IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 111

Criminal Reference No 1 of 2020

Between

Wham Kwok Han Jolovan

… *Applicant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Constitutional Law] — [Fundamental liberties] — [Freedom of assembly]

Wham Kwok Han Jolovan
v
Public Prosecutor

[2020] SGCA 111

Court of Appeal — Criminal Reference No 1 of 2020
Sundaresh Menon CJ, Andrew Phang Boon Leong JA, Judith Prakash JA, Tay Yong Kwang JA and Steven Chong JA
20 August 2020

6 November 2020

Judith Prakash JA (delivering the grounds of decision of the court):

Introduction

The Question

1 This matter came before us as a criminal reference on a question of law. The question referred was: "Is s 16(1)(*a*) of the Public Order Act a constitutionally valid derogation from Article 14(1) of the Constitution?" ("the Question").

2 Article 14 of the Constitution of the Republic of Singapore (Cap 1, 1985 Rev Ed) ("the Constitution") is entitled "Freedom of speech, assembly and association" and, in brief, among other rights, it confers on Singapore citizens the right to "assemble peaceably and without arms". By Art 14(2)(*b*) this right is, however, subject to such restrictions as Parliament considers "necessary or

expedient" in the interest of the security of Singapore or for public order. The issue raised by the Question was therefore whether s 16(1)(*a*) of the Public Order Act (Cap 257A, 2012 Rev Ed) ("the POA") amounted to an unconstitutional restriction on the right of peaceable assembly.

3 At the end of the hearing on 20 August 2020, we dismissed the criminal reference, thus answering the Question in the affirmative. We now provide the full reasons for our decision that s 16(1)(*a*) of the POA is valid under the Constitution despite the restriction it imposes on the right of Singaporeans to assemble peaceably.

Background facts

4 The Applicant, Mr Wham Kwok Han Jolovan, was charged and convicted on one charge brought under s 16(1)(*a*) of the POA of having organised and held a public assembly without having obtained the permit for it that the POA required. The facts leading to the charge are not disputed and may be summarised briefly.

5 The event in question was called "Civil Disobedience and Social Movements" ("the Event") and was organised by the Applicant for the purpose of discussing what he referred to as "the role of civil disobedience and democracy" in effecting social change. The Applicant publicised the Event by creating an event page and posting the link on his Facebook "wall". The Facebook event page asked potential participants in the Event to "[j]oin Joshua Wong, Secretary General of Hong Kong's Demosisto party as he shares with local activists Seelan Palay and Kirsten Han their thoughts on the role of civil disobedience and democracy in building social movements for progress and change". During the actual Event which was held in a public venue on

26 November 2016, the Applicant published another Facebook post stating that "Joshua Wong, one of the leaders of the Occupy Central movement, and Sec. Gen. of political party Demosisto is live now, sharing his experiences to [*sic*] an audience in Singapore".

6 Three days before the Event, on 23 November 2016, the Applicant was advised by a police officer to apply for the relevant permit under the POA to obtain permission to carry on with the Event. It was undisputed that under the Public Order (Exempt Assemblies and Processions) Order 2009 (S 489/2009) ("the Order"), a permit for the Event was required. This was because Mr Joshua Wong ("Mr Wong"), a non-citizen of Singapore, was planning to speak at the Event. Mr Wong's participation took the Event outside the scope of exemptions under the Order. It was common ground that the Applicant never applied for the relevant permit under the POA and that, during the Event, Mr Wong did indeed deliver a speech from Hong Kong by video link.

7 Subsequently, a police report was lodged against the Applicant in respect of his failure to obtain the permit and this led to the charge under s 16(1)(*a*) of the POA. The Applicant claimed trial. In his written submissions before the District Judge, the Applicant contended that the requirement to obtain a permit is unconstitutional *vis-à-vis* Art 14 of the Constitution. This submission was rejected by the District Judge who convicted the Applicant on the charge.

8 The Applicant filed an appeal to the High Court against his conviction and sentence. On the appeal, the Applicant again raised the submission that the permit requirement under the POA is unconstitutional. This submission rested on two bases: first, that by reason of that requirement a person who organises a public assembly commits a criminal offence even if the decision to refuse him a permit under the POA is made unconstitutionally; and second, an applicant

does not have a practical remedy against bad faith decisions made by the Commissioner of Police ("the Commissioner") to refuse the grant of a permit. The High Court Judge ("the Judge") dismissed the Applicant's appeal in its entirety and rejected his argument on the unconstitutionality of s 16(1)(*a*) of the POA.

9 In Criminal Motion No 22 of 2019, the Applicant applied to refer two questions of law of public interest to this court under s 397(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC"), the first of which related to the constitutionality of s 16(1)(*a*) of the POA. On 24 March 2020, we granted the Applicant leave to refer the Question. The decision to grant leave was made partly on the basis that this court had yet to consider the scope of Arts 14(1)(*b*) and 14(2)(*b*) of the Constitution and had never previously ruled on the constitutionality of a permit or licensing requirement such as that imposed by s 16(1)(*a*) of the POA.

