

**IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

[2021] SGHC 294

Originating Summons No 917 of 2021

In the matter of an application by the Attorney-General for an order of
committal for contempt of court against Xu Yuan Chen

And

In the matter of Articles 12(1), 12(2) and 35(8) of the Constitution of the
Republic of Singapore (1985 Rev Ed, 1999 Reprint)

And

In the matter of Order 53, Rule 1 of the Rules of Court (2014 Rev Ed)

Re Xu Yuan Chen (alias Terry
Xu)

... Applicant

FOUNDATIONS OF DECISION

[Administrative Law] — [Judicial review]
[Constitutional Law] — [Attorney-General] — [Prosecutorial discretion]
[Constitutional Law] — [Equal protection of the law]

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Re Xu Yuan Chen (alias Terry Xu)

[2021] SGHC 294

General Division of the High Court — Originating Summons No 917 of 2021
Hoo Sheau Peng J
11, 25 November 2021

30 December 2021

Hoo Sheau Peng J:

Introduction

1 HC/OS 917/2021 (“OS 917”) is an application by Mr Xu Yuan Chen (alias Terry Xu) (the “applicant”) for leave to commence judicial review proceedings in respect of a decision of the Attorney-General (“AG”) to prosecute him for contempt of court.

2 Essentially, the applicant sought leave to apply for a prohibiting order to stop the AG from proceeding with HC/SUM 3816/2021 (“SUM 3816”) in HC/OS 694/2021 (“OS 694”), which is the AG’s application for an order of committal against the applicant for contempt of court and for consequential orders. The applicant also sought leave to apply for declarations that SUM 3816 is in breach of Articles 12(1), 12(2) and 35(8) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) (the “Constitution”). However, as pointed out by the AG, procedurally, the applicant should have obtained leave to apply for the prohibiting order before including the prayers

for declaratory relief in the subsequent summons: O 53 rr 1(1) and 2(1) of the Rules of Court (2014 Rev Ed) (“Rules of Court”).¹

3 Be that as it may, having considered the parties’ submissions, I was of the view that leave should not be granted. I dismissed OS 917 on 25 November 2021, giving brief reasons for my decision. The applicant has appealed against my decision and I now set out the grounds for my decision in full.

Background facts

4 The applicant is the Chief Editor of The Online Citizen (“TOC”).² TOC is a news media platform.

5 SUM 3816 concerns the applicant’s publication of a letter entitled “Open letter to Singapore’s Chief Justice concerning omissions in ‘Opening of Legal Year 2021’ speech” (the “Letter”) with stylistic edits (the “Article”) on the website <https://www.theonlinecitizen.com> (the “TOC website”), as well as the applicant’s publication of a post on the Facebook page “The Online Citizen Asia” (the “TOC Facebook Page”) reproducing an excerpt from the Article and sharing the Article (the “Facebook Post”). Both publications were made on 27 January 2021.

6 Ms Julie Mary O’Connor (“Ms O’Connor”) is the original author of the Letter. Ms O’Connor is an Australian citizen who now resides in Australia.³ Ms

¹ The Attorney-General’s (“AG’s”) Written Submissions at p 2 footnote 7.

² Terry Xu’s Affidavit dated 8 September 2021 (“TXA”) at para 4.

³ Julie Mary O’Connor’s Affidavit dated 25 October 2021 (“JMCA”) at para 1; Applicant’s Written Submissions at para 5.

O'Connor first published the Letter on her blog <http://bankingonthetruth.com> ("BOTT") on 27 January 2021.⁴

7 The AG's position is that the Letter, read in its entirety, impugns the integrity and impartiality of the judiciary which poses a risk that public confidence in the administration of justice would be undermined, such that the applicant's publications of the Article on the TOC website and the Facebook Post on the TOC Facebook Page constitute contempt of court under s 3(1)(a) of the Administration of Justice (Protection) Act (Act 19 of 2016).

