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

[2022] SGHC 180

Originating Summons No 41 of 2022

Between

Attorney-General

… *Plaintiff*

And

(1) Ravi s/o Madasamy
(2) The Law Society of Singapore

… *Defendants*

GROUNDS OF DECISION

[Legal Profession — Disciplinary proceedings — Application for review of Disciplinary Tribunal's decision]
[Legal Profession — Disciplinary proceedings — Whether review application brought out of time]

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Introduction

1 This Originating Summons ("OS") was filed by the Attorney-General (the "AG") seeking the following orders:[1]

(a) that the AG be granted an extension of time to bring this application;

(b) that the Disciplinary Tribunal's ("DT") findings and determination, that the 1st Charge against Ravi s/o Madasamy (the "first defendant") in DT/6/2021 dated 20 December 2021 was not made out (see [12(a)] below), be reviewed;

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[1] Hui Choon Kuen's 1st Affidavit dated 18 January 2022 ("Hui's 1st Affidavit") at para 3.

(c) upon such review:

(i) a determination be made that: (1) the DT erred in finding that the 1st Charge was not made out; and (2) the 1st Charge is made out and the first defendant is guilty of misconduct unbefitting an advocate and solicitor as an officer of the Supreme Court or as a member of an honourable profession under s 83(2)(*h*) of the Legal Profession Act 1966 (2020 Rev Ed) (the "LPA"), pursuant to s 97(4)(*a*) of the LPA;

(ii) an order be made directing the AG, as the person who made the complaint, to make an application under s 98 of the LPA, pursuant to s 97(4)(*b*)(i) of the LPA, *ie*, an application for the matter to be advanced to the Court of Three Judges for one of the orders in s 98(1)(*a*) of the LPA to be imposed on the first defendant;

(iii) that costs be provided for; and

(iv) such further and/or other relief as the Honourable Court deems fit.

Facts

2 The AG's complaint (the "Complaint") pertained to a live interview that the first defendant gave to The Online Citizen Asia ("TOC Asia") immediately after the Court of Appeal delivered the oral grounds of its judgment in criminal review proceedings concerning the first defendant's client, Gobi a/l Avedian ("Gobi"). During the interview, the first defendant allegedly made false and/or misleading allegations, intending to convey that the Public Prosecutor ("PP") and/or the AG had acted in bad faith, maliciously and/or improperly so as to

discredit the Attorney-General's Chambers ("AGC") and/or its legal officers, which amounted to conduct unbefitting an advocate and solicitor under s 83(2)(h) of the LPA.

History of Gobi's criminal review proceedings

3 On 11 December 2014, Gobi was arrested on suspicion of having in his possession two packets of granular substance containing a prohibited drug. Gobi was subsequently charged under s 7 read with s 33(1) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"), punishable by death under s 33(1) read with Second Schedule of the MDA for importing a Class 'A' drug, containing 40.22g of diamorphine.[2] At the conclusion of Gobi's trial, the High Court found in *Public Prosecutor v Gobi a/l Avedian* [2017] SGHC 145 ("*Gobi (HC)*") that Gobi had rebutted the presumption under s 18(2) of the MDA that he had knowledge that the granular substance he possessed was diamorphine. The High Court thus convicted him on an amended lesser charge of attempting to import the said diamorphine believing it to be a controlled drug under Class 'C' instead, which was a non-capital charge. Gobi was thus sentenced to 15 years' imprisonment and ten strokes of the cane.[3]

4 The PP appealed against Gobi's acquittal. On 25 October 2018, the Court of Appeal in *Public Prosecutor v Gobi a/l Avedian* [2019] 1 SLR 113 ("*Gobi (CA)*") accepted the PP's submissions and disagreed with the High Court's finding that the s 18(2) presumption had been rebutted. Accordingly,

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2 Record of Proceedings ("ROP") (Volume 5) at p 851 (Disciplinary Tribunal Report at para 8).

