

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

Originating Summons No. 740 of 2010 /Q)

In the matter of Order 53 of the Rules of Court

And

In the matter of Article 22P of the Constitution of the Republic of Singapore

And

In the matter of Article 9 of the Constitution of the Republic of Singapore

And

In the matter of YONG VUI KONG (G0623288X)

BETWEEN

YONG VUI KONG
(G0623288X)

...Plaintiff

AND

ATTORNEY GENERAL

...Defendant

PLAINTIFF'S SUBMISSIONS

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I. THE DECISION TO GRANT PARDON IS AMENABLE TO JUDICIAL REVIEW.

1. In a constitutional democracy, all power is susceptible to judicial review. As Singapore's Court of Appeal has stated, "the notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power" (*Chng Suan Tze v. Minister for Home Affairs*, [1988] 2 SLR(R) 525 ¶86 (CA) {Tab 2}; see also *Law Society of Singapore v. Tan Guat Neo Phyllis* (2007), [2008] 2 SLR(R) 239 ¶149 (HC) {Tab 3}).
2. In other Commonwealth countries where there are similar constitutional powers of pardon, these powers have been held to be susceptible to judicial review:
 - a. In India, see *Maru Ram v. Union of India* (1980), (1981) 1 SCC 107 ¶65 {Tab 4}; and *Epuru Sudhakar v. Govt. of A.P.* (2006) 8 SCC 161 ¶22-34 {Tab 5}.
 - b. In England, see *R. v. Secretary of State for the Home Department, ex parte Bentley* (1993), [1994] 1 QB 349 at 363 (DC) {Tab 6}.
 - c. In South Africa, see *President of the Republic of South Africa v. Hugo*, [1997] ZACC 4 {Tab 7}.
 - d. In Jamaica, see *Lewis v. Attorney General of Jamaica* (2000), [2001] 2 AC 50 at 75-78 (PC) {Tab 8}.

3. It must be noted also that this application does not invite the court the review any matters of policy which may be non-justiciable. It is concerned solely with the basic right of the plaintiff to have his petition considered in the course of an unbiased decision-making process.
4. Therefore, it is submitted that the court in this case has jurisdiction to review the President's power to grant pardon under Article 22P of the *Constitution of the Republic of Singapore*.

II. THE POWER TO GRANT PARDON MUST BE EXERCISED IN ACCORDANCE WITH THE RULE AGAINST BIAS.

5. All administrative decision makers are presumed to be under a duty to act fairly (*R. v. Secretary of State for the Home Department, ex parte Doody* (1993), [1994] 1 AC 531 at 560 (HL) {Tab 9}). The exact content of the duty to act fairly varies according to the impact the decision will have on the affected individual. Where, as in this case, the decision affects rights, the content of the duty to act fairly will be substantial (*Kay Swee Pin v. Singapore Island Country Club*, [2008] 2 SLR(R) 802 ¶6 (CA) {Tab 10}).
6. The rule against bias is a fundamental requirement of fairness. Indeed, it has been held to be part of the “irreducible core” of the requirements of natural justice (*Re Shankar Alan s/o Anant Kulkarni* (2006), [2007] 1 SLR(R) 85 ¶42 (HC) {Tab 11}). Courts in the Commonwealth have recognised that the rule against bias must be observed in deciding whether to exercise the constitutional power to pardon (*Lewis v. Attorney General of Jamaica* (2000),

[2001] 2 AC 50 at 76F (PC) {Tab 8}; *Maru Ram v. Union of India* (1980), (1981) 1 SCC 107 ¶65 {Tab 4}).

III. THE PROCESS OF GRANTING PARDON HAS BEEN TAINTED WITH BIAS.

7. The rule against bias requires that “the decision-maker should not be biased or prejudiced in a way that precludes a genuine and fair consideration being given to the arguments or evidence presented by the parties” (*Kay Swee Pin v. Singapore Island Country Club*, [2008] 2 SLR(R) 802 ¶7 (CA) {Tab 10}). A decision-maker violates this rule when he makes known his views about the merits of the very issue he has to decide in such a way as to suggest prejudgment. This principle was applied in *R v. Kent Police Authority, ex parte Godden*, [1971] 2 QB 662 (CA) {Tab 12}. The principle has been approved of in Singapore in *Re Singh Kalpanath*, [1992] 1 SLR(R) 595 ¶76, 78, 80 (HC) {Tab 13}.
8. At a public event on 9 May 2010, the Minister for Law, Mr. K. Shanmugam, is reported to have said, “Yong Vui Kong is young. But if we say 'We let you go', what is the signal we are sending?” (Zakir Hussain, “Tough stance on serious crimes saves lives: Minister” *The Straits Times* (10 May 2010)).
9. The Minister’s remarks were made 5 days before the Court of Appeal’s verdict in the plaintiff’s case was handed down on 14 May 2010. On 9 May 2010, Cabinet could not lawfully have come to a decision about clemency for the plaintiff, as Article 22P(2) of the *Constitution* permits Cabinet to act only after the plaintiff’s sentence has been confirmed by the appellate court.