8 On 22 June 2021, the Attorney-General's Chambers ("AGC") sent a letter of demand to the applicant, asking the applicant to, *inter alia*, remove and delete the Article from the TOC website and to delete the Facebook Post from the TOC Facebook Page. The applicant did not do so.⁵

9 On 8 July 2021, the AG commenced OS 694 for leave to apply for the order of committal against the applicant. Having obtained such leave, SUM 3816 was filed on 11 August 2021. On 8 September 2021, the applicant lodged the present application.

10 In support of the application, apart from the required Statement pursuant to O 53 r 1(2) of the Rules of Court, there were four affidavits deposed by the applicant, as well as one affidavit deposed by Ms O'Connor. The AG filed an affidavit by an investigation officer, Assistant Superintendent of Police Tan Keng Seng ("ASP Tan"), and also filed a notice to intention to refer to an earlier affidavit by ASP Tan filed in OS 694.

⁴ JMCA at para 4.

⁵ Tan Keng Seng's Affidavit in HC/OS 694/2021 dated 8 July 2021 ("TKSA") at paras 24–26.

The parties' cases

11 Essentially, the applicant's application rested on two interrelated grounds. First, the applicant contended that the AG's decision to prosecute him for contempt of court is "both unlawful and irrational". Second, the applicant argued that the AG's decision to prosecute him for contempt is in breach of the applicant's right to equal protection under the law pursuant to Art 12(1) of the Constitution. Effectively, on either ground, it was the applicant's case that the AG has improperly exercised the prosecutorial power and discretion conferred on him by Art 35(8) of the Constitution.

12 In this connection, the main points that the applicant relied on for both grounds are as follows:

(a) The AG had singled the applicant out for committal for contempt of court and had not taken the matter up or pursued the matter with Ms O'Connor, who was the author and original publisher of the Letter.⁶

(b) On 27 January 2021, the applicant became aware of Ms O'Connor's publication of the Letter on BOTT. BOTT contains "many of [Ms O'Connor's] writings and articles which are targeted at Singapore readers, as she comments extensively on Singapore affairs". The comments on her blog are also mostly from Singaporeans.⁷

(c) He then sought and obtained permission from Ms O'Connor to republish the Letter as he judged it to be of public interest which merited republication by the TOC.⁸

⁶ TXA at para 26; AG's Written Submissions at para 6.

⁷ TXA at para 7.

⁸ TXA at para 9.

(d) Ms O'Connor has updated the Letter allegedly to the effect that she has taken "full responsibility" for it on 10 March 2021.⁹ She has also declared that she is willing to be questioned by the authorities.¹⁰

(e) It is not the case that "the authorities cannot reach [Ms O'Connor]". Indeed, the AG has been "willing to go to the end of the world to charge a contemnor". The AG "will not hesitate to pursue foreigners for contempt of court". In this connection, the applicant relied on action taken against Mr Li Shengwu ("Mr Li"), and two Malaysian entities MalaysiaNow and Lawyers for Liberty.¹¹

(f) There is discrimination against the applicant because of his position "as a journalist and the Chief Editor of TOC".¹²

(g) Ms O'Connor has also published the Letter on her Facebook, Twitter and LinkedIn platforms. The publications remain on BOTT, as well as on these social media platforms.¹³

13 During the hearing, the applicant indicated that a third ground concerning an alleged breach of Art 12(2) of the Constitution will not be relied on. Based on the evidence adduced, the applicant submitted that he had shown a *prima facie* case for leave to be granted.

⁹ TXA at para 17.

¹⁰ TXA at para 22 and pp 30, 35 and 44.

¹¹ TXA at paras 22–25.

¹² TXA at para 28.

¹³ TXA at para 19.

