IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 46

Civil Appeal No 20 of 2022

Between

Attorney-General

… *Appellant*

And

Datchinamurthy a/l Kataiah

… *Respondent*

In the matter of Originating Application No 67 of 2022

Between

Datchinamurthy a/l Kataiah

… *Applicant*

And

Attorney-General

… *Respondent*

GROUNDS OF DECISION

[Constitutional Law — Equal protection of the law]

[Constitutional Law — Fundamental liberties — Right to life and personal liberty]
[Constitutional Law — Judicial review]
[Criminal Procedure and Sentencing — Stay of execution]

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v
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28 April 2022

30 May 2022

Andrew Phang Boon Leong JCA (delivering the grounds of decision of the court):

Introduction

1 When a prisoner has been sentenced to the death penalty and is to be deprived of his life, he does not necessarily lose his other legal rights. Among other things, the exercise of discretion by the State in scheduling his execution is subject to legal limits, including the usual principles of judicial review and the fundamental liberties protected by the Constitution of the Republic of Singapore (2020 Rev Ed) (the "Constitution").

2 Mr Datchinamurthy a/l Kataiah (the "respondent") was convicted and sentenced in relation to a capital offence. Subsequently a date for his execution was fixed. This date fixed, however, was a date that fell prior to the hearing of a civil matter in which he was one of 13 plaintiffs. The question then was what

role due process ought to play in the circumstances and whether, by such scheduling, he was being subjected to unequal treatment when compared with other equally situated prisoners. The General Division of the High Court judge (the "Judge") found that there was a *prima facie* case of unequal treatment and allowed his application for leave to commence judicial review proceedings on that basis; she consequently ordered a stay of execution pending the resolution of the respondent's judicial review application. On appeal, we upheld her decision. We now provide our full grounds of decision.

Background

3 The respondent was tried and convicted on a capital offence of trafficking in not less than 44.96g of diamorphine, under s 5(1)(*a*) read with s 33 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed). As the respondent was not certified to have provided substantive assistance and in any event was not found by the trial judge to have been acting as a mere courier, he was sentenced to the mandatory death penalty on 15 April 2015 (see *Public Prosecutor v Christeen d/o Jayamany and another* [2015] SGHC 126 at [88]). His appeal against conviction and sentence was dismissed on 5 February 2016. On 3 February 2021, the respondent filed CA/CM 9/2021 ("CM 9"), seeking leave to make an application to review this court's dismissal of the said appeal, pursuant to s 394H(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"). CM 9 was summarily dismissed on 5 April 2021 (see *Datchinamurthy a/l Kataiah v Public Prosecutor* [2021] SGCA 30 ("*Datchinamurthy (CM)*") at [50]).

4 In addition to these criminal proceedings, the respondent filed civil applications in HC/OS 111/2020 ("OS 111") and HC/OS 181/2020 ("OS 181") on 28 January 2020 and 10 February 2020, respectively. In OS 111, the

respondent applied for a stay of execution of his death sentence, pending an investigation into allegations concerning the method of execution adopted by the Singapore Prison Service ("SPS"). In OS 181, the respondent applied for a declaration that a statement made by a Deputy Public Prosecutor at a pre-trial conference towards his lawyer violated his right to a fair trial. OS 111 and OS 181 were dismissed by the High Court on 13 February 2020. The respondent's appeals against the decisions in both cases were dismissed by this court on 13 August 2020 (see *Gobi a/l Avedian and another v Attorney-General and another appeal* [2020] 2 SLR 883 ("*Gobi a/l Avedian*")).

5 Prior to the substantive hearing of the appeals in *Gobi a/l Avedian*, the respondent wrote to the Registry of the Supreme Court to complain that the SPS had "illegal[ly] copied and forwarded" his and his co-appellant's correspondence with their lawyers and families to the Attorney-General's Chambers ("AGC"). In *Gobi a/l Avedian*, this court observed that there was no legal basis in the form of a positive legal right permitting the SPS to forward copies of the said correspondence to the AGC (see *Gobi a/l Avedian* at [90]). However, we accepted that the obtaining of these documents by the AGC was "an oversight and not an attempt to seek an advantage in the proceedings", and that AGC had conducted itself properly, by promptly destroying the copies upon being informed of the proper procedure it ought to adopt in relation to such correspondence (see *Gobi a/l Avedian* at [92]–[93]).

