Yong Vui Kong *v* Attorney-General
[2010] SGHC 235

Case Number : Originating Summons No 740 of 2010

Decision Date : 13 August 2010

Tribunal/Court : High Court

Coram : Steven Chong J

Counsel Name(s) : M Ravi (L F Violet Netto) for the plaintiff; David Chong SC, Shawn Ho Hsi Ming and Tan Shin Yi (Attorney-General's Chambers) for the defendant.

Parties : Yong Vui Kong — Attorney-General

Constitutional Law

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 144 of 2010 was dismissed by the Court of Appeal on 4 April 2011. See [2011] SGCA 9.]

13 August 2010 Judgment reserved.

Steven Chong J:

Introduction

1 This is an application by way of an *ex parte* originating summons pursuant to O 53 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC") for leave to seek, in essence, a permanent stay of execution on the death sentence passed on the applicant, Mr Yong Vui Kong ("Yong"), because of alleged flaws in the clemency process provided for by Article 22P of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) (the "Constitution"). This application raises issues of public importance that hitherto have not been the subject of any earlier judicial pronouncement in Singapore. Specifically, it raises the issue of whether the clemency process is subject to judicial review. The examination of this issue would entail a comparative review of the jurisprudence on this subject in several Commonwealth jurisdictions including England, the birthplace of the "*high prerogative of mercy*".

Background

The procedural history

2 This application is the latest legal challenge mounted by Mr M Ravi, Yong's present counsel, ("Mr Ravi"), on behalf of Yong. It is therefore useful to set out the procedural history for context before going into the merits.

3 Yong was convicted of trafficking in 47.27g of diamorphine under s 5(1)(*a*) of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) and sentenced to death by the High Court on 14 November 2008 (see *PP v Yong Vui Kong* [2009] SGHC 4). Yong filed a notice of appeal against both conviction and sentence on 27 November 2008 but subsequently had a change of heart, and after notifying the Court of Appeal through his assigned counsel, Mr Kelvin Lim, of his intention to withdraw his appeal on 23 April 2009, he proceeded to do so at the hearing itself on 29 April 2009.

4 After he withdrew his appeal, Yong petitioned the President for clemency on 11 August 2009 ("the First Petition"). It was around that time that Yong, through his brother, instructed Mr Ravi to take over conduct of his case. Yong's petition for clemency was rejected by the President on 20 November 2009, and with apparently only four days remaining before the sentence of death was to be carried out, Mr Ravi filed a criminal motion on 30 November 2009 to seek leave to appeal to the Court of Appeal, notwithstanding Yong's earlier withdrawal. The criminal motion was fixed before a High Court judge, who granted an interim stay of execution and adjourned the matter to be heard by the Court of Appeal. In the meantime, the Attorney-General advised the President to grant a temporary respite against the carrying out of the death sentence on Yong pursuant to s 220(f)(*ii*) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed), and such order was issued on 3 December 2009. After hearing submissions on 8 December 2009, the Court of Appeal granted Yong leave to appeal against his sentence and a stay of execution.

5 The appeal was then heard by the Court of Appeal on 15 March 2010. The crucial issue that was argued was whether the mandatory death penalty imposed by the Misuse of Drugs Act was *ultra vires* the Constitution. In the course of his submissions, Mr Ravi referred, peripherally, to the President's power to grant clemency under Article 22P of the Constitution ("Article 22P"), and in response, the then Attorney-General, Mr Walter Woon SC, submitted that the President's power to grant clemency has to be exercised in accordance with the advice of the Cabinet, and the President has no discretion in the matter.

6 The Court of Appeal delivered its judgment on 14 May 2010 and, in dismissing Yong's appeal, held that the mandatory death penalty was not unconstitutional. The Court of Appeal also noted that it was unnecessary "to consider Mr Ravi's submission as to the effect which the President's power to grant clemency under [Article 22P] has on the constitutionality of the [mandatory death penalty]" (see *Yong Vui Kong v PP* [2010] SGCA 20 at [121]).

The statements made by the Minister

7 On 9 May 2010, some days before the Court of Appeal delivered its judgment, local newspapers carried reports quoting Mr K Shanmugam, the Minister of Law and the Second Minister for Home Affairs ("the Minister") as making the following two statements (collectively "the Minister's Statement") in response to a question at a community dialogue session as to whether the Government's policy on the death penalty for drug offences would change in the future as a result of Yong's case. The first statement is:

> Yong Vui Kong is young. But if we say 'We let you go', what is the signal we are sending?

The second statement is:

> We are sending a signal to all the drug barons out there: Just make sure you choose a victim who is young, or a mother of a young child, and use them as the people to carry the drugs into Singapore.

Mr Ravi was later quoted in the media as saying his client's fate had been "poisoned by biasedness (*sic*)" as a result of the Minister's Statement. Before me it was accepted that, for present purposes, the Minister's words were accurately reported.

8 In response, the Ministry of Law issued a press release on 9 July 2010 to explain that the Minister was not commenting on any issue that was being considered by the Court of Appeal and that he was merely commenting on the Government's legislative policy and whether that policy will change,

and the extent to which youthfulness or other personal factors are relevant in the formulation of Government policy to tackle the drug menace.

The issues arising out of the present application

9 Against this background, this application was brought on 21 July 2010. As required by O 53 r 1(3), the application for leave was served on the Attorney-General, who was represented at the hearing by Mr David Chong SC. Yong is seeking leave to claim the following reliefs:

(a) A declaration that under Art 22P of the Constitution, it is the elected President and not his advisors who has the discretion to decide whether to grant Yong's petition for clemency.

(b) A prohibitive order enjoining the elected President from abdicating his authority under Art 22P of the Constitution to the Cabinet.

(c) An order enjoining the elected President from fettering his discretion to grant or refuse Yong's petition for clemency.

(d) A prohibitive order enjoining the Director of Prisons from executing Yong and granting Yong an indefinite stay of execution.

(e) An order that Yong be entitled to be pardoned or is alternatively entitled not to be deprived of his life because the conduct of the Minister has irreversibly tainted the clemency process with apparent bias.

(f) An order that the Cabinet is disqualified from taking further part in the clemency process.

(g) An order that Yong is entitled not to be deprived of his life on account of being deprived of the possibility of a fair determination of the clemency process;

(h) An order that Yong is entitled to see all the materials that will be before the Cabinet on his clemency petition including, and in particular, the trial Judge's report, the Chief Justice's report or other reports of the Appellate Court and the Attorney-General's opinion, so as to afford him an opportunity to make written representations before any decision is reached.

(i) An order that Yong is entitled not to be deprived of his life on account of having suffered grave injustice as a result of the actions of the President and the Cabinet.

10 The above reliefs can be classified into three categories, with the reliefs under each category sharing a common legal premise:

(a) Reliefs (a) to (d) premise that the power to grant pardons under Article 22P is justiciable, and that the discretion to grant pardons resides with the President and not the Cabinet.

(b) Reliefs (e) to (i), save for relief (h), premise that the power to grant pardons under Article 22P is justiciable, and specifically is subject to judicial review on the ground of apparent bias, which, I should stress, is the only substantive ground of review put forth by Mr Ravi.

(c) Relief (h) stands alone, and premises that Yong has a right to see the materials before the Cabinet or the President, either as an independent right, or as a corollary of a wider right to make representations to the Cabinet or the President in considering whether or not to exercise the power in Article 22P. I should stress that Yong is applying to see the materials on the basis that

this is a *substantive right by itself*. He is not asking for *discovery of evidence* in pursuit of some other substantive right.

In addition to the substantive questions raised by these premises, there are also two preliminary issues, *viz*:

(i) the standard applicable to deciding whether or not leave should be granted; and

(ii) whether declaratory relief is available under O 53.

11 In resisting the application for leave, the overarching argument raised by Mr Chong was that the entire clemency process was not subject to judicial review and therefore the application must fail *in limine*.

12 I will address each preliminary and substantive point in turn. I should say that there was absolutely no doubt that Yong, on whom the sentence of death has been imposed, had the requisite standing and interest to bring this application. This was, quite rightly, not disputed by Mr Chong at the hearing.

13 Before me, it was common ground that the Prison authorities had given Yong until 26 August 2010 to file his fresh petition for clemency. At the end of the hearing, I asked Mr Ravi if there were any considerations of time I should take into account. Mr Ravi quite sensibly took the position that even if I were unable to come to a decision by 26 August 2010, he is likely to advise Yong to file the petition by 26 August 2010 so as to preserve his position. I have therefore prepared this judgment rather urgently, in order that the parties could decide on the next step with all options remaining open.

