Yong Vui Kong *v* Attorney-General
[2011] SGCA 9

Case Number	: Civil Appeal No 144 of 2010
Decision Date	: 04 April 2011
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: M Ravi (L F Violet Netto) for the appellant; Aedit Abdullah, Low Siew Ling and Shawn Ho Hsi Ming (Attorney-General's Chambers) for the respondent.
Parties	: Yong Vui Kong — Attorney-General

Administrative Law

Constitutional Law

Courts and Jurisdiction

Words and Phrases

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2011] 1 SLR 1.]

4 April 2011 Judgment reserved.

Chan Sek Keong CJ:

Introduction

1 This is an appeal by Yong Vui Kong ("the Appellant") against the decision of the High Court judge ("the Judge") in *Yong Vui Kong v Attorney-General* [2011] 1 SLR 1 ("the HC Judgment") dismissing his judicial review application in Originating Summons No 740 of 2010 ("OS 740/2010").

Factual background

2 The events leading to the filing of OS 740/2010 are as follows. On 14 November 2008, the Appellant was convicted of trafficking in 47.27g of diamorphine, an offence under s 5(1)(*a*) of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) ("the MDA"), and was sentenced to death (see *Public Prosecutor v Yong Vui Kong* [2009] SGHC 4 ("*Yong Vui Kong (HC)*")). On 27 November 2008, he appealed, via Criminal Appeal No 13 of 2008 ("CCA 13/2008"), against both his conviction and his sentence. Subsequently, he indicated, via a letter dated 23 April 2009 from his then counsel, that he wished to withdraw CCA 13/2008. The Court of Appeal accepted the withdrawal of that appeal when it came on for hearing on 29 April 2009, and dismissed it formally.

3 After CCA 13/2008 was formally dismissed, the Appellant submitted a petition to the President on 11 August 2009 for clemency under Art 22P of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Singapore Constitution"). The President, acting on the advice of the Cabinet, declined on 20 November 2009 to grant clemency. On 30 November 2009, four days before his death sentence was due to be carried out, the Appellant, through his current counsel, Mr M Ravi ("Mr Ravi"), filed Criminal Motion No 41 of 2009 ("CM 41/2009") seeking leave to pursue his

appeal to the Court of Appeal (*ie*, CCA 13/2008) notwithstanding his earlier decision to withdraw the appeal and its consequential formal dismissal. The ground relied on by the Appellant for seeking leave to pursue CCA 13/2008 was that (*inter alia*) he had earlier withdrawn that appeal in the mistaken belief that he could not base it on the legal argument that the mandatory death penalty prescribed for the offence of trafficking in more than 15g of diamorphine (see s 33 of the MDA read with the Second Schedule thereto) was unconstitutional. Pending the hearing of CM 41/2009, the President, on the advice of the Attorney-General, granted a temporary stay of execution in respect of the death sentence imposed on the Appellant.

4 At the hearing of CM 41/2009 on 8 December 2009, the Court of Appeal granted the Appellant leave to proceed with CCA 13/2008 on the ground that his earlier decision to withdraw that appeal was a nullity, given his mistaken belief as to his legal rights (see *Yong Vui Kong v Public Prosecutor* [2010] 2 SLR 192). Subsequently, CCA 13/2008 was heard on 15 March 2010. In his written submissions for that hearing, the then Attorney-General stated (*inter alia*) that under Art 22P of the Singapore Constitution (referred to hereafter as "Art 22P" for short), the President had no discretion in exercising the clemency power as he had to act on the advice of the Cabinet. The Court of Appeal reserved judgment at the end of the hearing, and, on 14 May 2010, delivered its decision dismissing CCA 13/2008 (see *Yong Vui Kong v Public Prosecutor and another matter* [2010] 3 SLR 489 ("*Yong Vui Kong (No 2)*")).

5 On 10 May 2010, shortly before the Court of Appeal's decision on CCA 13/2008 was released, Mr K Shanmugam, the Minister for Law and the then Second Minister for Home Affairs ("the Law Minister"), was reported in a local newspaper, *TODAY*, as having made, at a community event the previous day, certain comments on the mandatory death penalty for serious drug trafficking offences (these comments will be referred to hereafter as "the Law Minister's statements"). The material parts of the Law Minister's statements, as reported in the 10 May 2010 edition of *TODAY*, are set out below: [note: 1]

> **Death penalty, a trade-off**
>
> **Saves 'thousands of lives' that may be ruined if drugs freely available: Minister**
>
> 05:55 AM May 10, 2010
>
> by Teo Xuanwei
>
> SINGAPORE – The mandatory death penalty for serious drug offences here is a "trade-off" the Government makes to protect "thousands of lives" that may be ruined if drugs were freely available, Law Minister and Second Home Affairs Minister K Shanmugam said yesterday.
>
> *He was replying to a resident during a dialogue session at Siglap South Community Centre who asked if there would be changes on this policy, in light of the case of [the Appellant]*.
>
> The 22-year-old successfully got a stay of execution from [the] High Court last December – despite the President rejecting his clemency plea – after being sentenced to hang for trafficking 47g of heroin.
>
> He had told the court during his trial [that] he was unaware of the contents of the packages [he was carrying at the material time] as he was merely following the instructions of his boss in Johor Bahru when he drove into Singapore to deliver them.

But Mr Shanmugam said "*thousands of lives have been ruined due to the free availability of drugs*" in cities such as Sydney and New York. It also contributes to soaring crime rates, he added.

"People assume you can have this safety and security without this framework of the law; that you can change it, and yet your safety and security will not be affected," he said. "But there are always trade-offs. The difficulty the Government has sometimes in explaining this is that the trade-offs are not apparent. The damage to a large number of others is not obvious.

"You save one life here, but 10 other lives will be gone. What will your choice be?"

If [the Appellant] escapes the death penalty, drug barons will think the signal is that young and vulnerable traffickers will be spared and can be used as drug mules, argued Mr Shanmugam.

"Then you'll get 10 more. There'll be an unstoppable stream of such people coming through as long as we say we won't enforce our laws," he said during his ministerial community visit to Joo Chiat.

…

[emphasis added]

6 In response to the Law Minister's statements, Mr Ravi declared that those statements had caused the Appellant's fate to be "'poisoned' with 'biasedness'". [note: 2] Mr Ravi's comments were reported in the 15 May 2010 edition of *TODAY*, which also elaborated on the Law Minister's statements and a press statement released by the Ministry of Law in respect of those statements ("the MinLaw press statement"), as follows: [note: 3]

Convict's last chance to escape death … President to hear clemency plea; lawyer takes issue with minister's remarks

05:55 AM May 15, 2010

by Teo Xuanwei

SINGAPORE – His first clemency plea was unsuccessful and now convicted drug mule Yong Vui Kong's [*viz*, the Appellant's] last chance to escape death lies in the President's hands, after the highest court in the land dismissed his appeal.