6 Subsequently, on 2 July 2021, the respondent was one of 13 plaintiffs in HC/OS 664/2021 ("OS 664"), in which leave to commence judicial review was sought under O 53 rr 1 and 7 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) (the "2014 Rules"). This was to apply for, *inter alia*, a declaration that the Attorney-General had acted *ultra vires* and therefore unlawfully in requesting

disclosure of their personal correspondence, and the SPS had acted *ultra vires* and unlawfully in disclosing the same; as well as damages and other relief for infringement of copyright and breach of confidence. On 28 October 2021, the day of the hearing of OS 664, counsel for the plaintiffs, Mr Ravi s/o Madasamy ("Mr Ravi"), indicated that they intended to withdraw OS 664, to pursue private law remedies outside the purview of OS 53 of the 2014 Rules. The General Division of the High Court judge granted leave to withdraw OS 664 and ordered that Mr Ravi bear costs personally. The judge found that there was no basis for Mr Ravi to have proceeded to make an application under O 53: there was "no genuine attempt by the plaintiffs" to seek prerogative relief in OS 664. Amongst other things, by that time, the legal position on the making of copies of such correspondence by the AGC was "settled" in light of the decision in *Gobi a/l Avedian*. Further, the AGC and the SPS had, in line with that decision, instituted safeguards concerning the said correspondence (see *Syed Suhail bin Syed Zin and others v Attorney-General* [2021] SGHC 270 ("*Syed Suhail (HC)*") at [25]–[29]). This also meant that leave under O 53 would never have been granted to the plaintiffs to seek any of the private law remedies for breach of confidence and infringement of copyright. Entitlement to do so would only have arisen following the grant of such a prerogative order or a declaration being made at the substantive judicial review hearing (see *Syed Suhail (HC)* at [33]). That being said, the plaintiffs remained entitled to assert their private law claims outside O 53, if they were of the view that these were viable (see *Syed Suhail (HC)* at [35]).

7 Further, on 1 October 2020, the respondent and various other prisoners who had been sentenced to the death penalty commenced HC/OS 975/2020 ("OS 975") against the Attorney-General and the Superintendent of Changi Prison (Institution A1). They sought pre-action discovery and leave to serve

pre-action interrogatories in relation to their claims concerning the unauthorised disclosure of their correspondence. OS 975 was dismissed by the judge in the General Division of the High Court on 16 March 2021, who held that the applicants were precluded from applying for pre-action disclosures against the Government, and that the pre-action disclosures sought were neither necessary nor relevant (see *Syed Suhail bin Syed Zin and others v Attorney-General and another* [2021] 4 SLR 698 at [38] and [60]).

8 On 25 February 2022, the same 13 plaintiffs in OS 664 (which included the respondent) filed HC/OS 188/2022 ("OS 188") under O 15 r 16 of the 2014 Rules, seeking substantially the same reliefs sought in OS 664. At the time of the present appeal, OS 188 remained pending before the court, having been fixed for hearing on 20 May 2022 at a pre-trial conference on 20 April 2022. It was also clear by 6 April 2022, when another pre-trial conference for OS 188 was held, that dates in May 2022 were being considered for the fixing of the hearing of OS 188.

9 Separately, the President's order for the respondent's execution under s 313(*f*) of the CPC was originally issued on 21 January 2020, and the Warrant of Execution under s 313(*g*) of the CPC was issued on 29 January 2020 for the death sentence to be carried out on 12 February 2020. However, an Order of Respite was issued by the President under s 313(*h*) of the CPC on 31 January 2020. On 12 April 2022, the President made a new order for the respondent to be executed on 29 April 2022. The decision to schedule the respondent for execution on that date was made just prior to that, on 11 or 12 April 2022. The Warrant of Execution was issued on 14 April 2022 and a letter from the SPS informing the respondent's mother of his upcoming execution was sent on 21 April 2022 (the "Notice").

The application

10 The respondent filed HC/OA 67/2022 ("OA 67") on 27 April 2022, seeking leave under O 53 r 1 of the 2014 Rules to commence judicial review proceedings against the Attorney-General in relation to the scheduling of his execution for 29 April 2022. He sought the following reliefs: (a) a declaration that the Notice was in breach of the respondent's rights under Arts 9(1) and 12(1) of the Constitution as OS 188 was pending; and (b) a prohibiting order or stay of execution of the respondent's sentence of death, pending the resolution of OS 188. It was contended that the "effect of the [d]eclaratory orders sought in OS 188" would render his conviction and sentence unlawful and in breach of his rights under Arts 9(1) and 12(1) of the Constitution.

The decision below

11 In an oral judgment delivered on 28 April 2022 (the "Judgment"), the Judge observed that OA 67 erroneously relied on O 53 r 1 of the 2014 Rules instead of O 24 r 5 of the Rules of Court 2021 (the "2021 Rules") (which came into force on 1 April 2022). However, the application substantively complied with the requirements of O 24 r 5(3) of the 2021 Rules in that an originating application, statement and supporting affidavit had been filed. The Judge observed that the respondent was acting in person and, pursuant to O 3 r 2(4) of the 2021 Rules, proceeded to deal with the substance of the application.