10. The remarks unequivocally indicate that Cabinet had decided not to grant clemency to the plaintiff, even before it was lawfully entitled to make that decision. Cabinet has effectively prejudged the matter.
11. A reasonable member of the public, on hearing the Minister's remarks, would harbour a reasonable suspicion that Cabinet has been biased. This fulfils the "reasonable suspicion" of bias test under Singapore law (*Re Shankar Alan s/o Anant Kulkarni* (2006), [2007] 1 SLR(R) 85 ¶75-76 (HC) {Tab 11}).

IV. THE RULE AGAINST PREMATURE APPLICATIONS FOR JUDICIAL REVIEW DOES NOT APPLY.

12. The Singapore courts have recognized that in a situation where "there is a real danger supported by evidence that there would be a breach of natural justice at the hearing", judicial review can proceed even though the decision making process being challenged has not been completed (*Wong Keng Leong Rayney v. Law Society of Singapore*, [2006] 4 SLR(R) 934 ¶20 (HC) {Tab 14}).
13. In the present case, as the taint of bias from the Minister's comments is clear and irremediable, there is a real danger that a breach of natural justice will occur in the decision-making process.
14. Furthermore, it would be dangerous to allow matters to rest until after the process has completed, because as soon as the pardon process is deemed to be complete, the accused stands in jeopardy of being executed. There may not be time for an application for judicial review to be taken out at that stage.

15. Therefore, the rule against premature applications for judicial review should not apply to this case.

V. THE PARDON PROCESS, NOW TAINTED WITH BIAS, CAN NO LONGER BE PROPERLY PROCEEDED WITH.

16. Having the appearance of bias, Cabinet must now be disqualified from deciding whether to grant pardon to the plaintiff.

17. The only other actor with legal power to decide the plaintiff's plea for clemency is the President. However, it would be undesirable for the President to act alone in deciding the matter, since the *Constitution* explicitly requires him to be advised by Cabinet, whose taint of bias cannot now be removed.

18. Effectively, there is no way for the pardon process to be properly carried out, given the circumstances of this case.

VI. THE PROPRIETY OF THE PARDON PROCESS HAS BEEN FURTHER COMPROMISED IN THAT IT IS THE PRESIDENT WHO SHOULD MAKE THE ULTIMATE DECISION REGARDING PARDON, AND NOT CABINET.

19. In previous proceedings concerning the plaintiff, the Attorney-General stated that "although in theory it is the President who exercises the prerogative of mercy, in fact it is the Cabinet that makes the decision" and that "the President does not have discretion in this matter" (see exhibit marked MR-3 ¶31, 33).

20. It may be argued that the Attorney-General is correct to assert that it is the Cabinet that makes the decision under Article 22P because Article 21(1) provides that "the President shall, in his exercise of his functions under this

Constitution or any other written law, act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet”.

21. However, this argument cannot withstand analysis. Article 21(2)(i) expressly provides that the President may act in his discretion when authorised to do so by the *Constitution*. Article 22P is written in terms which clearly confer on the President a discretionary power. The phrase “*may*, on the advice of” in Article 22P(1) should be contrasted with the phrase “*shall*, acting in accordance with the advice of” in Article 25(1). If the intention of the drafters had been to make the President’s decision wholly dependent on Cabinet’s advice, they could have made this abundantly clear by using the word “shall” instead of “may” in Article 22P(1), as they did in Article 25(1).
22. Although in certain provisions covered by Article 21(2) the phrase “acting in his discretion may” is used (eg. Article 22A(1)(a)), in other cases (eg. Article 30(1)), the word “may” is used without any modifying phrase about discretion, in contradistinction to the cases already mentioned where the word “shall” is used.
23. It is well established in law that the word ‘may’ is directory and permissive and confers a wide discretion (*Re Ng Lai Wat; Official Assignee v. Housing and Development Board*, [1996] 2 SLR(R) 261 ¶38 (HC) {Tab 15}). Where no discretion is intended, the word ‘shall’ is used instead (*Soda KL Plaza Sdn Bhd v. Noble Circle (M) Sdn Bhd*, [2002] 2 MLJ 367 (HC) {Tab 16}).
24. Although the context may in certain cases require that the word ‘may’ be given a mandatory meaning (see *WSG Nimbus Pte Ltd v. Board of Control for*

