IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 59

Civil Appeal No 68 of 2021

Between

Xu Yuan Chen
(alias Terry Xu)

… *Appellant*

And

Attorney-General

… *Respondent*

In the matter of 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*

JUDGMENT

[Constitutional Law — Attorney-General — Prosecutorial discretion]
[Constitutional Law — Equality before the law — Article 12(1) of the Constitution of the Republic of Singapore]
[Constitutional Law — Judicial review — Leave to commence judicial review proceedings]

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v
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Court of Appeal — Civil Appeal No 68 of 2021
Judith Prakash JCA, Tay Yong Kwang JCA and Steven Chong JCA
28 June 2022

25 August 2022 Judgment reserved.

Steven Chong JCA (delivering the judgment of the court):

Introduction

1 Article 12(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution") provides that "[a]ll persons are equal before the law and entitled to the equal protection of the law". This broadly framed constitutional right to equality before the law does not, however, entitle all persons to equal treatment regardless of the facts and circumstances of each case. As this court recently explained in *Attorney-General v Datchinamurthy a/l Kataiah* [2022] SGCA 46 ("*Datchinamurthy*") at [29], the concept of equality under Art 12(1) does not mean that all persons are to be treated equally, but simply that all persons *in like situations* will be treated alike. In line with this understanding of the right to equality, a two-step test has been developed in our local jurisprudence to determine whether executive action breaches Art 12(1), the first step of which requires the party alleging a breach

of Art 12(1) to show that he has been treated differently from other *equally situated* persons (*Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 ("*Syed Suhail*") at [61]–[62]). Thus, while it is not necessary for an applicant who alleges a breach of Art 12(1) to establish "deliberate and arbitrary discrimination" (see *Syed Suhail* at [57]–[61]), it is nevertheless essential for the applicant to be able to point to a relevant and appropriate comparator who is equally situated, and whose treatment can therefore be meaningfully compared with his or her own.

2 At the heart of the present appeal is the application of Art 12(1) in the specific context of the exercise of prosecutorial discretion by the Attorney-General ("the AG"). This is the first post-*Syed Suhail* case before this court where this particular question has been squarely raised. We therefore take the opportunity to set out the law on how the two-step test in *Syed Suhail* should apply in such cases.

Facts

The parties involved and the relevant publications

3 The appellant, Mr Xu Yuan Chen, is the Chief Editor of The Online Citizen ("TOC"), a news media platform.

4 On 27 January 2021, a letter titled "Concerning Omissions – Open Letter to Singapore's Chief Justice" ("the Letter") was published by one Ms Julie Mary O'Connor ("Ms O'Connor") on her blog, www.bankingonthetruth.com ("BOTT"). Ms O'Connor is an Australian citizen who presently resides in Australia. On the same day, the appellant – having read the Letter and judged that it merited republication by TOC – sent Ms O'Connor a message on Facebook asking if he could repost the Letter, and she agreed.

5 Later that day (27 January 2021), the appellant published an article comprising the Letter with only stylistic edits ("the Article") on TOC's website, www.theonlinecitizen.com ("TOC's Website"). At the end of the Letter was a hyperlink to the Letter on BOTT. In addition, the appellant published a post on TOC's Facebook page, "The Online Citizen Asia" ("TOC's Facebook Page"), which shared the Article and reproduced an excerpt therefrom ("the Facebook Post"). The appellant confirmed in his statement to the police that it was he who had published the Article on TOC's Website, and although he said he had "[n]o recollection" of who had published the Facebook Post, he had also stated that he was "the only person who ha[d] the authority to decide" what to publish on TOC's Website and TOC's Facebook Page.

6 On 29 January 2021, the Deputy Attorney-General declared that there were reasonable grounds to suspect that contempt of court under s 3(1)(*a*) of the Administration of Justice (Protection) Act 2016 (Act 19 of 2016) ("the AJPA") had been committed by the publishing of the Letter, the Article and the Facebook Post, and that it was in the public interest to investigate the alleged contempt. Following investigations, the Attorney-General's Chambers ("the AGC") was satisfied that "the contents of the Letter, and by extension the Article and the Facebook Post", amounted to contempt of court under s 3(1)(*a*) of the AJPA. On 22 June 2021, the AGC wrote to the appellant inviting him to withdraw his remarks (including by deleting and removing the Article and the Facebook Post) and to apologise to the Judiciary. However, the AGC did not send a similar letter to Ms O'Connor.

7 The appellant's solicitors responded on 29 June 2021, rejecting the AGC's allegations of contempt and asking why the AGC had not taken any steps to pursue Ms O'Connor for contempt. To date, the appellant has not taken the steps which the AGC invited him to take in its letter of 22 June 2021.

Commencement of contempt proceedings against the appellant

8 On 8 July 2021, the AG commenced HC/OS 694/2021, seeking leave to apply for an order of committal against the appellant for contempt of court in connection with his intentional publication of the Article and the Facebook Post, and his deliberate refusal to delete the same despite the AGC's demand that he do so. Such leave was granted by the General Division of the High Court ("the High Court") on 6 August 2021. Subsequently, on 11 August 2021, the AG filed HC/SUM 3816/2021 for an order of committal against the appellant and for an order for the appellant to delete the Article and the Facebook Post from TOC's Website and TOC's Facebook Page respectively, and to cease further publication of the same ("the Committal Application").

Application for leave to commence judicial review proceedings

9 On 8 September 2021, the appellant filed HC/OS 917/2021 ("OS 917"), seeking leave to apply for prohibiting orders preventing the AG from proceeding with the Committal Application ("the Prohibiting Orders"), as well as declarations that the Committal Application was in breach of Arts 12(1), 12(2) and 35(8) of the Constitution ("the Declarations").

