made in their favour against LFL and against Mr Yeo personally. The court accordingly gave directions for the filing of submissions on costs. All correspondence from the court was addressed to LFVN on behalf of Mr Yeo and LFL. The respondents' written submissions were duly filed on 1 March 2022. On 29 March 2022, Mr Yeo filed his written submissions. LFL was not mentioned in his written submissions. On 28 April 2022, Mr Yeo informed the court that LFL "will not be making any submissions in reply to the [Public Prosecutor's] requests for costs orders to be made against [it]". Up to that date, neither LFVN nor LFL had informed the court of any change to LFL's legal representation. Mr Yeo's letter did not contain any statement on the point either. LFVN thus remained LFL's solicitors on record.

8 The hearing in respect of costs was fixed for the morning of 11 May 2022. Just two days before the hearing, on 9 May 2022, by a letter of that date, LFL sought a postponement of that hearing so that it might file written submissions. LFL expressed its dissatisfaction that neither the court nor the

Attorney-General's Chambers had communicated with LFL directly and asserted that the court "wrongly assumed that [Ms Netto] continues to act for [it]". The letter was signed by LFL's director, Mr Zaid Malek.

9 On 10 May 2022, we informed parties that the hearing would be adjourned to a later date despite LFL's baseless complaint. We directed that LFL, if it wished to make submissions in respect of costs, ought to be represented by a Singapore solicitor or a representative holding a duly executed letter of authority from LFL. We also directed that its written submissions were to be filed and served by 17 June 2022. On 30 May 2022, LFL indicated, by way of letter signed by Mr Zaid Malek, that it would be represented by its "Advisor", Mr N Surendran a/l K Nagarajan ("Mr Surendran").

10 LFL failed to file and serve its written submissions on costs via eLitigation on 17 June 2022. As it was not represented by counsel, it was incumbent upon LFL to file through the LawNet & CrimsonLogic Service Bureau. On 21 June 2022, LFL requested that it be allowed to rely upon its submissions sent by e-mail. Effectively, LFL requested that the requirement to file and serve via eLitigation be dispensed with. LFL explained that as a non-profit organisation incorporated in Malaysia, it did not have the financial or logistical resources to send its representative to Singapore for the purpose of filing the submissions. On 23 June 2022, the AGC informed us that it did not object to LFL's requests. On 24 June 2022, we acceded to LFL's requests and accordingly accepted the filing of LFL's submissions and accompanying bundle of authorities notwithstanding the failure to follow the correct filing procedure.

11 We heard the applications in relation to costs on 27 June 2022. Mr Yeo appeared in person. LFL appeared by video link by its representative, Mr N Surendran.

Should LFL be ordered to pay costs

Preliminary issue

12 A preliminary procedural issue which arose for determination before us was whether a foreign body corporate such as LFL may appear in person in respect of costs sought against it. The oddity in the present case is that LFL *should not have been party to CM 6 to begin with* (see the CM 6 Judgment at [12]). Unsurprisingly, there is no provision in the CPC that addresses this particular procedural issue because it, understandably, would not have been in the Legislature's mind to have included a provision on the representation of a foreign body corporate who was not charged with any offence. Section 6 of the CPC, however, deals with situations in which no specific procedure has been laid down. It states:

> **Where no procedure is provided**
>
> **6.** As regards matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being in force, such procedure as the justice of the case may require, and which is not inconsistent with this Code or such other law, may be adopted.

13 The CPC does set out the relevant procedural rules in relation to the representation of a body corporate that is charged with an offence under s 117:

> **Proceedings against body corporate, limited liability partnership, etc.**
>
> **117.**—(1) If a body corporate … is charged with an offence, either alone or jointly with some other person, a representative may appear for the body corporate …
>
> (2) The representative may do anything on behalf of the body corporate … that an accused may do on the accused's own behalf under this Code.
>
> …

> (5) In this section, "representative", in relation to a body corporate … means a person duly appointed by the body corporate … to represent it at the court proceedings.
>
> (6) A representative for the purposes of this section may be appointed by a written statement which is to be signed —
>
> > (*a*) in the case of a body corporate … by a director, manager or secretary or other similar officer of the body corporate … ;
> >
> > …
>
> and such written statement is, for the purposes of this section, admissible without further proof as prima facie evidence that the person has been duly appointed as representative.

