IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 58

Civil Appeal No 31 of 2022

Between

(1) Iskandar Bin Rahmat
(2) Abdul Rahim Bin Shapiee
(3) Datchinamurthy a/l Kataiah
(4) Rosman Bin Abdullah
(5) Pannir Selvam a/l Pranthaman
(6) Saminathan Selvaraju
(7) Masoud Rahimi Bin Merzad
(8) Mohammad Rizwan Bin Akbar Husain
(9) Roslan Bin Bakar
(10) Pausi Bin Jefridin
(11) Jumaat Bin Mohamed Sayed
(12) Ramdhan Bin Lajis
(13) Lingkesvaran Rajendaren
(14) Syed Suhail Bin Syed Zin
(15) Mohammad Azwan Bin Bohari
(16) Hamzah Bin Ibrahim
(17) Mohammad Reduan Bin Mustaffar
(18) Moad Fadzir Bin Mustaffa
(19) Mohamed Shalleh Bin Abdul Latiff
(20) Zamri Bin Mohd Tahir
(21) Muhammad Faizal Bin Mohd Shariff
(22) Sulaiman Bin Jumari
(23) Tangaraju s/o Suppiah
(24) Tan Kay Yong

… *Appellants*

And

(1) Attorney General

(2) Government of Singapore

… *Respondents*

In the matter of Originating Claim No 166 of 2022 (Summons No 2858 of 2022)

Between

(1) Iskandar Bin Rahmat
(2) Abdul Rahim Bin Shapiee
(3) Datchinamurthy a/l Kataiah
(4) Rosman Bin Abdullah
(5) Pannir Selvam a/l Pranthaman
(6) Saminathan Selvaraju
(7) Masoud Rahimi Bin Merzad
(8) Mohammad Rizwan Bin Akbar Husain
(9) Roslan Bin Bakar
(10) Pausi Bin Jefridin
(11) Jumaat Bin Mohamed Sayed
(12) Ramdhan Bin Lajis
(13) Lingkesvaran Rajendaren
(14) Syed Suhail Bin Syed Zin
(15) Mohammad Azwan Bin Bohari
(16) Hamzah Bin Ibrahim
(17) Mohammad Reduan Bin Mustaffar
(18) Moad Fadzir Bin Mustaffa
(19) Mohamed Shalleh Bin Abdul Latiff
(20) Zamri Bin Mohd Tahir
(21) Muhammad Faizal Bin Mohd Shariff
(22) Sulaiman Bin Jumari
(23) Tangaraju s/o Suppiah
(24) Tan Kay Yong

… *Claimants*

And

(1) Attorney General

(2) Government of Singapore

… *Defendants*

JUDGMENT

[Constitutional Law — Accused person — Rights]
[Constitutional Law — Fundamental liberties — Right to life and personal liberty]
[Constitutional Law — Equality before the law]
[Tort — Breach of statutory duty — Essential factors]
[Abuse of Process — Collateral purpose]

Iskandar bin Rahmat and others
v
Attorney-General and another

[2022] SGCA 58

Court of Appeal — Civil Appeal No 31 of 2022
Sundaresh Menon CJ, Tay Yong Kwang JCA and Woo Bih Li JAD
4 August 2022

4 August 2022

Sundaresh Menon CJ (delivering the judgment of the court):

1 There are two matters before us today. The first is CA/CA 31/2022 ("CA 31"), which is an appeal against the decision of the High Court Judge ("the Judge") in HC/SUM 2858/2022 ("SUM 2858") that was rendered yesterday striking out HC/OC 166/2022 ("OC 166") in its entirety. OC 166 in turn was a claim brought by 24 convicted prisoners (collectively "the appellants") seeking:

> (a) A declaration that ss 356, 357 and 409 of the Criminal Procedure Code 2010 (2020 Rev Ed) ("the CPC Cost Provisions") are inconsistent with Arts 9(1) and 12(1) of the Constitution of the Republic of Singapore (2020 Rev Ed) ("the Constitution"). They claim that the CPC Cost Provisions deny their constitutional right to access to justice[1] ("the Declaration Claim").

---

[1] SOC at paras 1, 12(a).

(b) Damages for breach of a statutory duty "to allow and/or not to obstruct and/or to facilitate access to justice and/or access to counsel/legal advice in accordance with Article 9 of the Constitution, the Legal Profession Act 1966, Prisons Act 1993 and Prisons Regulations as well as the common law applicable in Singapore" ("the Damages Claim").[2]

2 The second matter that is before us today is an oral application made by the 2nd Appellant in CA 31, Abdul Rahim bin Shapiee ("Abdul Rahim"), seeking a stay of execution in respect of a Warrant to carry out the death sentence that was imposed on him some time ago. That sentence is scheduled to be carried out tomorrow. The stay application is grounded on an action that the 2nd appellant filed, namely HC/OC 173/2022 ("OC 173"), on 3 August 2022 against his counsel at trial, ostensibly for breach of his duty and for failing to follow instructions.

3 At the start of the proceedings before us, the appellants, who were in person, made an oral application for permission to be assisted by a McKenzie friend. Specifically, we were informed that the appellants wished to have Mr M Ravi ("Mr Ravi"), an advocate and solicitor, who currently does not hold a Practising Certificate ("PC") act as their McKenzie friend. Mr Ravi did hold a conditional PC, but this expired at the end of March this year. This was not renewed and indeed Mr Ravi had undertaken that he would not apply for a PC prior to the end of March 2023. We first dispose of this briefly.

---

[2] SOC at paras 7 and 12(b).