Decision below

10 The High Court judge below ("the Judge") dismissed OS 917 on 25 November 2021 and issued her full grounds of decision in *Re Xu Yuan Chen (alias Terry Xu)* [2021] SGHC 294 ("the GD") on 30 December 2021. The Judge found that the appellant had not shown a *prima facie* breach of Art 12(1) of the Constitution. The relevant comparator was Ms O'Connor, and the appellant was not *prima facie* equally situated with Ms O'Connor. In this regard, the Judge accepted the AG's arguments that, by way of illustration, there

were at least three material differences between the appellant and Ms O'Connor, namely: the degree of harm caused; the level of culpability involved; and the ease of investigation, prosecution and enforcement. These differentiating factors were legitimate considerations for the AG, and were not undermined by Ms O'Connor's admission of responsibility for the authorship of the Letter (see the GD at [27]–[38]).

11 As for the appellant's other claims and prayers for relief, the Judge found that these had effectively fallen away, and consequently did not consider these further. The appellant's claims of illegality and irrationality, which were premised on the same matters as those set out above, fell away in light of the finding that the appellant had not made out the alleged breach of his Art 12(1) right (see the GD at [39]). Further, the Judge noted that the appellant had "indicated that [the] ground concerning [the] alleged breach of Art 12(2) of the Constitution [would] not be relied on" (see the GD at [13]). As for the alleged breach of Art 35(8) of the Constitution, the Judge observed that on either the unlawfulness and irrationality ground or the Art 12(1) ground, it was the appellant's case that the AG had improperly exercised the prosecutorial power and discretion conferred on him by Art 35(8) (see the GD at [11]).

12 On 8 December 2021, the appellant filed the present appeal against the Judge's decision.

The parties' cases

The appellant's case

13 The appellant initially sought to challenge the AG's decision to file the Committal Application against him on four related grounds.

(a) First, the appellant argued that the Committal Application was "both unlawful and irrational" because the AG had "singled [him] out" for committal for contempt of court when he had only republished the Letter without embellishment, and the AG had not pursued any action against Ms O'Connor (as the author and original publisher of the allegedly contemptuous Letter) even though she had "offered herself for investigation and/or prosecution".

(b) Second, the appellant argued that the Committal Application was in breach of Art 12(1) of the Constitution because it "violate[d] his constitutional guarantee of equal treatment under the law".

(c) Third, the appellant argued that the Committal Application was in breach of Art 12(2) of the Constitution because it "discriminated against [him] … because of [his] position as a journalist and Chief Editor of TOC".

(d) Fourth, the appellant argued that the Committal Application was in breach of Art 35(8) of the Constitution because the AG had acted unlawfully and/or irrationally and in breach of Art 12(1) in exercising his prosecutorial discretion to bring this application.

14 The appellant is, however, no longer pursuing his arguments on illegality and/or irrationality or on Art 12(2) on appeal. Indeed, his prayer for a declaration that there had been a breach of Art 12(2) was expressly abandoned by his counsel, Mr Lim Tean ("Mr Lim"), at the hearing before the Judge. In our view, the appellant's decision not to pursue these points further was rightly made. As explained in *Lim Meng Suang and another v Attorney-General and another appeal and another matter* [2015] 1 SLR 26 at [102(d)], Article 12(2) prohibits only *specific* grounds of discrimination, namely: "discrimination

against citizens of Singapore on the ground only of *religion, race, descent or place of birth*" [emphasis added]. The appellant has not sought to argue that any of the four specific grounds of discrimination listed in Art 12(2) applies in the present case; instead, he contends that he was discriminated against because of his position as a journalist and Chief Editor of TOC (see [13(c)] above). Even if the factual premise of this argument were true, this would plainly fall outside the scope of Art 12(2). As for illegality and/or irrationality, this ground of challenge appears to be premised on the allegedly different treatment received by the appellant and Ms O'Connor. The appellant has not put forth any other legal, factual or evidential basis for contending that the AG acted illegally or irrationally in pursuing the Committal Application.

15 Further, although the appellant initially appeared to be contending on appeal that *both* Art 35(8) and Art 12(1) had been breached, his case on Art 35(8) is predicated on the alleged breach of Art 12(1), and no separate breach of Art 35(8) is alleged. Mr Lim confirmed this on the appellant's behalf at the hearing before us and consequently accepted that the appellant's arguments in respect of Art 12(1) and Art 35(8) would stand or fall together. Article 12(1) is therefore the cornerstone of the appellant's case in this appeal.

16 The appellant submits that the threshold for establishing a *prima facie* case for leave to be granted in a judicial review application is low, and that based on the evidence before the court, a *prima facie* case has more than been made out in respect of the alleged breach of Art 12(1). According to the appellant, Art 12(1) has been breached because:

> (a) Although Ms O'Connor called on the Singapore authorities to investigate her, there was no action by the police to investigate her or by the AG to prosecute her for contempt. The AG and/or his deputies have

not filed any affidavit to explain why the appellant is being prosecuted while Ms O'Connor is not. There is therefore no evidence before the court from the AG to justify his exercise of prosecutorial discretion to the court. Indeed, there is no reason why the AG could not have prosecuted Ms O'Connor, given that s 3(1)(*a*) of the AJPA states that "[a]ny person" can be prosecuted for the offence of contempt if the necessary elements are satisfied.

(b) Furthermore, the AG's decision not to take action against Ms O'Connor in this case stands in contrast to his attitude in respect of the prosecution of Mr Li Shengwu ("Mr Li"), as well as recent threats made against the Malaysian newspaper MalaysiaNow and the Malaysian group Lawyers for Liberty ("LFL").

(c) The Judge erred in concluding that the degree of harm caused, the level of culpability involved, and the ease of investigation, prosecution and enforcement were material differences between the appellant and Ms O'Connor such that they were not equally situated.

The AG's case

17 The AG's position is that the appellant has failed to show a *prima facie* case of reasonable suspicion in favour of granting the remedies sought. The AG's key submissions on appeal are as follows:

(a) The appellant's objection to the fact that neither the AG nor his deputies filed any affidavit in OS 917 is misconceived, as the AG need not disclose his reasons for making a particular prosecutorial decision unless the appellant produces *prima facie* evidence that the AG has breached the relevant standard. At this stage, the AG need only show

that such relevant differences or distinguishing factors between the appellant and Ms O'Connor exist *by way of illustration*.