Threshold test for leave

14 I first consider the appropriate standard by which I should scrutinise the merits of this application. Mr Ravi argued that for leave to be granted under O 53, it was sufficient for him to show that he has an arguable case for the various reliefs sought in the present application. Relying on *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294 ("*Colin Chan*"), Mr Ravi submitted that the court, at the leave stage, should only conduct a quick perusal of the materials to determine whether it discloses an arguable case for granting the reliefs claimed. Mr Ravi's submission was based on his understanding of the decision in *Colin Chan* which affirmed the test adopted in *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 643–644 ("*IRC*"):

> The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be *defeated if the court were to go into the matter in any depth at* that stage. *If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief*.
>
> [emphasis added]

15 On the strength of this passage, Mr Ravi submitted that it would not be appropriate at the

leave stage to conduct a detailed examination of the merits of the legal points raised. I disagree. It is clear from the very passage in *IRC* relied on by Mr Ravi that "the quick perusal" qualifies the materials, *ie* the evidence before the court. I would agree with Mr Ravi that at the leave stage, it would be inappropriate for the court to assess the weight or admissibility of the evidence in order to determine whether leave should or should not be granted. Assessing the weight of the evidence would require more than just a "quick perusal". In *IRC*, the House of Lords observed that the discretion to be exercised at the leave stage is different from that to be exercised at the substantive hearing "*when all the evidence is in*".

16 However, in the present application, Mr Chong has confirmed that the Attorney-General would not be filing any affidavits in response and is content to resist the application solely on the basis of the affidavit filed by Mr Ravi on behalf of Yong. As such, all the evidence is already in and there is no dispute of fact. Before me are pure questions of law which have been fully and indeed ably argued, and in the circumstances it makes no sense whatsoever for a bifurcated process where I "quickly peruse" the merits in order to decide whether to grant leave, while leaving a more detailed consideration to be made by another judge if I do decide to grant leave. Everything can and should be decided at one hearing.

17 I find support for such an approach in the judgment of the Court of Appeal in *Pang Chen Suan v Commissioner for Labour* [2008] 3 SLR(R) 648. The Court of Appeal's decision is instructive as to the proper approach to be adopted for such *ex parte* applications. It observed (at [56]) that in suitable cases, *ex parte* applications for leave should be heard *inter partes* and disposed of on the merits as a substantive application.

> We should like to add by way of guidance to judges who hear *ex parte* applications for leave for judicial review that the purpose of requiring leave is to enable the court to sieve out frivolous applications. *A case such as the present which clearly raises issues which require more than a cursory examination of the merits should have been heard as a substantive application. There is no reason why an ex parte application such as Pang's could not have been heard inter partes and disposed of on the merits as a substantive application*.
>
> [emphasis added]

In that case, the Court of Appeal was concerned with legal issues which required more than a cursory examination of the merits. It considered the issues on the substantive merits and granted leave. In fact, it went on to observe (at [56]) that the Commissioner should not resist the application since on the merits it was bound to fail:

> [G]iven our conclusions on the substantive issues in this case, we indicated to State Counsel that he should advise the Commissioner that Pang's claim for workmen's compensation should be processed immediately without the necessity of another court hearing, at which the Commissioner was bound to fail.

18 Similarly, in the High Court decision of *Chai Chwan v Singapore Medical Council* [2009] SGHC 115, Belinda Ang J examined the substantive arguments at the leave stage and concluded that as the applicant had no arguable case, leave was refused since, even on judicial review, he would ultimately fail on the merits. She observed (at [31]):

> I have to say that after the court has heard full arguments and seen information from both sides it is hard to see what else "might on further consideration turn out to be an arguable case."

19 For the reasons which I have just mentioned, I am of the view that this is a case where I should fully consider the points of law raised and dispose of them on the merits.

Whether declaratory relief is available under O 53

20 As another preliminary point, I agree with Mr Chong's submission that the court has no jurisdiction to grant declaratory relief in an application, such as the present one, made under O 53. Declaratory relief can only be obtained by way of ordinary action, *ie* writ or originating summons. See *Re Application by Dow Jones (Asia) Inc* [1987] SLR(R) 627 at [14]; *Colin Chan* at [5]–[6]; *Yip Kok Seng v Traditional Chinese Medicine Practitioners Board* [2010] SGHC 226 at [16]. Yong's prayers for declaratory relief can therefore be dismissed on this ground alone. However, given the gravity of the issues raised, I hesitate to rest my decision purely on procedural considerations, and would go on to consider the merits.

Whether the clemency process is justiciable

21 This, to my mind, is the pivotal issue. If this issue is decided against Yong, his application cannot succeed. The clemency process in Singapore is set out in Article 22P:

> **Grant of pardon, etc**.
>
> 22P. —(1) The President, as occasion shall arise, may, on the advice of the Cabinet —
>
> (a) grant a pardon to any accomplice in any offence who gives information which leads to the conviction of the principal offender or any one of the principal offenders, if more than one;
>
> (b) grant to any offender convicted of any offence in any court in Singapore, a pardon, free or subject to lawful conditions, or any reprieve or respite, either indefinite or for such period as the President may think fit, of the execution of any sentence pronounced on such offender; or
>
> (c) remit the whole or any part of such sentence or of any penalty or forfeiture imposed by law.
>
> (2) Where any offender has been condemned to death by the sentence of any court and in the event of an appeal such sentence has been confirmed by the appellate court, the President shall cause the reports which are made to him by the Judge who tried the case and the Chief Justice or other presiding Judge of the appellate court to be forwarded to the Attorney-General with instructions that, after the Attorney-General has given his opinion thereon, the reports shall be sent, together with the Attorney-General's opinion, to the Cabinet so that the Cabinet may advise the President on the exercise of the power conferred on him by clause (1).

22 However, Article 22P itself does not provide whether the clemency process is subject to judicial review. Therefore, in deciding this issue, it would be helpful to examine the legal position adopted by other Commonwealth jurisdictions which have some form of what originated in England as the prerogative of mercy. This I now do, beginning with England, the birthplace of the prerogative. As a stylistic point, I should note that the cases refer to the prerogative of mercy, the clemency process, and the power to grant pardons interchangeably, and in referring to them I will follow the particular terminology adopted. However, this makes no difference to my substantive analysis and I will treat them to mean the same thing.

England

23 Historically, the prerogative of mercy was one of the prerogative powers of the Crown. Nearly 200 years ago, the prerogative of mercy was described by Joseph Chitty as a power that was exercised *personally* by the Crown because criminal liability was, at that time, grounded upon the idea that the commission of an offence was a violation of the Crown's peace (*A Treatise on the Law of the Prerogatives of the Crown: and the Relative Duties and Rights of the Subject* (Joseph Butterworth and Son, 1820) at 89):

> The King is, in legal contemplation, injured by the commission of public offences; his peace is said to be violated thereby, and the right to pardon cannot be vested more properly than in the Sovereign, who is, from his situation, more likely than any other person to exercise it with impartiality, and to whom good policy requires that the people should look, with submissive respect, as the head of the nation, and supreme guardian of the laws...

24 This was noted in *R v Home Secretary, ex p Bentley* [1994] QB 349 ("*Bentley*") by Watkins LJ, who added (at 357) that the prerogative of mercy functioned to ameliorate the harshness of the law during the Middle Ages:

> The exercise of mercy by the Crown appears to have become firmly established in the middle ages, with the infringement of the King's peace emerging as the basis for criminal liability. Since major felonies were invariably capital, and pleas to self-defence had not developed, judicial procedure produced inflexible and unsatisfactory results. Use of the prerogative relieved those results.

25 It is therefore necessary to note two points:

(a) because the prerogative of mercy was originally exercised by the Crown in a personal capacity, it fell outside the courts' supervisory jurisdiction; and

(b) the prerogative of mercy was, for a period of time, as much a part of the criminal justice system as was the (then relatively undeveloped) legal system which produced the convictions, many of which resulted in capital punishment.

However, as Watkins LJ also notes (at 358), the English legal system has since matured, with more recourses to appellate courts in criminal cases, and accordingly, the significance of the prerogative has been greatly reduced.

26 Another important development was England's constitutional evolution from an absolute monarchy to a parliamentary democracy, which gave rise to the constitutional convention that the prerogative powers would be exercised by the Crown in accordance with the advice of its ministers, rather than as a matter of personal discretion.

27 Despite the fact that the prerogative powers were no longer personal to the Crown, the English courts remained reluctant to interfere with the prerogative of mercy due to *the nature of its subject matter*. In *Hanratty v Lord Butler* (unreported), 12 May 1971; Court of Appeal (Civil Division) Transcript No 171 of 1971 (cited in *Bentley* at 360) ("*Hanratty*"), the Court of Appeal upheld the order below to strike out an action in negligence that was brought against the Home Secretary in which it was alleged that he had failed to consider new evidence in the form of witness statements.

