Vellama d/o Marie Muthu *v* Attorney-General
[2012] SGHC 74

Case Number : Originating Summons No 196 of 2012

Decision Date : 09 April 2012

Tribunal/Court : High Court

Coram : Philip Pillai J

Counsel Name(s) : M Ravi (L.F. Violet Netto) for the applicant; David Chong SC, Hema Subramaniam and Lim Sai Nei for the Attorney-General's Chambers.

Parties : Vellama d/o Marie Muthu — Attorney-General

Administrative law – Judicial Review – Leave application under O 53 of the Rules of Court

09 April 2012

Philip Pillai J:

1 This was an application for leave under O 53 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC") to apply for:

(a) Declarations ("Declarations")

(i) That the Prime Minister does not have unfettered discretion in deciding whether to announce by-elections in Hougang Single Member Constituency ("SMC") ("the First Declaration"); and

(ii) That the Prime Minister does not have unfettered discretion to decide when to announce by-elections in Hougang SMC and must do so within three months or within such reasonable time as this Honourable Court deems fit ("the Second Declaration"); and

(b) A Mandatory Order enjoining the Prime Minister to advise the President to issue a Writ of Election mandating by-elections in Hougang SMC pursuant to Article 49(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) and Section 24(1) of the Parliamentary Elections Act (Cap 218, 2011 Rev Ed) and to tender such advice within three months or within such reasonable time as the Honourable Court deems fit ("the Mandatory Order").

2 I heard parties in chambers on the issue of leave on 30 March 2012. I directed counsel for the applicant to delete two headings in his Originating Summons No 196 of 2012 ("OS"): *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR(R) 525 and Article 21 of the Universal Declaration of Human Rights, 10 December 1948, 217A (III) ("UDHR"). Whilst counsel is at liberty to make submissions based on court decisions, the OS title reference to a particular case is unnecessary. The UDHR, not having been enacted as Singapore legislation, is not domestic law to which these proceedings relate. Accordingly such OS title reference is misleading. Counsel for the applicant agreed to do so.

3 On 2 April 2012, I granted leave for a substantive judicial review hearing. On 4 April 2012, the Attorney-General ("AG") appealed against my decision to grant leave. I now state my reasons for granting leave.

The background

4 The applicant avers that she is a resident voter of Hougang SMC.

5 She avers that she had previously sought financial advice and assistance from her then Member of Parliament of Hougang SMC ("MP"), Mr Yaw Shin Leong ("Mr Yaw") of the Workers' Party, for whom she had voted in the last general election. He had invited her to follow up with him.

6 She avers that on 15 February 2012, the Workers' Party declared that Mr Yaw had been expelled from the party. His parliamentary seat was thereafter declared vacant.

7 The applicant avers that she is deprived of an MP and that although she is being assisted by Workers' Party MPs from the adjacent Aljunied Group Representative Constituency ("GRC"), she avers that they do not represent her vote.

8 She avers that she has a right to be represented by an MP whom she had an opportunity of choosing. She has made this application to clarify the law and to seek the Declarations and Mandatory Orders.

The threshold for O 53 leave applications

9 Applications for O 53 prerogative orders require the leave of court. One of the purposes of the requirement of leave is to sieve out groundless applications *in limine*. The Court of Appeal in *Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR(R) 133 explained that the requirement of seeking the leave of court (at [23]) was:

> … intended to be a means of filtering out groundless or hopeless cases at an early stage, and its aim is to prevent a wasteful use of judicial time and to protect public bodies from harassment (whether intentional or otherwise) that might arise from a need to delay implementing decisions, where the legality of such decisions is being challenged. …

10 Leave is not granted unless the court is satisfied that: (i) the matter complained of is susceptible to judicial review; (ii) the applicant has sufficient interest in the matter; and (iii) the material before the court discloses an arguable or *prima facie* case of reasonable suspicion in favour of granting leave. Additionally, as these orders are discretionary remedies, the court has a discretion to refuse leave where the circumstances warrant a refusal (see *Singapore Civil Procedure 2007* (G P Selvam chief ed) (Sweet & Maxwell Asia, 2007) at para 53/8/22).

11 It was not disputed for purposes of the leave application that the matter relates to the performance of powers and duties which involve a public element and thus is susceptible to judicial review. It was also not disputed that the applicant has sufficient interest in the matter.

12 The main issue in dispute in this leave application was whether the material before the court disclosed an arguable or *prima facie* case in favour of granting leave. I noted what the Court of Appeal in *Chan Hiang Leng Colin and others v Minister for Information and the Arts* [1996] 1 SLR(R) 294 had to say on the meaning and scope of the phrases 'a *prima facie* case of reasonable suspicion' and 'what might on further consideration turn out to be an arguable case' (at [22]):

> This passage appears susceptible to two slightly different interpretations. One is that the court should quickly peruse the material put before it and consider whether such material discloses "what might on further consideration turn out to be an arguable case". The other is that the

applicant had to make out a "*prima facie* case of reasonable suspicion". In our view, both tests present a very low threshold and it is questionable whether there is really any difference in substance between the two interpretations.

The Court of Appeal (at [25]) then ruled that:

> ... What is required is not a *prima facie* case, but a *prima facie* case of reasonable suspicion. If the latter can be shown, then it cannot be said that the application must necessarily fail, for there would then appear to be an "arguable case".