(b) The crux of the appellant's case is that he has been treated differently from Ms O'Connor without basis. However, there are at least three material differentiating factors between the appellant and Ms O'Connor which indicate that they are not equally situated, and which were legitimate considerations in the AG's assessment of whether to prosecute:

(i) first, *greater harm* was likely occasioned by the appellant's publication of the Article and the Facebook Post, than by Ms O'Connor's publication of the Letter on BOTT;

(ii) second, the appellant's publication of the Article and the Facebook Post evinced *greater culpability* than Ms O'Connor's publication of the Letter, as TOC held itself out to be an independent media platform; and

(iii) third, the fact that Ms O'Connor resides overseas posed difficulties in *investigation, prosecution and enforcement*.

This analysis is unchanged by the fact that Ms O'Connor has publicly accepted responsibility for authoring the Letter.

(c) In so far as the appellant attempts to rely on the cases of Mr Li, MalaysiaNow and LFL as comparators for his own case, this argument is misguided.

(i) First, as a matter of law, the appellant is holding Mr Li, MalaysiaNow and LFL up as persons who are being treated *in a like manner to himself*. Even if Ms O'Connor were equally

situated with these other persons, this would only engage the Art 12 rights of these other persons, and would have no relevance to the *appellant's* Art 12 rights.

(ii) Second, as a matter of fact, these other cases are plainly distinguishable from the facts relating to the appellant and Ms O'Connor, and they cannot be said to be "equally situated".

(d) Accordingly, the appellant has failed to demonstrate a *prima facie* case of reasonable suspicion that the AG had acted in breach of Art 12(1), and he should thus not be granted leave to commence judicial review proceedings in respect of the AG's decision to prosecute him for contempt of court.

Preliminary observations regarding the appellant's prayers for the Declarations

18 Before we address the substantive issues arising in this appeal, we make some preliminary observations on the procedural question of whether applications for declarations can properly be included in applications for leave to commence judicial review proceedings.

19 As we have noted at [9] above, the appellant sought two categories of relief in OS 917: (a) leave to apply for the Prohibiting Orders to prevent the AG from proceeding with the Committal Application, (such leave being required under O 53 r 1(1)(*b*) of the Rules of Court (2014 Rev Ed) ("the ROC")), and (b) the Declarations. The AG argued in the proceedings below that, procedurally, the appellant should *first* have obtained leave to apply for the Prohibiting Orders before including the prayers for the Declarations in his subsequent summons, citing O 53 rr 1(1) and 2(1) of the ROC. The Judge accepted this procedural objection (see the GD at [2]).

20 With respect, we disagree. The provisions cited above do not state that an application for a declaration cannot be *included* in an application for leave to apply for a prohibiting order. Indeed, a similar procedural objection by the AG was rejected in *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2014] 4 SLR 773 ("*Ridzuan (HC)*") at [32], where Tay Yong Kwang J (as he then was) held that there was "*no procedural impediment* to prevent the applicant from including the application for declaratory relief *at the leave stage*" [emphasis added], so long as the declaration was "sought alongside leave for other prerogative orders". Such an approach "enable[d] the applicant to place his entire case before the court at the outset, thus enabling the court to be better apprised of the complete scope of remedies sought by the applicant". On this basis, Tay J concluded that the applicant in that case "[could not] be faulted for including the application for a declaration in the leave application for a mandatory order" (*Ridzuan (HC)* at [32]). This analysis was not disturbed on appeal in *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 ("*Ridzuan (CA)*"). The AG's procedural objection to the appellant's inclusion of his prayers for the Declarations in OS 917 was therefore erroneous.

21 Instead, the correct legal position is that the appellant cannot be *granted* the Declarations under O 53 of the ROC unless he first succeeds in obtaining leave to apply for the Prohibiting Orders: see *Ridzuan (HC)* at [31] and *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at [53]. Thus, the appellant's prayers for the Declarations need not be addressed substantively unless and until leave to apply for the Prohibiting Orders is granted. If leave is *not* granted, his prayers for the Declarations would then fall away.

22 It is well established that there are three requirements for such leave to be granted (*Syed Suhail* at [9]). Of these, only the third requirement is in dispute

– namely, whether the materials before the court disclose an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought by the appellant. The sole issue that arises for our determination in respect of the Prohibiting Orders is therefore whether the appellant has raised a *prima facie* case of reasonable suspicion that the alleged breach of Art 12(1) is made out. It is to this issue that we now turn.

Whether there is a *prima facie* case of reasonable suspicion regarding the alleged breach of Art 12(1)

23 As we have noted at the beginning of this judgment, a two-step test applies in determining whether executive action breaches Art 12(1) of the Constitution. First, the AG's actions must have resulted in the appellant being treated differently from other *equally situated* persons. This would then shift the burden to the AG to provide justification for the differential treatment by showing that it was "reasonable", in that it was based on legitimate reasons which made the differential treatment "proper": *Syed Suhail* at [61]–[62].

24 In *Datchinamurthy* – a decision handed down after both parties' cases in the present appeal had been filed – this court set out guidance on ascertaining whether persons are "equally situated" for the purposes of the first step of the *Syed Suhail* test. The court must "have regard to the nature of the executive action in question … and consider whether, in that context, the persons being compared are so situated that it is reasonable to consider that they should be similarly treated". The test is "a factual one of whether a prudent person would objectively think the persons concerned are roughly equivalent or similarly situated in all material respects" (*Datchinamurthy* at [30]).

25 We first set out how these legal principles should be applied where the executive action in question is the exercise of prosecutorial discretion. We will

then consider whether the appellant has established that he has been treated differently from another equally situated person in the present case.