4 We asked the appellants what the purpose of the proposed McKenzie friend was and were told it was to enable them to get legal advice. We declined the request. A McKenzie friend has no right at all with respect to pending litigation. Any attempt to invoke the assistance of a McKenzie friend is at the initiative of the litigant and subject to the permission of the court. The court will usually be sympathetic to such a request where it considers that the litigant reasonably requires assistance appropriate to that which may be provided by a McKenzie friend. A McKenzie friend may not act as an advocate for a litigant, and is best seen as a support to aid the litigant in the way of helping with documents or with taking notes or with guiding a litigant through the process.

5 In *Wee Soon Kim Anthony v UBS AG* [2003] 1 SLR(R) 833 (*Anthony Wee*), after observing at [17] that a litigant may be denied the assistance of a McKenzie friend if there is reason, the High Court observed at [18]:

> 18 A McKenzie friend who takes his responsibilities seriously is a help not only to the litigant who seeks his assistance, but also to the court. He should be permitted to stay. On the other hand, one who abuses the privilege by disregarding the directions of the court, who pursues an agenda beyond helping the litigant, or who uses the privilege as a ***back door to a legal practice*** he is not qualified for, should not be allowed to carry on.
>
> [emphasis added in bold italics]

6 It was clear to us that this was not a case where the appellants needed the assistance of a McKenzie friend. The appellants had advanced their arguments before the Judge yesterday and directions had been given for those to stand as submissions before us. It was evident from those submissions that they either had already been assisted in developing their legal points or they did not require such assistance. Further this was not a case where there were voluminous documents such that they needed help to be assisted with these.

7 In any case, we were not minded to permit Mr Ravi to take on such a role. First, we were mindful of his previous conduct where he had appeared in a matter when he did not have a valid PC, ostensibly to provide "technical support". In *Nagaenthran a/l K Dharmalingam v Attorney-General and another matter* [2022] SGCA 26 we observed as follows at [21]–[22]:

> 21 The hearing on 1 March 2022 was scheduled to start at 10.00am. Although the appellant and the Prosecution were in court and although the court was ready to hear the matter at 10.00am, Ms Netto only arrived at 10.15am. She was accompanied by Mr Ravi, even though he is not presently able to practise as an advocate and solicitor or to appear before the court …
>
> 22 When the hearing started, Ms Netto introduced Mr Ravi and sought permission for him to be allowed to sit at the counsel table to provide her with 'technical support'. When asked to explain the nature of this technical support, Ms Netto said that his role would be limited to handing her documents when she asked for them. However, as the hearing progressed, Mr Ravi hardly handed any documents to Ms Netto. Instead, it became obvious that Ms Netto would not take any position in relation to the case or the arguments without Mr Ravi's substantive inputs: nearly every submission made by Ms Netto and just about every answer she gave in response to questions from the court over the course of the hour-long hearing was preceded by an often extended, hushed discussion with Mr Ravi. This was embarrassing, since Mr Ravi was not permitted to act as a solicitor at this time but appeared to be giving instructions to Ms Netto; it was also disrespectful to the court for such conduct to be carried on in our sight and in a manner that was wholly contrary to what Ms Netto had conveyed to us as the basis for her request that Mr Ravi be permitted to sit beside her at the counsel table when he was not entitled to do so.

8 Aside from this, we had regard to the fact that Mr Ravi had subsequently decided not to renew his PC and had undertaken not to apply for a PC until next year. In those circumstances, we did not think it would have been appropriate for him to be giving legal advice to these appellants. We were concerned that Mr Ravi should not use this as a way to do through the back door that which he is not lawfully permitted to do.

9 With that we turn to the matters before us.

Background

10 The 2nd appellant, Abdul Rahim, and a co-accused person, Ong Seow Ping ("Ong"), are scheduled to be executed on Friday, 5 August 2022 pursuant to the death sentence that was imposed on each of them. Ong is not party to these proceedings.

Conviction and appeal

11 They were convicted on 15 March 2018 in a joint trial ("the Joint Trial"). They faced separate charges of possessing a Class A controlled drug for the purpose of trafficking under s 5(1)(*a*), read with s 5(2), of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA"). The trial judge found that the alternative sentencing regime under s 33B of the MDA was not applicable and imposed the death sentence (see *Public Prosecutor v Ong Seow Ping and another* [2018] SGHC 82 at [1]). Abdul Rahim was represented by Nadwani Manoj Prakash ("Manoj"), Jeeva Arul Joethy and Luo Ling Ling. We return to this later.

12 On 5 March 2020, Abdul Rahim's and Ong's appeals ("the Appeals") against conviction and sentence were dismissed. At the appeal Abdul Rahim was represented by a different counsel, Dhillon Surinder Singh ("Mr Singh") who was assisted by one of the assisting counsel, Luo Ling Ling, who had also been part of the team representing him at trial.

13 Abdul Rahim was also involved in two other sets of proceedings before the present set of proceedings. In HC/OS 825/2021 and HC/OS 1025/2021 (see for instance *Syed Suhail bin Syed Zin and others v Attorney-General* [2021] SGHC 274), he was part of a group of applicants jointly represented by Mr Ravi in proceedings that were dismissed.

OC 166

14 The Warrants of Execution for Abdul Rahim and Ong were issued to the Commissioner of Prisons on 19 July 2022, stating that they were to be executed on 5 August 2022. Abdul Rahim received his Notice of Execution on Friday, 29 July 2022.[3] The appellants contend that they had intended to file OC 166 on Thursday 28 July 2022, but that the Registry officer at the prison had erroneously[4] rejected their filing and that they were only eventually able to do so on Monday 1 August 2022.[5]

15 We have already noted that the principal relief sought in OC 166 was a declaration that the CPC Cost Provisions are invalid for inconsistency with the Constitution. For convenience we set these out as follows:

> **Costs ordered by Court of Appeal or General Division of High Court**
>
> **356.**—(1) The Court of Appeal or the General Division of the High Court, in the exercise of its powers under Part 20, may —
>
> (*a*) on its own motion, make an order for costs to be paid by any party to any other party as the Court of Appeal or the General Division of the High Court thinks fit; or
>
> (*b*) on the application of any party, make an order for costs, of such amount as the Court of Appeal or the