14 In response, the AG submitted that the applicant had fallen far short of showing a *prima facie* case in his favour for leave to be granted. “[W]hether seen through the lens of Art 12 or the judicial grounds of illegality and irrationality”, the application was “fundamentally premised on the assertion that the [r]espondent has treated him differently from Ms O’Connor without basis”. However, the AG submitted that “this ignore[d] the numerous factors which serve to distinguish him from Ms O’Connor, and which can legitimately account for the difference in treatment between them”.¹⁴

15 In this regard, the AG argued that *illustratively*, there are at least three material differences between them as summarised below:¹⁵

(a) First, the applicant’s publication of Ms O’Connor’s allegations gave them greater currency than they would otherwise have had by virtue of Ms O’Connor’s publication of the Letter alone. Greater harm was likely occasioned as a result of the Applicant publishing the Article and the Facebook Post, than as a result of Ms O’Connor publishing the Letter on BOTT (and her other social media platforms).

(b) Second, the applicant’s publication of the Article and the Facebook Post evinced a higher culpability than Ms O’Connor’s publication of the Letter.

(c) Third, the fact that Ms O’Connor resides overseas posed difficulties in investigation, prosecution and enforcement.

¹⁴ AG’s Written Submissions at para 16.

¹⁵ AG’s Written Submissions at para 17.

16 The AG emphasised that there was no duty on the part of the AG to disclose the reasons for its prosecutorial discretion. Therefore, it was not the AG's position that these were in fact the considerations, or the only considerations, which underpinned the difference in treatment of the two persons.¹⁶

Issue to be determined

17 From the foregoing, the only issue to be determined was whether leave to commence judicial review proceedings (against the AG's exercise of prosecutorial discretion) should be granted. In this regard, the applicant raised two grounds in support for his position (as mentioned at [11] above):

- (a) the AG's decision to prosecute him for contempt of court is "both unlawful and irrational"; and
- (b) the AG's decision to prosecute him for contempt is in breach of the applicant's right to equal protection under the law pursuant to Art 12(1) of the Constitution.

The law

18 As reiterated by the Court of Appeal in *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 ("*Syed Suhail*") at [9], for an applicant to obtain leave to commence judicial review proceedings, three conditions are to be met:

- (a) the subject matter of the complaint has to be susceptible to judicial review;

¹⁶ AG's Written Submissions at para 18.

- (b) the applicant must have sufficient interest in the subject matter; and
- (c) the material before the court must disclose an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought by the applicant.

19 Before me, there were no contentions in relation to the first two conditions. The dispute concerned the third condition only.

20 Article 35(8) of the Constitution vests prosecutorial power on the AG. In view of the constitutional office, when the AG initiates a prosecution against an offender, there is a presumption that the AG does so in accordance with the law. In other words, the court should presume that the AG's prosecutorial decisions are constitutional or lawful until they are shown to be otherwise: *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 ("*Ramalingam*") at [44].

21 In respect of both grounds, the applicant asserted that in exercising his prosecutorial power and discretion under Art 35(8) of the Constitution, the AG has treated the applicant differently from Ms O'Connor without basis. For completeness, Art 12(1) of the Constitution states:

Equal protection

12.—(1) All persons are equal before the law and entitled to the equal protection of the law.

22 In *Daniel De Costa Augustin v Public Prosecutor* [2020] 5 SLR 609 ("*Daniel De Costa*") at [54]–[55], the High Court summarised the principles concerning the interpretation and effect of Art 12(1) in relation to prosecutorial discretion as laid out by the Court of Appeal in *Ramalingam* thus:

Ramalingam embarked on a detailed and comprehensive consideration of the law pertaining to the constitutional ambits of prosecutorial discretion under Art 12(1). ...

After the lengthy discussion, the Court of Appeal established that: all things being equal, like cases must be treated alike with respect to all offenders involved in the same criminal conduct (at [24], [51]); there must be no bias on the Prosecution's part and irrelevant considerations must not be taken into account (at [51]); the Prosecution is entitled to take into account many factors in its exercise of prosecutorial discretion, and where the factors apply differently to different offenders, it may justify different treatment between them (at [24], [52]); the burden of proof lies on the offender to show a *prima facie* breach of prosecutorial discretion (at [70]–[72]); and if such *prima facie* breach is proven, the Prosecution must justify its prosecutorial decision to the court (at [28]).