…

But [the Appellant]'s lawyer, Mr M Ravi, told reporters he plans to file for a judicial review before the Court of Appeal over Law Minister K Shanmugam's remarks relating to his client's case during a residents' dialogue session last Sunday in Joo Chiat.

The resident had asked if [the Appellant]'s case would affect Singapore's laws on the mandatory death penalty.

Mr Shanmugam replied: "*[The Appellant] (who was sentenced to hang for trafficking in 47g of heroin) is young. But if we say, 'We let you go', what's the signal we're sending?*

"We're sending a signal to all drug barons out there: Just make sure you choose a victim who's young or a mother of a young child and use them as the people to carry drugs into Singapore."

With the sympathy generated after these people are caught, he added, there will be "a whole unstoppable stream of people coming through as long as we say we won't enforce our laws".

As [the Appellant]'s case was subjudice, or still under judgment, Mr Ravi said his client's fate had been "poisoned" with "biasedness".

In reply to media queries, the Ministry of Law said: "The Government has made clear its policy and philosophy on having the mandatory death penalty for a number of offences, such as drug trafficking.

"Minister Shanmugam, in response to a specific question … reiterated the policy and philosophy behind the death penalty and why Singapore adopted a tough stance."

…

[emphasis added]

7 Following the above reports in *TODAY*, the Appellant commenced OS 740/2010 pursuant to O 53 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) on 21 July 2010, naming the Attorney-General as the respondent ("the Respondent") and seeking the following orders: [note: 4]

1) That leave be granted for [the] hearing of prayers 2–12 as set out below:–

2) That under Article 22P of the Constitution of the Republic of Singapore [(1985 Rev Ed, 1999 Reprint) ("the Constitution")] it is the … President and not his advisors who has the discretion to decide whether or not to grant the [Appellant]'s petition for clemency, this being a matter in respect of which the President may decide in his discretion under Article 21(2) of the Constitution, it being a function the performance of which the President is authorised to act in his discretion pursuant to Articles 21(2)(i) and 22P of the Constitution[.]

3) That the Executive's statements 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" amount to a preemption and usurpation of the decision making powers of the … President under Article 22P and jeopardise a fair and just determination of the [Appellant]'s clemency petition[.]

4) That the … President's manifest acquiescence in the Executive's position as aforesaid is ultra vires and in breach of the Constitution inasmuch as:

   a. It amounts to an abdication by the … President of his decision making powers under Article 22P;

   b. It constitutes a breach of the maxim delegatus non potest delegare inasmuch as the … President is delegating to [the] Cabinet the decision making powers delegated to him by the Constitution;

   c. It amounts to an unlawful fettering by the … President of his discretion to grant or refuse

a petition for clemency[;]

d. It subordinates the holder of the highest office under the Constitution to an inferior executive body under the Constitution[.]

5) That the President's power, being a power of high prerogative of mercy, is an executive act exercised with the greatest conscience and care and without fear of influence from any quarter. It is a real decision-making power and not a mere ceremonial rubber stamp. It necessarily includes the power to decide to exercise the discretion in a way which may differ from the advice of the Cabinet.

6) That the remarks of the Law Minister Mr K Shanmugam on 9 May 2010 [*ie*, the Law Minister's statements as defined at [5] above] and of the Ministry of Law in its press release dated 9 July 2010 [*ie*, the MinLaw press statement as defined at [6] above] have created a reasonable apprehension that the views there expressed represent those of [the] Cabinet and that any advice which [the] Cabinet may give in this matter has as a result already been predetermined prior to the receipt of the [Appellant]'s clemency petition and that accordingly the [c]onstitutional process for handling the [Appellant]'s clemency petition has been irreversibly tainted to the prejudice of the [Appellant].

7) That the remarks of the Law Minister Mr K Shanmugam on 9 May 2010 and of the Ministry of Law in its press release dated 9 July 2010 have created a reasonable apprehension that the views there expressed represent those of [the] Cabinet and that accordingly any advice which [the] Cabinet may give in this matter has already been predetermined prior to the sentence being "confirmed by the appellate court" and before such reports were transmitted to the Cabinet for consideration as required under Article 22P of the Constitution.

8) That in keeping with the strong public interest in ensuring public confidence in the administration of justice, the Cabinet is disqualified by a reasonable apprehension of bias from taking further part in the clemency process; inasmuch as a reasonable member of the public could harbour a reasonable suspicion of bias by reason of predetermination even though the Court itself considers there is no real danger of this on the facts.

9) That the [Appellant] has been deprived of the possibility of a fair determination of the clemency process and is entitled not to be deprived of his life on account thereof.

10) That the conduct of the Minister of Law Mr K Shanmugam has irreversibly tainted the clemency process with apparent bias, and that the [Appellant] is entitled to be pardoned on account thereof or is alternatively entitled not to be deprived of his life.

11) The [Appellant] is entitled to see all the materials that will be before the Cabinet on his clemency petition including and in particular the Trial Judge's report, the Chief Justice's report or other reports of the Appellate Court and the Attorney-General's opinion so as to afford him an opportunity to make written representations before any decision is reached. The [Appellant] relies on the decision of the Judicial Committee of the Privy Council in ***Neville Lewis & Others (2001) 2 AC 50*** , as to the requirements of natural justice in a case such as this.

12) That the [Appellant] has suffered grave injustice as a result of the actions of the President and [the] Cabinet and is entitled not to be deprived of his life on account thereof.