Article 12(1) in the context of the exercise of prosecutorial discretion

26 It is well established that the Prosecution is "entitled and obliged to take into account many factors" in making prosecutorial decisions, and that relevant factors for the Prosecution's consideration "include the available evidence, public interest considerations, the personal circumstances of the offender, the offender's degree of culpability", and other factors. The Prosecution thus has to consider, "in addition to the legal guilt of the offender, his moral blameworthiness, the gravity of the harm caused to the public welfare by his criminal activity, and a myriad of other factors, including whether there is sufficient evidence against a particular offender, whether the offender is willing to co-operate with the law enforcement authorities in providing intelligence, whether one offender is willing to testify against his co-offenders, and so on – up to and including the possibility of showing some degree of compassion in certain cases". These considerations may apply differently to different offenders, such as to justify differential treatment between them (*Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 ("*Ramalingam*") at [24] and [63]). Thus, as this court noted at [53] of *Ramalingam*:

> … Offences are committed by all kinds of people in all kinds of circumstances. *It 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.* Furthermore, not all offences are provable in a court of law. ***It is not necessarily in the public interest that every offender must be prosecuted***, or that an offender must be prosecuted for the most serious possible offence available in the statute book. … ***The Attorney-General's final decision will be constrained by what the public interest requires.***
>
> [emphasis added in italics and bold italics]

27 Analysed through the prism of the two-step test set out in *Syed Suhail*, this means that the fact that an individual faces prosecution, while another who may have committed similar actions does not, does not *ipso facto* indicate a breach of Art 12(1). Similar observations were made in *Daniel De Costa Augustin v Public Prosecutor* [2020] 5 SLR 609 at [83] and in *Syed Suhail bin Syed Zin and others v Attorney-General* [2021] SGHC 274 at [67]–[72]. Indeed, the multitude of factors which the Prosecution is entitled and obliged to take into account in making prosecutorial decisions in each case means that it will generally be relatively challenging for an applicant to establish that he is "equally situated" to another person, or (as explained in *Datchinamurthy*) "so situated that it is reasonable to consider that they should be similarly treated".

28 The highly fact-sensitive nature of the exercise of prosecutorial discretion, and the distinctions that may legitimately be drawn between different persons even when they are in broadly similar circumstances, may be illustrated by two cases involving *co-offenders*: *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012 ("*Quek Hock Lye*") and *Ridzuan (CA)*.

29 In *Quek Hock Lye* at [24], this court held that even divergent consequences faced by accused persons in the same criminal enterprise, flowing from their respective charges, were "not *per se* sufficient to found a successful Art 12(1) challenge", as the question was whether the Prosecution's charging decision was made for "legitimate reasons". The court held that the appellant had not discharged his burden of establishing a *prima facie* case of breach of Art 12(1), and observed that in any event, the appellant was "the main culprit" behind the criminal enterprise and his co-conspirator's willingness to testify was "a relevant consideration which could have operated on the mind of the Public Prosecutor in preferring separate charges" against them (*Quek Hock Lye* at [25]).

30 In *Ridzuan (CA)*, the Prosecution had declined to grant the appellant a certificate of substantive assistance but had granted such a certificate to his co-offender. The appellant alleged that this non-certification decision breached Art 12. This court held that the appellant had to show two things: first, that his level of involvement in the offence and the consequent knowledge he acquired of the drug syndicate he was dealing with was "practically identical" to his co-offender's level of involvement and the knowledge the co-offender could have acquired; and second, that he and his co-offender had provided "practically the same information to [the Central Narcotics Bureau ("CNB")]", yet only his co-offender had been given the certificate of substantive assistance (*Ridzuan (CA)* at [51]). In arriving at the conclusion that the appellant had not established a *prima facie* case of reasonable suspicion that the Prosecution's non-certification decision was in breach of Art 12, the court took the view that the appellant and his co-offender's respective levels of involvement in the crime were not identical as they were "involved in different capacities" – the appellant had arranged the drug deliveries, while his co-offender had interacted first-hand with the jockey and might therefore have given certain valuable information on this to the CNB (*Ridzuan (CA)* at [53]). Further, the court was satisfied that the appellant and his co-offender had not given practically identical information to the CNB, having regard to the Public Prosecutor's affidavit stating that there were material differences between the information that had been supplied by them. On this basis, the court concluded that "it was clear that the two accused persons were then not situated in the same position" (*Ridzuan (CA)* at [67]).

31 Although *Quek Hock Lye* and *Ridzuan (CA)* preceded *Syed Suhail*, and therefore referred to a different test in respect of Art 12(1), the decisions in these cases can nevertheless be rationalised within the framework of the two-step *Syed Suhail* test. In both cases, this court identified salient differences between

the appellants and their co-offenders which meant that they were *not equally situated* for the purposes of the exercise of prosecutorial discretion (see also *Syed Suhail* at [60]–[61]).

32 We deal briefly with the appellant's reliance on an article written by Chan Sek Keong SC, "Equal Justice Under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773. In support of his case, the appellant quotes two passages from this article which opine that the right of all persons to equality before the law (which is said to be conceptually distinct from the entitlement to equal protection of the law) is a first-order right granted by Art 12(1) of the Constitution (at para 96); that the court must give effect to Art 12(1) as a substantive right and not as an "aspirational ideal"; and that it is the courts' duty to "formulate the principles … to give effect to that right against any legislative or executive encroachment" (at para 107). It is not clear what the appellant wishes us to make of this, given that this court *has* formulated principles to give effect to the substantive right enshrined in Art 12(1) by means of the two-step *Syed Suhail* test, which the appellant makes no reference to. In so far as the appellant might seek to argue that this two-step test *itself* does not adequately safeguard the rights protected by Art 12(1), he has not made any submissions or provided any basis to support this contention.

Application to the facts of the present case

33 With these principles in mind, we now turn to the facts of the present case. It should be borne in mind that the burden of proof "lies squarely on the applicant" (*ie*, the appellant) to satisfy the court that the materials before the court disclose a *prima facie* case of reasonable suspicion in favour of granting the remedies sought: see *AXY and others v Comptroller of Income Tax*

[2018] 1 SLR 1069 at [33]. While the threshold of proof for an application for leave to commence judicial review is the "very low one" of a *prima facie* case of reasonable suspicion, "this does not mean that the evidence and arguments placed before the court can be either skimpy or vague and bare assertions will not suffice" (*Gobi a/l Avedian and another v Attorney-General and another appeal* [2020] 2 SLR 883 at [54]).