3 ROP (Volume 5) at p 851 (Disciplinary Tribunal Report at para 9).

the Court of Appeal set aside Gobi's conviction on the amended charge and convicted Gobi on the original capital charge.[4]

5 On 27 May 2019, the Court of Appeal issued its judgment in *Adili Chibuike Ejike v Public Prosecutor* [2019] 2 SLR 254 ("*Adili*"). In *Adili*, the Court of Appeal clarified that wilful blindness could not be the subject of the presumption under s 18(1) MDA.[5]

6 On 3 January 2020, the first defendant filed CA/CM 1/2020 seeking leave pursuant to s 394H of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) (the "CPC") and s 11(2) of the Criminal Procedure Rules for the Court of Appeal to review its earlier decision in *Gobi (CA)* in light of, among other things, the new development in the law established in *Adili*.[6]

7 On 20 February 2020, the Court of Appeal granted leave to Gobi to file a review application pursuant to s 394I of the CPC. The first defendant thus filed CA/CM 3/2020 ("CM 3") for the Court of Appeal to review its decision in *Gobi (CA)* on 25 February 2020. On 19 October 2020, the Court of Appeal set aside Gobi's conviction on the Capital Charge. After reviewing the case, the Court of Appeal delivered brief grounds of its judgment (the "Oral Judgment"), as set out in its Minute Sheet.[7] Notably, in its Oral Judgment, the Court of Appeal considered the Prosecution's case in respect of Gobi's knowledge of the nature of the drugs. In particular, the Court of Appeal noted that the Prosecution might have formulated its case on the premise that actual knowledge and wilful

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4 ROP (Volume 5) at p 852 (Disciplinary Tribunal Report at para 11).

5 ROP (Volume 5) at p 852 (Disciplinary Tribunal Report at para 13).

6 ROP (Volume 5) at p 853 (Disciplinary Tribunal Report at para 14).

7 ROP (Volume 3) at p 2–10 (Minute sheet in CA/CM 3/2020).

blindness were not distinct concepts.[8] As such, while the Prosecution's case at trial was one of wilful blindness to the nature of the drugs, in contrast, its case on appeal was one of actual knowledge, premised on the contention that Gobi did not in fact believe the assurances he had been given as to the nature of the drugs. This led the Court of Appeal to make the observation (at para 20 of the Minute Sheet in CM 3):[9]

> … This change in the Prosecution's case was ultimately prejudicial to the Applicant because he was never squarely confronted with the case that he did not in fact believe what he had been told by Vinod and Jega, and so he could not have responded to such a case. …

8 In its written judgment in *Gobi a/l Avedian v Public Prosecutor* [2021] 1 SLR 180 ("Review Judgment"), the Court of Appeal stated that (at [120]–[121]):

> (a) The Prosecution's case at the High Court trial had been one of wilful blindness.
>
> (b) The Prosecution had changed its case in *Gobi (CA)* to argue that Gobi knew the drugs he carried were diamorphine and that he did not believe that they were "chocolate drugs" as he professed.
>
> (c) The Prosecution's change in position had prejudiced Gobi. In particular, the case that he knew the drugs were diamorphine and not "chocolate drugs" was never squarely put to Gobi.
>
> (d) Gobi's conviction was only safe if the Prosecution could establish beyond a reasonable doubt that he was wilfully blind as to the

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8 ROP (Volume 3) at p 7 (Minute sheet in CA/CM 3/2020 at para 19).

9 ROP (Volume 3) at p 8 (Minute sheet in CA/CM 3/2020 at para 20).

nature of the drugs in his possession, but the Prosecution could not establish this.