It is apparent from the nature of the claim that the challenge was made in relation to the decision making process, and not the merits of the decision itself. However, Lord Denning MR explained (as quoted in *Bentley* at 360) that:

> [t]hese courts have had occasion in the past to cut down some of the prerogatives of the Crown: but they have never sought to encroach on the prerogative of mercy. It is not exercised by the Queen herself personally. It is exercised by her on the advice of one of the principal Secretaries of State. He advises her with the greatest conscience and good care. He takes full responsibility for the manner of its exercise. That being so, the law will not inquire into the manner in which the prerogative is exercised. *It is outside the competence of the courts to call it into question: nor would they wish to do so*.
>
> [emphasis added]

28 This was reiterated by Lord Diplock in the landmark decision of the House of Lords in *Council of Civil Service Unions v Minister for Civil Service* [1985] 1 AC 374 ("the *GCHQ* case") at 411:

> While I see no a priori reason to rule out "irrationality" as a ground for judicial review of a ministerial decision taken in the exercise of "prerogative" powers, I find it difficult to envisage in any of the various fields in which the prerogative remains the only source of the relevant decision-making power a decision of a kind that would be open to attack through the judicial process upon this ground. Such decisions will generally involve the application of government policy. *The reasons for the decision-maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced tend to exclude from the attention of the court competing policy considerations which, if the executive discretion is to be wisely exercised, need to be weighed against one another — a balancing exercise which judges by their upbringing and experience are ill-qualified to perform*. I leave this as an open question to be dealt with on a case to case basis if, indeed, the case should ever arise.
>
> [emphasis added]

Lord Roskill added at 418:

> Prerogative powers such as those relating to the making of treaties, the defence of the realm, *the prerogative of mercy*, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others *are not, I think susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process*.
>
> [emphasis added]

Although the *GCHQ* case was not directly concerned with the prerogative of mercy, their Lordships' *dicta* lend support to the prevailing view that the question of whether a pardon should be granted is one that is "not amenable to the judicial process" due to its nature and subject matter.

29 In unpacking the meaning behind the phrase "not amenable to judicial review", the learned editors of *De Smith's Judicial Review* (Sweet & Maxwell, 6th Edition, 2007) have explained that there are some decisions which the courts have traditionally taken the view that they, as an institution, are ill-equipped to review (paras 1-030–1-033):

> Matters which are in essence matters of preference
>
> These include decisions which cannot be impugned on the basis of any objective standard because their resolution is essentially a matter of individual (including political) preference...
>
> ...
>
> Matters in relation to which the court lacks expertise
>
> A second institutional limitation of the courts is lack of relative expertise. Particularly as the review of fact, or the merits of a decision, is not routinely permitted in judicial review, there are some matters which are best resolved by those with specialist knowledge...
>
> Matters which are polycentric
>
> A third limitation on the court's institutional capacity occurs when the matter to be determined is "polycentric". Most "allocative decisions" – decisions involving the distribution of limited resources – fall within this category...

30 Regardless of whether the prerogative of mercy falls neatly within one or more of these categories, the position in England is clear that the pardon or clemency process is not justiciable. This established principle of English constitutional law was revisited in *Bentley*. The decision in *Bentley* arose out of extraordinary circumstances. The applicant had sought judicial review from the Divisional Court against the Home Secretary for upholding a previous Home Secretary's decision not to grant a *posthumous* free pardon to her brother, Derek Bentley, who was executed in 1953. This was based on the argument that the long-standing Home Office policy, *ie* that a free pardon would not be granted unless he was satisfied that the person concerned was both morally and technically innocent of the crime, was an error of law as it misunderstood the nature and effect of a free pardon.

31 The Divisional Court acknowledged that questions of policy were not reviewable and held that the Home Secretary was entitled to rely on the long-standing policy of previous Home Secretaries. The court was of the opinion, however, that the Home Secretary had failed to consider the option of granting a conditional pardon; but it stopped short of saying that the pardon process was subject to judicial review. Instead, owing to the exceptional circumstances of the case, it merely invited the Home Secretary to reconsider the exercise of the prerogative of mercy – an extralegal move. Indeed, subsequently conditional pardon was granted in July 1993 and his conviction was quashed by the Court of Appeal in 1998 (see *R v Bentley (deceased)* [2001] 1 Cr App R 307).

32 It can therefore be summarised, that the English courts have been reluctant to interfere with the Home Secretary's exercise of the prerogative of mercy, even in the most exceptional cases, and therefore the Home Secretary's discretion remains absolute and immune from any challenge. The main justification for this position is that neither the nature nor the subject matter of the pardon process is amenable to judicial review. This approach appears also to be consistent with the English courts' view of the separation of powers under the Westminster model of government.

New Zealand

33 The position in New Zealand is found in the Court of Appeal decision of *Burt v Governor-General* [1992] 3 NZLR 672. The appellant challenged the Governor-General's decision not to grant a pardon on the grounds that the Governor-General and the Department of Justice had failed to act fairly and reasonably in dealing with the petition. He raised the general arguments that "petitioners have

legitimate expectations of fair treatment" and that "the public too would expect a fair procedure to be followed". In considering the issue of whether the prerogative of mercy was justiciable, the court took the view that the prerogative has developed to become "an integral element in the criminal justice system, a constitutional safeguard against mistakes". However, the court was also of the opinion that the existence of various safeguards against miscarriages of justice meant that (at 683):

> . . . *no pressing reason has been made out for altering the practice regarding the Royal prerogative of mercy*. While accepting that it is inevitably the duty of the Court to extend the scope of common law review if justice so requires, we are not satisfied that in this field justice does so require, at any rate at present.
>
> [emphasis added]

34 In doing so, the Court of Appeal affirmed the position in the Privy Council decision of *de Freitas v Benny* [1976] AC 239 (discussed at [46] below) that the decision making process of the prerogative of mercy is not reviewable in a court of law.

Australia

35 The position in Australia is no different. This was clearly established in the decision of *Horwitz v Connor* (1908) 6 CLR 38 ("*Horwitz*"), in which the High Court of Australia affirmed the common law position that no court had jurisdiction to review the discretion of the Governor in Council in his exercise of the prerogative of mercy under s 540 of the Crimes Act 1890 (Victoria).

36 Although strictly not in issue, the Supreme Court of South Australia in the decision of *Von Einem v Griffin* (1998) 72 SASR 110 took the opportunity to revisit the issue of justiciability of the prerogative of mercy. It cited the *GCHQ* case with approval and accepted at 126 that the modern approach of justiciability considers the nature of the subject matter of the power which is sought to be reviewed. After reviewing the Privy Council decision of *de Freitas v Benny*, the court went on to observe that the prerogative of mercy was not subject to judicial review (at 129):

> It is probable, therefore, that, as presently advised, the prerogative of mercy is not subject to review, not because its source is the prerogative but because of the subject matter of the power itself. The weight of authority seems to suggest so: see *Burt v Governor-General* [1992] 3 NZLR 672; cf *R v Secretary of State for the Home Department; Ex parte Bentley* [1994] QB 349. However, as I say, there being no complaint about his Excellency's refusal to exercise the prerogative of mercy, this court does not need to finally decide that matter.

37 Recently in *Eastman v Australian Capital Territory* [2008] ACTCA 7, the Australian Capital Territory Court of Appeal observed that recent Privy Council decisions that have departed from the English position ought not to be followed and, instead, held that *Horwitz*, which excluded any review of procedural fairness, remained good law (at [38] and [41]):

> The cases cited by Lander J suggest that courts in New Zealand, South Australia and England have departed, or have considered departing, from the traditional view identified above. That trend appears to have been driven by two factors. The first is the availability of appeals to the Privy Council from former colonies where the death penalty continues to be imposed. The second is a perception that the application of general principles of procedural fairness should not be limited by archaic notions concerning the source of executive power. *Whilst we understand the difficulties faced by members of the Judicial Committee in capital cases, we are reluctant to treat those decisions as necessarily offering a principled basis for departing from well-*

established legal propositions. Similarly, we are not persuaded that we may depart from the decision in *Horwitz v Connor* in the interests of promoting a consistent body of administrative law. Until the High Court holds to the contrary, the decision in *Horwitz v Connor* is binding upon us.

...

The observations made by Lord Diplock in *de Freitas* suggest that the traditional view is that there is no obligation to extend procedural fairness to an applicant for exercise of the prerogative of mercy. Review of the kind contemplated in s 34B of the Supreme Court Act is not generally "on the merits". Any relevant error will usually be as to jurisdiction or in the process leading to the decision. Given the restrictive view of judicial review which prevailed at the time, it is unlikely that in *Horwitz v Connor*, Griffith CJ meant simply to exclude merits review.

[emphasis added]

38 The court also cautioned against the view taken in *Burt v Governor-General* that the prerogative of mercy "has become an integral element in the criminal justice system, a constitutional safeguard against mistakes" because adopting such an interventionist view would be "to depart from received views as to the separation of powers which have emerged over the last three hundred years" (at [39]). Ultimately, the court did not find it necessary to definitively re-examine the question of justifiability in light of the clear decision in *Horwitz* and the applicant's failure on the merits (at [43]).