34 The central premise of the appellant's case on Art 12(1) is the comparison between his treatment and that of Ms O'Connor. In concluding that the appellant and Ms O'Connor were not *prima facie* equally situated for the purposes of the first step of the *Syed Suhail* test, the Judge accepted the AG's submission that there were at least three material differences between them: the degree of harm caused; the level of culpability involved; and the ease of investigation, prosecution and enforcement (see the GD at [30]–[38]).

35 At the outset, we note that although the AG relies on *three* differentiating factors by way of illustration, only *one* material difference needs to be established for the appellant and Ms O'Connor to not be equally situated. We now consider each differentiating factor in turn.

Difficulties in investigation, prosecution and enforcement

36 We deal first with the difficulties in investigation, prosecution and enforcement which would be faced by the authorities in relation to Ms O'Connor compared to the appellant. This arises from the fact that Ms O'Connor resides overseas whereas the appellant resides in Singapore and was within Singapore's contempt jurisdiction at all material times. It is not disputed that Ms O'Connor is an Australian citizen who currently resides in Australia, and indeed has not set foot in Singapore since 7 July 2019 – nearly

three years ago. Further, as Mr Lim accepted during the hearing before us, there is nothing in the material before the court that evinces any intention on Ms O'Connor's part to come to Singapore.

37 The appellant's only basis for challenging the Judge's analysis and findings regarding this factor (at [36] of the GD) is that Ms O'Connor "offered herself for investigation and/or prosecution" by the police and the AG, but neither did so. In this regard, the appellant refers to the following steps taken by Ms O'Connor to take responsibility for the Letter:

(a) On 9 March 2021, Ms O'Connor wrote an e-mail addressed to the Chief Justice (and copied to the AG) which stated that:

> …
>
> 2. To set the record straight, Mr. Xu had no input into, or prior knowledge of the letter until I published it. …
>
> …
>
> 11. … I am not afraid of transparency; in fact, I welcome it. If Mr. Xu is charged and prosecuted for publishing my letter, *I will stand up with him and explain why I raised those concerns with you and the AG in both letters*.
>
> …
>
> [emphasis added]

(b) On 10 March 2021, Ms O'Connor updated the Letter on BOTT to include the following preamble:

> *I wrote and published* the open letter below to the chief justice of Singapore. Let me make myself perfectly clear: *I take full responsibility for its contents*.
>
> Some time after its publication, my open letter was shared by a #Singapore journalist [*ie*, the appellant] who has now had his phone and computer seized by the Police. He was also subjected to hours of interrogation by the Police.

> The journalist gave no input into this letter. In fact, he couldn't have known of its existence until after I had posted it publicly. As the author and publisher of the said letter, *the Singapore Police Force should be questioning me, not undertaking a political persecution of the journalist*. Is it 'killing a chicken to scare the monkeys'?
>
> …
>
> [emphasis added]

38 The appellant's case in respect of this differentiating factor has evolved somewhat between the filing of his Appellant's Case and the hearing before us. Initially, the appellant appeared to be focusing on the fact that Ms O'Connor was not questioned or investigated by the police or the AG in respect of the Letter. His written skeletal submissions and Mr Lim's oral submissions, however, took issue specifically with the fact that the AG made *assumptions* about the difficulties of investigation, prosecution and enforcement in relation to Ms O'Connor when there was no basis for the AG to do so as no correspondence had been sent to Ms O'Connor to invite her to come to Singapore for investigations. Indeed, Mr Lim's oral submissions suggested that the appellant's real grievance was that the AG had not even sent a letter to Ms O'Connor asking her to apologise and take the Letter down from BOTT, in terms similar to the letter sent to the appellant (see [6] above).

39 In our judgment, the difficulty in investigation, prosecution and enforcement which would be faced in respect of Ms O'Connor is the key differentiating factor between her and the appellant in the present case.

40 For example, s 21 of the Criminal Procedure Code 2010 (2020 Rev Ed) ("the CPC") empowers the police to require the attendance of a witness before them only when he or she is "within the limits of Singapore". The police may thus face difficulties in recording a statement from Ms O'Connor under s 22 of

the CPC. Critically, it would be challenging to enforce any court order made against Ms O'Connor or any sentence imposed on her, given that there is no evidence that she has assets in Singapore or that she is intending to come to Singapore. Thus, as the AG submits, the fact that Ms O'Connor resides outside Singapore poses various impediments to the exercise of criminal jurisdiction over her. These difficulties are not seriously contested by the appellant.

41 Further, even if it might be possible for *some* steps to be taken, it would be reasonable – as counsel for the AG, Ms Kristy Tan SC ("Ms Tan"), suggested during the hearing – for the AG, in deciding on the appropriate course of action to take, to "think one step ahead" about what the next step would be if Ms O'Connor refused to cooperate with the authorities at any of these stages. As we pointed out to Mr Lim, there may well have been no point in the AG taking anterior steps to investigate and prosecute Ms O'Connor after establishing that she was not within the jurisdiction, if it was anticipated that any court order or sentence could ultimately not be enforced against her.

42 In this regard, it bears emphasis that the AG's overriding duty is to act in the public interest. As this court noted in *Ramalingam* at [53], "[i]t is not necessarily in the public interest that every offender must be prosecuted", and the AG's final prosecutorial decision "will be constrained by what the public interest requires". In assessing what would be in the public interest, the AG was entitled to take into account the degree of difficulty that is likely to be faced in investigating and prosecuting Ms O'Connor, and was also entitled to consider whether taking action against the appellant (who resided in Singapore at the material time and was undoubtedly amenable to Singapore's contempt jurisdiction) in respect of the Article and the Facebook Post would be sufficient in the public interest. In the circumstances, the AG could legitimately have

concluded that it would not have been in the public interest to take further action against Ms O'Connor, in contrast to the appellant.