[underlining and emphasis in bold italics in original]

8 In the statement filed by the Appellant as required under O 53 r 1(2) of the Rules of Court ("the Appellant's O 53 statement"), the Appellant stated that he was seeking the following reliefs: [note: 5]

> 2. The reliefs sought:–
>
> a. That the [Appellant] be granted leave to apply for a [d]eclaratory judgment that it is the … President and not his advisors who make the final determination of the [Appellant]'s petition for clemency.
>
> b. That the [Appellant] be granted leave to apply for an order of prohibition enjoining the … President from abdicating his authority under Article 22P to the Cabinet.
>
> c. That the … President be enjoined from fettering his discretion to grant or refuse the [Appellant]'s petition of clemency.
>
> d. That the [Appellant] be granted an order of prohibition to enjoin the director of prisons from executing the [Appellant] and that the [Appellant] be granted an indefinite stay of execution.
>
> e. That the [Appellant] has been deprived of the possibility of a fair determination of the clemency process and is entitled not to be deprived of his life on account thereof.
>
> f. That the conduct of the Minister of Law Mr K Shanmugam has irreversibly tainted the clemency process with apparent bias, and that the [Appellant] is entitled to be pardoned on account thereof or is alternatively entitled not to be deprived of his life.
>
> g. That the [Appellant] has suffered grave injustice as a result of the actions of the President and [the] Cabinet and is entitled not to be deprived of his life on account thereof.
>
> h. There is a distinction between the review of the substantive decision whether or not to exercise discretion to grant a pardon on the one hand and a review of the question whether the decision to grant or not grant a pardon has been exercised by the party empowered to decide the matter – the latter being a reviewable jurisdictional issue. This application is not about reviewing a decision on pardon but [is about] reviewing … a failure to make a decision by the President; reviewing an abdication of the decision making power; reviewing a fettering of discretion by the President; reviewing a breach of the maxim delegatus non potest delegare.

[underlining and emphasis in bold in original omitted]

9 In summary, in OS 740/2010, the Appellant sought leave to be heard on his application for the grant of the following substantive reliefs:

> (a) a declaratory order that under Art 22P, the clemency power was exercisable by the President acting in his discretion, and not in accordance with the advice of the Cabinet (see para 2(a) of the Appellant's O 53 statement);

(b) a prohibitory order enjoining the President from delegating to the Cabinet his discretion to grant clemency (see paras 2(b) and 2(c) of the Appellant's O 53 statement);

(c) an indefinite stay of execution of the death sentence imposed on him (see para 2(d) of the Appellant's O 53 statement);

(d) a declaratory order that clemency should be granted to him for the reasons set out at paras 2(e)–2(g) of the Appellant's O 53 statement; and

(e) a declaratory order that he was entitled to disclosure of the materials required to be sent to the Cabinet under Art 22P(2) of the Singapore Constitution (referred to hereafter as "the Art 22P(2) materials" for short) in connection with his case (see prayer 11 of OS 740/2010).

The proceedings in the court below

10 The Judge heard the Appellant's application for leave together with his application for the substantive reliefs listed in the preceding paragraph.

11 The Appellant's case before the Judge was basically as follows:

(a) The clemency power under Art 22P was exercisable by the President acting in his discretion, and not on (that is to say, not in accordance with) the advice of the Cabinet. Hence, the President, in acting on the advice of the Cabinet in this regard, had wrongfully delegated his clemency power to the Cabinet.

(b) The Law Minister's statements had given rise to a reasonable apprehension that those statements represented not only the Law Minister's view, but also the view of the Cabinet as a whole. This had in turn engendered "a reasonable apprehension that … any advice which [the] Cabinet [might] give in [relation to the Appellant's case] ha[d] already been predetermined"; [note: 6] *ie*, there was "a reasonable suspicion of bias by reason of predetermination". [note: 7] Accordingly, the Law Minister's statements had "irreversibly tainted the clemency process with apparent bias". [note: 8] On this basis, the death sentence imposed on the Appellant could not possibly be executed "in accordance with law" within the meaning of Art 9(1) of the Singapore Constitution, and, therefore, clemency must be granted to the Appellant.

(c) The Appellant was entitled to disclosure of the Art 22P(2) materials relating to his case so that he could make adequate representations to the Cabinet before the Cabinet decided what advice to give to the President *vis-à-vis* whether clemency should be granted to him.

12 The Respondent's case was basically that the clemency power and/or its exercise (collectively referred to hereafter as "the clemency power" for convenience) was not justiciable as the clemency power was "an extra-legal, extra-judicial and extraordinary [power] … that [was] only invoked when the legal process ha[d] reached its final and ultimate conclusion". [note: 9] Consequently, it was argued, the manner in which the President exercised the clemency power and the decision which he made pursuant to that power would be outside the purview of the courts.

13 The Judge dismissed OS 740/2010 after carefully analysing in a reserved judgment (*ie*, the HC Judgment) the parties' arguments on the facts and the law, as well as case law from various common law jurisdictions on the clemency power. The Appellant then appealed to this court against the Judge's decision.

The issues on appeal

The Appellant's case

14 In his written case for this appeal, the Appellant listed his grounds of appeal under the following headings: [note: 10]

I. The power to grant pardon under Article 22P of the Singapore Constitution is not immune to judicial review …

…

II. The power to pardon is susceptible to judicial review on the grounds that fair procedure has not been observed …

…

III. Fair procedure requires that the power to pardon be exercised in accordance with the rule against apparent bias …

…

IV. The rule against apparent bias is violated when there is an appearance of prejudgment …

…

V. Apparent bias by prejudgment has arisen in the present case, and [the] Cabinet is therefore disqualified from taking any further part in the pardon process …

…

VI. [The] Cabinet being disqualified, the pardon process can no longer be properly proceeded with …

…

VII. The propriety of the pardon process has been further compromised because it is the President who should make the ultimate decision regarding pardon, and not [the] Cabinet …

…

VIII. The propriety of the pardon process will be further compromised if the materials placed before [the] Cabinet are not made available to the Appellant …

…

IX. The Appellant must not be excuted without the benefit of a properly conducted pardon process …

…

X. Whether declarations can be granted in actions begun under Order 53 …

[emphasis in bold in original omitted]

Mr Ravi elaborated on all of the above grounds of appeal in his oral submissions before this court as well as in two "Speaking Notes" which he tendered to the court at the hearing of the appeal.

The Respondent's case

15 The Respondent's written case joined issue with all of the Appellant's grounds of appeal, and crystallised them into five legal issues as follows:

(a) whether the clemency power under Art 22P is exercised by the President acting in his discretion or whether the President is bound by the advice of the Cabinet in this regard (referred to hereafter as "the Discretion Issue");

(b) whether, in our local context, the clemency power is subject to judicial review (referred to hereafter as "the Justiciability Issue");

(c) if the Justiciability Issue is answered in the affirmative, whether breach of natural justice is an applicable ground for reviewing the process of exercising the clemency power ("the clemency process"), and, if it is, whether the clemency process *vis-à-vis* the Appellant has been tainted by apparent bias in the present case as a result of the Law Minister's statements (referred to hereafter as "the Natural Justice Issue");

(d) whether the Appellant is entitled to disclosure of the Art 22P(2) materials relating to his case so that he can make adequate representations to the President on any fresh clemency petition which he may wish to file (referred to hereafter as "the Disclosure Issue"); and

(e) whether declaratory relief can be granted in proceedings commenced under O 53 of the Rules of Court (referred to hereafter as "the Declaratory Relief Issue").