Malaysia

39 The position in Malaysia on the question whether the clemency process is subject to judicial review is particularly relevant because Article 22P was adopted from Article 42 of the Malaysian Federal Constitution ("Article 42"). When Singapore became an independent Republic in 1965, Article 42 ceased to apply to Singapore and the power to grant pardon by the President of Singapore was preserved under s 8 of the Republic of Singapore Independence Act (1985 Rev Ed) which was subsequently enshrined in the Constitution as Article 22P. Given that Article 22P owes its origin to Article 42, reference to the Malaysian experience on this issue would therefore be both essential and helpful.

40 The Malaysian courts have consistently adopted the position in a series of decisions that both the decision for pardon and its decision making process are not justiciable. Beginning with the decision in *Sim Kie Chon v Superintendent of Pudu Prison* [1985] 2 MLJ 385, ("*Sim Kie Chon (No 1)*") the Malaysian Supreme Court affirmed the decision of the High Court in striking out the plaintiff's claim that the Pardon Board had failed to properly consider his petition for mercy and had therefore acted unconstitutionally. Specifically, the Supreme Court cited the *GCHQ* case and concluded (at 386) that the power of pardon is:

... a power of high prerogative of mercy which is an executive act but by its very nature is not an act susceptible or amenable to judicial review.

41 It then went on to cite with approval an earlier Malaysian Federal Court decision in *Public Prosecutor v Lim Hiang Seoh* [1979] 2 MLJ 170 where Suffian LP observed:

When considering whether to confirm, commute, remit or pardon, *His Majesty does not sit as a court, is entitled to take into consideration matters which courts bound by the law of evidence*

cannot take into account, and decides each case on grounds of public policy; such decisions are a matter solely for the executive. We cannot confirm or vary them; we have no jurisdiction to do so. The royal prerogative of mercy, as is recognised by its inclusion in Chapter 3 of Part IV of the Constitution, is an executive power as in Jamaica, *Hinds v The Queen*.

[emphasis added]

42 Undaunted by the decision, the prisoner, Sim Kie Chon commenced another suit seeking a declaration that Pardon Board was not lawfully constituted and therefore its decision was legally ineffective. It further claimed that the Pardon Board had acted unfairly and in breach of the rules of natural justice. The Malaysian Supreme Court in *Superintendent of Pudu Prison v Sim Kie Chon* [1986] 1 MLJ 494 ("*Sim Kie Chon (No 2)*"), after having reviewed the legal position in England (*Hanratty*), in Australia (*Horwitz*) and the Privy Council decision in *de Freitas v Benny*, reiterated its earlier decision that "when the Constitution has empowered the nation's highest executive as the repository of the clemency power, the court cannot intervene and judicial review is excluded by implication". I pause to observe that the Malaysian Supreme Court in both *Sim Kie Chon (No 1) and Sim Kie Chon (No 2)* were concerned with the decision making process given the nature of the challenge. Consistent with its decision that the clemency process was not justiciable, the Malaysian Supreme Court in *Sim Kie Chon (No 2)* went on to hold (at 498) that the rules of natural justice were not applicable to the clemency process because to hold otherwise, would:

> in effect be countenancing the respondent`s participation in the exercise of an executive and prerogative power and virtually reactivating a concluded trial. It follows sequentially that if it is, open to a court to examine the advice of the Pardons Board there would then in effect be an extra-curial retrial and endless reventilation of every convict's case.

43 The non-reviewability of the clemency process was reaffirmed in *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64 ("*Karpal Singh*"). In that case, the Sultan of Selangor made a public statement that he would not pardon anyone who has been sentenced to the mandatory death sentence for drug trafficking. The applicant applied for a declaration that the public statement was in violation of Article 42 since the Sultan had effectively pre-determined that *all* drug traffickers facing the death sentence were not suitable for clemency. Yong's challenge in the present application that the Minister's Statement had prejudged his clemency petition bears some resemblance to the challenge in *Karpal Singh*. However, the application was struck off since clemency process not being reviewable, the action was held to be frivolous, vexatious and an abuse of the process of the court.

44 Finally, the Malaysian Federal Court recently applied the same principle in *Juraimi bin Husin v Pardons board, State of Pahang* [2002] 4 MLJ 529 to strike out an application to review the decision making process of the Sultan of Pahang in rejecting the prisoner's clemency petition after a lapse of almost two years.

45 The consistent thread which runs through all the Malaysian decisions is the concurrence that "mercy is not the subject of legal rights. It begins where legal rights end" and that the power of high prerogative of mercy is an executive act which by its nature and content is not amenable to judicial review.

The Caribbean

46 The position in the Caribbean was, until recently, consistent with that in England. I shall first review some of the earlier Privy Council decisions from the Caribbean and then examine the circumstances that led to the recent change. The first noteworthy decision is the Privy Council

decision of *de Freitas v Benny* which pre-dated the *GCHQ* case and *Bentley*. Lord Diplock delivered the judgment and held that under the Constitution of Trinidad and Tobago, the position in relation to the clemency process was identical to the English position in its entirety, save for the identity of the parties involved. Further, it was held that a convicted person had no right to the materials furnished to the Minister and Advisory Committee because, previously in England, the Home Secretary's practice of calling for a report from the trial judge was simply a practice that did not give rise to a legal right (at 247–248):

> *Except in so far as it may have been altered by the Constitution the legal nature of the exercise of the royal prerogative of mercy in Trinidad and Tobago remains the same as it was in England at common law*. At common law this has always been a matter which lies solely in the discretion of the sovereign, who by constitutional convention exercises it in respect of England on the advice of the Home Secretary to whom Her Majesty delegates her discretion. Mercy is not the subject of legal rights. It begins where legal rights end. A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative of mercy. In tendering his advice to the sovereign the Home Secretary is doing something that is often cited as the exemplar of a purely discretionary act as contrasted with the exercise of a quasi-judicial function. *While capital punishment was still a lawful penalty for murder in England it was the practice of the Home Secretary in every capital case to call for a report of the case from the trial judge and for such other information from such other sources as he thought might help him to make up his mind as to the advice that he would tender to the sovereign in the particular case*. But it never was the practice for the judge's report or any other information obtained by the Home Secretary to be disclosed to the condemned person or his legal representatives.
>
> [emphasis added]

47 In *Thomas Reckley v Minister of Public Safety and Immigration (No 2)* [1996] 1 AC 527 ("*Reckley (No 2)*"), the applicant sought to persuade the Privy Council that the time was ripe for the clemency process to be subjected to judicial review. However, the Privy Council, after referring to the *GCHQ* case, *Bentley* and *Burt v Governor-General* (at 540–541), held that the legal position as decided in *de Freitas v Benny* remained good law (at 542). It accordingly held that the Minister's discretion in relation to his advice on the clemency process remained personal and non-reviewable. Furthermore, it was held that a convicted person had no legal right to make representations for the purpose of clemency. Lord Goff of Chieveley emphasised that the Constitution of Bahamas had sufficient safeguards in place, and that there was therefore no need for the courts to play a supervisory role over the exercise of the Minister's personal discretion (at 542):

> In this connection their Lordships wish to stress the nature of the constitutional safeguard which the introduction of the advisory committee has created. On the committee, the designated minister and the Attorney-General will be joined by a group of people nominated by the Governor-General. These will, their Lordships are confident, be men and women of distinction, whose presence, and contribution, at the heart of the process will ensure that the condemned man's case is given, and is seen by citizens to be given, full and fair consideration. Such people as these will expect to be provided with all relevant material, including any material supplied by or on behalf of the condemned man; and in the most unlikely event that the responsible civil servants do not place such material before them, they are perfectly capable of making the necessary inquiries. *It is plain to their Lordships that those who drew the Constitution of The Bahamas were well aware of the personal nature of the discretion to be exercised by the minister and the consequent absence of any supervisory role by the courts, but also considered that, by introducing an advisory committee with the constitution and functions specified in the*

Constitution, they were providing a safeguard both appropriate and adequate for the situation.

[emphasis added]

48 However, barely four years later, the Privy Council did an about turn in the decision of *Neville Lewis v Attorney-General of Jamaica* [2001] 2 AC 50 (*"Lewis"*). Lord Slynn of Hadley, who delivered the majority judgment, held (at 76) that the reasoning in *Reckley (No 2)* no longer held true:

> On the face of it there are compelling reasons why a body which is required to consider a petition for mercy should be required to receive the representations of a man condemned to die and why he should have an opportunity in doing so to see and comment on the other material which is before that body. This is the last chance and in so far as it is possible to ensure that proper procedural standards are maintained that should be done. Material may be put before the body by persons palpably biased against the convicted man or which is demonstrably false or which is genuinely mistaken but capable of correction. Information may be available which by error of counsel or honest forgetfulness by the condemned man has not been brought out before. *Similarly if it is said that the opinion of the Jamaican Privy Council is taken in an arbitrary or perverse way—on the throw of a dice or on the basis of a convicted man's hairstyle—or is otherwise arrived at in an improper, unreasonable way, the court should prima facie be able to investigate*.
>
> Are there special reasons why this should not be so?
>
> *In the Reckley (No 2) case [1996] AC 527 much importance was attached to the composition of the Advisory Committee on the Prerogative of Mercy. The experience, status, independence of the members is no doubt an important feature of the process. It provides a valuable protection and prevents the autocratic rejection of a petition by one person. Their Lordships do not however accept that this is a conclusive reason why judicial review should be excluded*. They may unconsciously be biased, there may still be inadvertently a gross breach of fairness in the way the proceedings are conducted.