14 Although s 117 of the CPC is clearly inapplicable to the present case because LFL has not been charged with an offence, it provides some guidance on the issue of the representation of a body corporate in criminal proceedings. In our view, it could not be contrary to the CPC to allow LFL's representative to appear on its behalf in this hearing for costs, provided that it gave a written statement signed by its director appointing such representative, if LFL was unable to be represented by counsel. We accordingly informed LFL that it had to be represented by a Singapore solicitor or a representative holding a duly executed letter of authority. On 30 May 2022, LFL duly indicated that Mr N Surendran would be its representative for this costs hearing.

The applicable legal principles

15 We turn to deal with the respondent's application for costs against LFL. This application is based on s 409 of the CPC which reads:

> **Costs**
>
> **409.** If the relevant court dismisses a criminal motion and is of the opinion that the motion was frivolous or vexatious or otherwise an abuse of the process of the relevant court, it may either on the application of the respondent or on its own motion, order the applicant of the criminal motion to pay to the

> respondent costs on an indemnity basis or otherwise fixed by the relevant court.

16 It would be seen from the above that the court's power to order costs against an applicant in a criminal motion can only be exercised if two prerequisites have been fulfilled. The first is that the application has been dismissed. The second is that the court must hold that the motion filed by the applicant was frivolous or vexatious or otherwise an abuse of the process of the court.

17 Section 409 of the CPC has been considered by the courts previously. In *Arun Kaliamurthy and others v Public Prosecutor and another matter* [2014] 3 SLR 1023 ("*Arun*"), Tan Siong Thye JC (as he then was) held that that provision is intended to "provide this court with supervisory powers over the conduct" of parties in the filing of criminal motions (at [30]). Furthermore, an applicant who withdraws a frivolous or vexatious criminal motion which causes the respondent to incur unnecessary costs would nevertheless fall within the ambit of s 409 of the CPC. This is because costs ordered under s 409 are "also compensatory, and not merely punitive".

The parties' submissions

18 As mentioned earlier, LFL appeared by its representative, Mr N Surendran. After LFL, rather belatedly, notified the court of its intention to appear, it was directed to file and serve its submissions on costs by 17 June 2022. The submissions came in only on 21 June 2022 – less than a week before the rescheduled hearing date of 27 June 2022.

19 The respondent submits that it is appropriate that costs be ordered against LFL because it abused the court's process by jointly commencing CM 6

with the first and second applicants despite the fact that it had no standing to do so. It notes that LFL is a foreign entity with no direct interest in either CCA 59 or CCA 26, and that it made no effort, whether in the cause papers or at the hearing, to provide any legal basis for its inclusion in the application. At the hearing of CM 6, Mr Yeo stated that LFL claimed standing on the basis that it was an "abolitionist" organisation which campaigned against the death penalty. Therefore, the respondent submits, it is clear that LFL participated in the proceedings to further its own cause. As far as the respondent is concerned, LFL's participation required it to prepare detailed written submissions to demonstrate to the court that LFL was not entitled to be a party to CM 6.

20 LFL used this hearing on costs to mount a constitutional challenge to ss 356, 357 and 409 of the CPC. Sections 356 and 409 of the CPC empower the court to make an order for costs to be paid by any party to another party in respect of criminal proceedings falling under Pt 20 of the CPC, which includes criminal motions. Section 357 of the CPC empowers the court to order costs against defence counsel personally. LFL submits that these provisions are "unconstitutional" because they breach Art 9 of the Constitution of the Republic of Singapore (2020 Rev Ed) ("the Constitution") and/or breach the rules of natural justice by impeding the right to a fair trial. To that end, the power to order costs against applicants in a criminal motion has, LFL submits, the "inevitable effect of preventing or intimidating NGOs … or concerned members of the public or lawyers from assisting or ensuring access to justice for the prisoners or their families". Sections 356, 357 and 409 of the CPC "ought to be struck down" in accordance with Art 4 of the Constitution. These allegations formed the bulk of LFL's written submissions.