---

3 Justice See's Oral Grounds ("Oral Grounds") at [22].

4 He claims they re-submitted the exact same documents on Monday: MS at p 4.

5 Justice See's Minute sheet dated 3 August 2022 ("MS") at p 4.

> General Division of the High Court thinks fit, to be paid to that party by any other party.
>
> …
>
> (3) Before the Court of Appeal or the General Division of the High Court makes any order for costs to be ***paid by an accused to the prosecution***, the Court of Appeal or the General Division of the High Court must be satisfied that —
>
> > (*a*) the commencement, continuation or conduct of the matter under Part 20 by the accused was an ***abuse of the process*** of the Court; or
> >
> > (*b*) the conduct of the matter under Part 20 by the accused was done in an ***extravagant and unnecessary*** manner.
>
> …
>
> **Costs against defence counsel**
>
> **357**.—(1) Where it appears to a court that costs have been incurred ***unreasonably or improperly*** in any proceedings (for example, by commencing, continuing or conducting a matter the commencement, continuation or conduct of which is an ***abuse of the process*** of the Court) or have been wasted by a failure to conduct proceedings with ***reasonable competence and expedition***, the court may make against any advocate whom it considers responsible (whether personally or through an employee or agent) an order —
>
> > (*a*) disallowing the costs as between the advocate and his or her client; or
> >
> > (*b*) directing the advocate to repay to his or her client costs which the client has been ordered to pay to any person.
>
> …
>
> **Costs**
>
> **409.** If the relevant court dismisses a criminal motion and is of the opinion that the motion was ***frivolous*** or ***vexatious*** or otherwise an ***abuse of the process*** of the relevant court, it may, either on the application of the respondent or on its own motion, order the applicant of the criminal motion to pay to the respondent costs on an indemnity basis or otherwise fixed by the relevant court.
>
> [emphasis added in bold italics]

16 Upon receiving OC 166, the Attorney-General ("AG") applied by way of SUM 2858 on 2 August 2022 to strike out the entirety of OC 166 under O 9 r 16 of the Rules of Court 2021 ("ROC"), which provides as follows:

> **16.**—(1) The Court may order any or part of any pleading to be struck out or amended, on the ground that —
>
> (*a*) it discloses no reasonable cause of action or defence;
>
> (*b*) it is an abuse of process of the Court; or
>
> (*c*) it is in the interests of justice to do so,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly.
>
> (2) No evidence is admissible on an application under paragraph (1)(*a*).

17 Under O 9 r 16(1)(*a*) ROC, the test is whether the action has some chance of success when only the allegations in the pleadings are concerned: *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and* others [1997] 3 SLR(R) 649 ("*Gabriel Peter*") at [21]. If that is found to be the case, then the action will not be struck out.

18 Order 9 r 16(1)(*b*) allows the court to strike out pleadings which constitute an abuse of process of the court. The inquiry here includes considerations of public policy and the interests of justice, and signifies that the process of the court must be used *bona fide* and properly and must not be abused; the court will prevent improper use of its machinery and the judicial process from being used as a means of vexation and oppression in the process of litigation: *Gabriel Peter* at [22].

19 In addition, Order 9 r 16(1)(*c*) allows the Court to strike out pleadings when it is in the interests of justice to do so. The Judge agreed with the AG[6] that this gives effect to the court's inherent jurisdiction to prevent injustice, such as where the claim is plainly or obviously unsustainable: *The "Bunga Melati 5"* [2012] 4 SLR 546 at [33].[7]

Appellants' claims

20 In relation to the Declaration Claim, the appellants' overarching case is that they stand to suffer or have suffered a breach of their right to natural justice. They contend that because of the imposition of what are termed "prohibitive cost[s] orders" in recent late-stage death row appeals or applications, they have been "prevented and/or obstructed from appointing lawyers to review and/or challenge their conviction and/or sentence and/or the clemency process and/or make other legal challenges."[8]

21 They contend that a denial of access to justice violates Arts 9(1) and 12(1) of the Constitution.

22 As to their case on Art 12(1), which appears to build on their claim in respect of Art 9(1), they contend that applicants/appellants in "*late-stage death row appeals or applications*"[9] [emphasis added] are especially disadvantaged by the CPC Cost Provisions because there is an exposure to such costs which makes it even more likely that lawyers will not represent them out of fear of costs consequences.

---

6 Attorney General's Submissions ("AGS") at para 6.

7 Oral Grounds at [21]; AGS at para 6.

8 SOC at paras 5-6.

9 SOC at para 5.

23 As for the Damages Claim, the appellants plead that the respondents breached their "statutory duty to allow and/or not to obstruct and/or to facilitate access to justice and/or access to counsel/legal advice in accordance with Article 9 of the Constitution, the Legal Profession Act 1966, Prisons Act 1993 and Prisons Regulations as well as the common law applicable in Singapore by virtue of Article 2 of the Constitution".[10] The appellants did not identify which provision(s) in these pieces of legislation gave rise to the pleaded statutory duty, nor how any of the remaining elements for the tort are established.

Respondents' submissions

24 The AG submits that the Declaration and Damages Claims are liable to be struck out under all three limbs of O 9 r 16(1) ROC. In gist, for the Declaration Claim, the AG argues that the CPC Cost Provisions do not prevent access to justice because cost consequences are only imposed on proceedings that are *improperly* prosecuted (citing *Roslan Bin Bakar and others v Public Prosecutor and another appeal* [2022] SGCA 57 ("*Roslan*") at [24]–[27]).[11] The CPC Cost Provisions do not apply to and cannot deter the filing of *bona fide* applications. For the Damages Claim, the AG argues that none of the elements of the tort of breach of statutory duty are made out.[12]

---

10 SOC at para 7.

11 AGS at para 16.

12 AGS at para 23.

Judge's decision

25 The Judge allowed SUM 2858 and struck out OC 166 in its entirety. He held that the claim disclosed no reasonable cause of action. While the Judge considered the facts pleaded by the appellants to be insufficient in all the circumstances, we do not think it is necessary to consider the factual deficiencies for reasons we explain shortly.