12 As stated by the Judge, the requirements for leave to commence judicial review proceedings are that: (a) the subject matter of the application is susceptible to judicial review; (b) the applicant has sufficient interest in the matter; and (c) the material before the court must disclose an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought by

the applicant (see the Judgment at [14], citing the decision of this court in *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 ("*Syed Suhail (CA)*") at [9]). As the appellant did not seriously dispute that the first two conditions were met, parties' arguments focused on the third requirement.

13 The Judge was of the view that Art 9(1) of the Constitution was not engaged, as OS 188 was unlikely to have a bearing on the propriety of the respondent's conviction or sentence (see the Judgment at [19] and [30]). On the other hand, she found that the respondent had shown a *prima facie* case of a breach of Art 12(1) of the Constitution. She observed that in *Syed Suhail (CA)* at [62], this court had held that to determine whether the scheduling of an applicant's execution was in breach of Art 12(1), the test was: (a) whether it resulted in the applicant being treated differently from other equally situated persons; and (b) whether this differential treatment was reasonable in that it was based on legitimate reasons (see the Judgment at [24]). Further, it was held in *Syed Suhail (CA)* at [64] that for the purposes of scheduling of executions, prisoners were "equally situated persons" once they had been denied clemency (see the Judgment at [27]). However, the premise of this was that there were "no further pending recourse or other relevant pending proceedings in which the prisoner's involvement was required" (see *Syed Suhail (CA)* at [67]). Where prisoners were involved in such pending proceedings requiring their involvement, they would not be regarded as being equally situated with other prisoners awaiting capital punishment who had been denied clemency (see the Judgment at [27]).

14 The Judge found that the respondent was to be regarded, on a *prima facie* basis, as being "equally situated" with prisoners who also had pending proceedings, namely, OS 188 (see the Judgment at [28]). She was of the view

that OS 188 was a relevant pending proceeding, being connected with the respondent's criminal proceedings, and was one in which the respondent's involvement was required (see the Judgment at [30]–[31]). In this connection, she observed that although the appellant's initial position was that "relevant" proceedings would be confined to proceedings that directly bore on the conviction and sentence of the prisoners, the appellant subsequently accepted that disposal or forfeiture proceedings following the convictions of accused persons would also be considered relevant proceedings (see the Judgment at [29]). She was of the view that the respondent's personal knowledge of the events would be important in OS 188, especially since specific references had been made therein to his correspondence and/or rights. Without the respondent's participation in those proceedings, his claim therein could be hampered in a manner that was "not dissimilar to an accused person's participation in disposal or forfeiture proceedings" (see the Judgment at [31]). As such, the decision to schedule the respondent for execution on 29 April 2022 had, *prima facie*, resulted in the respondent being treated differently from other equally situated persons, *ie*, the other 12 plaintiffs in OS 188. Although it could well be that this differential treatment was reasonable in that it was based on legitimate reasons, as a threshold matter for the purposes of the granting of leave, it appeared that the 13 plaintiffs in OS 188 should be treated alike, but that the respondent had been "singled out by the scheduling decision" (see the Judgment at [32]). As the Judge found that the respondent had shown a *prima facie* case of a breach of Art 12(1) of the Constitution, she granted permission to the respondent to commence judicial review proceedings, as well as a stay of execution pending the conclusion of OA 67.

The parties' arguments on appeal

15 Shortly after the Judge's delivery of the Judgment, the appellant filed a Notice of Appeal for Civil Appeal No 20 of 2022. This specified that it appealed "against the part of the decision of [the Judge] in [OA 67] … to grant leave in [OA 67] to commence judicial review proceedings against the Attorney-General". However, as we clarified with counsel for the appellant, Mr Yang Ziliang, the appeal was properly against the whole of the Judge's decision, given that her substantive reasoning on a *prima facie* breach of Art 12(1) of the Constitution was what resulted in the consequential grant of leave to the respondent to commence judicial review proceedings.