49 Lord Slynn went on to declare that the common law could be used to supplement the Constitution and, accordingly, held that the Jamaican Privy Council were under a common law duty to consider representations by a convicted person (at 78):

> Sir Godfray Le Quesne on behalf of the interveners forcefully stressed that the process of clemency is unique. It amounts to a power to dispense with the normal application of the law—that is to carry out the prescribed death penalty—and it involves an exceptional breadth of discretion. These submissions are no doubt correct but in their Lordships' view they are not inconsistent with a court insuring that proper procedures are followed nor are they inconsistent with the Privy Council of Jamaica being required to look at what the condemned man has to say any more than they are in principle inconsistent with a duty to consider the judge's report. One is prescribed by statute the other is not. *The question is whether the common law requires that other material than the judge's report be looked at*.
>
> [emphasis added]

50 It appears that, in arriving at this decision, the Privy Council was heavily influenced by the fact that Jamaica had, on 7 August 1978, ratified the American Convention on Human Rights 1969 which provides for the right to procedural fairness in the clemency process (at 78–79):

The importance of the consideration of a petition for mercy being conducted in a fair and proper way is underlined by the fact that the penalty is automatic in capital cases. The sentencing judge has no discretion, whereas the circumstances in which murders are committed vary greatly. Even without reference to international conventions it is clear that the process of clemency allows the fixed penalty to be dispensed with and the punishment modified in order to deal with the facts of a particular case so as to provide an acceptable and just result. *But in addition Jamaica ratified the American Convention on Human Rights 1969 on 7 August 1978 and it is now well established that domestic legislation should as far as possible be interpreted so as to conform to the state's obligation under such a treaty*: *Matadeen v Pointu* [1999] 1 AC 98, 114 G–H.

Article 4 of the American Convention on Human Rights 1969 provides for the right to life. By paragraph 6:

> *"Every person condemned to death shall have the right to apply for amnesty, pardon or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority."*

As to article 4 of the American Convention the Inter-American Court in paragraph 55 of its Advisory Opinion OC-3/83 (Restrictions to the Death Penalty), 8 September 1983 has said:

> "Thus, three types of limitations can be seen to be applicable to states parties which have not abolished the death penalty. First, the imposition or application of this sanction is subject to certain procedural requirements whose compliance must be strictly observed and reviewed. Second, the application of the death penalty must be limited to the most serious common crimes not related to political offenses. Finally, certain considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into account."

Whether or not the provisions of the Convention are enforceable as such in domestic courts, it seems to their Lordships that *the states' obligation internationally is a pointer to indicate that the prerogative of mercy should be exercised by procedures which are fair and proper and to that end are subject to judicial review*.

[emphasis added]

51 Lord Hoffmann, the only judge in *Lewis* who also sat on the Privy Council in the earlier decision of *Reckley (No 2)*, issued a dissenting judgment and noted that nothing had changed since *Reckley (No 2)* to warrant the departure from settled law (at 87-88):

> These appeals concern the legality of the sentence of death which, in accordance with the law of Jamaica, has been passed upon six prisoners convicted of murder. The questions raised are of the utmost importance, not only for the prisoners whose lives are at stake but also for the administration of justice in Jamaica and the other Commonwealth countries of the Caribbean. *The Board sits as a supreme court of appeal to enforce their laws and Constitutions. It is of course obvious to the members of the Board that they must discharge that duty without regard to whether they personally favour the death penalty or not. But the wider public may need to be reminded*.
>
> ...

> The Board now proposes to depart from its recent decisions on all three points. I do not think that there is any justification for doing so. It was appropriate in *Reckley v Minister of Public Safety and Immigration (No 2)* [1996] AC 527 for the Board to review its previous decision in *de Freitas v Benny* [1976] AC 239. Twenty years had passed, during which there had been important developments in administrative law. In particular, the notion once entertained that an exercise of the prerogative was, as such, immune from judicial review had been repudiated by the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. It was arguable that the reluctance of the courts to impose a general rule of audi alterem partem upon the exercise of the prerogative of mercy was a mere relic of outdated theory. But the Board decided in the *Reckley (No 2)* case that there were still, in modern conditions, strong enough grounds for maintaining the old rule. In *Burt v Governor General* [1992] 3 NZLR 672 Cooke P similarly decided that although there were no conceptual obstacles to requiring the Governor General to observe the principle of audi alterem partem in exercising the prerogative of mercy, pragmatic considerations in New Zealand pointed the other way. The Board in the *Reckley (No 2)* case took the same view of conditions in the Caribbean in 1996. *Nothing has happened since then which could justify revisiting the decision not to depart from de Freitas v Benny* [1976] AC 239.
>
> [emphasis added]

52 It would thus appear that the current position in the former British colonies in the Caribbean region is that the clemency process with regard to capital punishment is subject to judicial review. Further, the courts will go so far as to impose requirements of procedural fairness such as the right to make representations, even though such requirements are not provided for in their written Constitutions. The key justification for doing so is that these Caribbean nations have ratified the American Convention on Human Rights 1969.

India

53 The present law in India on the reviewability of the clemency process is found in the key decision of *Maru Ram v Union of India* 1981 (1) SCC 107 ("*Maru Ram*"). Prior to *Maru Ram*, the position was that stated in *G Krishta Goud v State of Andhra Pradesh* [1976] 2 SCR 73 ("*G Krishta Goud*"). In *G Krishta Goud* the petitioners had sought to review the President's decision on the ground that he had not taken into account two factors, namely that their offences were 'political' in nature, and the prevailing trends against the death sentence.

54 Although the Supreme Court of India observed that there had previously been no definite pronouncement on the question of justiciability in relation to the President's exercise of his power to pardon, it found no reason to interfere with the manner in which the President had exercised that power. It went on to comment (at 77), however, that in an extreme situation, the courts would have to contemplate the suitability of judicial review as a remedy:

> We must however sound a note of caution. Absolute, arbitrary, law-unto-oneself mala fide execution of public power, if gruesomely established, the Supreme Court may not be silent or impotent. Assuming as proved the case of a President gripped by communal frenzy and directing commutation of all the penalties where the convict belongs to a certain community and refusing outright where the convict belongs to a different community, there may be, as Shri Garg urged, a dilemma for the Court. Assuming the Governor in exercising his power under Art. 161 refusing to consider cases of commutation where the prisoner is above 40 years of age as a rule of thumb or arbitrarily out of personal vendetta rejecting the claim of clemency of a condemned prisoner, is the Court helpless? This large interrogation is highly hypothetical and whether the remedy is in Court or by impeachment in Parliament or by rising resentment in public opinion, it is not for us to

examine now. Enough unto the day is the evil thereof.

5 5 *G Krishta Goud* therefore set the stage for a possible change in position should there be evidence of abuse of the power of pardon. Indeed the opportunity was seized in the decision of *Maru Ram* where the Supreme Court of India acknowledged that the constitutional powers of the Indian President and the State Governors to pardon have their origins from the prerogative of mercy in England. However it also noted that that was where their similarities end (at 145):

> The present provisions (Sections 432 and 433) have verbal verisimilitude and close kinship with the earlier Code of 1898 (Sections 401 and 402). Likewise, the Constitutional Provisions of today were found even in the Government of India Act, 1935. Of course, in English constitutional law, the sovereign, acting through the Home Secretary, exercises the prerogative of mercy. *While the content of the power is the same even under our Constitution, its source and strength and, therefore, its functional features and accountability are different*. We will examine this aspect a little later. Suffice it to say that Articles 72 and 161 are traceable to Section 295 of the Government of India Act, 1935.
>
> [emphasis added]

56 Essentially, the Supreme Court in *Maru Ram* held that, while the merits of the decision to pardon was not subject to judicial review, it had the jurisdiction to review its decision making process. It held that the power to pardon, being a constitutional power derived from the written Constitution, was, like all public powers, subject to judicial review, although on limited grounds (at 147):

> An issue of deeper import demands our consideration at this stage of the discussion. Wide as the power of pardon, commutation and release (Arts. 72 and 161) is, it cannot run riot; for no legal power can run unruly like John Gilpin on the horse but must keep sensibly to a steady course. Here, we come upon the second constitutional fundamental which underlies the submissions of counsel. *It is that all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power. We proceed on the basis that these axioms are valid in our constitutional order*.
>
> [emphasis added]

57 In *Maru Ram*, the Indian Supreme Court was concerned with the issue whether an amendment to the Indian Criminal Procedure Code which mandated that remission for two categories of offences could not be reduced below 14 years imprisonment was unconstitutional. In that context, the Indian Supreme Court approached the issue by *assuming* that all public power including the power to pardon could not be exercisable arbitrarily. Further, it is clear from the decision that the Solicitor General of India also accepted the position and therefore the point was not argued at all (at 146). Significantly, the relevant decisions from other jurisdictions on this issue were not considered by the Indian Supreme Court. In fact, the Indian Supreme Court specifically observed that "*its source and strength and, therefore, its functional features and accountability are different"* from that in England.