The Applicant's submissions

10 In his written submissions to this court, the Applicant made two main arguments, largely mirroring his submissions before the Judge. First, the Applicant argued that the licensing scheme established by the POA subjects a citizen's constitutional rights entirely to the Commissioner's act of granting a permit even if the Commissioner's failure to grant a permit is *ultra vires* the POA. In this respect, the Applicant further contended that even if the Commissioner's decision to deny an applicant a permit is contrary to s 7(2) of the POA, a citizen has no "real remedy" as he would still be committing a criminal offence. A legislative scheme that fails to provide an effective remedy for a deprivation of a citizen's constitutional rights renders those rights nugatory as there is nothing to prevent an abuse of public power.

11 The Applicant's second submission, which was connected to the first, was that by failing to provide a real remedy for abuses of power, the licensing scheme gives the Commissioner untrammelled power to constrain a citizen's exercise of his Art 14(1) constitutional rights on pain of criminal punishment. This is not the proper purpose of Art 14(2).

12 During the hearing of the criminal reference, the Applicant raised one additional argument, namely, that whilst Art 14(2)(*b*) of the Constitution permits Parliament to pass *restrictions* on freedom of assembly as it considers "necessary or expedient", there was a difference between Parliament passing legislation *restricting* the exercise of a constitutional right and Parliament making a constitutional right (in this case, the right to peaceably assemble) exercisable *only by permission*. According to the Applicant, by making the constitutional right exercisable only by permission, the "character" of the constitutional right under Art 14(1)(*b*) is destroyed. In this respect, the Applicant contended that there is a curtailment of the constitutional right *beyond* that of a mere "restriction" permitted by Art 14(2)(*b*) of the Constitution. It was, however, not very clear from the Applicant's oral submissions precisely why the permit regime established by the POA would strip Art 14(1)(*b*) of the Constitution of its very nature and therefore would exceed a mere "restriction" permissible under Art 14(2)(*b*).

Our decision

The legislative regime

13 Article 14 of the Constitution grants citizens of Singapore constitutional rights to freedom of speech, assembly and association, subject to certain restrictions. It reads as follows:

> **Freedom of speech, assembly and association**
>
> **14.—**(1) *Subject to clauses (2*) and (3) —
>
> (*a*) every citizen of Singapore has the right to freedom of speech and expression;
>
> (*b*) all citizens of Singapore have the right to assemble peaceably and without arms; and
>
> (*c*) all citizens of Singapore have the right to form associations.
>
> (2) *Parliament may by law impose —*
>
> (*a*) on the rights conferred by clause (1)(*a*), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence;
>
> (*b*) on the right conferred by *clause (1)(b*), such *restrictions as it considers necessary or expedient* in the interest of the security of Singapore or any part thereof or public order; and
>
> (*c*) on the right conferred by clause (1)(*c*), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, public order or morality.
>
> (3) Restrictions on the right to form associations conferred by clause (1)(*c*) may also be imposed by any law relating to labour or education.
>
> [emphasis added]

14 Turning to the POA, it is an Act that was first passed in 2009 for the purpose of, among other things, regulating assemblies in public places, providing powers necessary for preserving public order and supplementing other laws relating to the preservation and maintenance of public order in public spaces. By s 2 it defines a "public assembly" as an assembly held or to be held in a public place or to which members of the public in general are invited, induced or permitted to attend. An "assembly" is a gathering or meeting of persons with a purpose of (a) demonstrating support for or opposition to the

views or actions of any person, group of persons or any government; (b) publicising a cause or campaign; (c) or marking or commemorating any event.

15 Section 16(1)(*a*) of the POA makes it an offence to organise a public assembly without a permit. On conviction of such an offence, an offender is liable to be fined up to $5,000.

16 The regulation of public assemblies under the POA involves two control mechanisms. The first regulates which assemblies require a permit. The second, where a permit is required, regulates the grounds for refusing to grant such permit.

17 As a starting point, permits are required for public assemblies unless they are exempted by the Minister under s 46 of the POA. The exemptions currently in force are set out in the First Schedule to the Order. The exemptions include sporting events, celebration of certain festivals, charitable events and some election events.

18 Indoor public assemblies organised by and only involving Singapore citizens are generally exempted from the permit requirement. The relevant provision in the First Schedule of the Order is set out below:

> Exempt assemblies
>
> 4.—(1) A public assembly … that is held wholly inside a building or other enclosed premises outside of the prohibited area, and —
>
> (*a*) every organiser of which is a citizen of Singapore or a Singapore entity;
>
> (*b*) every individual giving a speech or lecture during the assembly (whether in person, through real-time transmission or a recording) is a citizen of Singapore;

> (*c*) the purpose of which is to demonstrate support for or opposition to the views or actions of any person, group of persons, to publicise a cause or campaign, or to mark or commemorate any event, without dealing with any matter which relates (directly or indirectly) to any religious belief or religion, or any matter which may cause feelings of enmity, hatred, ill-will or hostility between different racial or religious groups in Singapore; and
>
> (d) during which an organiser thereof, or an authorised agent of such an organiser, is present at all times during the assembly.
>
> …

19 In the present case, the Event attracted the licensing regime established by the POA and did not qualify to be exempted from the same because while: (a) the Event was held indoors; (b) the Event was organised by the Applicant, who is a Singapore citizen; (c) the Event was to publicise the cause of civil disobedience; and (d) the Applicant was present at the Event, Mr Wong, a non-Singaporean activist, had been asked to speak at (and did speak at) the Event. This took the Event outside the ambit of para 4(1) of the First Schedule to the Order, and a permit under the POA was required.