43 The appellant invites us to draw the inference that, if the AG had written to Ms O'Connor to invite her to come to Singapore, she would have been willing to do so and subject herself to investigation and prosecution in Singapore. He relies in this regard on Ms O'Connor's e-mail to the Chief Justice (copied to the AG) which we have set out at [37(a)] above. However, we are not prepared to draw such an inference as there is no basis for doing so. As we have emphasised at [33] above, the burden lies *on the appellant* to prove that Ms O'Connor is amenable to Singapore's contempt jurisdiction, so as to establish that they are *prima facie* equally situated and to (in Mr Lim's words) "compare like with like". This is critical for the appellant's case on Art 12(1) to succeed. We highlight that the appellant was able to obtain some assistance and input from Ms O'Connor in relation to the Committal Application against him: she prepared a letter setting out certain "relevant information", requested that Mr Lim "include [these] attachments … in any appeal [made] to the AGC on behalf of [the appellant]" and told him "not [to] hesitate to contact [her] should [he] require any additional information or assistance going forward", and even filed an affidavit on his behalf in OS 917. There is no reason why Ms O'Connor would not have gone on to state, whether in her affidavit or in a letter to the AG or the Singapore police, that she would be willing to come to Singapore for investigation and prosecution if she was in fact so minded. Her omission to do so in the context of this case only serves to demonstrate that there is simply no basis for us to draw the inference that the appellant urges us to draw.

44 At this juncture, we turn to address the cases involving Mr Li, MalaysiaNow and LFL which the appellant refers to. In our view, these do not assist the appellant as these other individuals and entities are not relevant

comparators with the appellant for the purposes of his Art 12(1) challenge. What the appellant bears the burden of establishing (at least to the standard of a *prima facie* case of reasonable suspicion) is that he has been treated differently from another equally situated person. The relevant comparison, as the Judge noted at [29] of the GD, is between the appellant and Ms O'Connor. Whether Mr Li, MalaysiaNow and LFL were treated differently from Ms O'Connor is not relevant to the analysis. Furthermore, as the AG submits, to the extent that contempt action was taken or threatened against these individuals or entities, they were if anything treated *in a like manner* to the appellant. The appellant has also not made any attempt to show how these individuals and entities are equally situated with either himself or Ms O'Connor. These comparisons therefore do little to further his case.

45 More fundamentally, in so far as the appellant relies on these examples to argue that the difficulties in investigation, prosecution and enforcement of overseas individuals and entities are not prohibitive or decisive in the AG's exercise of prosecutorial discretion, this does not undermine the fact that these difficulties may nevertheless be a material consideration for the AG depending on the facts of the case – and, in particular, depending on the degree of harm caused by the particular publication (which we consider in more detail in relation to the present appeal in the next section).

46 In Mr Li's case, he was prosecuted for contempt in respect of a Facebook post he had made which alleged that "the Singapore government is very litigious and has a pliant court system". Mr Li's post, which was published on a "Friends only" setting, shared an article published by the Wall Street Journal which commented on the highly publicised dispute between Prime Minister Lee Hsien Loong (Mr Li's paternal uncle) and his siblings (Mr Li's father and paternal aunt) over their family home at 38 Oxley Road. Mr Li's post

was subsequently republished and/or reported in several media platforms and websites, including The Straits Times, TODAY, Lianhe Zaobao, and TOC's Website. In finding Mr Li guilty of scandalising contempt, the High Court judge (delivering his reasons in an oral judgment) considered that the republication of Mr Li's post to the general public was reasonably foreseeable and posed a real risk of undermining public confidence in the administration of justice in Singapore. In this regard, the High Court judge took into account (among other factors) that Mr Li must have known that the fact that the post was made by him "arguably lent it credence in the eyes of the public" given his family background, as well as the significant public interest in the dispute at the time his post was published. This made his post "of significant interest to the general public and the media". These were considerations relating to the likely degree of harm caused which could legitimately have been taken into account by the AG, and which could reasonably have been considered to outweigh the difficulties posed by the fact that Mr Li was outside Singapore (in the United States of America) when action was taken against him. Ms O'Connor's case is simply not comparable to that of Mr Li.

47 Indeed, the background to Mr Li's case demonstrates that the AG's decision not to prosecute someone who is outside jurisdiction for contempt is not unique to Ms O'Connor. Immediately after his offending comment regarding Singapore's "litigious" government and "pliant" court system, Mr Li's Facebook post contained a link to an article published by the New York Times in April 2010 which stated that members of the Singapore government "use a local court system in which … they have never lost a libel suit". This might have been taken to suggest that the Singapore courts invariably or systematically decide in favour of the government in respect of libel matters, which could pose a real risk of undermining public confidence in the

administration of justice. Nevertheless, no contempt of court proceedings appear to have been brought against the New York Times, its editors or publishers, or the author of that article, all of whom were presumably based overseas. As we have stated at [42] above, the AG's prosecutorial decision is ultimately one that must be guided by his assessment of what would be in the public interest. Depending on the precise facts and circumstances of each case, it may well not be in the public interest for the AG to pursue an alleged contemnor overseas even if there are grounds to suspect that the offence of contempt of court may have been committed.

48 As for MalaysiaNow or LFL, there is also no evidence before this court of these entities having been prosecuted for contempt.

49 After the hearing, Mr Lim wrote to the court on the appellant's behalf on 18 July 2022 seeking to have a new and "important piece of evidence" taken into account in the determination of this appeal. This was a Facebook post by one Mr Zaid Malek ("Mr Malek") of LFL, which described how he was interrogated by the Singapore police when he arrived in Singapore from Malaysia on 4 July 2022. Mr Malek was informed by the police that he had committed the offence of contempt of court under s 3(1)(*a*) of the AJPA and was given a conditional warning. Mr Lim argued that this contradicted the AG's contention that it was not feasible to investigate and prosecute persons residing outside Singapore, and stood in contrast with the police and the AG's treatment of Ms O'Connor. The AG responded *via* a letter to the court on 22 July 2022, taking the position that this new evidence should not be considered.