First defendant's interview with TOC Asia

9 Shortly after the Oral Judgment was released on 19 October 2020, the first defendant gave an interview to TOC Asia wherein he commented on the Court of Appeal's ruling in CM 3 and made several allegations against the PP's conduct of Mr Gobi's prosecution as follows ("Interview Statements"):[10]

(a) that the PP had been "*overzealous in his prosecution and that has led to the death sentence of [Gobi]*" ("First Interview Statement");

(b) that "*one of the things which is troubling in this decision today, is that the Court noted that the Attorney General, or the Public Prosecutor ran a different case in the High Court and the Court of Appeal. Then that begs the questions and calls into the fairness of the administration of justice in Gobi's case by the Prosecution* [sic]…" ("Second Interview Statement"); and

(c) that the PP, among others, should "*apologise*" to Gobi for the suffering Gobi and his family had gone through because "*the Prosecution, as the Court observed, ran a different case in the High Court and the Court of Appeal*", and therefore, "*essentially the fairness of the Prosecution, [was] called into question by the Court itself*" ("Third Interview Statement").

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10 ROP (Volume 5) at p 855 (Disciplinary Tribunal Report at para 20).

10 The interview was subsequently uploaded to TOC Asia's website and Facebook page, which could be publicly viewed.[11] An article titled "*Court of Appeal sets aside death sentence of Malaysian inmate, cites miscarriage of justice*" was also subsequently uploaded on TOC Asia's website, containing extracts of the Interview Statements.[12]

Events subsequent to TOC Asia Interview

11 On 20 October 2020, the AGC wrote a letter ("AGC's Letter") to the first defendant, stating that the Interview Statements alleged that the PP had acted in bad faith or maliciously in the prosecution of Gobi.[13] The AGC also requested that the first defendant apologise and unconditionally retract all the Interview Statements in writing within two days. On the same day, the first defendant uploaded AGC's Letter in a Facebook post (the "Facebook Post"). The first defendant stated, *inter alia*, that the "*government lawyers*" were "*wrongdoers*", and that he had instructions from Gobi to commence proceedings against certain AGC officers.[14] Two days later, the first defendant wrote to the AGC, categorically denying all of the AGC's allegations made in AGC's Letter.[15]

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11 ROP (Volume 5) at p 855 (Disciplinary Tribunal Report at para 21).

12 ROP (Volume 5) at p 856 (Disciplinary Tribunal Report at para 22).

13 ROP (Volume 5) at p 857 (Disciplinary Tribunal Report at para 24); Hui's 1st Affidavit at para 7(h) and Annex F.

14 ROP (Volume 5) at p 857 (Disciplinary Tribunal Report at para 25).

15 ROP (Volume 5) at p 857 (Disciplinary Tribunal Report at para 26).

The DT and the Council's decisions

12 On 25 March 2021, the DT was constituted to inquire into the AG's complaint. On 22 December 2021, the Law Society forwarded the DT's determination on the Complaint to the AGC.[16] The DT found that:

> (a) The 1st Charge for making the Interview Statements, which were false and/or misleading allegations intended to convey to listeners of the interview and/or readers of TOC Asia that the PP and/or AG had acted in bad faith, maliciously and/or improperly so as to discredit the AGC and/or its legal officers in the eyes of the public, thereby committing an act amounting to misconduct under s 83(2)(h) of the LPA, had not been made out.
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> (b) The 2nd to 4th Charges, for making baseless accusations of misconduct and/or threatening to commence legal proceedings against fellow legal practitioners and the Law Society in his First Facebook Post and Second Facebook Post, were made out. The first defendant was to pay a total penalty of $6,000 and costs of $3,000 (including disbursements).

13 On appeal, the AG submitted that the DT had erred in finding that the 1st Charge was not made out. The AG argued that the Interview Statements meant and were intended to imply that the Prosecution had acted in bad faith, maliciously and/or improperly. The AG further submitted that the Interview Statements could not constitute fair criticism as there was no reasonable or rational basis for the Interview Statements and they were not made in good faith.

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16 Hui's 1st Affidavit at para 10.

The AG's submissions

14 As a preliminary point, the AG submitted that the present OS was not filed out of time. Notwithstanding the plain wording of s 97(1) of the LPA, the AG pointed to the Court of Appeal's clarifications in the case of *Iskandar bin Rahmat v Law Society of Singapore* [2021] 1 SLR 874 ("*Iskandar*") that in general, the Council of the Law Society (the "Council") considers and decides what it will do in response to the DT's determination, and s 97 of the LPA is triggered after the Council has made its decision under s 94 and advised the parties under s 94(4) of whether it agrees with the DT's determination (*Iskandar* at [33]). As the AG received the Council's decision on the DT's determination on 4 January 2022 and brought this application on 18 January 2022, the application was brought within time.