58 It appeared to me that the Indian Supreme Court, in carving out the limited circumstances under which it would review the pardon process, was heavily influenced by the capricious exercise of the power of pardon by some of the state Governors and even the Home Minister (at 149):

> Pardon, using this expression in the amplest connotation, ordains fair exercise, as we have indicated above. Political vendetta or party favouritism cannot but be interlopers in this area. The

order which is the product of extraneous or mala fide factors will vitiate the exercise. While constitutional power is beyond challenge, its actual exercise may still be vulnerable. Likewise, capricious criteria will void the exercise. *For example, if the Chief Minister of a State releases every one in the prisons in his State on his birthday or because a son has been born to him, it will an outrage on the Constitution to let such madness survive. We make these observations because it has been brought to our notice that a certain Home Minister's visit to a Central Jail was considered so auspicious an omen that all the prisoners in the jail were given substantial remissions solely for this reason*. Strangely enough, this propitious circumstance was discovered an [*sic*] year later and remission order was issued long after the Minister graced the penitentiary. The actual order passed on July 18, 1978 by the Haryana Government reads thus:

> "In exercise of the powers conferred under Article 161 the Constitution of India, the Governor of Haryana grants special: remissions on the same scale and terms as mentioned in Govt. Of India, Ministry of Home Affairs letter No. U. 13034/59/77 dated June 10, 1977 to Prisoners who happened to be confined in Central Jail, Tihar, New Delhi on 29th May, 1977, at the time of the visit of Home Minister Govt. Of India, to the said Jail and who has been convicted by the Civil Courts of Criminal Jurisdiction in Haryana State.
>
> A. Banerjee
>
> Secretary to Government of Haryana Jails Department
>
> Dated: Chandigarh,
>
> July 18, 1978."

Push this logic a little further and the absurdity will be obvious. No Constitutional power can be vulgarised by personal vanity of men in authority. Likewise, if an opposition leader is sentenced, but the circumstances cry for remission such as that he is suffering from cancer or that his wife is terminally ill or that he has completely reformed himself, the power of remission under Arts. 72/161 may ordinarily be exercised and a refusal may be wrong- headed. If, on the other hand, a brutal murderer, blood-thirsty in his massacre, has been sentenced by a court with strong observations about his bestiality, it may be arrogant and irrelevant abuse of power to remit his entire life sentence the very next day after the conviction merely because he has joined the party in power or is a close relation of a political high-up. *The court, if it finds frequent misuse of this power may have to investigate the discrimination*. The proper thing to do, if Government is to keep faith with the founding fathers, is to make rules for its own guidance in the exercise of the pardon power keeping, of course, a large residuary power to meet special situations or sudden developments. This will exclude the vice of discrimination such as may arise where two persons have been convicted and sentenced in the same case for the same degree of guilt but one is released and the other refused, for such irrelevant reasons as religion, caste, colour or political loyalty.

59 The exercise of the power of pardon in India continues to be controversial to this day. In a recent Supreme Court decision, which was also cited by Mr Ravi, Arijit Pasayat J noted in *Epuru Sudhakar v Government of Andhra Pradesh* (2006) 8 SCC 161 (at 169–170) that:

> [c]onsidering the fact that in large number of cases challenge is made to the grant of pardon or remission, as the case may be, we had requested Mr Sol J. Sorabjee to act as amicus curiae. He has highlighted various aspects relating to the grant of pardon and remission, as the case may be, and the scope of judicial review in such matters. He has suggested that *considering the*

frequency with which pardons and/or the remissions are being granted, in the present political scenario of the country it would be appropriate for this Court to lay down guidelines so that there is no scope for making a grievance about the alleged misuse of power.

[emphasis added]

60 In 2007, it was reported that the Supreme Court had granted a stay of pardon after the Governor of Andhra Pradesh had generally pardoned 1,500 prisoners to commemorate 150 years of India's first War of Independence. The position in India is therefore hugely affected by local government politics, and the Supreme Court's reaction to such abuses of power was to subject such abuses to judicial review in order to limit the grounds on which the powers can be exercised.

This Court's decision on the position in Singapore

61 In Singapore, as Mr Ravi correctly pointed out, we adhere to the general principle laid down by the Court of Appeal in *Chng Suan Tze v Minister of Home Affairs* [1988] 2 SLR(R) 525 at [86] ("*Chng Suan Tze*"), that: "[a]ll power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power." In *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [148] –[149], the Court of Appeal referred to this statement of principle in observing that the constitutional power to prosecute is not unfettered, but is judicially reviewable in exceptional cases.

62 In my respectful opinion, the principle of legality so forcefully laid down in *Chng Suan Tze* must be right. However, it only says that the courts can, and must, police the legal limits of a power. It says nothing about the legal limits of a particular power. That can only be done on a case-by-case basis, having regard to the nature of the power under examination and the constitutional or statutory provision under which the power arises. In *Chng Suan Tze*, the power under examination was s 8(1) of the Internal Security Act (Cap 143, 1985 Rev Ed) ("ISA"), which provided that "the Minister shall make" a detention order "if the President is satisfied with respect to any person that, with a view to preventing that person from acting in any manner prejudicial to the security of Singapore ..., it is necessary to do so". The Court of Appeal decided (at [30]) that the requirement that the President be satisfied meant exactly that, and therefore, in order to demonstrate a valid exercise of the power in s 8(1), it must be shown that the President was in fact satisfied.

63 The power under examination here is Article 22P. Just as the Court of Appeal in *Chng Suan Tze* examined s 8(1) of the ISA by reference to its plain wording, an examination of Article 22P must begin in the same way. The clemency process under Article 22P (2) mandates that:

> Where any offender has been condemned to death by the sentence of any court and in the event of an appeal such sentence has been confirmed by the appellate court, the President shall cause the reports which are made to him by the Judge who tried the case and the Chief Justice or other presiding Judge of the appellate court to be forwarded to the Attorney-General with instructions that, after the Attorney-General has given his opinion thereon, the reports shall be sent, together with the Attorney-General's opinion, to the Cabinet so that the Cabinet may advise the President on the exercise of the power conferred on him by clause (1).

I can accept that if a sentenced person is able to show that the reports are not furnished, or not sent to the Attorney-General, or if the Cabinet does not advise the President, some judicial remedy must lie. In those limited situations, such a sentenced person is entitled to apply for review on the basis that the clear requirements laid down in Article 22P have not been satisfied. However, in my view, the relief is only limited to require that the relevant reports be submitted to the Attorney-

General for him to provide his opinion and thereafter for the Cabinet to advise the President on the exercise of the power of pardon accordingly. For reasons explained in further detail below (see [82]–[84] below), the applicant is not entitled to have access to the reports by the courts, opinion by the Attorney-General or the advice by the Cabinet. But once the analysis moves beyond the plain wording of Article 22P, I think the court should be very cautious in implying legal limits to the power to grant pardons. At the very least, the implied limits to the power cannot derogate from its nature as evinced from its expressed aspects. Otherwise the Court will be moving beyond the bounds of legitimate interpretation into illegitimate legislation. As a general proposition I think this is uncontroversial.

64 It is therefore necessary to look at the nature of the pardon in Article 22P in deciding whether or not to imply legal limits upon it. The express provisions of Article 22P precisely describe the old English practice where mercy was a prerogative exercised by the sovereign on the advice of his or her ministers and, where as a matter of practice, advice was also taken by the responsible minister from the Attorney-General and the courts. In addition, there are no express words delimiting the substantive grounds on which the power in Article 22P may be exercised or not exercised. In my judgment, therefore, while the Constitution has removed the power to grant pardons from the realm of prerogative and placed it firmly within the realm of law, it is nevertheless clear that the discretion afforded in deciding whether or not to exercise the power remains very wide indeed. To borrow the words of Lord Diplock in *de Freitas v Benny*, Article 22P is very much a power that begins where the law ends. I am fortified in this conclusion by the weight of the judicial opinion which I have surveyed. Of all the jurisdictions that I have looked at, only Jamaica and India have permitted judicial review of the substantive grounds on which pardons were granted or refused. The Jamaican position is based on the premise that the clemency process ameliorates the problems with a mandatory death penalty. It is therefore inapplicable to Singapore, where the Court of Appeal has held, in a challenge brought by Yong himself, that the mandatory death penalty is perfectly constitutional. The Jamaican position is also based on that jurisdiction's ratification of the American Convention on Human Rights 1969, a treaty which does not apply in the Singapore context.