Analysis of the interplay between Art 14(1)(a) and Art 14 (1)(b)

20 It is plain from even a cursory examination of Art 14 that although it does confer certain rights on Singapore citizens, those rights are not unlimited. Instead, the rights conferred in Art 14(1) are expressly made subject to the limitations that Parliament may impose on them pursuant to the powers granted to it by Art 14(2). While the Constitution does empower Parliament to enact limitations on the Art 14 freedoms, however, this is a power that is constrained by the language of Art 14 (2). This language concerns what the Constitution itself regards as a list of permissible derogations from the rights in Art 14(1). Thus, when one endeavours to determine whether any legislation passed by

Parliament to limit any of the Art 14 freedoms improperly derogates from any of those freedoms, a close examination must be made of the purpose and language of such legislation.

21 The starting point of our analysis in determining whether s 16(1)(*a*) of the POA is an impermissible derogation from Art 14 must be Art 14(1)(*b*) read with Art 14(2)(*b*). The inescapable conclusion arising from Art 14(2)(*b*) is that the right under Art 14(1)(*b*) is subject to a permitted list of restrictions. This is a point which this court recognised in earlier decisions (see *eg*, *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 1 SLR(R) 791 at [61] in the context of maintaining a balance between the right of free speech and the right to protection of reputation). The Applicant, in fairness, did not dispute this. The question that remains to be answered, however, is how the court should determine whether a restriction is permitted or not. Is it sufficient that the restriction is contained in an Act of Parliament?

An objective approach must be applied

22 Article 14(2)(*b*) of the Constitution provides that Parliament may impose "such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof or public order". Despite the broad language used in Art 14(2)(*b*), this does not prescribe a wholly *subjective* approach in the sense that any law that Parliament passes which restricts the right of peaceable assembly is deemed valid. Such a subjective approach would render the conferred right under Art 14(1)(*b*) wholly toothless since there would be nothing to constrain Parliament's ability to pass laws abrogating or restricting that conferred right. A wholly subjective approach would also mean that the constitutional right would be purely symbolic and be without any real force or effect. In our judgment, the scope of restrictions under Art 14(2)(*b*) cannot be

interpreted in a manner such as to undermine entirely the right to peaceably assemble under Art 14(1)(*b*).

23 An approach that grants Parliament *carte blanche* to pass any law which it deems (subjectively) necessary or expedient in the interests of public order would also be inconsistent with earlier decisions of this court. In this respect, we refer to our recent decision in *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 ("*Tan Seet Eng*"). While *Tan Seet Eng* concerned an application for judicial review of the Minister's decision to detain the applicant without trial (under the Criminal Law (Temporary Provisions) Act (Cap 67, 2000 Rev Ed) ("CLTPA")), it is useful to refer to the court's observations on how it should scrutinise the Minister's exercise of discretion (*ie*, in determining whether the applicant's detention was necessary on the basis that he was a threat to public peace, safety and good order), namely, that this should be done on an *objective* basis. Following its earlier decision in *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 ("*Chng Suan Tze*"), the court in *Tan Seet Eng* held as follows at [61]:

> … The court in *Chng Suan Tze* was undoubtedly conscious of the difficulty with adopting a purely subjective analysis because, in practical terms, it would result in the court being bound to accept whatever was put before it. ***It is in this context that the court equated the adoption of a purely subjective analysis to endorsing the possibility of arbitrary detention, and the court therefore rejected the subjective test on this basis. In any event, it follows from Chng Suan Tze that the Minister's discretion is to be reviewed objectively.*** This is the latest statement of the law and neither party has suggested we should depart from it. [emphasis added in bold italics]

24 Whilst we recognised in *Tan Seet Eng* that this court cannot simply accept Parliament's subjective view that a given piece of legislation is necessary or expedient in the interests of public order, we accepted that the court must

proceed on the basis that the Constitution vests the primary decision-making power regarding whether a derogation from the right is necessary or expedient on Parliament. The court's role is therefore confined to reviewing the relevant legislation and legislative materials (including the speeches, explanatory notes and any other *relevant* material) to ascertain whether objectively, the statutory derogation is within the permitted space provided for this purpose in the Constitution. More specifically, the key question is whether the statutory derogation is objectively something that Parliament thought was necessary or expedient in the interests of public order and whether Parliament could have objectively arrived at this conclusion.