15 The AG submitted that the DT had erred in finding that the 1st Charge was not made out. The Interview Statements meant that the Prosecution acted in bad faith, maliciously and/or improperly. The AG pointed out that an ordinary reasonable listener of the interview would not have known of the observations made by the Court of Appeal in the Review Judgment and would not have understood the meanings of the Interview Statements in that context. The first defendant gave evidence that the interview was given immediately after the Court of Appeal delivered its Oral Judgment, when the full Review Judgment had not yet been seen or collected by the first defendant. It was thus inexplicable for the DT to assume that the general public, who did not have access to the Oral Judgment or Review Judgment at the time of the interview, would have known of the observations made by the Court of Appeal in the Review Judgment.

16 Furthermore, the insinuation of the words "*overzealous*" and "*troubling*" in the Interview Statements was that the Prosecution was so eager to secure Gobi's conviction on the capital charge to the point that it unjustifiably and insidiously changed its case against Gobi to achieve that objective. This invariably leads to an inference that there was misconduct on the part of the Prosecution, to the extent of bad faith or malice, in its prosecution of Gobi. This severity was also emphasised by the first defendant when he claimed that even the Court of Appeal had "*called into question* […] *the fairness of the Prosecution"*.

17 In addition, the first defendant had *intended* to imply through the Interview Statements that the Prosecution had acted in bad faith, maliciously and/or improperly. The AG argued that the contemporaneous evidence at the material time of the interview should be taken into account in determining the first defendant's intention. Such contemporaneous evidence includes the first defendant's response to AGC's Letter. In particular, the first defendant did not dispute or deny the meaning attributed to the Interview Statements, but confirmed the implication that the Prosecution had acted in bad faith by posting a statement stating that "*government lawyers*" who "*handled Gobi's case are the wrongdoers*". The first defendant also wrote a Response Letter, in which he did not dispute or deny the meanings attributed to the Interview Statements but only denied that he knew or must have known that these allegations were false. He then posted his Response Letter on Facebook. The AG submitted that the first defendant's collective actions of making the Interview Statements, posting AGC's Letter in the Facebook post and stating that the "*government lawyers*" were "*wrongdoers*" confirmed that the first defendant had intended to imply and did imply that the Prosecution had acted in bad faith, maliciously and/or improperly.

18 Lastly, the Interview Statements could not constitute fair criticism as there was no rational and cogent basis for making the Statements and the Statements were not made in good faith. There was reasonable justification for the change in the Prosecution's case on appeal as the line between wilful blindness and actual knowledge had not been clearly drawn before *Adili*. Furthermore, the first defendant had made the Statements in bad faith as he omitted to mention that the Court of Appeal had expressly pointed out that it was understandable for the Prosecution to have thought that it could run a case of actual knowledge on appeal even if the trial had been substantively founded on wilful blindness.

The first defendant's submissions

19 As a preliminary point, the first defendant submitted that the AGC was out of time to make the application pursuant to s 97(1) of the LPA. The plain wording of s 97(1) of the LPA clearly requires the person who made the complaint to make the application within 14 days of being notified of the determination of the DT. In the present case, the Law Society notified the AGC of the DT's determination on 22 December 2021, but the AGC only filed the present OS on 18 January 2022, almost one month after the notification, without good reason for the delay.

20 The first defendant submitted that the AGC had not established the elements of the 1st Charge beyond reasonable doubt. Firstly, the first defendant submitted that the word "*overzealous*" in the First Interview Statement was with reference to the change in the Prosecution's case in *Gobi (CA)* and therefore was not false or misleading. Secondly, the Second Interview Statement was a factual observation that was not false or misleading. The word "*troubling*" only bore the ordinary meaning of "*causing stress or anxiety",* which was natural in

a case such as Gobi's where his life was at stake. Thirdly, the Third Interview Statement was an accurate factual observation save for the opinion that the fairness of the Prosecution was called into question by the Court of Appeal, which was based on the Court of Appeal's observation at [120] of the Review Judgment. Furthermore, there was no insinuation in the Interview Statements that the Prosecution had changed its case arbitrarily or for an ulterior purpose, or because it was biased against Gobi.