21 It was only at the end of its written submissions that LFL asserted that there was "no merit" in the claim for costs in the present case. LFL submits that

costs must not be ordered "merely because [it] was unsuccessful" in CM 6. Such an order for costs would be "oppressive, unnecessary, and unreasonable" and "intended as [a] form of retribution". Further, LFL submits that the respondent's "claim for costs is … unenforceable and futile".

22 In his oral submissions, Mr Surendran accepted that LFL had no standing to be an applicant in CM 6 and indicated that that was why no appeal had been filed by LFL. Yet he maintained the position that no costs should be ordered against LFL because of the "oppressive" and "chilling" effect of such an order. We address the constitutional arguments further below, but must emphasise immediately that Mr Surendran's position was impossible to justify. Having accepted that LFL had no standing to make any application in this Court in relation to the cases involving only the first and second applicants, he yet had the temerity to question the validity of a law that was passed precisely to discourage the wasting of valuable court resources by persons who have no business being a party before the courts in the first place. As a foreign entity which had not been the subject of the criminal prosecutions involving the first and second applicants, LFL had no interest to protect which required it to become an applicant in CM 6. Any assistance which it wished to provide to the first and second applicants could have been given outside of court. Instead, it voluntarily brought itself within the jurisdiction of the court by being a party to the application. Having done this and made itself subject to the CPC, it really did not lie in LFL's mouth to complain that its actions could have costs' consequences.

Our decision

23 We find LFL's arguments for this Court to strike down ss 356, 357 and 409 of the CPC under Art 4 of the Constitution unconvincing and devoid of

any legal basis. LFL's submissions are premised on the fundamental assumption that these provisions are impediments to an accused person's access to justice or otherwise infringe upon such person's right to a fair trial. This is not so, both in general and in the particular cases of the first and second applicants. Both the first and second applicants have had ample access to the courts and were assisted by defence counsel. Their cases have been given exhaustive consideration and all points raised by them have been argued on their behalf in court. CM 6 and CA 6 are but the last in a long line of cases in the Singapore courts concerning the first and second applicants. Given the gravity of the right to a fair trial and the importance of access to justice, allegations of breaches of the same which could impugn the criminal justice system ought not to be made lightly.

24 The argument that ss 356, 357 and 409 of the CPC impede access to justice or otherwise infringe upon the right to a fair trial plainly (and rather conveniently) ignores the applicable test which must be satisfied before the court makes an adverse costs order against the applicant or defence counsel. As mentioned above, the court's power to order costs against an applicant in a criminal motion can only be exercised if two prerequisites have been fulfilled, the second being that the motion filed by the applicant was *frivolous or vexatious or otherwise an abuse of the process of the court*. When that is so, it cannot at the same time be said that an accused person's access to justice or right to fair trial was compromised. It suffices to say that an accused person's access to justice is not unlimited to the extent that one could infinitely take out applications that are frivolous, vexatious or otherwise an abuse of process in order to effectively delay the punishment that has been pronounced and upheld on appeal. For the same reason, LFL's submission that it should not be ordered to pay costs "merely because [it] was unsuccessful" in CM 6 is misplaced.

25 In any case, on the facts before us, we are satisfied that both the first and second applicants in CM 6 had been accorded every opportunity to defend their innocence, challenge their convictions (and sentences), and even review their sentences following amendments to the sentencing framework of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) under which they had been charged and convicted (see the CM 6 Judgment at [14]–[15]).

26 LFL made a more general argument to the effect that s 357 had a chilling effect on lawyers in Singapore in that due to the fear of adverse costs consequences, lawyers here were unwilling to take up the cases of criminal defendants. We have no hesitation in rejecting that argument. For one, no evidence whatsoever was put forward to substantiate it. Mr Surendran cited two recent cases where he said the litigants were forced to represent themselves because no lawyer would represent them. That was his supposition only, unsupported by any evidence from the litigants themselves. It may be worth noting that in one of the cases the litigant, though unrepresented, succeeded in his application.