The surprises which Mr Ravi sprang at the hearing of this appeal

The application for my recusal

16 At the commencement of the hearing of this appeal, Mr Ravi sprang a surprise by making, without any prior notice to either the court or the Respondent, a preliminary application for me to recuse myself from hearing the appeal on the ground of apparent bias. His reasons for making the application, in his own words (as recorded in the court's notes taken at the hearing of the appeal), are set out in the following passages: [note: 11]

> Apply to disqualify Chief Justice from the bench. ... Asking CJ to disqualify himself from hearing the matter: he was the AG in 2006. *Your Honours have a conflict of interest in this matter to the extent that you were the AG advising the President*. The outcome of this application, in the event that [the] President does not have powers, must be in conflict with the CA's reasoning. YH [Your Honour] becomes an interested member in the outcome of this application. Because if YH agrees that [the] President has clemency powers, then YH would be wrong as well. I'm not saying that CJ is prejudiced, I'm just going by apparent bias. I am only basing my proposition on the rule of law, and the fact that life is at stake. I will leave it to you, to make your own judgment within the province and prerogative of the court.

…

Straightforward point. CJ was the AG who had advised the President, who had no discretion in the matter. *Puts CJ in conflict with any reading of the [Singapore] Constitution which states that the President does have power*.

…

11 April 2006, the AG became the current CJ. When cases which were processed by him as AG come up to court, the CJ doesn't sit to hear them. When [the Appellant]'s case was heard as a Criminal Appeal, his case was not processed when CJ was AG. But the current application: the current CJ, being the AG before, if this court rules that [the] President has clemency powers, the CJ must have advised Cabinet wrongly as AG, and therefore advised the President wrongly. If so, then all the other executions would have been carried out wrongly. There is a potential of reasonable apprehension of bias.

…

… It's not whether [Your Honour] must have advised – the fact that the President assumed he had no power. *Either by way of negligence, omission, the advice was wrong*. I do not want to go outside and tell another story.

…

My proposition is *Bentley* [*ie*, *Regina v Secretary of State for the Home Department, Ex parte Bentley* [1994] QB 349]. It's not that [Your Honour has] advised the President. I fortify my position that in 2005, Mr Nathan [*ie*, President S R Nathan] … gave an interview to the papers to say that he had no powers, it's only the Cabinet. This article shows that the President himself says he didn't have clemency powers. *As it stands, it must mean that the [Attorneys-General] have taken that view and given such advice to the President*.

[emphasis added]

Mr Ravi explained that his lateness in making his recusal application, despite his having been informed of the coram two weeks before the hearing of the appeal, was due to his foreign legal advisers having advised him only two days before the hearing to raise the aforesaid arguments in the interests of the Appellant.

17 Whatever reasons Mr Ravi might have for the lateness of his recusal application, his objections to my hearing this appeal were patently without merit. His objections were based on two premises, none of which were tenable in the context of the present case.

18 The first premise is that I had, *qua* Attorney-General, given advice to the President which had a bearing on the Discretion Issue. Mr Ravi was unable to make good this premise. When I asked him if he had any evidence for his assertion that I had, during my tenure as Attorney-General, given the President such advice, he replied that his position was "*not* that you have advised the President" [note: 12] [emphasis added], but that, because the President himself had said in an interview that he did not have any discretion in exercising the clemency power, "it must mean that the [Attorneys-General] have taken that view and given such advice to the President". [note: 13]

19 The second premise is that *if* I had advised the President that he had no discretion in exercising

the clemency power, I would have been wrong in law, and this would put me in "*in conflict with any reading of the [Singapore] Constitution which states that the President does have power*". [note: 14] However, the legal argument which underlies this premise – *viz*, the argument that the President can act in his own discretion in exercising the clemency power – is fundamentally flawed. It is trite law that the Head of State in a Constitution based on the Westminster model, such as the Singapore Constitution, is a ceremonial Head of State who: (a) must act in accordance with the advice of the Cabinet in the discharge of his functions; and (b) has no discretionary powers except those expressly conferred on him by the Constitution. In our local context, Art 22P is not a provision which expressly confers discretionary powers on the President. This point is conclusively demonstrated by my colleagues on this bench, Andrew Phang Boon Leong and V K Rajah JJA, in their joint judgment (see, specifically, [156]–[157] and [178]–[180] below). Reference may also be made to the following judicial pronouncements and academic writings: *Lee Mau Seng v Minister for Home Affairs and another* [1971□1973] SLR(R) 135 (at [31]□[34] *per* Wee Chong Jin CJ); S Jayakumar, *Constitutional Law (with documentary materials)* (Singapore Law Series No 1) (Malaya Law Review, 1976); *N Madhavan Nair v Government of Malaysia* [1975] 2 MLJ 286 (at 289 and 292 *per* Chang Min Tat J); and R H Hickling, *Malaysian Public Law* (Pelanduk Publications, 1997) (at pp 67□68).

20 Notably, with reference to the clemency power specifically, the constitutional law principle outlined at [19] above was stated by the then Prime Minister on 22 December 1965 (in his parliamentary speech at the second reading of the Republic of Singapore Independence Bill 1965 (Bill 43 of 1965), which was subsequently enacted as the Republic of Singapore Independence Act 1965 (Act 9 of 1965)) *vis-à-vis* the President's role in the clemency process (see [172]–[173] below). Mr Ravi's argument that the President has a discretion in exercising the clemency power was rejected by the Judge in a carefully reasoned judgment. Before this court, Mr Ravi made no attempt whatsoever to demonstrate why (in his view) the Judge was wrong, apart from baldly reiterating that the Judge was wrong.

21 In our legal order, no judge, in discharging his functions, is free to disregard fundamental principles of law. The principle that under the Singapore Constitution, the President must act on the advice of the Cabinet in all matters in the discharge of his functions, except where discretion is expressly conferred on him, is one such fundamental principle of constitutional law. This principle is set out in Art 21(1) read with Art 21(2) of the Singapore Constitution, and has been part of our constitutional order ever since Singapore attained internal self-government in 1959.

22 It was clear to this court that Mr Ravi postulated a completely unsustainable argument *vis-à-vis* the President's exercise of the clemency power – one that contradicts our constitutional history, the text of Arts 21 and 22P and existing case law – for no reason other than it suited his purpose, whatever it was. For the foregoing reasons, this court rejected Mr Ravi's recusal application.