23 I emphasise that where there is an allegation of breach of Art 12(1) of the Constitution by the AG, unless the applicant produces *prima facie* evidence of reasonable suspicion of breach, the AG need not justify his prosecutorial decision. To discharge his evidential burden, an applicant may adduce evidence that he could be considered equally situated with another person. At this first stage, the court engages in an assessment of whether the persons in question could be said to be equally situated such that any differential treatment required justification. If so discharged, the evidential burden is shifted to the AG to provide justification for treating them differently. At this second stage, the court considers the question of whether the differential treatment was reasonable – meaning whether it was based on “legitimate” reasons which made differential treatment “proper”: *Syed Suhail* at [61].

24 At this juncture, I digress briefly to address the applicant's submission that the AG did not even provide any evidence by way of affidavit to justify his prosecutorial discretion to the court. Instead, there were only two affidavits by ASP Tan. However, ASP Tan was not in the position to explain the reasons for

the AG's exercise of the prosecutorial discretion.¹⁷ In response, the AG stated that the applicant had not even discharged his evidential burden to show that Ms O'Connor could be said to be equally situated such that any differential treatment required justification. At this stage, it was only necessary for the AG to show that such relevant differences or distinguishing factors exist "by way of illustration": *Daniel De Costa* at [82]–[84]. This was the purpose for reliance on ASP Tan's affidavits. On this point, I accepted the AG's position that ASP Tan's affidavits were meant to engage with this first stage inquiry, and not to provide the actual justification for the exercise of the prosecutorial discretion.

25 To round off, the applicant also contended that SUM 3816 is illegal and/or irrational based on the AG treating him differently from Ms O'Connor. In considering the legality of a decision, the court examines whether a decision-maker "has exercised his discretion in good faith according to the statutory purpose for which the power was granted, and whether he has taken into account irrelevant considerations or failed to take account of relevant considerations". In examining the rationality of a decision, the court "seeks to ascertain the range of legally possible answers and asks if the decision made is one which, though falling within that range, is so absurd that no reasonable decision-maker could have come to it" [emphasis in original omitted]: *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 at [80]. Again, it was for the applicant to show *prima facie* evidence in support of such contentions.

26 As stated above, the crux of the applicant's case was that the AG has treated him differently from Ms O'Connor without any basis. Therefore, for convenience, I begin with the second ground (*ie*, whether the AG's decision to

¹⁷ Applicant's Written Submissions at paras 38–39.

prosecute him for contempt is in breach of the applicant's right to equal protection under the law pursuant to Art 12(1) of the Constitution).

Whether *prima facie* evidence of a breach of Article 12(1) of the Constitution shown

27 Having considered the submissions, I was of the view that the applicant had not shown a *prima facie* breach of Art 12(1) of the Constitution.

28 As observed in *Daniel De Costa* at [83], the fact that one offender faces prosecution, while others who may have committed similar actions do not, does not *ipso facto* indicate breach of Art 12(1) or the improper exercise of discretion. Differentiation between offenders (even of equal guilt), can be legitimately taken for many reasons and based on the consideration of many factors. It is for the offender who complains of a breach of Art 12(1) of the Constitution to prove that there are *no* valid grounds for such differentiation. In the absence of such proof by the offender, the court should not presume that there are no valid grounds in this regard.

29 It is important, as in any case where an applicant alleges a breach of Art 12(1) of the Constitution, to be clear of the relevant comparator. As the applicant pointed out, the relevant comparator was Ms O'Connor. In my judgment, it was both erroneous and irrelevant to analogise Ms O'Connor to other cases concerning Mr Li or other Malaysian entities such as MalaysiaNow and Lawyers for Liberty as the applicant contended (see [12(e)] above).

30 I considered whether the applicant is *prima facie* equally situated with Ms O'Connor. In my judgment, this had to be answered in the negative. In this regard, I accepted the AG's arguments that *by way of illustration*, there were at least three material differences between the applicant and Ms O'Connor.