65 As for India, the courts there plainly thought that such gross abuses of power had occurred in the clemency process, such that they were compelled to intervene. However, Mr Ravi is not arguing that this is the case here and the Indian authorities are therefore irrelevant.

66 Finally, Mr Ravi also submitted that all the decisions relied on by the Attorney-General in support of the proposition that the clemency process is not justiciable are distinguishable as they only concerned the merits of the pardon and not the decision making process. After examining those authorities, I am satisfied that that was not the case. In fact, it was clear that the courts have consistently declined to review the process of the exercise of the prerogative of mercy on any ground at all.

67 For the reasons which follow, I am also of the view that Article 22P is not justiciable on the grounds raised by Mr Ravi, *viz*:

(a) that it is the President, and not the Cabinet, who should exercise the power to grant pardons;

(b) that the clemency process is tainted because the Cabinet has pre-judged Yong's case, as evidenced by the Minister's statement; and

(c) that Yong has a right to see the materials before the Cabinet.

I shall address each in turn.

Whether the power to grant pardons resides with the President

68 I can accept that if the power to grant pardon is exercised by an officer or institution other than the one provided for in the Constitution, a judicial remedy must lie. But, on the proper interpretation of the Constitution, I am equally of the view that the power to grant pardons resides with the Cabinet and not the President.

69 Under the Constitution, the default position is that the President acts in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet. This is specifically provided for under Article 21(1) of the Constitution:

> **Discharge and performance of functions of President**
>
> 21. —(1) Except as provided by this Constitution, the President shall, in the exercise of his functions under this Constitution or any other written law, *act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet*.
>
> [emphasis added]

The exceptions to this default position are exhaustively set out in Article 21(2), which provides that the President may act in his discretion for the following functions:

> (2) The President *may act in his discretion* in the performance of the following functions:
>
> (a) the appointment of the Prime Minister in accordance with Article 25;
>
> (b) the withholding of consent to a request for a dissolution of Parliament;
>
> (c) the withholding of assent to any Bill under Article *5A, 22E, 22H, 144 (2) or 148A;
>
> *Article 5A was not in operation at the date of this Reprint.
>
> (d) the withholding of concurrence under Article 144 to any guarantee or loan to be given or raised by the Government;
>
> (e) the withholding of concurrence and approval to the appointments and budgets of the statutory boards and Government companies to which Articles 22A and 22C, respectively, apply;
>
> (f) the disapproval of transactions referred to in Article 22B (7), 22D (6) or 148G;
>
> (g) the withholding of concurrence under Article 151 (4) in relation to the detention or further detention of any person under any law or ordinance made or promulgated in pursuance of Part XII;
>
> (h) the exercise of his functions under section 12 of the Maintenance of Religious Harmony

Act (Cap. 167A); and

(i) any other function the performance of which the President is authorised by this Constitution to act in his discretion.

...

(5) The Legislature may by law make provision to require the President to act after consultation with, or on the recommendation of, any person or body of persons other than the Cabinet in the exercise of his functions other than —

(a) functions exercisable in his discretion; and

(b) functions with respect to the exercise of which provision is made in any other provision of this Constitution.

[emphasis added]

70 Mr Ravi submitted that based on the saving clause under Article 21(2)(*i*), the President may act in his own discretion to grant pardons since the discretion to do so is vested with the President and not the Cabinet under Article 22P. However on a plain reading of Article 22P(1), it is clear that the President does not have any discretion and can only act on the advice of the Cabinet in granting a pardon to a convicted offender:

22P. —(1) The President, as occasion shall arise, *may, on the advice of the Cabinet* —

(a) grant a pardon to any accomplice in any offence who gives information which leads to the conviction of the principal offender or any one of the principal offenders, if more than one;

(b) grant to any offender convicted of any offence in any court in Singapore, a pardon, free or subject to lawful conditions, or any reprieve or respite, either indefinite or for such period as the President may think fit, of the execution of any sentence pronounced on such offender; or

(c) remit the whole or any part of such sentence or of any penalty or forfeiture imposed by law.

(2) Where any offender has been condemned to death by the sentence of any court and in the event of an appeal such sentence has been confirmed by the appellate court, the President shall cause the reports which are made to him by the Judge who tried the case and the Chief Justice or other presiding Judge of the appellate court to be forwarded to the Attorney-General with instructions that, after the Attorney-General has given his opinion thereon, the reports shall be sent, together with the Attorney-General's opinion, to the Cabinet *so that the Cabinet may advise the President on the exercise of the power conferred on him by clause (1)*.

[emphasis added]

71 Consistent with the default position under Article 21(1) and the saving clause under Article 21(2)(*i*), the President is only empowered to act in his own discretion in situations other than those spelt out in Article 21(2) where they are specifically provided for under the Constitution. Such situations under the Constitution include:

Moneys of the Central Provident Fund

22E. The President, *acting in his discretion*, may withhold his assent to any Bill passed by Parliament which provides, directly or indirectly, for varying, changing or increasing the powers of the Central Provident Fund Board to invest the moneys belonging to the Central Provident Fund.

...

President may withhold assent to certain Bills

22H. —(1) The President *may, acting in his discretion*, in writing withhold his assent to any Bill (other than a Bill seeking to amend this Constitution), if the Bill or any provision therein provides, directly or indirectly, for the circumvention or curtailment of the discretionary powers conferred upon the President by this Constitution.

...

Restraining order under Maintenance of Religious Harmony Act

22I. The President, *acting in his discretion*, may cancel, vary, confirm or refuse to confirm a restraining order made under the Maintenance of Religious Harmony Act (Cap. 167A) where the advice of the Cabinet is contrary to the recommendation of the Presidential Council for Religious Harmony.

[emphasis added]

It is clear that the framework under the Constitution is such that in situations where the President is empowered to act in his own discretion, the relevant provision provides for the President "*acting in his discretion*". This is to be contrasted with Article 22P where a contrary intention appears from the use of the words "*may, on the advice of the Cabinet*".

72 I therefore hold that the President has no discretion under the Constitution, and specifically under Article 22P, to grant pardons. The power to do so rests solely with the Cabinet.

Apparent bias arising from pre-determination

73 I turn next to Mr Ravi's argument that the Minister's Statement as well as the press release by the Ministry of Law demonstrate that the Cabinet had pre-determined the outcome prior to receipt of his clemency petition. Yong submitted that such pre-determination constitutes apparent bias. This would require an examination of the following issues:

(a) whether the Minister's Statement and the press release by the Ministry of law indicated a pre-determination of the outcome of the clemency petition to be filed by Yong;

(b) if the answer to (a) above is in the affirmative, whether such pre-determination in the context of the case would give rise to reasonable suspicion of bias.

Apparent bias

74 It is more convenient to deal with apparent bias first. In this application, the fatal difficulty with apparent bias is that it is a test designed to apply to judicial or quasi-judicial institutions. This is

evident from the very test for apparent bias – "whether a reasonable and fair-minded person sitting in the court and knowing all the relevant facts would have had a reasonable suspicion that a fair trial was not possible" (see *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 ("*Re Shankar*") at [77]). The rationale for this ground of review is that there is a vital public interest in ensuring that justice is manifestly and undoubtedly seen to be done. It bears explanation that this is a vital public interest because the judiciary is not elected and litigants have no recourse against it if they lose. In order for the system to function, it is therefore of paramount importance that the judiciary strives to conduct itself in such a way as to maintain the confidence of the public in the administration of justice. At the very least, when a judge fails in this duty, his error must be capable of correction by other judges.

75 Separately, the court is bound to only consider the law and the facts in reaching its decision. Any predisposition to consider anything else is therefore impermissible. The substantive scope of apparent bias is correspondingly robust in the sense that it precludes consideration of anything other than the law and the facts and, even then, a judge cannot be "so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented" (see *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] 205 CLR 507 ("*Jia Legeng*") at 532).

76 These reasons do not apply to acts by the Executive branch. As a general proposition, it is self-evident that the Executive is entitled to formulate and act in accordance with policy, which is wide-ranging by its very nature and difficult to evaluate in accordance with objective legal criteria. Separately, the vital need for public confidence in the administration of justice does not obtain in quite the same way for Executive action. I agree with Mr Chong's submission that in our Westminster-modelled system, the leaders of the Executive are chosen from the elected ranks of Parliament and, together with the rest of the elected members, are accountable to the electorate at the ballot box. If the Executive fails to inspire public confidence, its leaders will pay the price at the ballot box. There is no need for the court to interpose in this dynamic a requirement that the Executive acts in an "apparently unbiased" way from the perspective of a hypothetical fair-minded person. The real persons that make up the electorate can apply whatever metric they think appropriate in evaluating the decisions which the Executive has made.