27 Secondly, the prerequisite for an order for costs against defence counsel under s 357 is that those costs have been incurred "unreasonably or improperly". The section specifically gives as an example of incurring unreasonable or improper costs, the conduct of proceedings that are an abuse of process. In *Arun*, it was observed that there would be an abuse of process if the motion "is not brought *bona fide* for the purpose of obtaining relief but for some other ulterior or collateral purpose" (at [33]). It cannot be described as "chilling" if the purpose of legislation is to prevent cases being filed for ulterior motives or when they would otherwise be vexatious or an abuse of process.

28 Thirdly, it was not open to LFL to make this argument as it was not acting for the first or second applicant in the first place.

29 In the CM 6 Judgment, in dealing with the position of LFL, we held that in an application under s 394H of the CPC, the "applicant" had to be one of the parties to the decision of the appellate court which the applicant wanted to have reviewed. That meant that only the person against whom the original criminal case had been brought and the public prosecutor could apply under s 394H (see the CM 6 Judgment at [8]). The criminal appeals which were ostensibly the subject of CM 6, CCA 59 and CCA 26, involved only the first and second applicants. LFL, a Malaysian organisation, had nothing to do with either the original criminal proceedings or the criminal appeals and therefore had no basis on which to make an application under s 394H of the CPC. There was also no relief that LFL itself could obtain from the application. Further still, LFL's somewhat nonchalant attitude in arguing that the respondent's claim for costs against it is "unenforceable and futile" suggests to us that it was indifferent to any concerns of whether it had brought CM 6 in good faith. The purpose of s 394H is to allow relief to be given in appropriate cases to convicted persons or to the Public Prosecutor. It is not there to be used by private organisations for their own purposes. LFL's purpose in becoming an applicant could not have been for it to obtain any relief in relation to the proceedings against the first and second applicants. Instead, its purpose must have been to further, or obtain publicity for, its abolitionist aims. Accordingly, it was an abuse of process for LFL to join in the application.

30 Finally, we deal with LFL's argument that no order for costs should be made against it as such order will be unenforceable in Malaysia and therefore futile. This argument suggests that FLF has decided not to comply with any order for payment of costs that we may make against it. We note the

contemptuous nature of such a suggestion. Quite apart from that, however, in relation to costs under s 409, the court in making its order is primarily concerned with whether the requirements of the section have been met and what the justice of the case requires, not with whether its orders will be obeyed. Arguments about the court not acting in vain may be applicable to certain types of remedies asked for in civil cases, but they have never been applied or accepted in respect of costs' orders made against litigants who have become party to litigation entirely of their own volition, much less when such litigants in fact had no right of access.

31 The respondent asks for costs of $2,000 against LFL. We appreciate that the work was done on an urgent basis as the main hearing took place only one day after CM 6 was filed. The point of standing was not, however, a very complicated one and did not take up much time. We therefore consider that it would be appropriate to award the respondent costs of $1,000 against LFL.

Should Mr Yeo be ordered to pay costs

The applicable legal principles

32 The leading authority on the issue of when a lawyer for a criminal defendant or applicant in a criminal motion can be ordered to pay costs personally to the prosecution is *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] 2 SLR 377 ("*Syed Suhail*"). In that case, this Court recapitulated the principles to be applied as follows (at [15]–[20]):

(a) The court hearing criminal proceedings has the power under s 357(1)(*b*) or by virtue of its inherent powers to order that defence counsel pays costs directly to the prosecution in an

appropriate case (see *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 at [77]–[80]).

(b) The intention of the order made under s 357(1)(*b*) of the CPC is to "penalise and discipline the solicitor in question for the sort of conduct set out in that provision" and "show disapproval of the solicitor's conduct in the proceedings in question" (at [16]).

(c) The additional formal requirement under s 357(1A) of the CPC which is substantially the same as the former s 357(1A) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) (for matters under Div 1B of Pt 20 of the CPC titled "Review of earlier decision of appellate court", which applies to CM 6) is that the prosecution must have applied to the court for a costs order "on the ground that the commencement, continuation or conduct of that matter was an abuse of the process" and the court must "state whether it is satisfied that the commencement, continuation or conduct of that matter was an abuse of the process" (at [17]).