Cricket in Sri Lanka, [2002] 1 SLR(R) 1088 ¶21 (HC {Tab 17}), it is submitted there is nothing in the context of Article 22P to suggest that the President has no discretion to decide whether to grant a pardon. On the contrary, the use of the word 'shall' (which is mandatory) in contradistinction to 'may' in the same Article is strongly indicative of the discretion intended to be conferred by the use of the word 'may'. Furthermore the context of a Presidential pardon, being an act of conscience, is more consistent with a discretion to consider the advice of Cabinet than with a mandatory obligation to automatically rubber stamp it.

25. Furthermore, it should be noted that because Article 22P confers the power of granting a pardon upon the President, members of the public and relatives of the condemned offender naturally expect to be able to submit personal pleas to the Istana, in the hope of touching the heart of the President in person. The sense of injustice felt by those who petition the President in this way will be palpable if they were to discover that in fact nothing is decided by the President and that the whole issue of clemency is handled exclusively by the Cabinet. Similarly, Article 22P(2) speaks of reports made by the trial judge and the presiding appellate judge *to the President*, and not to Cabinet. It would be natural for judges to expect that their reports will have some impact on the President, whereas the Attorney-General would have it that the impact of those reports ends with Cabinet.
26. By excluding the President from the decision-making process in this way, Cabinet has usurped the President's constitutional power to grant pardon, thereby further compromising the propriety of the pardon process.

VII. THE PARDON PROCESS HAS ALSO BEEN FURTHER COMPROMISED BY OTHER REQUIREMENTS OF NATURAL JUSTICE THAT HAVE BEEN DENIED TO THE PLAINTIFF.

27. In *Lewis v. Attorney General of Jamaica* (2000), [2001] 2 AC 50 {Tab 8}, the Privy Council decided, in the context of the Jamaican constitutional power to pardon, which is materially similar to Singapore's, that natural justice requires that:

- a. A condemned person be given notice when his petition is to be considered, to allow time for him or her to prepare.
- b. The condemned person be told of the material before the clemency body.
- c. The condemned person be given an opportunity to make representations concerning that material.
- d. The clemency body must consider the petition submitted by the condemned person.

28. These requirements are especially important in the present case, which involves a mandatory death penalty. Without the condemned person's participation in the decision-making process through these requirements, the only material upon which the petition will be decided will be the reports of judges and the Attorney-General. Those producing these reports will not be privy to the mitigating circumstances of the particular case, since these will not be relevant at trial, given the mandatory nature of the sentence (see *Attorney General v. Kigula* (2009) at 43-44 (SC Uganda) {Tab 18}). Without

the condemned person's participation, therefore, Cabinet and the President will have no knowledge of the mitigating circumstances of the individual condemned person's case, which ought to be considered.

29. These important requirements of natural justice have been denied to the plaintiff in this case, who has not been provided with the material placed before the Cabinet and the President, and whose petition has been prejudged before having even been submitted. This has further compromised the pardon process.

VIII. THE PLAINTIFF MUST NOT BE EXECUTED WITHOUT THE BENEFIT OF A PROPER PARDON PROCESS.

30. It would be undesirable for the Plaintiff to be executed without the benefit of a proper right to petition for clemency, which is a basic right that has been traditionally accorded to all persons who have been sentenced to death in Singapore, and which he has been deprived of due to no fault of his own.
31. An accused who has been sentenced to death has a legitimate expectation by virtue of Article 9 of the *Constitution* that he may be pardoned in the exercise of the President's discretion if the provisions of Article 22P are allowed to operate according to its terms. The condemned person can legitimately expect that the ultimate decision on his petition will be made only by a person who is properly empowered to make that decision, and that the decision-making process will not be tainted with bias.
32. Where the pardon process has been fatally compromised, the presumption in favour of life, which is enshrined in Article 9 of the *Constitution*, requires the

court to order an indefinite stay of execution. Unless the court makes such an order, the condemned person will be executed without having the benefit of the pardon process, which would be a deprivation of his life not in accordance with law, in breach of Article 9.

IX. CONCLUSION AND REMEDY SOUGHT

33. In the circumstances, the Plaintiff humbly prays for the court to:

- a. issue a prohibition order to enjoin the Director of Prisons from executing the Plaintiff, and
- b. grant the Plaintiff an indefinite stay of execution.

DATED THIS 28 DAY OF JULY 2010



Counsel for the Plaintiff

M. Ravi

M/s L. F. VIOLET NETTO