16 In essence, the appellant contended on appeal that OS 188 was not a relevant pending proceeding, since it would not affect the respondent's conviction and sentence. Nor had the respondent shown that his involvement in OS 188 was needed, or that his personal knowledge was important in those proceedings. It was argued that the affidavits filed in OS 188 and the preceding summonses including OS 664 were by solicitors for the plaintiffs, not the plaintiffs themselves. Furthermore, issues concerning the declarations sought by the plaintiffs in OS 188 had been resolved in earlier decisions, including OS 664 (noted at [6] above). Since there was therefore no relevant difference between prisoners awaiting capital punishment who were involved in OS 188 and those who were not, the scheduling of executions took place in line with the position on equal treatment stated in *Syed Suhail (CA)*, namely, that prisoners whose executions arose for scheduling would be executed "in the order in which they were sentenced to death" (see *Syed Suhail (CA)* at [72]).

17 In this appeal, the respondent did not elaborate on his submissions in OA 67. These were that, amongst other things, since he did not know what

would take place during the proceedings in OS 188, he could not know what his next course of action might be. For example, he could potentially file another related application or an appeal to this court, or even a complaint to the Law Society of Singapore, should the AGC be found to have been acting unlawfully as regards his correspondence. In relation to Art 9(1) of the Constitution, his contention therefore appeared to be one focused on a breach of natural justice: the civil matters of prisoners awaiting capital punishment could not be "inconsequential" in relation to them. In relation to Art 12(1), he disagreed with the appellant that OS 188 had no relevance to his criminal case, as the subject documents in OS 188 contained "details of the arguments" which he had prepared to make in court. He submitted that more arguments on the relevance of OS 188 would be canvassed at the hearing of the same.

Issues to be determined

18 The following issues therefore arose for our determination:

(a) Was there a *prima facie* case of reasonable suspicion that the scheduling of the execution of the respondent while OS 188 was pending was a breach of his rights under Art 9(1) of the Constitution (the "Art 9(1) ground")?

(b) Alternatively, was there a *prima facie* case of reasonable suspicion that the said scheduling was a breach of his rights under Art 12(1) of the Constitution (the "Art 12(1) ground")?

19 As a preliminary point, the law governing applications for leave to commence judicial review proceedings is well-established. The application is a means of filtering out groundless or hopeless cases at an early stage: it is not the duty of the court at this juncture to embark on a detailed and microscopic

analysis of the material before it. Instead it has to peruse the material quickly and appraise whether it discloses an arguable and *prima facie* case of reasonable suspicion (see, for example, the decisions of this court in *Re Nalpon, Zero Geraldo Mario* [2018] 2 SLR 1378 at [19] and *Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR(R) 133 at [20]–[22]).

20 The first and second requirements for leave to commence judicial review proceedings (as noted at [12] above) are not contentious and may be dealt with briefly. Whether a matter is susceptible to judicial review typically depends on the nature of the power being exercised, and it must also be queried whether there exists a decision for the court to review in the first place (see *Syed Suhail (CA)* at [26]). Here, the illegality complained of was the decision by the State to schedule the respondent's execution despite the fact that OS 188 was pending. Further, in *Syed Suhail (CA)*, this court accepted that a prohibiting order for a stay of the respondent's execution could in principle be obtained against the SPS, even if the illegality did not stem from an exercise of discretion by SPS itself (at [31]). As for the second requirement, sufficient interest would be *prima facie* made out where there was an alleged violation of a constitutional right (see the decisions of this court in *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [83] and *Gobi a/l Avedian* at [72]).

The Art 9(1) ground

21 Art 9(1) of the Constitution provides as follows:

> No person shall be deprived of his life or personal liberty save in accordance with law.

22 The scope of "life" in Art 9(1) protects against arbitrary execution or incarceration as well as the unlawful use of force against a person (see the decision of this court in *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129

("*Yong Vui Kong*") at [22]). The ambit of "personal liberty" therein similarly refers "only to the personal liberty of the person against unlawful incarceration or detention" (see the High Court decision of *Lo Pui Sang and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and other appeals* [2008] 4 SLR(R) 754 at [6] and the decision of this court in *Lim Meng Suang and another v Attorney-General and another appeal and another matter* [2015] 1 SLR 26 ("*Lim Meng Suang (CA)*") at [45]). Finally, the phrase "in accordance with law" in Art 9(1) connotes more than Parliament-sanctioned legislation, but incorporates "fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution" (see the Privy Council decision of *Ong Ah Chuan and another v Public Prosecutor* [1979–1980] SLR(R) 710 at [26] and the decision of this court in *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR(R) 103 at [82]). These refer to procedural rights aimed at securing a fair trial, and do not have anything to say about the punishment of criminals after they have been convicted pursuant to a fair trial (see *Yong Vui Kong* at [64]).