25 Both parties referred to and accepted the principles stated in the High Court decision in *Chee Siok Chin and others v Minister for Home Affairs and another* [2006] 1 SLR(R) 582 ("*Chee Siok Chin*") for the determination of the constitutionality of a given piece of legislation in relation to Art 14. In particular, it was accepted that the court must consider the nexus between the object of an impugned law and one of the purposes listed under Art 14(2)(*b*). In this respect, V K Rajah J (as he then was) held that the touchstone of constitutionality is whether the law curtailing a right under Art 14 can be fairly considered "necessary or expedient" for the purposes specified in Art 14(2) of the Constitution (*Chee Siok Chin* at [49]).

26 We are broadly in agreement with the principles stated in *Chee Siok Chin*. We, however, expressly state our disagreement with the observation in *Chee Siok Chin* that there is a "presumption of legislative constitutionality" which would not be "lightly displaced" in the court's assessment of whether an impugned law falls outside of the purview of the permissible restrictions under Art 14(2)(*b*) of the Constitution (*Chee Siok Chin* at [49]). In our judgment, the presumption of constitutionality cannot determine or answer whether the

legislative derogation falls within the scope permitted by Art 14(2). Our reasons for this view were explained in *Saravanan Chandaram v Public Prosecutor and another matter* [2020] 2 SLR 95 at [154] as follows:

> It has previously been held that legislation attracts a presumption of constitutionality. … In our judgment, such a presumption of constitutionality in the context of the validity of legislation can be no more than a starting point that legislation will not presumptively be treated as suspect or unconstitutional; ***otherwise, relying on a presumption of constitutionality to meet an objection of unconstitutionality would entail presuming the very issue which is being challenged.*** The enactment of laws undoubtedly lies within the competence of Parliament; but *the determination of whether a law that is challenged is or is not constitutional lies exclusively within the ambit and competence of the courts, and this task must be undertaken in accordance with the applicable principles*. [emphasis added in bold italics]

27 In addition to our observations above, in its analysis of the constitutionality of any law, the court must bear in mind the following principles. First, that each branch of Government has its own role and space. In that respect, it has been recognised that the separation of powers is a part of the basic structure of the Westminster constitutional model that Singapore has adopted (see the decision of the High Court in *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 ("*Mohammad Faizal*")). At [11] of *Mohammad Faizal*, Chan Sek Keong CJ held as follows:

> The Singapore Constitution is based on the Westminster model of constitutional government … under which the sovereign power of the State is distributed among three organs of state, *viz*, the Legislature, the Executive and the Judiciary. In the UK (where the Westminster model originated), the Legislature is the UK parliament (comprising the House of Commons and the House of Lords), the Executive is the UK government and the Judiciary consists of the UK judges. Likewise, under the Singapore Constitution, the sovereign power of Singapore is shared among the same trinity of constitutional organs, *viz*, the Legislature (comprising the President of Singapore and the Singapore parliament), the Executive (the Singapore government) and the Judiciary (the judges of the Supreme

> Court and the Subordinate Courts). The principle of separation of powers, whether conceived as a sharing or a division of sovereign power between these three organs of state, is therefore part of the basic structure of the Singapore Constitution.

28 The second principle is to recognise that, as observed previously, the Constitution both confers a constitutional right and permits that right to be derogated from for the purposes listed under Art 14(2)(*b*). In this respect, while it is undeniably Parliament that acts to derogate from the constitutional right for one of the purposes under Art 14(2)(*b*), *it is unequivocally for the judiciary to determine whether that derogation falls within the relevant purpose.* In this connection, it is apposite to refer to [1] of *Tan Seet Eng*:

> The rule of law is the bedrock on which our society was founded and on which it has thrived. The term, the rule of law, is not one that admits of a fixed or precise definition. However, one of its core ideas is that the notion that the power of the State is vested in the various arms of government and that such power is subject to legal limits. But it would be meaningless to speak of power being limited were there no recourse to determine whether, how, and in what circumstances those limits had been exceeded. *Under our system of government, which is based on the Westminster model,* ***that task falls upon the Judiciary. Judges are entrusted with the task of ensuring that any exercise of state power is done within legal limits.*** *In 2012, at the Rule of Law Symposium that was held in Singapore, Prof Brian Z Tamanaha observed that judges have the specific task of ensuring that the arms of government are held to the law, and in that sense,* ***the ultimate responsibility for maintaining a system which abides by the rule of law lies with the Judiciary …*** [emphasis added in italics and bold italics]

29 With the above principles in mind, we set out below a three-step framework to assist courts in determining whether a law impermissibly derogates from Art 14 of the Constitution.

30 First, it must be assessed whether the legislation *restricts* the constitutional right in the first place. It may be possible that the legislation does

not restrict the constitutional right so as to trigger the second and third steps of the analysis. For instance, in *Attorney-General v Ting Choon Meng and another appeal* [2017] 1 SLR 373 ("*Ting Choon Meng*"), Sundaresh Menon CJ (in the minority) considered whether s 15 of the Protection from Harassment Act (Cap 256A, 2015 Rev Ed) ("POHA") impermissibly inhibits the right to free speech guaranteed by Art 14 of the Constitution. Menon CJ held that s 15 of the POHA does not inhibit or restrict the speaker's freedom of speech, but merely constrains the publication of speech that has been proven to be false without a notification that it has been so proven and/or without a direction to where the truth may be found (*Ting Choon Meng* at [111]). On the threshold issue on appeal in *Ting Choon Meng*, which concerned the interpretation of s 15 of the POHA, the majority held that the Government is not a "person" that could invoke the provision. In the circumstances, the majority deemed it unnecessary to further consider whether s 15 was inconsistent with Art 14 of the Constitution (*Ting Choon Meng* at [37]). The majority in *Ting Choon Meng* did not therefore expressly disagree with Menon CJ's reasoning concerning the constitutionality of s 15 of the POHA.