31 First, the difference in the *degree of any harm caused*. As the AG pointed out, TOC, founded in 2006, is a well-known alternative news platform in Singapore with a substantial audience and reach. Apart from the applicant, TOC had a team of writers and reporters to “provide readers with alternative perspectives and to cover stories ignored or under-reported by traditional media” in Singapore.¹⁸ In May 2019, an article by the digital and social media agency Hashmeta stated that TOC received over a million monthly web visits. A survey conducted by the Reuters Institute for the Study of Journalism in January/February 2020 found that 17% of its 2,014 respondents accessed TOC at least weekly.¹⁹ As of 17 June 2021, the TOC Facebook Page was “liked” by about 143,718 Facebook users, and “followed” by 211,343 Facebook users.²⁰

32 In contrast, BOTT appeared to be a blog administered by Ms O’Connor alone. While the applicant pointed out that the contents on BOTT were all related to Singapore, BOTT may be characterised as a vehicle for sharing of the personal views of Ms O’Connor on such matters. BOTT is less established. As of 4 October 2021, the oldest blog post displayed on BOTT was the Letter (which was stated to be published on 27 January 2021). The other blog posts were posted between 2 February 2021 and 4 October 2021. There were three webpages, one of which was dated 6 July 2020.²¹ Again, while the applicant argued that 93% of the viewers were from Singapore,²² it was certainly not as

¹⁸ AG’s Written Submissions at para 19(e).

¹⁹ TKSA at para 15.

²⁰ TKSA at para 17.

²¹ Tan Keng Seng’s Affidavit dated 15 October 2021 (“TKSA2”) at paras 21–24.

²² Applicant’s Written Submissions at para 34.

widely followed as TOC. Apart from the Letter which attracted 4,421 views, the other BOTT pages attracted between 69 and 161 views.²³

33 By 29 January 2021, the Article had received 16 comments, posted by ten different usernames.²⁴ By 17 June 2021, the Facebook Post had received a total of 146 Facebook reactions, 31 comments and 44 shares.²⁵ In contrast, as of 14 September 2021, on BOTT, the Letter had received only 12 comments (of which four were made by Ms O'Connor) and the other eight comments by three different persons.²⁶ There was some force in the AG's argument that if not for the applicant's publications, the Letter would not have received such great traction (with 4,421 views on BOTT). There was some basis to assume that some of these views were from users who came across the Article on the TOC Website or the TOC Facebook Page, and then clicked the link to BOTT at the bottom of the Article.²⁷

34 Thus, by publishing the Article and the Facebook Post, the applicant had likely given Ms O'Connor's allegations much wider circulation and more attention in the eyes of the public. There was likely to be greater impact following the applicant's publication on the TOC website and the TOC Facebook page. Given that TOC pitched itself to be an independent and reliable news platform, the publication would also likely have given Ms O'Connor's allegations more credibility than they would have enjoyed had they been published on BOTT alone. For similar reasons, the fact that Ms O'Connor also

²³ JMCA Exhibit JC-1 at Tab B.

²⁴ TKSA Exhibit TKS-12 at pp 163-170.

²⁵ TKSA at para 17.

²⁶ TKSA2 at para 14.

²⁷ AG's Written Submissions at para 19(b).

published the Letter on her Facebook, LinkedIn and Twitter platforms did not materially change my analysis.

35 Second, the difference in the *level of culpability involved*. The applicant is the Chief Editor of the TOC, which holds itself out as an independent media platform. The descriptions on the TOC Website portray TOC as an objective, reliable and credible news source.²⁸ As such, a higher standard of professionalism and integrity should be expected of its Chief Editor. In contrast, Ms O'Connor is not of the same stature. Upon a perusal of BOTT, it did not describe who Ms O'Connor was or explain BOTT's purpose. Based on its homepage,²⁹ it appeared that Ms O'Connor was aggrieved by what she perceived to be a fraudulent conspiracy against her involving various Singapore corporate entities and institutions. Certainly, Ms O'Connor did not hold herself out to be an independent journalist. While she may have written and published the Letter based on her personal belief in her allegations, the applicant, as a journalist and editor by profession could be expected to exercise a higher degree of judgment and circumspection in determining what to publish.