The late raising of an additional ground of appeal

23 In the course of his oral submissions before this court on the appeal proper, Mr Ravi sprang another surprise when he argued that, independent of the Appellant's rights under the Singapore Constitution, the Appellant had a legitimate expectation that the President would act in his discretion, as opposed to on the Cabinet's advice, in deciding whether or not the Appellant should be granted clemency. Nevertheless, given the grave personal (from the Appellant's viewpoint) and constitutional implications which the decision in this appeal will have, this court permitted Mr Ravi to raise the argument notwithstanding his lateness in presenting it as one of the Appellant's grounds of appeal. For convenience, I shall hereafter refer to this issue as "the Legitimate Expectation Issue".

My approach in this judgment

24 In this judgment, I shall not discuss in detail all of the issues enumerated at [15] above. I shall, instead, focus on the Justiciability Issue, the Natural Justice Issue, the Disclosure Issue and the Declaratory Relief Issue. With respect to the Discretion Issue and the Legitimate Expectation Issue, I have read the relevant portions of Phang and Rajah JJA's joint judgment (namely, [151]–[187] below) which deal with these two issues with great clarity, and I fully agree with the decision and the reasoning set out therein.

The Declaratory Relief Issue

25 I shall begin my analysis with the Discretionary Relief Issue since it can be given short shrift in view of existing case law on the type of relief available in proceedings brought under O 53 of the Rules of Court (see, *eg*, *Chan Hiang Leng Colin and others v Minister for Information and the Arts* [1996] 1 SLR(R) 294 at [5]–[6] and *Re Application by Dow Jones (Asia) Inc* [1987] SLR(R) 627 at [14]). The case authorities show clearly that declaratory relief is not a remedy provided for under O 53 of the Rules of Court, and, thus, the court has *no* power to grant such relief in proceedings commenced under this Order. Mr Ravi has not convinced us that his argument to the contrary is correct.

The Justiciability Issue

26 I turn next to the Justiciability Issue, *ie*, the issue of whether or not, in our local context, the clemency power under Art 22P is amenable to judicial review. This issue has not hitherto been considered by this court. In this regard, I note that in *Jabar bin Kadermastan v Public Prosecutor* [1995] 1 SLR(R) 326, this court held, with reference to the immediate predecessor of Art 22P (*viz*, s 8 of the Republic of Singapore Independence Act 1965 (1985 Rev Ed)), that only the President had the power to commute or remit a sentence, or to stay the execution of a sentence (see also the decision to the same effect in *Lwee Kwi Ling Mary v Public Prosecutor* [2003] 2 SLR(R) 151). These two decisions are not relevant to the Justiciability Issue since they concern the separation of the executive power from the judicial power under the Singapore Constitution, and not the reviewability or otherwise of executive decisions made in exercise of the clemency power.

Preliminary points

27 Before I begin my analysis of the Justiciability Issue, there are a number of preliminary points which I wish to make. The first concerns the public policy underlying the clemency power (or the pardon power, as it is also called), which originated from the prerogative of mercy in England. In this regard, the following passages from two commentaries on the clemency power under the US Constitution are apposite. The first is from the section on "Pardon and Parole" by John Glenn *et al* in *Corpus Juris Secundum: A Complete Restatement of the Entire American Law as developed by All Reported Cases* (West Group, 2010), where the authors explain the relevant public policy considerations as follows (at vol 67A, §11):

> The pardoning power is founded on considerations of the public good, and is to be exercised on the ground that the public welfare, which is the legitimate object of all punishment, will be as well promoted by a suspension as by an execution of the sentence. It may also be used to the end that justice be done by correcting injustice, as where after-discovered facts convince the official or board vested with the power that there was no guilt or that other mistakes were made in the operation or enforcement of the criminal law. Executive clemency also exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law.

The second commentary is from the section on "Pardon and Parole" by Anne M Payne in *American*

Jurisprudence (West Group, 2nd Ed, 2002), where the author states (at vol 59, §11):

> The granting of a pardon is an act of grace, bestowed by the government through its duly authorized officers or department, and is designed to relieve an individual from the unforeseen injustice, because of extraordinary facts and circumstances peculiar to the case, of applying the punishment provided in a general statute which, under ordinary circumstances, is just and beneficial. However, a pardon is more than a mere act of private grace proceeding from an individual having the power to exercise it, and is a part of the constitutional scheme; properly granted, it is also an act of justice, supported by a wise public policy.

28 My second preliminary point relates to the meaning of the terms "justiciability" and "reviewability" as used in the context of judicial review proceedings. Judges from common law jurisdictions have often discussed the question of whether judicial review applies to the clemency power in terms of the "justiciability" of this power by the courts, with the concept of "justiciability" frequently used synonymously with the concept of "reviewability". I shall adopt the same approach in this judgment. I shall also adopt the meaning of "justiciable" set out in *The Oxford English Dictionary* (Clarendon Press, 2nd Ed, 1989) at vol 8, p 327, *ie*, "[l]iable to be tried in a court of justice; subject to jurisdiction".

29 My third preliminary point, which is likewise a definitional one, concerns two expressions which are often used interchangeably in discussions on the clemency power – *viz*, "clemency power" and "clemency process". Indeed, in the present case, the Judge expressly stated that he was treating these two terms as synonyms (see [22] of the HC Judgment). Thus, he set out his ruling on the Justiciability Issue as follows in the HC Judgment:

> 67 For the reasons which follow, I am … of the view that *Article 22P* is not justiciable on the grounds raised by Mr Ravi, *viz*:
>
> (a) that it is the President, and not the Cabinet, who should exercise the power to grant pardons;
>
> (b) that the clemency process is tainted because the Cabinet has pre-judged [the Appellant]'s case, as evidenced by the [Law] Minister's statement[s]; and
>
> (c) that [the Appellant] has a right to see the materials before the Cabinet.
>
> …
>
> 85 In summary, the *clemency process* is not justiciable on the grounds pursued by [the Appellant], because:
>
> (a) the power to grant pardons under Article 22P is exercised by the Cabinet, and not the President, who has no discretion in the matter;
>
> (b) apparent bias is not an available ground on which to review the clemency process;
>
> (c) there is no evidence of a pre-determination of [the Appellant]'s imminent [clemency] petition; and
>
> (d) there is no basis for a substantive right to the materials which will be before the Cabinet when it advises the President on the clemency petition.

[emphasis added]

In effect, at [67] of the HC Judgment, the Judge said that "Article 22P" – *ie*, the clemency *power* – was not justiciable, whilst at [85] thereof, he said that the clemency *process* was not justiciable.