31 Second, if the legislation is found to restrict the right guaranteed by Art 14, it must be determined whether the restriction is "necessary or expedient" in the interests of one of the enumerated purposes under Art 14(2)(*b*) of the Constitution. In making that assessment, the court may have regard to the relevant legislation, parliamentary material and contemporary speeches as well as documents to determine whether Parliament had considered it "necessary or expedient" to restrict the constitutional right in question, or more generally to assess *the purposes for which Parliament passed the relevant legislation*. It is not necessary for Parliament to have expressly referred to the restriction of the constitutional right which is subject to the legislative restriction. A failure to do

so does not *ipso facto* render the legislation constitutionally suspect. In this regard, the court may infer from the general purposes for which Parliament passed the relevant legislation that it had considered it "necessary or expedient" to restrict the constitutional right in question.

32 Third, the court must analyse whether, objectively, the derogation from or restriction of the constitutional right falls within the relevant and permitted purpose for which, under the Constitution, Parliament may derogate from that right. This must be established by showing a nexus between the purpose of the legislation in question and one of the permitted purposes identified under Art 14(2)(*b*) of the Constitution.

33 In the final analysis, it is imperative to appreciate that a balance must be found between the competing interests at stake. In the present case, the balance required was between the constitutional right to peaceably assemble and the interest of public order, which is a constitutionally permitted derogation from the right to peaceably assemble. In this vein, we note that the idea of achieving a balance between a constitutional right and a constitutionally permitted derogation is not novel to our law (see *eg*, *Ting Choon Meng* at [120]; *Chee Siok Chin* ([26] *supra*) at [2] and *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [261]–[264]).

34 We now return to the Question and explain why our analysis in accordance with the framework yielded an affirmative answer to it.

What is the nature of s 16(1)(a)?

35 Section 16(1)(*a*) of the POA provides as follows:

Other offences in relation to assemblies or processions

> **16.**—(1) Each person who organises a public assembly or public procession —
>
> > (*a*) in respect of which no permit has been granted under section 7 or no such permit is in force, where such permit is required by this Act;
>
> …
>
> shall be guilty of an offence and shall, subject to subsection (3), be liable on conviction to a fine not exceeding $5,000.

36 We first considered whether s 16(1)(*a*) imposes a "restriction" under Art 14(2)(*b*) of the Constitution. In essence, s 16(1)(*a*) prohibits the holding of a public assembly in certain circumstances where no permit has been obtained or is in force. Where a person organises a public assembly in respect of which a permit is required and does not obtain one, he commits a criminal offence. In our judgment, s 16(1)(*a*) of the POA is self-evidently a restriction on a person's constitutional right to peaceably assemble under Art 14(1)(*a*) of the Constitution, as it subjects the exercise of this right to criminal prosecution and punishment where no permit under the POA is obtained. As we also made clear during the hearing of this criminal reference, however, we disagreed with the Applicant's submission that s 16(1)(*a*) went *beyond* a mere restriction permissible under Art 14(2)(*b*). This was because the POA does not, ultimately, prohibit the right to peaceably assemble, but simply makes that right exercisable with the permission of the Commissioner. While the Commissioner could decline to provide that permission, he could, in the same vein and, depending on the particular facts and circumstances of the application, grant the permit. There are also certain categories of public assemblies which are entirely exempted from the permit regime. Moreover, as our analysis below will show, the Commissioner's discretion is not an untrammeled and arbitrary one but one that has to be exercised with regard to the guidelines set out in the POA. In the

circumstances, it was difficult to appreciate how the s 16(1)(*a*) of the POA could be not merely a restriction, but a more fundamental deprivation.

37 Apart from our view on the effect of s 16(1)(*a*), it has been judicially recognised that permit or licensing requirements are in the nature of restrictions. The Applicant did not highlight any authority to the contrary. In *Chee Soon Juan v Public Prosecutor* [2003] 2 SLR(R) 445, the High Court considered the constitutionality of s 19(1)(*a*) of the former Public Entertainments and Meetings Act (Cap 257, 2001 Rev Ed) ("PEMA"). Section 19(1)(*a*) of PEMA provides that any person who provides or assists in providing public entertainment without a licence issued under PEMA shall be guilty of a criminal offence. Yong Pung How CJ recognised that the licensing requirement under PEMA impinged on Mr Chee Soon Juan's constitutional right to free speech, but held that the licensing requirement was ultimately a *restriction* that was permissible under Art 14(2) of the Constitution.