77 This distinction was also recognised in *Jia Legeng* at 539:

> As the circumstances of the radio interview demonstrate, the Minister himself can be drawn into public debate about a matter in respect of which he may consider exercising his powers… The position of the Minister is substantially different from that of a judge, or quasi-judicial officer, adjudicating in adversarial litigation. It would be wrong to apply to his conduct the standards of detachment which apply to judicial officers or jurors.

In *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51 at 70, the High Court of Australia emphasised the importance of being sensitive to the context of the relevant decision maker in question. The court stressed that while the test remains "reasonable suspicion of bias", the content of the test may be different when applied to a Minister:

> [A] Minister would be entitled to act in accordance with governmental policy when making a decision. Thus, it will ordinarily be very difficult to impute bias or the reasonable suspicion of bias to the decision of a Minister who has considered all applications on their merits but made it clear that preference would be given to applicants who complied with government policy.

A similar observation was made by Sundaresh Menon JC in *Re Shankar* at [80].

78 In this case, I would go further. The power in Article 22P begins when the judicial process has ended and there are no substantive criteria which delimit the grounds on which it can be exercised or not exercised. It is eminently a discretionary power which can be exercised on wide ranging grounds of policy, and in my judgment it might well be impossible to articulate a justiciable conception of proper behaviour against which any exercise or non-exercise of the power can be said to be apparently biased. Certainly, the Minister's Statement, which only articulated the government's policy on the death sentence as a deterrent against drug trafficking, cannot by any measure be said to evince such apparent bias.

Pre-determination

79 The analysis with regard to pre-determination is more nuanced. As a general proposition, it can be said that a grantee of a discretionary power must actually exercise the discretion, *ie* consider the full range of relevant material, before reaching a decision. More particularly, with reference to Article 22P(2), it can be said that if the Cabinet reaches a decision before the mandated reports are presented to it, this would short-circuit the constitutionally prescribed process and therefore amount to an improper pre-determination. One thing, however, is clear – the most that can be said of these points is that the Cabinet must *subjectively* consider the materials prescribed by Article 22P(2) before arriving at a decision. As for objective criteria, the same reasons which I mentioned in the context of apparent bias apply with equal force here – the highly discretionary nature of the power to grant pardons defies review by objective and substantive legal criteria, and even if such review was possible, there would be nothing objectionable or irrational about the policy articulated by the Minister.

80 The factual question, then, is whether the Cabinet had *subjectively* pre-determined Yong's imminent second petition for clemency even before his fresh petition was filed. The Minister was reported to have said "Yong Vui Kong is young. But if we say 'we let you go', what is the signal we are sending?" Yong submitted that the remarks taken at face value indicated that the Cabinet had already decided not to grant clemency to him even before filing his fresh clemency petition. The Minister's Statement must however be viewed against the context. Yong was convicted and sentenced to death on 14 November 2008. Although he appealed against both conviction and sentence, he subsequently withdrew the appeal on 29 April 2009. Thereafter, he filed the First Petition on 11 August 2009. The First Petition was rejected by the President on 20 November 2009. Under Article 22P of the Constitution, the rejection of the First Petition would have been on the advice of the Cabinet. Therefore, it was plain that the Cabinet had previously considered Yong's clemency petition and had advised the President to reject it. The principal ground relied on in the First Petition was Yong's age/youth. He was 19 years old at the time of the offence. Again, it is plain that this particular ground was rejected. Further, during the hearing before me, I sought clarification from Mr Ravi whether Yong would be relying on additional grounds for the fresh clemency petition which were not covered in the First Petition. Mr Ravi clarified that Yong would essentially be relying on the same grounds, *ie* his age/youth. In the circumstances, given that the Cabinet had already advised the President to reject Yong's First Petition some six months prior to the Minister's Statement and/or the press release, and the fact that Yong does not intend to raise new grounds in his second clemency petition, in my view, there was no question of pre-determination. In any event, I can see nothing objectionable about the Minister's Statement, which only restated the Cabinet's policy that the age of the offender *per se* should not be a ground for the exercise of clemency for drug trafficking convictions. I cannot infer from the Minister's Statement that the Cabinet will not even *subjectively* consider Yong's second petition and the materials put before it by virtue of Article 22P(2) when it next advises the President.

81 Mr Ravi's arguments on the apparent bias and pre-determination points, whether taken singly or

together, must therefore fail.

Whether Yong has a right to the materials that will be before the Cabinet

82 I come now to Mr Ravi's final argument. It bears reiteration that Mr Ravi is arguing for an *ex ante*, substantive right to the materials that will be before the Cabinet, and not for the discovery of those materials in the pursuit of some other substantive right. The distinction is vital, and appears to have been overlooked by the Privy Council in *Lewis* (*supra*[48]) when it held that a sentenced person should have access to the materials before the executive when it makes its decision on clemency, so that the courts can investigate any allegation of arbitrariness in the process. When a substantive right is argued to have been infringed, as was the Privy Council's concern in *Lewis*, it is arguable that discovery of the relevant evidence should lie as of right, and as a matter of procedure. When, as here, a substantive right to information is alleged, quite independently of a breach of any other right, there must be some other juristic basis. In this regard, the only possible basis for a right to the materials before the Cabinet is that such a right is a corollary to a larger duty to act judicially in coming to a decision. However, there can be no such duty. I have said several times in this judgment that the power to grant pardons is an executive power which is highly discretionary in nature. This excludes, by necessary implication, any duty to act judicially. This analysis finds support in the very procedure stipulated in Article 22P(2), which prescribes a highly private process by which the relevant materials ultimately come before the Cabinet. Even the courts whose reports are prepared first, have no access to the Attorney-General's opinion or the Cabinet's advice.

83 A similar conclusion was reached in *de Freitas v Benny* (*supra* [46]) and, recently, in more detail in *Reckley (No 2)*. In *Reckley (No 2)* Lord Goff of Chieveley decided the question against the petitioner on two grounds: that there was no standard of fairness by which the discretion of mercy could be managed, and, in any event, the express provisions did not provide for any right to the materials and to make representations (at 541–542):

> In their Lordships' opinion the petitioner faces similar difficulties in respect of the alternative submission advanced on his behalf, viz. that the principle of fairness required that he should be entitled to make representations to the advisory committee and, for that purpose, to see, or to be provided with the gist of, the material (including the trial judge's report) which had been placed before the advisory committee. In support of this proposition, reliance was placed on the decision of the House of Lords in *Reg. v. Secretary of State for the Home Department, Ex parte Doody* [1994] 1 A.C. 531. That case was however concerned with a different subject matter, viz. the exercise by the Home Secretary of his statutory power to release on licence a person serving a sentence of life imprisonment. It was there held that the Home Secretary was bound to afford a prisoner serving a mandatory life sentence the opportunity to submit in writing representations as to the penal element in the sentence which he must serve, and further that, to enable those representations to be effective, he must make available to the prisoner the gist of the material upon which he will found when making his decision. What is important for present purposes, however, is that Lord Mustill (with whose speech the remainder of the Appellate Committee agreed) was careful, at p. 556G-H, to distinguish that case from a case in which the prisoner is *"essentially in mercy" where there is "no ground to ascribe to him the rights which fairness might otherwise demand*:" see p. 556H. That is precisely the present case. *Indeed it is clear from the constitutional provisions under which the advisory committee is established, and its functions are regulated, that the condemned man has no right to make representations to the committee in a death sentence case; and, that being so, there is no basis on which he is entitled to be supplied with the gist of other material before the committee*. This is entirely consistent with a regime under which a purely personal discretion is vested in the minister. Of course the condemned man is at liberty to make such representations, in which event the

minister can (and no doubt will in practice) cause such representations to be placed before the advisory committee, although the condemned man has no right that he should do so.

84 I therefore hold that Yong has no right to see the materials which will be before the Cabinet when it advises the President.

Conclusion

85 In summary, the clemency process is not justiciable on the grounds pursued by Yong, because:

(a) the power to grant pardons under Article 22P is exercised by the Cabinet, and not the President, who has no discretion in the matter;

(b) apparent bias is not an available ground on which to review the clemency process;

(c) there is no evidence of a pre-determination of Yong's imminent petition; and

(d) there is no basis for a substantive right to the materials which will be before the Cabinet when it advises the President on the clemency petition.

86 In the absence of any meritorious ground on which judicial review can be sustained, Yong's application must be dismissed. However, as the Registry of the Supreme Court by letter dated 8 June 2010 had treated this application as a criminal matter since it arises from a criminal appeal, I shall make no order as to costs for this application.

87 I should also point out that the 26 August 2010 limit for the filing of the petition of clemency is fast approaching and I understand that this time limit imposed by the Prison authorities is merely an administrative one. In anticipation of the very likely decision by Yong to appeal against my judgment, I would respectfully invite the Prison authorities to extend the time limit for the filing of the fresh petition until such time as the Court of Appeal reaches a decision.

88 It remains for me to express my appreciation to, and commendation for, both counsel for the dedication and vigour which they have shown in arguing their respective cases.