26 The Judge found that Art 9 was not violated because the CPC Cost Provisions were "unlikely to deter" counsel from providing *bona fide* legal advice and representing clients in good faith (citing *Roslan* at [24]).[13]

27 Likewise for Art 12, he found this was not violated by the CPC Cost Provisions because the relevant differentiating criteria was whether claims were brought properly, and this was an entirely reasonable classification that bore a rational relation to "the object sought to be achieved by statute which is to deter any person or lawyer to appear before a court and act improperly".[14]

28 The Judge struck out the Declaration Claim for being "plainly unsustainable". However, he did grant an interim stay of execution pending the hearing of any appeal.

29 The Judge did not have to consider Abdul Rahim's separate application for a stay based on OC 173 as that was brought before us for the first time.

---

13 Oral Grounds at [13].

14 Oral Grounds at [14].

Our decision

30 We first deal with the Declaration claim.

The Declaration Claim is without merit

Art 9(1)

31 Article 9 of the Constitution states in relevant part:

> **9.**—(1) No person shall be deprived of his life or personal liberty save in accordance with law.
>
> …
>
> (3) Where a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

32 In the Declaration Claim, the appellants allege that the CPC Cost Provisions violate Art 9(1). Before the Judge and initially before us, considerable time was spent exploring various factual points. Specifically:

(a) It was contended that the Singapore Prisons Service ("SPS") had deliberately refused to accept service of the draft filing that later emerged as OC 166 on 28 July because SPS wanted first to issue the Notice of Execution against the 2nd appellant on the next day. We note for the record that this was hotly contested by the AG.

(b) Having issued the Notice of Execution, the draft document was then accepted on 1 August and filed, but it had to be dealt with on an expedited basis because of the pendency of the Warrant of Execution a few days later.

(c) The expedited nature of the hearing deprived the appellants of the opportunity to gather evidence to show that practising lawyers were in fact deterred by the prospect of having to incur liability for costs from taking on the task of advising or representing applicants such as the present appellants.

(d) Their family members also indicated to the court that they were willing to put forward specific evidence setting out the names of such lawyers and the reasons they had advanced for declining to take on the representation of at least some of the present appellants.

33 In our judgment, given the nature of the Declaration Claim, this was a case where it was necessary to consider whether there was a viable claim to begin with. Just as the exploration of an interesting or important point of law cannot be undertaken by a court without an appropriate substratum of fact, the exploration of an interesting set of factual points cannot be undertaken without a viable legal claim. It is the confluence of a legal cause of action and the supporting substratum of fact that a court is concerned with in cases like the present. Hence, although the appellants present a robust case to the effect that there were factual points to be investigated, in our judgment, this would only be so if there was a viable legal cause of action that the factual averments could conceivably support. And this is where the appellants fail.

34 The fatal flaw in the appellants' case is that when the case law of this court dealing with the CPC Cost Provisions is understood, as it should be by any reasonable person, and even more so by lawyers, these provisions cannot reasonably deter lawyers from acting in *bona fide* applications/appeals for death row inmates.

35 We set out some of our pronouncements on this point in a variety of settings. In *Nagaenthran a/l K Dharmalingam v Attorney-General and another matter* [2022] SGCA 44, we rejected the submission made in the context of O 59 r 8(1)(*c*) of the Rules of Court (2014 Rev Ed) and s 357(1)(*b*) of the CPC that an order of personal costs against counsel would have a chilling effect on lawyers being willing to act for accused persons. The former of the provisions in question there empowers the court to order costs against solicitors personally where costs have been incurred "unreasonably or improperly" in any proceedings or have been "wasted by failure to conduct proceedings with reasonable competence and expedition". We stated (at [19]) that:

> Mr Ravi also made some general comments and submissions to the effect that this would constitute a reprisal against the Bar and claimed that both advocates and forensic psychiatrists were being chilled and discouraged from taking on engagements to act for accused persons if such orders were made. ***With respect, this was a baseless submission. No person, psychiatrist or lawyer, has a licence to appear before a court and act improperly; and if the making of an adverse costs order would deter such conduct, then that is precisely what the power is there for***.
>
> [emphasis added in bold italics]

36 In *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] 2 SLR 377 ("*Syed Suhail*") we considered the operation of s 357(1)(*b*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC 2012 Rev Ed") and ordered personal costs against a solicitor after a review application under s 394J of the CPC 2012 Rev Ed was dismissed. However, our grounds for imposing the personal costs order demonstrates that a high threshold must be crossed before such consequences are visited upon counsel. We said as follows (at [55]–[56]):