Did Parliament consider the restriction necessary or expedient?

38 In the light of the above, we had to determine whether this restriction imposed by s 16(1)(*a*) of the POA was considered by Parliament to be "necessary or expedient" in the interests of public order.

39 We began our analysis with the POA itself. The purpose of the POA is not only revealed in its name but is also discernable from its long title, which provides that it is "[a]n Act to regulate assemblies and processions in public places, to provide powers necessary for *preserving* ***public order*** *and the safety of individuals* at special event areas, *to supplement other laws* relating to the *preservation and maintenance of* ***public order*** *in public places*" [emphasis added in italics and bold italics]. The general purpose of the POA was also

explained by the then Second Minister for Home Affairs, K Shanmugam ("the Minister") during the second reading of the Public Order Bill (see *Singapore Parliamentary Debates, Official Report* (13 April 2009) vol 85 at cols 3657–3761) (K Shanmugam, Second Minister for Home Affairs) ("the Second Reading Speech")). Significantly, the Minister stated that the key philosophy underpinning the Public Order Bill was to give adequate space for an individual's rights of political expression without compromising society's needs for order and stability. Thus, on its face, the POA is intended to impose restrictions for the purpose of maintaining public order and is therefore compatible with Art 14(2)(*b*).

40 The Minister also made more specific remarks on the requirement to obtain a permit under the POA. The Minister stated that while some activities were exempted from permits, others were not. In cases where there was no exemption, an individual or group could apply for a permit and the Commissioner would decide the application based on matters set out in the statute. We elaborate on those matters below (at [45]–[46]). In the context of explaining the various permit exemptions under the POA and under the relevant subsidiary legislation, the Minister stated that the focus of the legislation would shift away from the number of the participants (in a public assembly) towards whether the activity in question would have a disruptive effect on the public (see the Second Reading Speech at col 3664). In our view, the Minister's remarks further demonstrate that Parliament had enacted the permit regime to prevent public disorder and to fine-tune the matters that could impact on public order.

What is the nexus between Art 14(2)(b) and the POA?

41 This part of our discussion relates to the third stage generally, though part may have been included in the second stage discussion as well. It would be helpful, in this regard, to explain the general scheme of the POA and the subsidiary legislation passed by the Minister. Before we do so, we observe that public assemblies organised to promote certain purposes do have the potential to lead to public disorder. This may seem like a banal observation especially as it is reflected in Art 14(2)(*b*) itself, but it is necessary to bear it in mind in the discussion that follows of a statute intended to regulate such assemblies.

42 We first consider the salient provisions of the statute. As a default rule, s 5(1)(*a*) of the POA provides that a public assembly shall not take place unless the Commissioner is notified of the intention to hold the public assembly and a permit is granted in respect of that public assembly. This default rule, however, does not apply where the public assembly is exempted from the requirements imposed under s 5 by way of s 46 of the POA. The latter provision states that the Minister may, with or without conditions, exempt any public assembly from any of the provisions of the POA.

43 The Order provides a list of exemptions to the permit requirement. Paragraph 4(1) of the Order, for instance, reads as follows:

> EXEMPT ASSEMBLIES
>
> …
>
> 4.—(1) A public assembly … that is held wholly inside a building or other enclosed premises outside of the prohibited area, and –
>
> > (*a*) every organiser of which is a citizen of Singapore or a Singapore entity;

> (*b*) every individual giving a speech or lecture during the assembly (whether in person, through real-time transmission or a recording) is a citizen of Singapore;
>
> …

44 Section 4(1)(*b*) of the Order makes it clear that where there is an individual speaking at an indoor public assembly (whether in person, through real-time transmission or a recording) who is *not* a citizen of Singapore, the public assembly is not exempt from the requirement to obtain a permit. In the present case, the Event was not exempted under the Order because the key speaker was a political activist from Hong Kong who was going to speak on civil disobedience as a political tool by sharing his experience of civil disobedience in Hong Kong. In the circumstances, the Applicant was statutorily obliged under s 7 of the POA to apply for a permit from the Commissioner.

45 Upon receiving an application for a permit, the Commissioner must exercise his discretion to either grant or refuse to grant a permit for the proposed public assembly. In doing so he must have regard to whether any of the circumstances set out under s 7(2) of the POA exists or is likely to occur if the permit is granted. The relevant circumstances as set out by s 7(2) are as follows:

> (2) The Commissioner *may* refuse to grant a permit for a public assembly or public procession in respect of which notice under section 6 has been given if he has *reasonable ground* for apprehending that the proposed assembly or procession may —
>
> > (*a*) occasion *public disorder*, or damage to public or private property;
> >
> > (*b*) create a public nuisance;
> >
> > (*c*) give rise to an obstruction in any public road;
> >
> > (*d*) place the *safety* of any person in jeopardy;
> >
> > (*e*) cause *feelings of enmity, hatred, ill-will or hostility between different groups in Singapore*;