(d) The test to determine whether to order costs against a solicitor personally comprises three questions, each of which must be answered in the affirmative. The questions are (at [19]):

(i) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently?

(ii) If so, did such conduct cause the applicant (in this case the Public Prosecutor) to incur unnecessary costs?

(iii) If so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

(e) In relation to the determination of whether the solicitor's conduct has been improper, unreasonable or negligent, this Court in *Syed Suhail* (at [20]) adopted the formulation of Sir Thomas Bingham MR (as he then was) in *Ridehalgh v Horsefield* [1994] Ch 205 at 232–233. In essence, what was said is that:

(i) "Improper" conduct is conduct which would ordinarily be held to justify disbarment, striking out, suspension from practice or other serious professional penalty and also conduct which would be regarded as improper according to the consensus of professional opinion, whether or not it violates the latter of a professional code.

(ii) "Unreasonable" conduct is that which is vexatious and designed to harass the other side rather than advance the resolution of the case and the acid test is whether there is a reasonable explanation for the conduct.

(iii) "Negligent" conduct denotes failure to act with the competence reasonably to be expected of ordinary members of the legal profession.

33 In respect of CA 6, O 59 r 8(1)(*c*) of the Rules of Court (Cap 332, R 5, 2014 Rev Ed) ("ROC") empowers the court to direct solicitors to personally bear the costs of the opposing party where costs have been incurred "unreasonably or improperly" or have been "wasted by failure to conduct proceedings with reasonable competence and expedition". In *Munshi Rasal v Enlighten Furniture Decoration Co Pte Ltd* [2021] 1 SLR 1277, this Court recapitulated the applicable three-step test as follows (at [17]):

(a) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently?

(b) If so, did such conduct cause the other party to incur unnecessary costs?

(c) If so, is it in all the circumstances just to order the legal representative to compensate the other party for the whole or any part of the relevant costs?

The submissions

34 The respondent submits that costs of $10,000 should be ordered against Mr Yeo personally in respect of CM 6. It says that his conduct in bringing and facilitating CM 6 was improper. It gives three reasons for this. The first reason is that there were serious procedural deficiencies in the application as evidenced by: (i) the inclusion of a foreign organisation that lacked standing as the third applicant; (ii) no written submissions were filed and served on the same day as the application was filed as required by r 11(3) of the Criminal Procedure Rules 2018; and (iii) Mr Yeo's affidavit "failed to set out reasons why it was necessary to review the concluded appellate decisions and omitted to produce material … that would be relied on in the review".

35 Secondly, there were serious substantive deficiencies in CM 6. This was because it sought reliefs which the court had no power to grant and a lawyer who had studied the history of the cases would have known that a review application in respect of CCA 59 and CCA 26, the appeals in question, was a legal non-starter. In addition, Mr Yeo admitted that he had no new evidence to ground the application and that he would have to rely on new evidence "which might possibly arise if time was given" to have the first and second applicants'

mental states re-assessed. He offered no legal arguments or authorities to support the application for review of the appeals. Furthermore, at the hearing, oral submissions traversed a wide range of issues including Arts 9 and 12 of the Constitution, international conventions and customary international law but the submissions lacked merit.

36 Thirdly, the respondent described CM 6 as not having been a genuine attempt to seek a review but rather an attempt to frustrate and delay the scheduled execution of the applicants' sentences. Although the applicants' mental states had been known for years, Mr Yeo did not explain why CM 6 was filed just before the scheduled execution date. The collateral purpose of seeking an order for stay of execution was, the respondent said, "confirmed" when Mr Yeo announced at the end of the hearing and upon dismissal of CM 6 that he would be applying for judicial review. As mentioned, an application for leave for judicial review was indeed filed that same evening.