21 In addition, the first defendant was entitled to the defence of fair criticism in respect of the Interview Statements. The Court of Appeal itself had observed that the Prosecution's change in case had prejudiced Gobi, as the case was never put squarely to him at trial. The first defendant therefore had a rational basis to establish the defence of fair criticism.

22 Furthermore, the Interview Statements did not impute any bad faith, malice and/or impropriety on the Prosecution. When the first defendant gave the Interview Statements and uploaded his Facebook Post, he was simply reflecting on what the Court of Appeal had itself said in the Oral Judgment on the Prosecution's conduct that was prejudicial to Gobi. This was also alluded to by the Court of Appeal in the Review Judgment, where it referred to its comments in the case of *Zainal bin Hamad v Public Prosecutor and another appeal* [2018] 2 SLR 1119 ("*Zainal*"). As a matter of chronology, the first defendant gave the TOC Asia interview right outside the Supreme Court on the same day and immediately after the Supreme Court had summarised its Review Judgment. As such, he mainly had in mind the Court of Appeal's own observations of the prejudice caused to Gobi.

Issues for determination

23 The preliminary issue to consider was whether the AG was out of time to make this application pursuant to s 97(1) of the LPA.

24 The key issue for consideration in the substantive OS was whether the Law Society's DT had erred in finding that the 1st Charge against the first defendant was not made out.

Decision

Whether the AG was out of time for bringing a review application

25 I was of the view that the AG was not out of time for bringing the application in this OS to review the decision of the DT. Section 97(1) of the LPA states that:

> **Application for review of Disciplinary Tribunal's decision**
>
> 97.—(1) Where a Disciplinary Tribunal has made a determination under section 93(1)(a) or (b), the person who made the complaint, the regulated legal practitioner or the Council may, within 14 days of being notified of that determination or any order under section 93(2) or (2A), apply to a Judge for a review of that determination or order.

26 In the present case, the Law Society notified the AGC of the DT's determination on 22 December 2021.[17] By the plain wording of s 97(1) of the LPA, the AG would have had 14 days from the Law Society's letter to apply for a s 97(1) review, *ie*, by 5 January 2022. The AGC received the Council's decision on the DT Determination on 4 January 2022.[18] The AG then filed the

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17 Hui's 1st Affidavit at para 10.

18 Hui's 1st Affidavit at para 12.

present OS on 18 January 2022, almost one month after the Law Society's notification.

27 However, I noted that the Court of Appeal in *Iskandar* had stated that (at [33]):

> … Where the recommendation of the Disciplinary Tribunal goes to the Council, the Council's decision in respect of that determination may be challenged before a Judge under s 95. **However, s 97 seems to provide an avenue of recourse even before the Council has come to a determination**. To make sense of this, it is necessary to return to the logic underlying the architecture of these provisions, which is that in general, the *Council* considers and decides what it will do in response to the Disciplinary Tribunal's determination, though in certain limited circumstances, the Council must adhere to the determination: see, for instance, s 94(1). **We have also noted that as far as the complainant is concerned, the complainant's only recourse against a determination of the Disciplinary Tribunal is under s 97. That will be triggered after the Council has made *its* decision under s 94 and advised the parties under s 94(4).**
>
> [emphasis in original in italics; emphasis added in bold]

28 While a complainant has the avenue of recourse even before the Council has come to a determination, it was also pointed out in the case of *Loh Der Ming Andrew v Koh Tien Hua* [2021] 2 SLR 1013 ("*Andrew Loh"*) that (at [31]):

> … In practical terms, while the complainant or regulated legal practitioner would be well advised to await the decision of the Council, and would, as we anticipated in *Iskandar* at [33], typically do so, there is no strict impediment to their making a s 97 application once the Council has conveyed the DT's determination to them.