30 Unlike the Judge, I shall not be treating the terms "clemency power" and "clemency process" as synonyms in this judgment. Instead, as indicated earlier, I shall use the expression "the clemency power" to denote the clemency power *and/or its exercise* where the context so requires (see [12] above), and the expression "the clemency process" to denote the process of exercising the clemency power (see sub-para (c) of [15] above). Admittedly, the distinction between the exercise of the clemency power and the process of exercising that power (*ie*, the clemency process) is a fine one, and, arguably, the distinction may not even exist at all in certain contexts (*eg*, the manner in which the clemency power is exercised can be regarded either as an aspect of the clemency *process* or as an aspect of the clemency *power*, as defined to include (where appropriate) the exercise of this power). Be that as it may, I think it is worthwhile to make this distinction as it is, in my view, more appropriate to use the expression "the clemency process", as opposed to "the clemency power", in discussing the Natural Justice Issue.

The range of matters which are justiciable by the courts

31 The Justiciability Issue can be seen as a subset of the broader question of whether there are any matters which are non-justiciable, *ie*, which the courts do not have jurisdiction to rule on. Where Singapore is concerned, I am of the view that by virtue of the judicial power vested in the Supreme Court under Art 93 of the Singapore Constitution, the Supreme Court has jurisdiction to adjudicate on every legal dispute on a subject matter in respect of which Parliament has conferred jurisdiction on it, including any constitutional dispute between the State and an individual. In any modern State whose fundamental law is a written Constitution based on the doctrine of separation of powers (*ie*, where the judicial power is vested in an independent judiciary), there will (or should) be few, if any, legal disputes between the State and the people from which the judicial power is excluded. In this regard, the following comment by Melville Fuller Weston in his article "Political Questions" (1924–1925) 38 Harv L Rev 296 ("Weston's article") is pertinent (at p 299):

> The word "justiciable" … is legitimately capable of denoting almost any question. That is to say, the questions are few which are intrinsically incapable of submission to … an adjudication from which practical consequences in human conduct are to follow.

32 The matters which are "intrinsically incapable of submission to … an adjudication" (*per* Weston's article at p 299) may vary greatly in different legal contexts. For instance, in *Chandler and Others v Director of Public Prosecutions* [1964] AC 763 ("*Chandler*"), Viscount Radcliffe expressed the view that the question of whether it was in the interests of the UK to acquire, retain or house nuclear armaments was "not … a matter for judge or jury" (at 799) because it involved "an infinity of considerations, military and diplomatic, technical, psychological and moral" (at 799) which were not within the province of the courts to assess. In contrast, the converse position was taken in *Operation Dismantle Inc and others v Her Majesty The Queen* [1985] 1 SCR 441 ("*Operation Dismantle*"), where the Supreme Court of Canada held that the courts could adjudicate on the issue of whether or not the Canadian government's decision to allow the US to test cruise missiles in Canada violated s 7 of the Canadian Charter of Rights and Freedoms ("the Canadian Charter"), which sets out "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

Whether the clemency power is justiciable in our local context

The parties' arguments

33 Mr Ravi's argument *vis-à-vis* the Justiciability Issue in the present appeal is that the clemency power under Art 22P is justiciable, given the principle of legality laid down by this court in *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR(R) 525 ("*Chng Suan Tze*") – *ie*, the principle that "[a]ll power has legal limits" (at [86]). He argues that in view of this principle (referred to hereafter as "the *Chng Suan Tze* principle"), the clemency power is likewise subject to judicial review if the person or body of persons on whom this power is conferred ("the ultimate authority") has acted illegally or outside the scope of the power, or has made a decision (pursuant to the power) which is tainted by a reasonable apprehension of bias.

34 The Respondent does not take the position that *Chng Suan Tze* was wrongly decided (*ie*, he accepts the *Chng Suan Tze* principle). Rather, his position is that:

(a) Because of the doctrine of separation of powers which underlies Singapore's constitutional framework, "there are clearly provinces of executive decision-making that are, and should be, immune from judicial review" (see *Lee Hsien Loong v Review Publishing Co Ltd and another and another suit* [2007] 2 SLR(R) 453 at [95]).

(b) The clemency power is one area of executive power which is (or should be) non-justiciable.

(c) If, however, the clemency power is indeed justiciable, then its justiciability should be limited to a determination of whether or not a particular clemency decision (*ie*, a particular decision as to: (i) whether or not to grant clemency; and (ii) if clemency is to be granted, the form and/or extent of clemency to be granted) was made in accordance with Art 22P, and should extend no further.

35 To elaborate on the Respondent's position, its central premise is that the clemency power, howsoever exercised, is non-justiciable. In support of this proposition, the Respondent highlighted several factors. The first is the breadth of the power conferred by Art 22P. This Article does not spell out any limits on the scope of the clemency power or how it may be exercised, except for the procedure applicable in what I shall hereafter refer to as a "death sentence case", *ie*, a case involving an offender who has been sentenced to death and who has (assuming he appeals against his conviction and/or his sentence) exhausted all his rights of appeal. The second factor emphasised by the Respondent is that a clemency decision is based purely on policy considerations. The third factor which the Respondent pointed out is that the clemency power in Art 22P is derived from the prerogative of mercy. Since mercy "begins where legal rights end" (to use Lord Diplock's famous aphorism in *Michael de Freitas also called Michael Abdul Malik v George Ramoutar Benny and Others* [1976] AC 239 ("*de Freitas*") at 247), the grant of mercy, so the Respondent submits, is not the subject of legal rights and, therefore, is not amenable to judicial review.

36 In order to evaluate the opposing views of Mr Ravi and the Respondent respectively on the Justiciability Issue, it is helpful to consider case law from and the constitutional history of England as well as those former British colonies and dominions which have a legal heritage similar to ours. Since Singapore was formerly a British colony, with the clemency power previously exercisable by the Governor of Singapore (and, subsequently, the Yang di-Pertuan Negara) in the name and on behalf of the British sovereign (see further [160]–[168] below), it is only appropriate that I begin by reviewing the English position on the justiciability of the clemency power.

Justiciability of the clemency power in England and former British colonies

(1) The position in England

37 The traditional approach in England *vis-à-vis* the justiciability of the clemency power was reiterated in 1971 by the English Court of Appeal in *Hanratty and Another v Lord Butler of Saffron Walden* (1971) 115 SJ 386 ("*Hanratty*"), namely, "[t]he law would not inquire into the manner in which [the] prerogative [of mercy] was exercised" (at 386) – *ie*, the clemency power was not reviewable by the courts. Lord Denning MR (with whom Salmon and Stamp LJJ agreed) explained that this approach was grounded on public policy. The English courts' traditional reluctance to encroach on the prerogative of mercy stems from the fact that in England, this power has been exercised by the Sovereign from time immemorial, and has always been regarded as an essential attribute of sovereignty. This traditional approach persisted even long after constitutional government had taken root in England, and even after prerogative powers, including the prerogative of mercy, became exercisable by the Executive instead of by the British sovereign.