13 Counsel addressed me primarily on the issue of whether the material before me raised an arguable or a *prima facie* case of reasonable suspicion in favour of granting leave.

The relationship between O 53 and O 15 r 16

14 Pursuant to amendments to O 53 made in May 2011, a public law declaration may now be sought under O 53 r 1(1)(a). Previously, public law declarations had to be separately commenced under O 15 r 16.

15 In these proceedings, the AG's counsel took the position that while leave is not required for a declaration under O 15 r 16, O 53 does not permit the applicant to pray for a declaration until and unless she has first obtained the Court's leave to apply for a prerogative order, *i.e.*, the Mandatory Order.

16 Counsel for the applicant did not dispute the AG's counsel's position, but gave notice that if the court did not grant leave for the Mandatory Order application to be heard, he would immediately be filing an application under O 15 r 16 for the declarations sought here, for which no leave of court is required. In support he relied on V K Rajah J's observation (as he then was) in *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [20]:

> ... The court rules are designed essentially to facilitate workflow and not to impede legitimate legal grievances. They are the vassals and vessels and not the masters of substantive justice. ...

17 At the threshold, it would appear that declarations sought under O 53 are subject to the language of O 53 and require leave of court whilst declarations sought under O 15 r 16 do not require leave of court but are subject to the normal requirements including *locus standi* and a live dispute.

18 I have directed parties to prepare further submissions on the above issue at the substantive hearing.

The Mandatory Order

19 Counsel for the applicant argued that the court may issue a mandatory order to compel the Prime Minister to exercise his powers in accordance with the law. When a seat in Parliament has become vacant, Article 49(1) of the Constitution states that:

> … the vacancy shall be filled by election in the manner provided by or under any law relating to Parliamentary elections for the time being in force.

20 Counsel for the applicant argued, that the word "shall" suggests that it is mandatory for by-elections to be called. If so, he argued that the Prime Minister does not have a discretion as to whether to hold a by-election in Hougang SMC. Counsel for the applicant argued further that the

Prime Minister does not have an unfettered discretion as to the timing of the by-election. He submitted that even though there is no constitutional or statutory requirement to call by-elections within a specified time period, s 52 of the Interpretation Act (Cap 1, 2002 Rev Ed) suggests that elections should be called within a reasonable time.

21 The AG's counsel argued that the application for the Mandatory Order is misconceived in law and in fact for the following reasons:

(a) There is no executive decision that could properly be the subject of the prerogative order as the Prime Minister is presently exercising his discretion to decide when to call the by-election in Hougang SMC;

(b) It directs the Prime Minister on the particular way he is to exercise his discretion thus disregarding the discretion conferred on him by the Constitution to decide when to call the by election; and

(c) It usurps the power of the Prime Minister under the Constitution to decide, in his discretion when to call the by election in Hougang SMC and transgresses the doctrine of separation of powers.

22 The AG's counsel pointed out that on 9 March 2012 the Prime Minister had stated in Parliament that he intended to call a by-election and that he is considering the relevant factors in deciding when to call the by-election ("the Prime Minister's 9 March Statement").

23 In reply, counsel for the applicant pointed out that the Prime Minister's 9 March Statement only spoke of his intention to hold a by-election. Counsel for the applicant observed that that was very different from saying that he was compelled to hold one. In this regard, and citing the case of *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 967 at 1041, counsel for the applicant submitted that the Prime Minister, by stating that he had the power to decide "whether and when" to call an election, had "misinterpreted the law or proceeded on an erroneous view of the law". He conceded that the Prime Minister has a discretion as to the timing of a by-election and that the applicant is not seeking a specific date for the announcement of a by-election.

The Declarations

24 Counsel for the applicant submitted that public law declarations have "significant legal utility" in that they can conclusively settle the legal boundaries within which administrative determinations would have to proceed.

25 The AG's counsel submitted that the First and Second Declarations are entirely academic and theoretical in light of the Prime Minister's 9 March Statement. He argued that courts do not burden themselves by granting declarations which raise theoretical issues or which serve no useful purpose. In addition, if the court were to grant the Second Declaration, it would be substituting its discretion for that of the Prime Minister's.

26 Counsel for the applicant earlier informed the AG's counsel and the court that he would if necessary immediately apply under O 15 r 16 for the First and Second Declarations to be considered as standalone declarations for which the leave of court is not required. In light of this, the question of whether the quite separate requirements for standalone declarations have been met would have to be determined at a substantive hearing, which this O 53 leave hearing is not.

27 I asked counsel whether this court at this leave stage, is to examine each and every prayer of the OS and consider any severance process. Counsel did not make any submissions on this question. In any event, the applicant would have to establish her case for the First Declaration (whether under O 53 or O 15 r 16), quite apart from and before any consequential Second Declaration and the Mandatory Order are considered.

Conclusion

28 The applicant has filed this OS for leave to be heard in court for declarations and a mandatory order relating to the Prime Minister's powers with respect to elections and the filling of vacancies of seats of MPs under Arts. 12, 39(1) and 49(1) of the Constitution of the Republic of Singapore.

29 Based on what was presented and submitted to me for the purposes of the leave application, without making any comment or decision on the merits or the substantive legal issues, I granted leave for a judicial review hearing as I was of the view that the very low threshold for leave has been met.