29 As such, even though the time for bringing an application under s 97(1) has expired, in line with the Court of Appeal's guidance in *Iskandar* and *Andrew Loh*, there is no impediment to the AG making a s 97 application after the Council had conveyed its decision on the DT's determination.

30 Neither statute nor case law provides explicit guidance on the timeline before which the complainant may apply to review the DT's decision upon receipt of the Council's decision. Nevertheless, the Court of Appeal in *Iskandar* considered that s 97 is "triggered" after the Council's decision, thus suggesting that the AG may bring the review application within 14 days of receiving the Council's decision. As the AG received the Council's decision on the DT Determination on 4 January 2022 and filed this OS on 18 January 2022, the AG was not out of time.

Whether the DT erred in finding that the 1st Charge was not made out

31 In my view, the Interview Statements made by the first defendant which constitute the subject matter of the 1st Charge, taken as a whole and understood in context, did not necessarily imply that the Prosecution had acted with malice, in bad faith or improperly. The statements were supported by a rational basis – that the Prosecution's advancement of a different case on appeal in *Gobi (CA)*, premised on actual knowledge of the drugs instead of wilful blindness as put forward at trial in *Gobi (HC)*, *did* cause prejudice to Gobi. This was specifically highlighted by the Court of Appeal in both its Oral Judgment and subsequent written grounds in the Review Judgment.

Did the first defendant imply that the Prosecution had acted in bad faith, maliciously or improperly?

32 In ascertaining the meaning of the Interview Statements, regard must be had to how an ordinary reasonable listener of the Interview Statements would understand the statements in the context in which they were made (*The Law Society of Singapore v Chia Ti Lik alias Xie Zhili* [2011] SGDT 4 at [53]–[59] and *Review Publishing Co Ltd and anor v Lee Hsien Loong and another appeal* [2010] 1 SLR 52 at [27]–[29]).

33 In the First Interview Statement, the first defendant opined that the PP had been "*overzealous*" in the prosecution of Gobi, leading to the imposition of the death sentence on him. The AG submitted that the use of the word "*overzealous*" may carry the insinuation that the Prosecution was overly enthusiastic or too eager to secure Gobi's conviction on a capital charge. I agreed that there appeared to be some suggestion, albeit not in explicit words, that the word "*overzealous*" could, on one interpretation, mean that the Prosecution was endeavouring to ensure that Gobi did not escape the death penalty. Nevertheless, I did not think that the first defendant's characterisation had crossed the line to imply that the Prosecution had sought to achieve this at all costs or through any means. Suggesting that the Prosecution had tried its utmost to secure a conviction also did not equate to a suggestion that the Prosecution had acted improperly in its conduct of Gobi's case on appeal when it changed its case.

34 In the Second Interview Statement, I was unable to see any issue with the first defendant's usage of the word "*troubling*", as there was some factual basis to this sentiment. The Court of Appeal did find that the Prosecution had advanced a different case against Gobi at trial as compared to what was put forward on appeal, and had expressed its concern in no uncertain terms that the fact that Gobi was never squarely confronted with the case of wilful blindness ultimately resulted in prejudice to Gobi (Review Judgment at [120]).

35 As for the first defendant's Second and Third Interview Statements pertaining to whether the Prosecution had acted fairly in Gobi's case and having its conduct "*called into question by the Court itself*", these comments again may be understood as suggesting that the Prosecution had acted improperly in failing to conduct its case fairly. The Third Interview Statement could suggest that there was grave alleged impropriety on the part of the Prosecution, since the Court of

Appeal had "*called into question*" "*the fairness of the Prosecution*". That said, in view of the Court of Appeal's remarks in its Oral Judgment that the change in the Prosecution's case was "ultimately prejudicial to [Gobi]",[19] I found that there was some factual basis for these statements.