38 In 1985, a significant inroad into the non-justiciability of prerogative powers in general was made by the House of Lords in its seminal decision in *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374 ("*GCHQ*"). In that case, three of the law lords (*viz*, Lord Scarman, Lord Diplock and Lord Roskill) held that it was no longer constitutionally appropriate to deny the courts supervisory jurisdiction over a governmental decision merely because the legal authority for that decision stemmed from a prerogative power rather than a statutory power (the other two law lords, *viz*, Lord Fraser of Tullybelton and Lord Brightman, preferred to leave this point open, although they agreed with their fellow law lords that, on the facts of the case, the governmental decision in question was not illegal).

39 At 407 of *GCHQ*, Lord Scarman stated:

> … [T]he law relating to judicial review has now reached the stage where … if the subject matter in respect of which [the] prerogative power [in question] is exercised is justiciable, that is to say[,] if it is a matter upon which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power. … *Today, therefore, the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter*. [emphasis added]

In essence, what Lord Scarman said in the above passage was that the justiciability of an executive power depended not on the source of the executive power in question (*ie*, the fact that the executive power was derived from the royal prerogative did not automatically render its exercise immune from judicial review), but on the subject matter in respect of which the executive power was exercised, with the decisive factor being whether that subject matter was one which, either as a matter of law or as a matter of fact, the courts could not adjudicate on.

40 Notwithstanding the change in judicial attitude expressed by Lord Scarman, Lord Diplock and Lord Roskill in *GCHQ* apropos the justiciability of prerogative powers, it appears that the prerogative of mercy specifically remained immune from judicial review after *GCHQ* since that case did not concern that particular prerogative power (it concerned, instead, the prerogative power to make orders regulating the conditions of service of staff employed by the UK Civil Service). Further, Lord Roskill (albeit alone among the law lords) expressed the view (at 418) that the prerogative of mercy was one of the prerogative powers which should remain non-justiciable (the others being, in his Lordship's view, the prerogative powers relating to, respectively, the making of treaties, the defence of the realm, the grant of honours, the dissolution of Parliament and the appointment of Ministers).

41 The break from the traditional view (expressed in, *inter alia*, *Hanratty*) that there could be no judicial review of the clemency power came in 1994 with the ruling of the Divisional Court in *Regina v Secretary of State for the Home Department, Ex parte Bentley* [1994] QB 349 ("*Bentley*"). That case concerned the execution in 1953 of a 19-year-old murderer ("Bentley"). The then Home Secretary had refused to grant Bentley a reprieve from the death sentence even though the jury at the trial had, after returning its verdict of guilty, recommended mercy for Bentley. In 1992, the Home Secretary rejected a petition by Bentley's sister for Bentley to be granted a posthumous free pardon (under English law, the grant of a free pardon serves to "remove from the subject of the pardon … 'all pains[,] penalties and punishments whatsoever that from the said conviction may ensue,' but not … eliminate the conviction itself" (see *Regina v Foster* [1985] QB 115 at 130)). His reasons were that: (a) he could not substitute his judgment for the judgment of the then Home Secretary in 1953; and (b) it was the Home Office's established policy not to grant a free pardon to an offender unless the Home Secretary was satisfied that the offender was both morally and technically innocent of any crime.

42 Bentley's sister applied for judicial review of the Home Secretary's decision on the ground that, *inter alia*, the Home Secretary had failed to recognise that the prerogative of mercy was capable of being exercised in many different circumstances and over a wide range, and had therefore failed to consider the form of pardon which would be appropriate in Bentley's case. A preliminary question arose before the Divisional Court as to whether the prerogative of mercy was reviewable *on the facts before the court*. The court declined to follow *Hanratty* on the basis that it had been decided before *GCHQ*, and answered the preliminary question in the affirmative, as follows (see *Bentley* at 362–363 *per* Watkins LJ):

> [Counsel for Bentley's sister] … argues that the prerogative of mercy is exercised by the Home Secretary on behalf of us all. It is an important feature of our criminal justice system. It would be surprising and regrettable in our developed state of public law were the decision of the Home Secretary to be immune from legal challenge irrespective of the gravity of the legal errors which infected such a decision. Many types of decisions made by the Home Secretary do involve an element of policy (e.g. parole) but are subject to review.
>
> We accept these arguments. [*GCHQ*] made it clear that the powers of the court cannot be ousted merely by invoking the word "prerogative." *The question is simply whether the nature and subject matter of the decision is amenable to the judicial process. Are the courts qualified to deal with the matter or does the decision involve such questions of policy that they should not intrude because they are ill-equipped to do so? Looked at in this way[,] there must be cases in which the exercise of the [r]oyal [p]rerogative is reviewable*, in our judgment. If, for example, it was clear that the Home Secretary had refused to pardon someone solely on the grounds of their sex, race or religion, the courts would be expected to interfere and, in our judgment, would be entitled to do.
>
> *We conclude therefore that some aspects of the exercise of the [r]oyal [p]rerogative are amenable to the judicial process. We do not think that it is necessary for us to say more than this in the instant case. It will be for other courts to decide on a case by case basis whether the matter in question is reviewable or not*.
>
> [emphasis added]

The Divisional Court noted Lord Roskill's comment in *GCHQ* that the clemency power should remain immune from judicial review, but regarded it as *obiter* (see *Bentley* at 363).

43 On the facts before it, the Divisional Court found that the Home Secretary had not given sufficient consideration to his power to grant some form of pardon which would be suitable to the particular circumstances of the case, other than a free pardon. It did not, however, declare the Home Secretary's decision null and void, but merely invited him to (see *Bentley* at 365):

> … look at the matter again and … examine whether it would be just to exercise the prerogative of mercy in such a way as to give full recognition to the now generally accepted view that [Bentley] should have been reprieved.

44 In my view, *Bentley* clearly decided that the prerogative of mercy would be reviewable if it were exercised based on an error of law (in that case, the Home Secretary's misconstruction of the type of pardon which the Home Office could grant), or based on arbitrary and/or extraneous considerations. In other words, the Divisional Court held that, depending on the facts of the case at hand, it was possible that the prerogative of mercy would be subject to judicial review like any other executive power, whether derived from a statutory source or a prerogative source. However, the Divisional Court also affirmed the long-established administrative law principle that the courts could not review the *merits* of the Home Secretary's decision as to whether or not to grant clemency in a particular case.