23 Further, the fundamental rules of natural justice include the hearing rule ("*audi alteram partem*") and the rule against bias ("*nemo iudex in sua causa*") (see the decision of this court in *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [88]). An essential aspect under the former is "that the person concerned should have a reasonable opportunity of presenting his case", and includes that he have a fair opportunity to correct or contradict the case and the allegations of the other party (see, for example, the English Court of Appeal decision of *Russell v Duke of Norfolk and Others* [1949] 1 All ER 109 at 118 and the High Court decision of *Stansfield Business International Pte Ltd v*

Minister for Manpower (formerly known as Minister for Labour [1999] 2 SLR(R) 866 ("*Stansfield*") at [26]).

24 In our view, the heart of the matter was whether an alleged lack of opportunity of the respondent to present his case in *OS 188* would have an impact on the lawfulness of his scheduled execution (pursuant to his conviction and sentence for a capital offence in 2015, which was upheld on appeal and undisturbed following the applications described at [3]–[7] above). That was the true premise for the respondent's present assertion that the declaratory relief sought in OS 188 would, if granted, render his conviction and sentence unlawful. Ascertaining this required a closer analysis of the subject matter engaged in OS 188 and what was alleged therein, which we turn to next.

Proceedings in OS 188

25 As mentioned above, the respondent was one of 13 applicants in OS 188. In that action, the respondent sought, *inter alia*, a declaration that the Attorney-General had acted *ultra vires* in requesting and disclosing correspondence belonging to him; and a declaration that the Attorney-General committed a breach of confidence by disclosing: (a) letters dated 24 May 2017 and 6 June 2017 between the respondent and his then-counsel, Mr Thangavelu; and (b) a letter dated 3 May 2018 from M/s Daim & Gamany to the respondent. It was alleged that one of the former letters contained "detailed instructions to his counsel about reopening his appeal on a ground relating to his mental state that had not been raised in argument previously".

26 We noted, however, that the aforementioned letters *predated* the respondent's previous application in CM 9 for leave to review this court's dismissal of his appeal against conviction and sentence which was, as

mentioned above, filed on 3 February 2021. At the same time, the position taken by the respondent in CM 9 (for reasons best known to himself) was *not* premised on his mental state at the material time. Rather, the respondent, who was represented by Mr Ravi, the same counsel who acted for him in OS 188 (as well as in earlier related proceedings), had taken the position that following this court's decision in *Gobi a/l Avedian v Public Prosecutor* [2021] 1 SLR 180, the Prosecution and trial judge had erred in conflating actual knowledge and wilful blindness (see the decision of this court in *Datchinamurthy (CM)* at [9]). Yet, s 394K(1) of the Criminal Procedure Code 2010 (2020 Rev Ed) provides that an applicant cannot make more than one review application in respect of any decision of an appellate court, including more than one leave application (see the General Division of the High Court decision of *Mohammad Yusof bin Jantan v Public Prosecutor* [2021] 5 SLR 927 at [13] and the recent decision of this court in *Panchalai a/p Supermaniam and another v Public Prosecutor* [2022] SGCA 37 at [28]). The respondent must therefore be taken to have exhausted his rights of appeal and review of his conviction and sentence *with the awareness of matters raised in his correspondence that was the subject of OS 188*.

27 It followed that any lack of opportunity of the respondent to present his case in OS 188 did not suffice to make out a *prima facie* case of reasonable suspicion that the scheduled execution breached Art 9(1) of the Constitution. Although there could be certain questions raised as to the propriety of scheduling the execution despite the pendency of OS 188, as will be subsequently addressed in the analysis on Art 12(1), that did not fall within the ambit of what is protected by Art 9(1). As stated above, the fundamental rules of natural justice have "nothing to say about the punishment of criminals after they have been convicted pursuant to a fair trial" (see *Yong Vui Kong* at [64]).

In this connection, there was nothing to suggest any lack of fairness in the proceedings relating to the respondent's conviction and sentence in the High Court, on appeal, and in his subsequent applications thereto. The Judge was therefore correct in finding that Art 9(1) was inapplicable (see the Judgment at [19]).

The Art 12(1) ground

28 We turn to Art 12(1) of the Constitution, in relation to which the Judge found that the respondent had shown a *prima facie* case of a breach. Art 12(1) provides as follows:

> All persons are equal before the law and entitled to the equal protection of the law.