36 The *context* in which the Interview Statements were made was also relevant in determining how the statements would be understood by an ordinary reasonable person, as well as what the first defendant had intended in making the statements. The AG submitted that in determining the first defendant's intent, the DT had failed to consider the contemporaneous evidence in the days after the interview took place, including AGC's Letter to the first defendant to retract the interview statements, the first defendant's Facebook Post published on 20 October 2020 which stated that the "*government lawyers*" who "*handled Gobi's case are the wrongdoers*" and the first defendant's Response Letter issued on 22 October 2020.

37 In my view, the relevant context of the Interview Statements would be the full transcript of the TOC Asia interview, alongside the Oral Judgment which immediately preceded those statements. Statements or events which emerged *subsequent* to the making of the Interview Statements may well be connected to the Interview Statements, but I was unable to see how they are relevant in determining how an ordinary reasonable person would have understood the Interview Statements *at the time that they were made*. Equally, even if the evidence of subsequent statements or events in the days after may be said to shed some light on the first defendant's intent *at the time of making the statements*, such evidence would, at best, only serve as a form of secondary (and weak) corroboration.

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[19] ROP (Volume 3) at p 8 (Minute sheet in CA/CM 3/2020, p 7 at para 20).

38 I noted that the first defendant's Facebook Post was also separately the subject of the 2nd Charge, which the DT found to have been made out. In my view, the evidence that formed the basis for the 2nd Charge, including AGC's Letter which gave rise to the first defendant's first Facebook Post, should not be readily conflated with the evidence that formed the context of the Interview Statements.

39 Taking the entirety of the Interview Statements in their context (as defined at [37] above), I was not persuaded that the first defendant had sought to imply or insinuate that the Prosecution had acted with malice, in bad faith or improperly in its conduct of the matter.

Whether the Interview Statements constituted fair criticism

40 The DT considered that whether or not the first defendant was guilty of misconduct "depends ultimately on whether the Interview Statements constitute fair criticism which [the first defendant] is entitled to rely upon in his defence".[20] The concept of fair criticism was considered by the Court of Appeal in the context of contempt of court proceedings in *Shadrake Alan v Attorney-General* [2011] 3 SLR 778, where the Court of Appeal specified the following non-exhaustive factors to be considered (at [81] and [139]):

(a) The criticism must be made in good faith and must also be respectful. In determining good faith, the court is entitled to consider the rationale and basis for the criticism.

(b) The manner in which the criticism is made.

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[20] ROP (Volume 5) at p 883 (Disciplinary Tribunal Report at para 97).

(c) The extent to which the criticism is supported by a cogent rational basis.

41 In addition, any such rational basis must have been accurately stated (*Attorney-General v Au Wai Pang* [2015] 2 SLR 352 at [42]). It was also not necessary to establish an unassailable basis for the criticism made, as the court was not required or concerned to determine whether the criticism was proved or disproved as a fact (*Attorney-General v Shadrake Alan* [2011] 2 SLR 445 at [72]).

42 In my view, the DT was correct in finding that the Interview Statements constituted fair criticism, as the first defendant had a rational basis for making the statements. The first defendant had made the Interview Statements in a live interview with TOC Asia immediately after the Court of Appeal delivered its Oral Judgment. The relevant enquiry as to whether the first defendant had any cogent rational basis in making his Interview Statements should thus be directed at the contents of the Oral Judgment. Pertinently, in the Oral Judgment, the Court of Appeal observed that the change in the Prosecution's case was "ultimately prejudicial to the Applicant [*ie*, Gobi]".[21] I noted that the Court of Appeal had also clearly acknowledged that "[i]n fairness to the parties, at the time of the trial, they did not have the benefit of the guidance subsequently set out in *Adili*", and recognised that the DPP "might thus have formulated the Prosecution's case on the premise that actual knowledge and wilful blindness were not distinct concepts".[22] Nevertheless, it was understandable that the first defendant, in referring to the Court of Appeal's unambiguous observation in its Oral Judgment of the change in the Prosecution's case and the prejudice caused

21 ROP (Volume 3) at p 8 (Minute sheet in CA/CM 3/2020, p 7 at para 20).

22 ROP (Volume 3) at p 7 (Minute sheet in CA/CM 3/2020, p 6 at para 19).

to Gobi, had stated that the "fairness of the Prosecution" was "called into question by the Court itself".