50 We decline to take this purported new evidence into account as it has not been formally admitted into evidence and, in any event, is not relevant to the issues raised in this appeal. As we have stated at [44] above, the relevant

comparator with the appellant for the purposes of his Art 12(1) challenge is Ms O'Connor, whom he alleges was treated differently from him despite being equally situated. Furthermore, no affidavit has been filed by Mr Malek, nor is there any suggestion in Mr Lim's letter to the court that Mr Malek would be prepared to affirm such an affidavit on the appellant's behalf. Even if this purported new evidence is taken at face value, we do not see how this would assist the appellant's case, as Mr Malek appears to only have been investigated and issued the conditional warning *upon entering Singapore*. This therefore does not detract from our analysis of the difficulties in investigation, prosecution and enforcement that would be faced in relation to Ms O'Connor, as someone who presently resides overseas and has not expressed any intention to come to Singapore.

51 To conclude on this point, the fact that Ms O'Connor resides overseas remains, in our view, a key differentiating factor which weighs heavily against a finding that she and the appellant are equally situated in the present case, *even if* they may have both satisfied the requirements of s 3(1)(*a*) of the AJPA.

Degree of harm caused

52 Another differentiating factor accepted by the Judge was the degree of harm caused by the appellant and Ms O'Connor, arising from the respective reach and credibility of TOC and BOTT (see the GD at [31]–[34]). We agree with the Judge and the AG that the appellant's publication of the Article and the Facebook Post on TOC's platforms was indeed likely to cause a greater degree of harm than Ms O'Connor's publication of the Letter on BOTT. In our view, the assessment of the degree of harm entails both a quantitative and a qualitative analysis, and this was rightly accepted by Mr Lim at the hearing. We consider the quantitative and qualitative differences between the two comparators in turn.

(1) Quantitative analysis

53 We do not see any reason to disturb the Judge's finding that the appellant's publication of the Article and the Facebook Post likely gave Ms O'Connor's allegations much wider circulation than they would otherwise have enjoyed (see the GD at [34]). As the Judge noted (at [31] of the GD), TOC has a substantial audience and reach. At the material time, the level of traffic on TOC's Website and TOC's Facebook Page was likely to be high. A survey conducted by the Reuters Institute for the Study of Journalism in January/February 2020 had found that 17% of its 2,014 respondents accessed TOC at least weekly; and as at 17 June 2021, TOC's Facebook Page had been "liked" by about 143,718 Facebook users and "followed" by 211,343 Facebook users. Furthermore, TOC's Website attracted 5,041,423 pageviews or 4,473,549 unique pageviews during the two-month period from 18 January 2021 to 24 March 2021. In contrast, BOTT's homepage appears to have attracted only 161 views as at 22 October 2021. This provides an indication of the respective reach of each platform.

54 With regard to the Letter and the Article specifically, the appellant submits that the Letter on BOTT attracted more views than the Article on TOC's Website, and that there was no basis for the Judge to find that the Letter would not have received such great traction but for TOC's republication of the same, or for the Judge to assume that some of the views on BOTT were from users who had first come across the Article on TOC's Website (at [33] of the GD).

55 We are unable to agree with this argument. As we pointed out to Mr Lim during the hearing, although the evidence before us indicates that the Letter on BOTT attracted 4,421 views while the Article on TOC's Website attracted 4,310 pageviews or 3,799 unique pageviews, this comparison may not be like-for-like

because these numbers appear to have been captured over different periods of time. The former appears to be the number of views of the Letter on BOTT as at 22 *October* 2021, whereas the latter records the number of views of the Article on TOC's Website in the much shorter period from 18 January 2021 to 24 *March* 2021. Mr Lim invited us to draw the inference that the Letter on BOTT had already attracted more views than the Article on TOC's Website as at 24 March 2021. However, this seems to us unlikely, given that the next two most frequently viewed pages on BOTT are its homepage, with only 161 views (as noted at [53] above), and an article about Ms Parti Liyani, with only 92 views. In any event, having regard to BOTT's relatively low usual viewership levels compared to TOC's, the Judge was in our view entitled to draw the common-sense inference that a substantial part of the number of views of the Letter on BOTT was attributable to the secondary traffic generated by readers who had clicked the hyperlink in the Article on TOC's Website and were thereby redirected to the Letter on BOTT.

56 The appellant also relies on the fact that Ms O'Connor published posts containing hyperlinks to the Letter on her social media platforms – such as her Facebook, LinkedIn and Twitter pages – and highlights that her LinkedIn post had attracted 1,049 views as at 25 October 2021. However, as pointed out by the AG, this simply reflects the number of times that Ms O'Connor's LinkedIn post was displayed to other users, and says nothing about how many of those users clicked on the hyperlink to read the Letter on BOTT. Mr Lim suggested at the hearing that the viewership of BOTT and Ms O'Connor's LinkedIn post were linked, such that viewers of the LinkedIn post would inevitably have to access the Letter on BOTT as well. Even if we were to accept this argument and proceed on the basis that all 1,049 users who viewed the LinkedIn post went on to access the Letter on BOTT, this does not assist the appellant as it would not

account for the remainder of the 4,421 views of the Letter on BOTT (assuming, in the appellant's favour, that these were 4,421 *unique* views). This also cannot realistically be explained by Ms O'Connor's post on Facebook on 27 January 2021 (which attracted only 12 "likes" and one "share" as at 25 October 2021) or by Ms O'Connor's post on Twitter on 10 March 2021 (which did not appear to have attracted any reactions or comments from other Twitter users as at 9 September 2021). Therefore, in the circumstances, Ms O'Connor's other publications on her social media platforms do not undermine – and indeed *strengthen* – the inference that a substantial part of the views attracted by the Letter came from the secondary publicity generated by its republication on TOC's platforms.