37 In relation to the second question, the respondent says that it had to undertake a vast amount of unnecessary work in preparing written submissions for the application in the belief that Mr Yeo had taken instructions from the first and second applicants on seeking a review of their concluded appeals. It came as a surprise when Mr Yeo disclosed in court that he had not met the first and second applicants. This suggested that he was taking instructions from LFL. When the application came on for hearing, Mr Yeo did not engage with the requirements of s 394H of the CPC but instead brought up issues of constitutional and international law. As a result, the respondent was compelled to carry out research while the hearing was on-going in order to answer Mr Yeo's new points.

38 In respect of CA 6, the respondent asks for $15,000 which is half of the lower end of the range of costs for an appeal before this Court against a judgment following an originating summons under Part V of Appendix G to the applicable Supreme Court Practice Directions 2013. The respondent raises three points. First, Mr Yeo acted "improperly" given that there were serious procedural irregularities and serious substantive irregularities. OS 139 was accompanied by a defective statement and affidavit which was "simply a rehash" of the contents of the affidavit for CM 6. Further, it was apparent that Mr Yeo was "completely unfamiliar with the applicable law" on judicial review and eventually abandoned "all pretence of seeking leave to commence judicial review". What he sought, rather, was a stay to halt the scheduled judicial executions. In this connection, CA 6 must have been filed only for the collateral purpose of having it serve as a legal filibuster to frustrate and delay the execution scheduled for 16 February 2022. Such an appeal should never have been pursued after OS 139 was dismissed.

39 Secondly, the respondent incurred unnecessary costs in having to prepare for CA 6. Thirdly, it is just to make a personal costs order against Mr Yeo as he should be held "fully accountable" for the unnecessary costs incurred. The facts point to Mr Yeo filing CA 6 flagrantly to facilitate proceedings which are an abuse of process and it is just that a personal costs order should follow.

40 In his written submissions, Mr Yeo dealt with both CM 6 and the subsequent appeal from the judicial review decision, CA 6, and at times it was not quite clear which set of proceedings his submissions were referring to. In the main, however, the submissions related to the application for a personal costs order against him in CA 6. It would appear that he was asking for no order as to costs to be made against him at all but that, at worst, a sum not exceeding

$2,000 should be ordered against him as costs in respect of both applications. At the hearing before us, Mr Yeo emphasised the short length of time that he had been in practice and urged the court not to order an amount of more than $2,000 in costs against him. He also informed the court of other personal circumstances that he considered might be relevant in assessing the appropriate quantum of costs to be ordered and distinguished precedents where lawyers had been ordered to pay greater sums on the basis that the lawyers there had been more senior than he now is.

41 In his submissions, Mr Yeo gave the following "key factors" as reasons why he should not be made to bear costs:

(a) That no fees, whatsoever, were earned or charged by him and he simply followed the instructions of the applicants and their next of kin and appointed "Liaison Representatives" to file CM 6;

(b) That if CM 6 were found to be unmeritorious, then the key point of reference should be the $10,000 costs' orders made in *Syed Suhail* but that amount should be reduced in the case of Mr Yeo because:

(i) Mr Yeo is a junior lawyer, much less senior than the lawyer in *Syed Suhail*;

(ii) Mr Yeo had never previously made an application under s 394H of the CPC;

(iii) Mr Yeo was not informed, unlike counsel in *Syed Suhail*, that if he proceeded with CM 6 he would be liable to pay costs personally.

Our decision

42 The first question we have to consider is whether Mr Yeo acted improperly. In this connection, as we pointed out in [19]–[21] of the CM 6 Judgment, the requirement under s 394H of the CPC to apply for leave for criminal review under s 394J was instituted to weed out unmeritorious applications for review of appellate decisions at an early stage. The review application itself which is made under s 394J of the CPC requires "sufficient material", being evidence or legal arguments, on which the appellate court may conclude that there has been a miscarriage of justice in the criminal matter in respect of which the earlier decision was made. The material, whether legal or evidential, must not have been previously canvassed and must be compelling in that it is capable of showing almost conclusively that there has been a miscarriage of justice. Accordingly, in a leave application under s 394H the applicant must be able to show the court that "the material it will be relying on in the review proper is almost certain to satisfy the s 394J requirements". In CM 6, after hearing Mr Yeo and considering the affidavit he had filed, we found at ([25] of the CM 6 Judgment) that there was no evidential material at all which could found a criminal review of either CCA 59 or CCA 26. Further, at [26] we were satisfied that there was no material in the form of legal arguments reflecting a change in the law after the decisions in CCA 59 and CCA 26 that could support a review. Accordingly, CM 6 was dismissed. We observed at [30]:

> Having heard and considered the applicants' arguments, we were satisfied that there was no basis for the application at all. Regrettably, it had been cobbled together without substance in a desperate attempt to halt the scheduled executions of the first and second applicants. …

43 As counsel for the applicants, it was incumbent on Mr Yeo to determine whether there existed any material, legal or evidential, that could support a

criminal review of the sentences that had been imposed on the first and second applicants. What he did in this regard could be gleaned from the affidavit he filed in support of the application. In para 4 of the affidavit, he gave the "reasons" why a review was required. These "reasons" centred first, on the assertion that the first and second applicants had an abnormality of mind in that their IQs were low, and secondly, the assertion that no one should be sentenced to death or executed subsequently if that person had a mental disorder at the time of the offence or at the time of execution. Mr Yeo's affidavit did not deal with the findings of the court in CCA 59 and CCA 26 that the applicants were not suffering from such abnormalities of mind that impaired their responsibility for their offences or the fact that such findings were made after consideration of all the psychiatric and other expert evidence provided to the court. Nor did his affidavit contain any new evidence on the mental states of his clients. As for new legal material, Mr Yeo only cited two cases from other jurisdictions in the Commonwealth, which, based as they were on different legal provisions and different facts, were only marginally relevant, if at all. As we found in the CM 6 Judgment, there was a dearth of any material that could support a s 394H application much less a review under s 394J of the CPC.

44 The foregoing criticisms apply equally to Mr Yeo's conduct in relation to CA 6. As we pointed out at [8] of the CA 6 Judgment, all of the reasons in purported support of the application for leave to commence judicial review proceedings had to do with the assertion that by reason of an alleged mental disorder or substantial mental impairment on the part of each of the appellants, it would not be lawful or constitutional to carry out the death sentences that had been imposed. We commented that the four "reasons" for judicial review were almost *identical* to the four grounds that had been stated in CM 6 (at [9]) and, again, found that the affidavit did not contain any factual material whatsoever

(at [11]). Simply put, there was no factual basis for any of the arguments Mr Yeo raised in CA 6 (see the CA 6 Judgment at [19]). It was incumbent on Mr Yeo to determine whether there existed any material, legal or evidential, that could support an application for judicial review. Given the earlier courts' findings that the appellants did not suffer from an abnormality of the mind that impaired their responsibility for the offences that they committed in CCA 59 and CCA 26, and a further reiteration of the same at the hearing in respect of CM 6, it would have been obvious to Mr Yeo that there could be no factual basis whatsoever for CA 6.

45 We are satisfied that Mr Yeo acted improperly in filing and presenting both CM 6 and CA 6 when he had no material to justify it. Lawyers owe a duty both to their clients and to the court not to invoke the court's jurisdiction without a proper basis. It is notable that in his CM 6 affidavit, Mr Yeo stated he would make reference at the hearing of CM 6 to the affidavits filed by experts about the mental state of one Nagaenthran a/l Dharmalingam ("Mr Nagaenthran"), another convicted drug-trafficker, who was at that time involved in judicial review proceedings that sought to challenge his own death sentence. At the hearing of CM 6 it turned out that Mr Yeo was hoping that his clients could be examined by Mr Nagaenthran's experts and that such examination would then provide evidence to support his arguments against the carrying out of their sentences. Before any application is filed, material arguably capable of justifying it must exist – it is improper to file an application especially of this nature in the hope of obtaining evidence at a later date. By the end of September 2018, both CCA 59 and CCA 26 had been dismissed. More than three years elapsed before CM 6 was filed and this lapse of time made the paucity of material on which it was based even more egregious. Likewise, in CA 6, Mr Yeo argued that the appellants' execution be stayed pending the outcome of

the court proceedings in Mr Nagaenthran's case. We held that such an argument was totally unacceptable as Mr Yeo was effectively speculating on the outcome of a case entirely distinct from that in CA 6 (see CA 6 Judgment at [24]).