> (*f*) glorify the commission or preparation (whether in the past, in the future or generally) of *acts of terrorism* or any offence or otherwise have the effect of directly or indirectly encouraging or otherwise inducing members of the public to commit, prepare or instigate acts of terrorism or such an offence;
>
> (*g*) be held within or enter a prohibited area, or an area to which an order or a notification under section 13 applies; or
>
> (*h*) be directed towards a political end and be organised by, or involve the participation of, any of the following persons:
>
> (i) *an entity that is not a Singapore entity*;
>
> (ii) *an individual who is not a citizen of Singapore*.
>
> [emphasis added]

46 All of the grounds for refusing a permit are predicated on the Commissioner having "reasonable ground[s] for apprehending" that one or more undesirable results may occur. Most of these grounds expressly pertain to considerations of public order and thus have the required nexus to a key purpose of the POA. Particularly significant for present purposes is s 7(2)(*h*), which provides that the Commissioner may refuse to grant a permit if he has reasonable grounds for apprehending that the proposed assembly may be directed towards a political end and will involve the participation of an entity that is not a Singapore entity or of an individual who is not a citizen of Singapore. It is, unfortunately, an inescapable fact of modern life that national politics anywhere are often the target of interference by foreign entities or individuals who are promoting their own agendas. And with the wonderful technology now available, such entities or individuals can carry out their activities from anywhere else in the world.

47 By way of brief background, s 7(2)(*h*) of the POA was introduced by way of the Public Order (Amendment) Bill in 2017. During the parliamentary

speech accompanying the passing of the amendments, the Minister warned of the danger presented by foreign involvement in domestic politics (see *Singapore Parliamentary Debates, Official Report* (3 April 2017) vol 94):

> [W]e need to bear in mind that *foreign involvement may not just be the relatively innocent types where foreigners come in and take part or organise, but also [those] directed by foreign state agencies.* And I do not think you will support that. I do not think that any Singaporean will support that. How do you distinguish between one and the other? I think it is a cleaner rule to say foreigners, "Do not engage". It is not a hard rule. *I told you the Commissioner "may". So, the Commissioner has a discretion.* …
>
> …
>
> Why are we making this amendment? The balance between public space for political expression and social order and stability is really different when it comes to foreigners. *Foreigners must not take our public space for granted to advocate a political cause, whether in Singapore, relating to Singapore, or outside of Singapore.*
>
> [emphasis added]

48 In our judgment, s 7(2) of the POA achieves a careful balance between the constitutional right to peaceably assemble and the delineation of the restriction imposed on that right. All of the circumstances listed are situations in which threats to the interests of public order or its maintenance could conceivably arise. However, the Commissioner is not *obliged* to refuse to grant an applicant a permit where he apprehends on reasonable grounds that one of the listed circumstances may occur. He may do so but, similarly, may exercise his discretion to grant the permit if in the overall circumstances he considers that public order will not be imperiled notwithstanding the existence of the listed circumstance. In the case of the application of s 7(2)(*h*), even if a foreigner is going to speak at a public assembly in Singapore, the Commissioner may nevertheless, for example, grant the permit if he considers the nature of the assembly, the speaker or the topic will not pose any sort of a threat to public order.

49 Further, it must be borne in mind that foreigners are not guaranteed constitutional rights under Art 14(1) as the article makes clear that these rights are extended only to *Singapore citizens*. For this reason, derogations which are directed at the participation of foreigners, such as s 7(2)(*h*) of the POA, would attract an even more generous standard of review by the court. It is worth reiterating that in the present case the Applicant could have organised the very same Event on the very same topic at the very same public venue without having to apply for a permit had all the speakers at the Event been Singaporeans.

50 In regard to setting up a permit scheme and the delegation of the permit-granting power to the Commissioner, this is a wholly reasonable and well-trodden approach by Parliament. It is obvious that Parliament cannot be expected to anticipate all the different circumstances that may be relevant or may arise at any given time in relation to decisions as to whether a public assembly ought to be allowed to proceed. In this respect, it is useful to refer to the observations of N M Miabhoy J in the High Court of Gujarat decision of *Indulal K Yagnik v State of Gujarat and Ors* AIR 1963 Guj 259 ("*Indulal*"). This was a case in which the petitioner challenged the constitutionality of s 33(1)(r)(iii) of the Bombay Police Act 1951 ("Bombay Police Act") on the ground that it violated Arts 14 and 19 of the Indian Constitution (the latter provides for the constitutional right to freely assemble). Section 33(1)(r)(iii) of the Bombay Police Act prohibited every person from using a loudspeaker in or near any public place without first obtaining a licence from the District Magistrate. The petitioner argued that the right of freedom of speech and expression included the right to propagate one's views by and through all available means, including by means of a loudspeaker, and that the provision contained a "total prohibition" of the fundamental right of free speech and expression. Miabhoy J, delivering the decision of the court, observed that the

powers contained in Bombay Police Act were not untrammeled, as s 33 of that legislation provided for certain safeguards and imposed certain conditions in the exercise of those powers. Significantly, Miabhoy J explained the usefulness of granting discretionary powers to those "whom the duty of preservation of the public order is imposed from day to day" (*Indulal* at [28]):

> The objects which are to be achieved by making such a rule are clearly mentioned. As we have already pointed out these objects can best be achieved by the Legislature by leaving the powers in the hands of those on whom the duty of preservation of the public order is imposed from day to day. It is impossible for the Legislature to envisage, in advance, what rules or orders will be required to be gassed in different parts of the State for preservation of public peace and order. It is unreasonable to expect that the Legislature could have brought out in a single piece of legislation, all the diverse conditions and circumstances in which such powers will be required to be exercised in the interests of peace and order.