> 55 Where counsel brings a *patently unmeritorious application* in the face of these principles, the case for a personal costs order is particularly strong. In particular, where an advocate *deposes a belief that the application has merit despite the clear absence of merit,* that can be viewed in one of two ways. On the one hand, that advocate could be lying in his affidavit, in which case, he or she would be dishonestly trying to bring an application when he or she knows that the requirements are not satisfied. *On the other hand, even if the advocate possessed such an honest belief, if the application was objectively without merit and that would have been clear to any reasonable defence counsel (as opposed to being merely a weak case on the merits)*, then the advocate in question would have failed in his or her professional duty to act with reasonable competence. In either instance, that advocate would have failed to play the role expected of him or her in the criminal process, and this would be a very significant factor in favour of making a personal costs order against that advocate. It is also important to underscore the fact that these observations are being made in the context of a review application and not an appeal (which is given as of right to every convicted accused person and for which the threshold for an adverse costs order to be made against defence counsel may well be higher).
>
> 56 Second, in the context of such review applications, a personal costs order would be a salutary reminder to defence counsel that they have a responsibility to their clients to advise them properly. Accused persons who have been sentenced in particular to the death penalty should be protected from having their hopes unnecessarily raised and then dashed because of inaccurate or incompetent legal advice. This is especially so where, as in the context of a review application, the legal threshold for a successful application is very high. Failing to advise their clients appropriately at a sufficiently early stage may result in unrealistic expectations that are inflated by counsel … Lawyers should be aware that their advice must be accurate, measured, and serve the interests of justice, and that they should not simply encourage last-ditch attempts to reopen concluded matters without a reasonable basis. Due consideration should be given to the high threshold for a successful review application and the fact that it is a limited avenue of recourse which is not intended to simply allow anyone to relitigate their case.
>
> [emphasis in original omitted; emphasis added in italics]

37 It is evident from the foregoing that personal costs orders are not something that a lawyer faces in the event of running a case that may turn out

to be weak on the merits. On the contrary it is when the case run is plainly unmeritorious such that any reasonable counsel would have known this, that the counsel needs to consider whether he or she ought to be mounting that argument at all.

38 We also alluded in that case to the public interest in securing that lawyers conduct themselves appropriately especially in this context, even as we considered the need to ensure access to justice, as follows (*Syed Suhail* at [59]):

> 59 … In saying this, we recognise that there is a public interest in ensuring access to justice, and we reiterate that counsel who conduct themselves properly, even in advancing weak cases, will not be subject to adverse costs orders. We also continue to encourage counsel to take up opportunities to conduct cases *pro bono* for needy clients, a practice that exemplifies the best traditions of the Bar. However, there is no public interest in withholding criticism and adverse costs orders against counsel whose improper conduct amounts to an abuse of the court's process. Put another way, there is a public interest in maintaining standards at the Bar, and it is that interest that a personal costs order in the present case aims to advance.

39 Most recently, in *Roslan* we squarely considered and dismissed the argument that ss 356, 357 and 409 of the CPC have an impermissible chilling effect on lawyers in Singapore due to the fear of adverse cost consequences and therefore that it breaches Art 9 of the Constitution. This is an authority that stands directly in the way of the present claim, and we highlight some extracts from that judgment as follows at [20], [24] and [27]:

> 20 LFL used this hearing on costs to mount a constitutional challenge to ss 356, 357 and 409 of the CPC. Sections 356 and 409 of the CPC empower the court to make an order for costs to be paid by any party to another party in respect of criminal proceedings falling under Pt 20 of the CPC, which includes criminal motions. Section 357 of the CPC empowers the court to order costs against defence counsel personally. LFL submits that these provisions are 'unconstitutional' because they breach Art 9 of the Constitution of the Republic of Singapore (2020 Rev Ed) ('the Constitution') and/or breach the rules of

> natural justice by impeding the right to a fair trial. To that end, the power to order costs against applicants in a criminal motion has, LFL submits, the 'inevitable effect of preventing or intimidating NGOs … or concerned members of the public or lawyers from assisting or ensuring access to justice for the prisoners or their families'. Sections 356, 357 and 409 of the CPC 'ought to be struck down' in accordance with Art 4 of the Constitution. These allegations formed the bulk of LFL's written submissions.
>
> …
>
> 24 The argument that ss 356, 357 and 409 of the CPC impede access to justice or otherwise infringe upon the right to a fair trial plainly (and rather conveniently) ignores the applicable test which must be satisfied before the court makes an adverse costs order against the applicant or defence counsel. As mentioned above, the court's power to order costs against an applicant in a criminal motion can only be exercised if two prerequisites have been fulfilled, the second being that the motion filed by the applicant was *frivolous or vexatious or otherwise an abuse of the process of the court*. When that is so, it cannot at the same time be said that an accused person's access to justice or right to fair trial was compromised. It suffices to say that an accused person's access to justice is not unlimited to the extent that one could infinitely take out applications that are frivolous, vexatious or otherwise an abuse of process in order to effectively delay the punishment that has been pronounced and upheld on appeal. For the same reason, LFL's submission that it should not be ordered to pay costs 'merely because [it] was unsuccessful' in CM 6 is misplaced.
>
> …
>
> 27 Secondly, the prerequisite for an order for costs against defence counsel under s 357 is that those costs have been incurred 'unreasonably or improperly'. The section specifically gives as an example of incurring unreasonable or improper costs, the conduct of proceedings that are an abuse of process. In *Arun*, it was observed that there would be an abuse of process if the motion 'is not brought bona fide for the purpose of obtaining relief but for some other ulterior or collateral purpose' (at [33]). It cannot be described as 'chilling' if the purpose of legislation is to prevent cases being filed for ulterior motives or when they would otherwise be vexatious or an abuse of process.
>
> [emphasis in original in italics]

40 Those passages emphasise again the high threshold that must be met before adverse costs consequences may be imposed. The CPC Cost Provisions can ***only*** be invoked to inflict cost consequences if the proceedings are brought or conducted with some *impropriety* (such as where they are frivolous, vexatious or an abuse of process). In other words, the *true scope* of the CPC Cost Provisions does not impinge on one's right of access to justice or right to counsel at all, simply because there is and can be no right to advance a position in court *improperly*. The Judge recognised this at [13]–[14] of his oral grounds.