29 The concept of equality under Art 12(1) does not mean that all persons are to be treated equally, but simply that "all persons in like situations will be treated alike" (see the decision of this court in *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [54]). As this court held in *Syed Suhail (CA)*, in assessing whether an executive action has breached Art 12(1), the proper test is that: (a) the applicant must first discharge his evidential burden of showing that he has been treated differently from other equally situated persons; (b) the evidential burden then shifts to the decision-maker in question to show that the differential treatment was reasonable, in that it was based on legitimate reasons which made the differential treatment proper (at [61]–[62]). Further, having regard to the nature of the executive action in question, *ie*, one which had been taken on an individual basis and which affected the respondent's life and liberty to the gravest degree, the court would be searching in its scrutiny (see *Syed Suhail (CA)* at [63] and the decision of this court in *Tan Seng Kee v Attorney-General and other appeals* [2022] SGCA 16 ("*Tan Seng Kee*") at [327]). We

held that prisoners awaiting capital punishment might *prima facie* be regarded as being equally situated once they have been denied clemency, although we recognised that prisoners for whom there were pending *recourse* or *other relevant pending proceedings in which their involvement was required* would *not* be equally situated compared to other prisoners awaiting capital punishment (see *Syed Suhail (CA)* at [64] and [67]; as applied by the General Division of the High Court in *Syed Suhail bin Syed Zin v Attorney-General* [2021] 5 SLR 452 at [35]–[43]). Where that was the case, we were of the view that it would be "inappropriate" to proceed with the scheduling of the execution of a prisoner, as the Ministry of Home Affairs ("MHA") had also recognised (*Syed Suhail (CA)* at [18(b)] and [67]). We therefore accepted that the fact that such proceedings were ongoing for certain prisoners would place them in a different position in relation to other prisoners who were not involved in the same or other relevant proceedings.

30 It is apposite to clarify, at this juncture, that in ascertaining whether persons are equally situated, the court is to have regard to the nature of the executive action in question (see *Syed Suhail (CA)* at [63] and *Tan Seng Kee* at [327]) and consider whether, in that context, the persons being compared are so situated that it is reasonable to consider that they should be similarly treated. Put another way, the test is a factual one of whether a prudent person would objectively think the persons concerned are roughly equivalent or similarly situated in all material respects (see the United States Court of Appeals decisions in *Barrington Cove Limited Partnership v Rhode Island Housing & Mortgage Finance Corporation* 246 F 3d 1 (1st Cir, 2001) at 18 and *Superior Communications v City of Riverview, Michigan* 881 F 3d 432 (6th Cir, 2018) at 446, respectively, both in relation to allegedly unequal governmental treatment as between "similarly situated" entities). Here, the notion of being

equally situated is "an analytical tool used to isolate the purported rationale for differential treatment, so that its legitimacy may then be assessed properly"; the first limb of the test in *Syed Suhail (CA)* being intended to identify the "purported criterion for the differential treatment in question" (see *Syed Suhail (CA)* at [62] and *Tan Seng Kee* at [314] and [318]). The subsequent question, under the second limb of the test, would then be whether the differential treatment was reasonable (see *Syed Suhail (CA)* at [61] and *Tan Seng Kee* at [318]).

31 We agreed with the Judge that in the present case, the respondent was to be regarded as equally situated with prisoners awaiting capital punishment who had been denied clemency and who also had pending proceedings, namely, the other 12 plaintiffs involved in OS 188 (see the Judgment at [28]). The question then was whether, on a *prima facie* basis, OS 188 could be said to be a relevant pending proceeding in which the respondent's involvement was required. Where there were such relevant pending proceedings, it would be, as we had stated in *Syed Suhail (CA)*, "inappropriate to proceed with the scheduling of the execution of a prisoner" (at [67]). We had observed of an affidavit filed by the Attorney-General, which was sworn by a senior director at the MHA, with the Minister's authorisation ("MHA's affidavit") (see *Syed Suhail (CA)* at [18]):

> MHA's affidavit stated that there were two prerequisites that had to be met before it would commence scheduling an execution: first, the death sentence must have been upheld by the Court of Appeal, and second, the Cabinet must have advised the President not to grant clemency. After these prerequisites were met, MHA would have regard to the following non-exhaustive list of what it referred to as "supervening factors based on policy considerations" in scheduling the execution …:
>
> > (a) the date of the pronouncement of the death sentence;
> >
> > (b) *the determination of any other court proceedings affecting the prisoner or requiring his involvement;*

> (c) the policy that co-offenders sentenced to death will be executed on the same day;
>
> (d) whether the prisoner has previously been scheduled to be executed; and
>
> (e) the availability of judges to hear any application by the prisoner to the courts before the intended date of execution.

[emphasis added]

32 Further, in respect of the determination of "any other court proceedings affecting the prisoner or requiring his involvement", MHA's affidavit had provided that these would be apart from any appeals relating to his conviction and sentence of death, but contemplated:

> … whether or not the offender is a litigant (e.g. confiscation proceedings under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed), forfeiture proceedings under the Misuse of Drugs Act (Cap 185, 2008 Rev Ed), or proceedings in which the offender's testimony may be required).