57 Moreover, in so far as the appellant seeks to argue that the degree of harm caused by allowing the Letter to *remain* accessible to the public on BOTT and Ms O'Connor's social media platforms to date is equal to or greater than that caused by TOC's republication of the Letter, this misses the point. The relevant comparison is not between the degree of harm caused by the Article and the Facebook Post until their removal on the one hand, and on the other hand, the degree of harm caused by the AG's decision to allow the Letter to remain accessible on BOTT and Ms O'Connor's social media platforms. Instead, the relevant comparison, for the purposes of the AG's exercise of prosecutorial discretion to charge the appellant but not Ms O'Connor, is between the degree of harm that would likely be caused by the appellant's republication of the Letter (in the form of the Article and the Facebook Post) and the degree of harm that would likely be caused by Ms O'Connor's publications (taken on their own), if *both* sets of publications were allowed to remain. This assertion by the appellant is also highly speculative and unsupported by any evidence, particularly because the assessment of the degree

of harm that would likely be caused by the appellant's and Ms O'Connor's respective publications does not involve a purely *quantitative* exercise (in comparing the number of times each publication could be viewed), but also involves a *qualitative* analysis of the nature of the platform on which each publication was made. We turn now to that qualitative analysis.

(2) Qualitative analysis

58 In our view, the nature of each platform – and therefore the degree and reach of its online presence enjoyed by each publication – is a highly material consideration in assessing the degree of harm. Founded in 2006, TOC is an established alternative news platform in Singapore with a substantial audience and reach. It describes itself as "Singapore's longest-running independent online media platform" and has a team of editors, writers and reporters. In contrast, BOTT appears to be a personal blog administered by Ms O'Connor to express her personal views and does not purport to be a news platform. BOTT is also far less established and less widely followed than TOC, and there is no evidence that Ms O'Connor is a public figure whose personal views would be particularly influential or attract a sizeable audience in and of themselves. By publishing the Article on TOC's Website and the Facebook Post on TOC's Facebook Page, the appellant conferred on the allegations made in Ms O'Connor's Letter a greater appearance of journalistic and editorial legitimacy than they would have enjoyed if they had been published on BOTT alone. We therefore agree with the Judge that this was a material differentiating factor between the appellant and Ms O'Connor (see the GD at [31]–[32] and [34]).

59 As a result of these quantitative and qualitative factors going towards the respective reach of TOC's platforms compared to BOTT, the AG could

reasonably have concluded that the impact of TOC's republication of the Letter was likely to be more significant and that it amplified the risk of undermining public confidence in the administration of justice, which is the mischief that contempt of court proceedings are intended to address. As we have emphasised at [42] above, the AG's overriding duty is to act in the public interest. In assessing what the public interest required, the AG was entitled to undertake both a quantitative and qualitative assessment of the degree of harm and to conclude that the Committal Application against the appellant was in the public interest whereas the prosecution of Ms O'Connor might not have been. This differentiating factor further weighs against the appellant and Ms O'Connor being equally situated.

Level of culpability involved

60 The remaining differentiating factor accepted by the Judge was the level of culpability involved on the part of the appellant *vis-à-vis* Ms O'Connor, arising from the differences in their stature. In this connection, the Judge held that a higher standard of professionalism, integrity and circumspection should be expected from the appellant in determining what to publish, given that he was the Chief Editor of TOC and a journalist by profession, whereas Ms O'Connor did not hold herself out to be an independent journalist (see the GD at [35]).

61 In our view, however, this differentiating factor is neutral at best. There is not much to choose between the appellant and Ms O'Connor in terms of their respective levels of culpability in this case. On one hand, Ms O'Connor was the author and original publisher of the Letter, and had also granted permission for its republication, which would have enabled it to reach a wider audience. On the other hand, while the appellant emphasises that he was not the author of the

Letter, he chose to republish it (in the form of the Article and Facebook Post) on TOC's Website and TOC's Facebook Page respectively, thereby providing a platform for and an implicit endorsement of its contents. Indeed, it was the appellant who took the initiative to reach out to Ms O'Connor to request permission to republish the Letter (see [4] above). Nevertheless, on balance, we are unable to accept the AG's submission that the appellant's conduct demonstrates a materially higher level of culpability than that of Ms O'Connor.

62 However, this does not affect our overall analysis. As we have explained at [35] above, only one material difference needs to be established in order to show that the appellant and Ms O'Connor are not equally situated. Even though the level of culpability involved may not be a material differentiating factor in the present case, the difficulties in investigation, prosecution and enforcement in relation to Ms O'Connor compared to the appellant, as well as the degree of harm caused by the appellant and Ms O'Connor respectively, are salient differentiating factors which render them not equally situated.

Conclusion

63 For the foregoing reasons, we are of the view that the appellant has failed to discharge his burden of showing that the AG's actions have resulted in him being treated differently from another equally situated person for the purposes of Art 12(1) of the Constitution. The only relevant comparator in the present case is Ms O'Connor, and it is clear that they are not equally situated in view of the differentiating factors we have analysed above. Applying the test set out by this court in *Datchinamurthy* at [30], the appellant and Ms O'Connor are not, in our judgment, "so situated that it is reasonable to consider that they should be similarly treated", and a prudent person would not objectively think they were "roughly equivalent or similarly situated in all material respects".

64 As the appellant's case fails at the first step of the two-step *Syed Suhail* test, the second step of that test – which would require the AG to provide a justification for any differential treatment by showing that it was based on legitimate reasons – does not arise for consideration. Thus, in the present case, we agree with the Judge that the appellant has not established any *prima facie* case of reasonable suspicion in relation to the alleged breach of Art 12(1) of the Constitution, on which his entire case rests.

65 Accordingly, there is no basis for this court to grant the appellant leave to apply for the Prohibiting Orders to prevent the AG from proceeding with the Committal Application. Without such leave, the appellant's prayers for the Declarations would also fall away (see [21] above). In any event, given our conclusions above, there would be no legal or factual basis for granting any of the Declarations sought by the appellant.

66 We therefore dismiss the appeal. As to costs, we order the appellant to pay the AG the costs of the appeal fixed at $15,000 (inclusive of disbursements). The usual consequential orders apply.

Judith Prakash
Justice of the Court of Appeal

Tay Yong Kwang
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Lim Tean (Carson Law Chambers) for the appellant;
Tan Ruyan Kristy SC, Sarah Siaw Ming Hui and Jean Goh
(Attorney-General's Chambers) for the respondent.