41 Given this analysis, and taking the appellants' case at its highest, it is simply irrelevant that some lawyers might have misunderstood the CPC Cost Provisions or the decisions of this court. The real question is whether in the light of the jurisprudence that we have referred to, the position is that any reasonable counsel would decline to represent a party with a *bona fide* claim, even if it might be thought to be weak on the merits; and in our judgment, the answer to that is no. These provisions are there for good reason and the fact that some or even many lawyers approached by the appellants do not wish to take on their cases because they fear costs consequences may mean one of two things: either they have misunderstood the effect of these provisions and that plainly cannot be a basis of invalidating them; or they do not see any merit in the prospective case that the appellants wish them to run, in which case the provisions are working as they are meant to work.

Art 12(1)

42 We can be brief on the challenge under Art 12(1), which provides:

> **12.**—(1) All persons are equal before the law and entitled to the equal protection of the law.
>
> (2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens of Singapore on the

> ground only of religion, race, descent or place of birth in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.
>
> …

43 To the extent the claim rests on the same arguments as those advanced under Art 9, we need say no more. To the extent the argument is that the costs provisions unfairly target counsel in post-appeal applications, we think there is no merit in this. First, as we noted during the arguments, it is not correct that all the provisions only apply to post-appeal applications. Sections 357 and 409 for instance, are not so limited.

44 Aside from this, there is a difference between an appeal and a post-appeal application. This was alluded to in *Syed Suhail* which we have referred to above and where we said as follows (at [55]):

> It is also important to underscore the fact that these observations are being made in the context of a *review application* and *not* an appeal (which is given as of right to every convicted accused person and for which the threshold for an adverse costs order to be made against defence counsel may well be higher).

45 The point in simple terms is that an appeal is a process available to an accused person as a *right*. A post-appeal review is a process that takes place after the merits have been reviewed not only at trial but on appeal and it is a discretionary process that is made available to avert possible miscarriages of justice in rare cases where there has been some development in terms of the law or the evidence. It is therefore entirely rational to provide for costs sanctions to be imposed more readily against improper applications being made at the post-appeal stage.

46 For the foregoing reasons, we are satisfied that the entire Declaration Claim was rightly struck out under O 9 r 16(1)(*a*) ROC for having no chance of success on the face of the pleadings.

The Damages Claim has no merit

47 We turn briefly to the Damages Claim even though this was not pressed on us today. To establish the tort of breach of statutory duty, the claimants must prove that:

(a) Parliament intended to impose a statutory duty for the protection of a limited class of the public to which the claimants belong;

(b) Parliament intended to confer on members of that limited class a private right of action for breach of that duty;

(c) That duty has been breached; and

(d) The breach caused the claimants damage.

(*Syed Suhail bin Syed Zin and others v Attorney-General and another* [2021] 4 SLR 698 at [48]; Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at paras 09.007–09.009).

48 First, as the Judge noted, the appellants "have not pleaded precisely what statutory duty has been breached" (element (a) above).[15] Nor did the appellants' oral submissions before the Judge clarify matters.

49 But aside from this the pleadings reveal that the principal assertion is that the Government owes the appellants a statutory duty under any or all of Art

15 Oral Grounds at [17].

9 of the Constitution, the Legal Profession Act 1966 (2020 Rev Ed) ("LPA"), Prisons Act 1993 (2020 Rev Ed) or the Prisons Regulations (2002 Rev Ed) to facilitate or not to obstruct access to justice, their access to counsel and legal advice. In short, this is another way to come to the same complaint in respect of lawyers being deterred from acting on account of the CPC Cost Provisions and we cannot see how there can possibly be a statutory duty to enable representation, even if this should turn out to be vexatious or frivolous or abusive.

50 Thus, purely to illustrate the point, even if the LPA were to be read as including the Legal Profession (Professional Conduct) Rules 2015, which states at r 4(*e*) that a legal practitioner "must facilitate the access of members of the public to justice", this duty is subject to a "paramount duty to the court" to, among other things, not abuse its process.

51 In addition, the Judge rightly noted that the appellants have not pleaded *how* the alleged statutory duty was breached *by the AG* (element (c)).[16] The Judge inferred that the alleged breach is constituted by the AG's applications for cost orders against defence counsel in past cases.[17] But as we have already pointed out, any right of access to justice cannot possibly include the right to bring improper applications/appeals and that is when such an application may be made successfully. Further, that the AG is exercising a *legislative* power under the CPC Cost Provisions to take such abusers of the court process to task cannot be a breach of any alleged statutory duty. Finally, it is in the end the court that decides whether to impose such sanctions and the court is wholly independent.

---

16 Oral Grounds at [17].

17 Oral Grounds at [17] and [19].

52 We are therefore satisfied that the Judge was correct to strike out the Damages Claim. It follows that we dismiss CA 31.

OC 173

53 We turn finally to the oral application made by Abdul Rahim to stay his execution pending the disposal of OC 173.

54 OC 173 is a claim filed by Abdul Rahim on ***3 August 2022 at 11:51am***. The defendant was his assigned counsel, Manoj, who represented him in the Joint Trial (see [11] above). The principal written allegation is very brief and contends that Manoj did not make a reasonable or sufficient effort to understand Abdul Rahim's instructions before trial; that during the trial Manoj did not call one Nuraiin Binte Rosman ("Nuraiin") as a witness to give evidence; "only Jebek was called on the basis that it was sufficient"; Manoj did not object when Central Narcotics Bureau officers allegedly distorted the facts; and, generally, Manoj did not give proper support. He pleads that he wishes to "express [his] resentment and dissatisfaction." However, before us, Abdul Rahim articulated a number of points of significance:

(a) His principal complaint is that he wanted to adduce the evidence of Nuraiin but his counsel, Manoj allegedly declined to do so.

(b) He also maintained that he wanted to change counsel during the trial, but Manoj allegedly told him that it would be difficult to effect this in the middle of the trial.

(c) He did get a new counsel for his appeal, Mr Singh, and he was happy with his performance and had no complaints with his conduct.

(d) He did not tell Mr Singh about his desire to call Nuraiin because he did not think about it. It only occurred to him much later when he thought about the case.