33 Before us, the appellant argued that there were two groups of relevant proceedings, and that OS 188 fell into neither group. The first group involved proceedings which had an impact on the conviction and sentence of an accused person. The second group involved disposal, forfeiture or other proceedings in which his testimony was required. In respect of the former, the appellant argued that, among other things, the respondent had not challenged the assertion on affidavit by Deputy Attorney-General Hri Kumar Nair in OS 975 that the appellant did not use the correspondence disclosed, or gain any advantage from them in any legal proceedings involving the respondent. It was argued that the respondent could not explain how the contents of any of his letters which were disclosed to the appellant could have been used to prejudice his defence or how the reliefs sought in OS 188, if granted, would entitle him to file proceedings to challenge his conviction or sentence. Further, the available details of those

letters showed that they had no bearing on his conviction or sentence, none of them having been sent or received during the time of his trial or appeal. In respect of the second group, the appellant argued that the respondent was unable to show why his involvement was needed or his personal knowledge was important in OS 188, as noted above (at [16]). It submitted that OS 188 was not akin to disposal or forfeiture proceedings, and the scope of what constituted relevant proceedings should not be overly wide.

34 In our judgment, these assertions of a lack of relevance of OS 188 by the appellant were in substance an attempt to have this court try OS 188 without the benefit of a proper trial. Yet, while we found that the respondent could not make out a *prima facie* case of reasonable suspicion that OS 188 would impugn the validity of his conviction and sentence in relation to Art 9(1) (see [26]–[27] above), it was not possible to conclusively determine, in the absence of a hearing of OS 188, that there *could not* be a *prima facie* case of reasonable suspicion in relation to Art 12(1).

35 Further, as mentioned above (at [33]), the appellant had agreed, before us and in the proceedings below, that disposal or forfeiture proceedings would be a "relevant" outstanding proceeding (see the Judgment at [29]). It could be argued that such proceedings stood on the same footing as the proceedings concerning correspondence that was the subject of OS 188, inasmuch as the outcome of either would (arguably at least) have no bearing on the conviction and sentence imposed on the respondent. Moreover, the dispute in OS 188 had arisen from the unauthorised disclosure by the SPS to the AGC of private correspondence belonging to, amongst others, the respondent. As far as he was concerned, that correspondence had been generated in the course of his criminal proceedings. OS 188 could therefore be said to be connected to those

proceedings, as the Judge had recognised (see the Judgment at [30] and *Gobi a/l Avedian* at [84]–[93]). And while disposal or forfeiture proceedings might more clearly require the involvement of an accused person given that they could involve property claimed by him, it did not necessarily follow, as a matter of logic, that OS 188 as another type of proceeding would not require the involvement of the respondent.

36 Additionally, as stated by the High Court in *Stansfield*, the rules of natural justice represent (at [26]; which this court endorsed in *Leiman, Ricardo and another v Noble Resources Ltd and another* [2020] 2 SLR 386 at [123]):

> … what the ordinary man expects and accepts as fair procedure for the resolution of conflicts and disputes by a decision making body that affects his interest. The ordinary man will feel that he has not been fairly heard if he has not been allowed a reasonable opportunity to present his case. He will equally feel that he has not been fairly heard if he has not been fully informed of what his opponent has to say or if he has not been given an opportunity to answer it or correct it. …

In this regard, we agreed with the Judge who had observed (see the Judgment at [31]) that the respondent's involvement in OS 188 would be required inasmuch as "the [respondent's] personal knowledge of the events would be important, especially since specific references have been made to the [respondent's correspondence] and/or rights" and that "[without] the [respondent's] participation, his claim in OS 188 (whatever the merits) *may* be hampered, in a manner that is not dissimilar to an accused person's participation in disposal or forfeiture proceedings" [emphasis in original].

37 We also rejected the appellant's argument that since issues concerning the declarations sought in OS 188 were resolved in earlier proceedings such as OS 664, the respondent's involvement in OS 188 was not required. Notably, OS 188 had a different basis from OS 664, which was withdrawn before there

could be a hearing on the merits. OS 188 was a civil claim for damages, whereas OS 664 was an application for leave to commence judicial review. Indeed, the General Division of the High Court judge in OS 664 had expressly mentioned that the plaintiffs in that case remained entitled to assert their private law claims outside O 53 of the 2014 Rules (see *Syed Suhail (HC)* at [35]). At the same time, it was also not possible to know, at present, whether arguments made on behalf of the other plaintiffs in OS 188 could affect the outcome for the respondent in that suit, and *vice versa*.