43 The prejudicial effect of the Prosecution's change in its case on appeal was further elucidated in the Review Judgment. The Court of Appeal pointed to the case of *Zainal*, which "alluded to the importance of the Prosecution running a consistent case" to "give the accused a fair chance of knowing the case that is advanced against him" (Review Judgment at [119]). This reasoning was clearly mirrored in the Oral Judgment. The Court of Appeal had clearly accepted that the Prosecution's failure to run a consistent case at trial and on appeal was unfair to Gobi since "he was never squarely confronted [at trial] with the case that he did not in fact believe what he had been told by Vinod and Jega, and so he could not have responded to such a case".[23]

44 Taking into account both the Oral Judgment and Review Judgment, I accepted that there was reasonable justification for the manner in which the Prosecution's case was run on appeal. However, whether Gobi was prejudiced by the Prosecution's approach on appeal and whether the Prosecution's approach may have been justifiable were separate and distinct considerations that should not be conflated. In the Review Judgment, the Court of Appeal reiterated that it was "understandable" that without the benefit of the guidance subsequently set out in *Adili*, in formulating the case at the time of trial, the DPP "might thus have operated on the premise that actual knowledge and wilful blindness were not distinct concepts" (Review Judgment at [110] and [113]). However, in my view, the first defendant's Interview Statements hinged on the Court of Appeal having specifically highlighted two matters in the Oral Judgment: first, the Prosecution's change in its stance on appeal, and second,

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[23] ROP (Volume 3) at p 8 (Minute sheet in CA/CM 3/2020, p 7 at para 20).

the resulting prejudice to Gobi. The former was an objective fact. The latter was also factual in that the Court of Appeal had expressly articulated its concern that prejudice *was* caused to Gobi by the Prosecution's change in stance, and this was so irrespective of whether the Prosecution had reasonable justification for how it ran its case on appeal.

45 I was thus of the view that the first defendant's Interview Statements were premised on the rational basis that the Prosecution's approach on appeal had caused prejudice to Gobi. As such, the first defendant did not make the Interview Statements with intent to impute malice, bad faith or impropriety to the AGC. To the extent that the Interview Statements had suggested unfairness in the Prosecution's approach on appeal, this also did not necessarily imply that the AG had acted improperly.

Conclusion

46 Given the Court of Appeal's unequivocal observations in the Oral Judgment on how the change in the Prosecution's case on appeal was "ultimately prejudicial" to Gobi, I accepted that the first defendant had a rational basis for making the Interview Statements and his statements thus constituted fair criticism.

47 Accordingly, I agreed with the DT that the 1st Charge was not made out. The OS was therefore dismissed.

48 On the issue of costs, the AG submitted that no costs should be ordered. The AG had filed the OS under s 85(3)(*b*) of the LPA, in his role as guardian of the public interest. Adopting the reasoning in *Law Society of Singapore v Top Ten Entertainment* [2011] 2 SLR 1279 (at [24]), costs should ordinarily not be ordered against unsuccessful public bodies performing regulatory functions.

The first defendant submitted that a distinction should be drawn between situations where the public body performing regulatory functions is the complainant and where it is the respondent.

49 I agreed with the AG and considered that the AG's decision to bring the OS was made honestly and reasonably. In any event, there was no suggestion that the AG had acted in bad faith or in dereliction of his duties. I therefore made no order as to costs.

See Kee Oon
Judge of the High Court

Jeyendran Jeyapal and Lee Hui Min (Attorney-General's Chambers) for the plaintiff;
Eugene Thuraisingam and Hamza Zafar Malik (Eugene Thuraisingam LLP) for the first defendant;
Teo Guo Zheng Titus (WongPartnership LLP) for the second defendant (watching brief).