(e) Nuraiin's evidence would show that the drugs that Abdul Rahim had were in fact for the person he referred to as Jebek.

55 Although the AG was not a party to OC 173, Mr John Lu ("Mr Lu") for the AG did address us on the oral application for the stay of execution and he told us that:

(a) Nuraiin was committed to trial at the same time as Abdul Rahim, and she was separately dealt with. Her statements were therefore available to the Defence.

(b) She had initially been listed as one of the Prosecution's witnesses but at the close of its case without having called her, the Prosecution offered Nuraiin to the Defence which chose not to call her.

(c) Abdul Rahim gave evidence at his trial and at no stage did he suggest that Nuraiin would be able to assist with his defences.

(d) Nor was she mentioned in his submissions on appeal.

56 In these circumstances, Mr Lu submitted in effect that this was an afterthought. This was not in any sense of the word a case of "new evidence" because Nuraiin was available as a witness to the Defence and not having called her at trial or raised this on the appeal, each of which proceedings was conducted by different counsel, it could not be said that this could have any bearing on the merits of the conviction.

57 In our judgment the claim against Manoj is an abuse of process and it is plainly an afterthought. The suggestion that Manoj was told that Abdul Rahim wished to call Nuraiin and refused to do so is wholly untenable when one considers that:

(a) Abdul Rahim did not mention this at all in his evidence at trial.

(b) More importantly, he did not even raise this with his counsel in the appeal whose work he said, even today, that he was happy with, and who he felt had conducted his appeal properly. It should be noted that the appeal was heard in March 2020 almost 2 years after the trial and it beggars belief that throughout that period Abdul Rahim did not see fit to mention this to his new counsel.

(c) And he did not take any step to act on this until literally days before the sentence was to be carried out.

58 Moreover, if he has no complaints with the conduct of the *appeal* this strengthens the difficulty with his complaint about the way the *trial* was allegedly conducted.

59 Aside from this, it seems to us that OC 173 is an abuse of the process of the court in that it seeks in effect to mount a collateral attack on another decision of the court. Abdul Rahim's claim against Manoj must rest on the notion that his alleged misconduct caused Abdul Rahim damage in that but for Manoj's failure, he would not have been subject to the punishment he now faces because he was in fact just a courier and would have been found to be so had Nuraiin's evidence been led. But the punishment he now faces is a consequence of the decision and finding of the High Court in his trial and of the Court of Appeal in his appeal not only as to his guilt, but as to the fact that he was ***not*** just a courier.

Hence to succeed in his claim, he would have to mount a collateral attack against those decisions. We touched on this recently in *Beh Chew Boo v Public Prosecutor* [2021] 2 SLR 180 ("*Beh*") at [58]–[65], where we endorsed the position reflected in the decision of the House of Lords in *Hunter v Chief Constable of the West Midlands Police and others* [1982] AC 529 ("*Hunter*"). *Hunter* stands for the proposition that the court will not allow a litigant to launch a collateral attack on a prior criminal judgment through later civil proceedings because this is an impermissible abuse of process. We set out here at some length what we said in *Beh* at [58]–[62] and [64] as follows:

> 58 The next situation is where the 'collateral attack' is said to be on a prior criminal judgment in later civil proceedings ('criminal-civil' scenario). The leading case on this issue is and remains the House of Lords' decision in *Hunter v Chief Constable of the West Midlands Police and others* [1982] AC 529 ('*Hunter*'). There, the appellant was charged with murder. During the trial, a *voir dire* was held to ascertain the voluntariness of certain statements recorded from the appellant. In particular, the appellant alleged that he had been assaulted by the police before his confession was obtained. The trial judge admitted the evidence, finding that the prosecution had proven beyond reasonable doubt that the appellant had not been assaulted by the police and the statements were in fact voluntary. The appellant was convicted of murder and sentenced to life imprisonment. He appealed but no issue was taken with the judge's ruling on the admissibility of the statements. The appeals were dismissed. Subsequently, the appellant commenced a civil action against the police claiming damages for the identical assaults that had allegedly taken place and had been canvassed at the *voir dire* to determine the voluntariness of the statements. The defendant sought to strike out the statement of claim on the ground of abuse of process.
>
> 59 The House of Lords unanimously held that the civil action was an abuse of process. Lord Diplock (who delivered the leading judgment) began by explaining the abuse of process doctrine as follows (at 536B):
>
> > My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any Court of Justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would

> nevertheless be *manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people*. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. … [emphasis added]

60 Lord Diplock then further outlined the collateral attack doctrine as follows (at 541H–542C):

> My Lords, collateral attack upon a final decision of a court of competent jurisdiction may take a variety of forms. … But the principle applicable is, in my view, simply and clearly stated in those passages from the judgment of A. L. Smith L.J. in *Stephenson v. Garnett* [1898] 1 Q.B. 677, 680-681 and the speech of Lord Halsbury L.C. in *Reichel v. Magrath* (1889) 14 App. Cas. 665, 668 which are cited by Goff L.J. in his judgment in the instant case. I need only repeat an extract from the passage which he cites from the judgment of A. L. Smith L.J.:
>
> > '… the court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so *when, as here, it has been shewn that the identical question sought to be raised has been already decided by a competent court*.'
>
> The passage from Lord Halsbury's speech deserves repetition here in full:
>
> > '… I think it would be a *scandal to the administration of justice* if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again.'
>
> [emphasis added]

61 As to whether there was an abuse of process on the facts of that case, Lord Diplock found that 'the identical question sought to be raised has been already decided' (at 542B). Thus, the abuse of process lay in (at 541B):

> … the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings *in which the intending plaintiff had*