51 The Privy Council in *Arthur Francis v Chief of Police* [1973] AC 761 ("*Arthur Francis*") made a similar observation in the context of a challenge to s 5 of the Public Meetings and Processions Act 1969 (No 4 of 1969) (UK) on the basis that it contravened s 10 of the St Christopher, Nevis and Anguilla Constitution Order 1967 (SI 1967 No 228) (UK). The former provision required that an individual obtain the permission of the Chief of Police to use a loudspeaker in a public meeting. The Privy Council noted that it was convenient to designate the Chief of Police as the licensing authority as he was concerned with preserving public order and knew of the prevailing local conditions and was therefore capable of making a quick decision. In the circumstances, the Chief of Police was well placed to decide whether a permit should be granted or not (*Arthur Francis* at 772–773).

52 We would add that it is entirely legitimate and in the interests of society for a permit scheme to operate given that this would assure the best prospects

of *preventing* disorder as opposed to attempting to stop disorder which has already taken place. The Commissioner may, if he believes that there is a risk of public disorder (for example, through the involvement of a hostile foreign agency) still allow the public assembly to carry on but with certain conditions attached. The High Court of Gujarat in *Indulal* made much the same point at [30] when it stated that if licensing powers were not granted, the public authorities would only be able to preserve public order *after* disorder had already taken place whilst also remarking that it was more important to prevent disorder than restore order after disorder had taken place.

53 In line with the observations made by Miabhoy J in *Indulal*, we considered it entirely appropriate for Parliament to confer the licensing discretion on a public authority (in this case, the Commissioner). Instead of prohibiting all public assemblies directed at a political end and which involved a foreign entity or individual, Parliament has granted the Commissioner the discretion to either grant or refuse to grant a permit. This discretion must be exercised in accordance with the guidelines provided by the POA. Further, the Commissioner's decision to refuse to grant an applicant a permit is not necessarily final, as the POA allows an applicant to appeal that decision to the Minister pursuant to s 11. The Minister must similarly consider the merits of any appeal in accordance with the guidelines established by the POA and may, if the facts and circumstances warrant, either (a) reject the appeal and confirm the Commissioner's decision; (b) allow the appeal in whole or in part and vary the Commissioner's decision; (c) set aside the Commissioner's decision and make a decision in substitution of it; or (d) direct the Commissioner to reconsider his decision (s 11(3) of the POA).

54 Having applied the three-step framework set out above, we found that the statutory derogation under s 16(1)(*a*) of the POA passes constitutional muster and is therefore valid.

55 Finally, we noted that the additional and very considerable difficulty that the Applicant faced here was that he had never applied for the requisite permit from the Commissioner even though he had been expressly advised to do so. In the circumstances, the only route available to the Applicant in his attempt to resist conviction on the charge was to show that the entire POA is *ex facie* invalid. On the basis of the analysis set out above, this submission clearly could not be accepted.

56 The Applicant was also wrong to suggest that he had no real or effective remedy against any decision which had been made by the Commissioner in bad faith or otherwise to deny him the necessary permit to carry out the public assembly. This was because, as we have already explained above at [53], if the Applicant had indeed applied for a permit and this had been refused by the Commissioner, he could have appealed that decision to the Minister. In the situation that both the Commissioner and the Minister acted in bad faith and on this basis refused the grant of the permit to the Applicant, the Applicant could have made an application for judicial review. Even though the court cannot by its own motion grant the Applicant the required permit to carry out the proposed public assembly, it may (in a successful judicial review application) quash the Minister's decision and require that the decision be made afresh in accordance with the relevant legal principles. In any event, it was plain to us that there was no basis at all for assessing the constitutional validity of the POA on the premise that those entrusted with the discretion would exercise it in bad faith or for improper purposes. The POA on its face clearly sets out the grounds upon which the Commissioner may refuse to grant the permit. As these grounds are

constitutionally valid considerations by which the Commissioner may refuse to grant the permit and the refusal must be based on one or more of them, the only recourse available to an individual is to contend that the actual exercise of the discretion was tainted by bad faith or by improper considerations or is otherwise unconstitutional. Such arguments were not open to the Applicant as he had not even applied for the relevant permit in the first place. No application having been made, there was no decision that could be impugned on any basis. No question of remedies arose at all in the Applicant's situation.

Conclusion

57 For the reasons set out above, we answered the Question in the affirmative. In the circumstances, there was no reason to set aside the Applicant's conviction under s 16(1)(*a*) of the POA.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal

Tay Yong Kwang Judge of Appeal	Steven Chong Judge of Appeal

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