38 In our view, it could not, even taking the appellant's case at its highest (*ie*, that the "relevance" of a pending proceeding requires that it has a bearing on the conviction and sentence imposed on the respondent), be said that in the present case, the correspondence that was the subject of OS 188 was completely *irrelevant* to the respondent's conviction and sentence of death (see [35] above). The court could not speculate on what evidence would be adduced in respect of OS 188, and the effect that that evidence might have on the respondent's arguments in respect of an alleged breach of Art 12(1). In this regard, it was clear that the respondent would *not* have a reasonable opportunity to present his case in OS 188 if the scheduled execution was proceeded with. The determination of the respondent's claim in OS 188 (as described at [25] above) could well require further evidence from him, and such evidence could have a bearing (as just mentioned) on his argument in relation to Art 12(1).

39 In sum, we considered that the respondent could establish a *prima facie* case that OS 188 was a relevant pending proceeding in which his involvement was required. Further, based on the evidence before the Judge, the other 12 plaintiffs in OS 188 had not yet been scheduled for execution, and certainly not for 29 April 2022 (see the Judgment at [21]). This then shifted the evidential

burden to the appellant to provide justification for treating him differently (see *Syed Suhail (CA)* at [61]). It did not appear that there was such justification in the circumstances, the appellant having mainly proceeded on the basis that OS 188 was not a relevant proceeding. Thus, in our judgment, the Judge did not err in her observation that although it could be that the differential treatment was reasonable in that it was based on legitimate reasons, it appeared at the present stage that the respondent had been "singled out" by the decision to schedule him for execution on 29 April 2022 (see the Judgment at [32]). She was accordingly justified in finding that the respondent had established a *prima facie* breach of Art 12(1) of the Constitution.

40 All this is ***not*** to say, however, that where a prisoner awaiting capital punishment has a pending legal proceeding, the decision to schedule him for execution would *automatically* attract the protection of Art 12(1) (and consequently, a stay of execution) on that basis. In the absence of the proceeding being "relevant", having regard to the nature of the executive action – *ie*, the due scheduling of a prisoner's execution following his conviction for a capital offence – a prisoner with a pending proceeding would be equally situated with other prisoners without such proceedings. Put another way, the fact that a prisoner awaiting capital punishment has a pending (albeit not relevant) proceeding but was nevertheless scheduled for execution is not differential treatment which requires justification (see *Syed Suhail (CA)* at [61]). In relation to such prisoners awaiting capital punishment, the position would be as we had held in *Syed Suhail (CA)*: they might *prima facie* be regarded as being equally situated once they had been denied clemency, and equal treatment entailed that prisoners whose executions arose for scheduling should be executed in the order in which they were sentenced to death (see *Syed Suhail (CA)* at [64] and [72]). As we had acknowledged in *Lim Meng Suang (CA)*, while it is theoretically

desirable to achieve equality, that normative ideal faces the factual reality that inequality is "an inevitable part of daily life"; and the question really is one of ascertaining the situations in which such a level of equality should be *legally* mandated (at [61]). In the context, then, of the present inquiry, it should be borne in mind that every application is fact-centric, and whether a prisoner has a relevant pending proceeding would ultimately depend on the precise facts and circumstances concerned.

41 We make a final point. In the present case, it was significant that OS 188 appeared to be a proceeding brought in good faith, that was filed without notice of the date of the scheduled execution, and which was ongoing (a point that was also noted by the Judge in the Judgment at [33]). We emphasise the rather unusual context of the present appeal: OS 188 arose out of this court's observations in *Gobi a/l Avedian* concerning the unauthorised disclosure of prisoner's correspondence to the AGC, which has since been addressed via safeguards adopted by the AGC and SPS. This was therefore a state of affairs that was unlikely to recur. Conversely, in our view, most pending proceedings found to be relevant would be disposal or forfeiture proceedings, as contemplated by MHA's affidavit in *Syed Suhail (CA)*. At the same time, actions brought at an eleventh hour and without merit in fact and/or law could lead to the inference that they were filed not with a genuine intention to seek relief, but as a "stopgap" measure to delay the carrying out of a sentence imposed on an offender (see the decision of this court in *Nagaenthran a/l K Dharmalingam v Attorney-General and another matter* [2022] SGCA 26 at [65]). Suffice it to state that such actions (which was not the situation here) would *not* provide any basis for a stay of execution, and would be dealt with accordingly as an abuse of process.

Conclusion

42 For the reasons given above, we affirmed the Judge's decision and dismissed the appeal.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Belinda Ang Saw Ean
Judge of the Appellate Division

Yang Ziliang and Pavithra Ramkumar (Attorney-General's Chambers) for the appellant;
The respondent in person.