> *a full opportunity of contesting the decision in the court by which it was made*. [emphasis added]
>
> 62 The 'proper method' of attacking the trial judge's decision in the *voir dire* that he was not assaulted by the police (at 541C):
>
> > … would have been to make the contention that the judge's ruling that the confession was admissible had been erroneous *a ground of his appeal against his conviction* to the Criminal Division of the Court of Appeal. This Hunter did not do. [emphasis added]
>
> …
>
> 64 Also relevant to Lord Diplock's decision was the fact that the expert evidence from the doctor that the appellant sought to adduce 'was available at the trial or could by reasonable diligence have been obtained then' (at 545B); and further that the 'dominant purpose' of the action was not to recover damages, but to pressurise the Home Secretary to release them from the life sentences. Lord Diplock inferred this purpose from the manner in which the action was conducted (the appellant did not obtain judgment on liability and proceed to assessment of damages, even though he was in a position to do so, since the Home Office had amended their defence to admit liability for the alleged assaults by the prison officers) (at 541F–541G).
>
> [Court of Appeal's emphasis in *Beh* in italics]

60 In our judgment, the "proper method" for Abdul Rahim to challenge the finding of the trial judge that he was just a courier, or as to any other aspect for that matter, was by way of appeal. He has had that opportunity. Furthermore, the evidence that he claims is new was available then, and even if we assume in his favour he raised this with his trial counsel, he accepts that he did not mention it to his counsel at the appeal. This is precisely the sort of situation in which the civil suit will be seen as an impermissible collateral attack on the earlier decisions in the criminal proceedings.

61 We also do not regard OC 173 as a relevant proceeding to warrant the stay of execution in this case because of its patent lack of merit. Mr Lu mentioned in this connection that OC 173 has no bearing on the merits of the

conviction. The question in the end is not whether Abdul Rahim did or did not mention Nuraiin to his trial counsel but whether her evidence could or would have led to a different outcome and there is simply nothing to lead us to this conclusion in the light of the way in which the trial and then the appeal was conducted.

62 But more than that, the sentence that is to be executed is based on the decision of the trial court in this case, that was affirmed on appeal. The question now is whether that decision is impugned in any way by the supposed new evidence. Where evidence is available at the time of the trial and not adduced it will not readily be admitted on appeal without some consideration of why it was not produced earlier and without due regard to its materiality and reliability: see *Miya Manik v Public Prosecutor and another matter* [2021] 2 SLR 1169 at [32]–[33].

63 This is plainly even more so the case *after* an appeal. In *Kho Jabing v Attorney-General* [2016] 3 SLR 1273, we held that where the appellant *expressly declined* to adduce evidence at trial and did not take up the opportunity on appeal it was *not* a denial of a right to a fair trial. We said as follows at [8]:

> 8 We now turn to the second main argument, which is the argument that the re-sentencing process has violated his constitutional rights. He says this is so for a number of reasons, and we propose to deal with them in sequence. First, he says it violates his right to a fair trial under Art 9 of the Constitution, for he was denied a right to lead evidence which might be relevant to the question of his sentence. This is plainly not true for one simple reason. As we explained at [95]–[97] of the judgment we delivered in April, the appellant had expressly declined to lead further evidence when he appeared before the High Court judge who heard his re-sentencing application. When he appeared before us in the appeal in 2015, he could have made a fresh application to lead further evidence, but he did not. Having not done so, he cannot now say that he had been denied a right to a fair trial.

64 And more recently, in *Public Prosecutor v Pang Chie Wei and other matters* [2022] 1 SLR 452, we set out the position on the review powers in general as follows at [70]:

> Having surveyed the English authorities, we consider that an appellate court may only reopen an earlier decision, whether pursuant to its inherent or statutory power of review, when it has been presented with new material that gives rise to a powerful probability that substantial injustice has arisen in the criminal matter in respect of which the earlier decision was made. This … is aligned with the well-established threshold of 'serious injustice' that must be met whenever our courts' revisionary powers are invoked (see *Public Prosecutor v Yang Yin* [2015] 2 SLR 78 at [25]). We add that the same test of substantial injustice should be adopted when deciding whether to grant leave to appeal out of time.

65 In that case, the new material concerned a change in the law but it can also consist of new evidence but this must be evidence that could not reasonably have been obtained at the time of the trial or appeal as reflected, for instance, in s 394J(3) of the CPC.

66 It follows from the foregoing that there is simply no reasonable prospect of the conviction being reopened on the basis of Nuraiin's purported evidence and this supports Mr Lu's submission that OC 173 cannot therefore have any bearing on the merits of the conviction.

67 The fact that OC 173 was filed at the eleventh hour and almost five days after the Notice of Execution was issued is also a factor we take into account. The claim pertains to events that occurred between 2016 and 2018 and was then not followed up until 2022, a few days before the sentence was to be carried out. For all these reasons we are satisfied that OC 173 is without merit and an abuse of process and cannot therefore be a basis for us to grant a stay of execution. We accordingly dismiss the oral application for the stay of execution.

68 Order 3 r 2(2) ROC states that "Where there is no express provision in these Rules or any other written law on any matter, the Court may do whatever the Court considers necessary on the facts of the case before it to ensure that justice is done or to ***prevent an abuse of the process*** of the Court, so long as it is not prohibited by law and is consistent with the Ideals [in civil procedure listed in O 3 r 1(2)]" [emphasis added in bold italics].[18] We exercise our powers under that provision to strike out OC 173 on the basis that it is appropriate and necessary to do so to prevent frustration of the administration of justice.

Sundaresh Menon
Chief Justice

Tay Yong Kwang
Justice of the Court of Appeal

Woo Bih Li
Judge of the Appellate Division

The appellants in person;
John Lu Zhuoren, Chin Jincheng, Ting Yue Xin Victoria (Attorney-General's Chambers) for the respondents.

---

[18] The Ideals are listed in O 3 r 1(1) ROC, and include "expeditious proceedings" and "efficient use of court resources".