36 Third, the difference in *ease of investigations, prosecution and enforcement*. Ms O'Connor resides in Australia. Even if Ms O'Connor accepted full responsibility for the authorship and publication of the Letter on BOTT, and was open to questioning by the authorities, it could not be seriously challenged that her residence overseas would pose some difficulties in investigations, prosecution and enforcement for the authorities. In this connection, the applicant's reliance on three other cases – involving Mr Li, MalaysiaNow and Lawyers for Liberty (as mentioned at [29] above) – did not buttress his case. It

²⁸ TKSA Exhibit TKS-13 at p 173.

²⁹ TKSA2 Exhibit TKS-8 at pp 52-54.

was not disputed that the AG could prosecute person residing overseas for contempt of court. However, this did not mean that the fact that Ms O'Connor resides overseas was not a differentiating factor between the applicant and Ms O'Connor. It also did not follow that the AG must prosecute all persons residing overseas along with the offenders who reside locally, or else be in breach of Art 12(1) of the Constitution.

37 Certainly, “[i]t is not the policy of the law under our legal system that all offenders must be prosecuted, regardless of the circumstances in which they have committed offences”: *Ramalingam* at [53]. Also “[i]t is not necessarily in the public interest that every offender must be prosecuted”. In addition to legal guilt, the AG is obliged to consider the offender’s “moral blameworthiness, the gravity of harm caused to the public welfare by his criminal activity, and a myriad of other factors”: *Ramalingam* at [63]. The differentiating factors which were put forth *for illustrative purposes only* – especially of harm and culpability in respect of the applicant and Ms O'Connor – were legitimate considerations for the AG. As such, I found that applicant had not discharged his burden to adduce evidence of a *prima facie* breach of Art 12(1) of the Constitution.

38 I acknowledged that there was some evidence for the applicant’s position that Ms O'Connor has accepted “full responsibility” for the contents of the Letter which she wrote and published on BOTT. However, Ms O'Connor’s admission of responsibility for the authorship of the Letter did not in any way undermine the fact that there were these differentiating factors as mentioned between the applicant and Ms O'Connor. Further, it seemed to me that Ms O'Connor’s action did not absolve the applicant of his responsibility, *if any*, for the publication of the Article and the Facebook Post as the Chief Editor of TOC. That, of course, would be a matter for another day in SUM 3816.

Whether *prima facie* evidence of illegality or irrationality shown

39 The Applicant’s claims of illegality and irrationality were premised on the same matters discussed above. In light of my finding that the applicant’s argument that the Art 12(1) right has been breached was not made out, these claims fell away.

Conclusion

40 Accordingly, I dismissed the application.

41 The applicant submitted that there should be no order as to costs. Although the AG succeeded in resisting OS 917, the applicant submitted that the application was one of “public importance”. It was appropriate for the applicant to challenge the AG’s prosecutorial decision.

42 The AG submitted that costs should be awarded in accordance with the general principle that costs follow the event. The AG submitted that, having regard to the guidelines for party-and-party costs, the appropriate quantum of costs would be \$8,000 (with reasonable disbursements) to be paid by the applicant to the AG.

43 In response, the applicant submitted that should costs be awarded, the quantum should be adjusted downwards to \$5,000.

44 Having considered the parties' submissions on costs, I awarded costs of \$5,000 (with reasonable disbursements to be agreed on) to be paid by the applicant to the AG.

Hoo Sheau Peng
Judge of the High Court

Lim Tean (Carson Law Chambers) for the applicant;
Kristy Tan SC, Sarah Siaw and Amanda Sum (Attorney-General's
Chambers) for the Attorney-General.