46 On the terms of each of the applications, there was nothing to anchor CM 6 or CA 6 at all when they were filed. At the hearing, as the respondent submitted, Mr Yeo made no attempt to show how s 394H of the CPC or the requirements for leave for judicial review could be satisfied. Instead, he brought up questions of international law and customary international law but was not able to substantiate his arguments on these bases (see the CM 6 Judgment at [28]–[29] and the CA 6 Judgment at [22]). We also accept the submissions of the respondent in relation to the procedural and substantive inadequacies of CM 6 and CA 6 which we have recited earlier. We agree with the points made in this regard.

47 As regards the second question of this inquiry, we are satisfied that the filing of CM 6 and CA 6, an application and appeal for which there was no basis, caused the respondent to incur costs unnecessarily in both proceedings especially as the work had to be done on an urgent basis. Additionally, more work had to be done to anticipate and cover possible arguments that might be made by the applicants since the applicants failed to specify their grounds for either CM 6 or CA 6 and did not file written submissions with CM 6 as procedurally required.

48 We have considered Mr Yeo's submissions as to why, even if his conduct was improper, he should not be made to bear any of the respondent's costs. In our view, however, it is irrelevant that Mr Yeo did not charge any fees for representing the applicants or that he was acting on their instructions. As a qualified lawyer of four years' standing, he should have known that it was his

duty to determine whether there was any proper case to put forward to the court – he could not just act willy-nilly on the basis of his clients' instructions or desires. We do take into account his sincere passion to assist his clients and his youthful enthusiasm in deciding on the appropriate quantum of costs to be ordered against him. We would warn, however, that a lawyer's passion for a cause is insufficient – before any application is filed a lawyer must use the full force of his legal knowledge and acumen to determine whether the case has any legal merit at all or whether the circumstances are such that the application would be improper or an abuse of purpose.

49 It is not relevant that Mr Yeo was not warned by the respondent that in filing and arguing CM 6 and CA 6, he might incur personal liability for costs. The respondent owed him no such duty to give advance notice that it would seek personal costs orders against him. Mr Yeo should himself have been aware of the possible pitfalls of acting improperly.

50 In our judgement, in all the circumstances of this case it would be just to order Mr Yeo to personally contribute to the costs incurred by the respondent in dealing with CM 6 and CA 6. The respondent has asked for $10,000 in costs for CM 6 and $15,000 for CA 6 but, in our view, a more appropriate amount would be $1,500 and $2,500 for CM 6 and CA 6 respectively, bearing in mind the nature of the cases, the brevity of the accompanying affidavits and the obvious lack of any material justifying the applications. The respondent did not need to file any substantial affidavit in response. The hearing of CM 6 itself took an afternoon only due to the absence of a viable case for the applicants, and part of that afternoon related to the question of standing of LFL, in respect of which we have already awarded costs. As regards CA 6, the hearing likewise did not take very long. We have, however, increased the amount of costs payable in respect of CA 6 because the arguments put forward there were largely

repetitious of those in CM 6 and as they had already failed both in CM 6 and OS 39, Mr Yeo should have known they were bound to fail again and should not have put the respondent to the expense of defending the appeal.

Conclusion

51 For the reasons given above we order LFL to pay the Public Prosecutor costs of $1,000 in respect of CM 6 and Mr Yeo to pay the Attorney-General and the Public Prosecutor costs totalling $4,000 in respect of CM 6 and CA 6.

Judith Prakash
Justice of the Court of Appeal

Belinda Ang Saw Ean
Judge of the Appellate Division

Woo Bih Li
Judge of the Appellate Division

Charles Yeo Yao Hui in person;
Francis Ng Yong Kiat SC, Adrian Loo Yu Hao,
Samuel Yap Zong En, Chan Yi Cheng and
Shenna Tjoa Kai-En (Attorney-General's Chambers)
for the respondent.