(2) The position in the Caribbean States

45 The current legal position in the Caribbean States on the justiciability of the clemency power is that set out by the Privy Council in *Neville Lewis v Attorney General of Jamaica and another* [2001] 2 AC 50 ("*Lewis*"). In that case, the Privy Council declined to follow two of its own decisions, *viz*, *de Freitas*, an appeal from Trinidad and Tobago, and *Thomas Reckley v Minister of Public Safety and Immigration and Others (No 2)* [1996] AC 527 ("*Reckley*"), an appeal from the Bahamas, both of which held that, under the law of the jurisdiction concerned, the clemency power was not amenable to judicial review.

46 In *de Freitas*, the offender in question ("MF") was a convicted murderer who had been sentenced to death. Under the Constitution of Trinidad and Tobago, the prerogative of mercy is exercisable by the Governor-General on the advice of the designated Minister. In a death sentence case, the trial judge's report and such other information as the designated Minister may require must be placed before the advisory committee on the prerogative of mercy. The designated Minister *must* consult the advisory committee before he advises the Governor-General, but is not obliged to follow its advice.

47 MF, after exhausting all his rights of appeal, commenced an action in the High Court of Trinidad and Tobago seeking a declaration that the execution of the death sentence imposed on him would violate his human rights and fundamental freedoms under the Constitution of Trinidad and Tobago. One of the arguments which MF made was that the functions of the advisory committee were quasi-judicial in nature and thus had to be performed in accordance with the rules of natural justice. This meant, MF contended, that whenever the advisory committee met to consider what advice to give to the designated Minister *vis-à-vis* the prerogative of mercy in a death sentence case, the offender in question was entitled to be shown the materials placed before the advisory committee, and was also entitled to be legally represented and heard at a hearing before the advisory committee.

48 The Privy Council unanimously rejected MF's argument. Lord Diplock said (at 247–248):

> Except in so far as it may have been altered by the Constitution [of Trinidad and Tobago,] the legal nature of the exercise of the royal prerogative of mercy in Trinidad and Tobago remains the

same as it was in England at common law. *At common law this has always been a matter which lies solely in the discretion of the sovereign, who by constitutional convention exercises it in respect of England on the advice of the Home Secretary to whom Her Majesty delegates her discretion. Mercy is not the subject of legal rights. It begins where legal rights end. A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative of mercy. In tendering his advice to the sovereign the Home Secretary is doing something that is often cited as the exemplar of a purely discretionary act as contrasted with the exercise of a quasi-judicial function*. While capital punishment was still a lawful penalty for murder in England it was the practice of the Home Secretary in every capital case to call for a report of the case from the trial judge and for such other information from such other sources as he thought might help him to make up his mind as to the advice that he would tender to the sovereign in the particular case. But it was never the practice for the judge's report or any other information obtained by the Home Secretary to be disclosed to the condemned person or his legal representatives.

Section 70(1) of the Constitution [of Trinidad and Tobago] makes it clear that the prerogative of mercy in Trinidad and Tobago is of the same legal nature as the royal prerogative of mercy in England. It is exercised by the Governor-General but "in Her Majesty's name and on Her Majesty's behalf." By section 70(2) the Governor-General is required to exercise this prerogative on the advice of a Minister designated by him … This provision does no more than spell out a similar relationship between the designated Minister and the Governor-General acting on behalf of Her Majesty to that which exists between the Home Secretary and Her Majesty in England under an unwritten convention of the British Constitution. It serves to emphasise the personal nature of the discretion exercised by the designated Minister in tendering his advice. The only novel feature is the provision in section 72(1) and (2) that the [designated] Minister before tendering his advice must, in a case where an offender has been sentenced to death, and may, in other cases, consult with the Advisory Committee established under section 71, of which the [designated] Minister himself is chairman; but section 72(3) expressly provides that he is not obliged in any case to act in accordance with their advice. In capital cases the Advisory Committee too must see the judge's report and any other information that the [designated] Minister has required to be obtained in connection with the case, but it still remains a purely consultative body without any decision-making power.

In their Lordships' view these provisions are not capable of converting the functions of the [designated] Minister, in relation to the advice he tenders to the Governor-General, from functions which in their nature are purely discretionary into functions that are in any sense quasi-judicial. This being so [an offender in a death sentence case] has no legal right to have disclosed to him any material furnished to the [designated] Minister and the Advisory Committee when they are exercising their respective functions under sections 70 to 72 of the Constitution [of Trinidad and Tobago].

[emphasis added]

49 Some twenty years later, in 1996, the Privy Council reviewed its approach in *de Freitas* and affirmed it in *Reckley*, an appeal from the Bahamas. The clemency regime in that jurisdiction is similar to the clemency regime in Trinidad and Tobago, in that: (a) the prerogative of mercy is exercised by the Governor-General on the advice of the designated Minister; and (b) in a death sentence case, the designated Minister must place before the advisory committee on the prerogative of mercy the trial judge's report of the case and such other information as he (the designated Minister) may require. However, unlike the position in Trinidad and Tobago, in a death sentence case in the Bahamas, the designated Minister is *not* required to consult the advisory committee before he advises the Governor-

General on whether or not mercy should be granted to the offender concerned. The designated Minister may consult the advisory committee if he wishes, but even if he does do so, he is not obliged to accept its advice.

50 In *Reckley*, the offender in question ("TR") was convicted of murder and sentenced to death. His clemency petition to the designated Minister was rejected without his being given the opportunity to see and comment on the trial judge's report and the other materials placed before the advisory committee. TR filed a constitutional motion alleging that his constitutional rights would be violated if he were executed without his having the opportunity to see those materials and make representations to the advisory committee.

51 The Privy Council applied the principle laid down in *de Freitas* and rejected TR's argument. Lord Goff of Chieveley, delivering the Privy Council's judgment, said that the observations of Lord Diplock in *de Freitas* were apposite to the corresponding provisions of the Bahamian Constitution. At 539–540 of *Reckley*, Lord Goff said:

> It is of some interest to observe that articles 90 to 92 of the present Bahamian Constitution first appeared in the Constitution of 1963, which came into force at a time before capital punishment was abolished in Great Britain in 1965. At that time, there can be no doubt that the status of the Home Secretary's discretion in death sentence cases in England was as described by Lord Diplock [in *de Freitas*]; and it appears that the statutory intention, when enacting articles 90 to 92 of the Bahamian Constitution of 1963, was to replicate that discretion, save that the designated minister was to be provided with the benefit of advice from an advisory committee. It was recognised by Lord Diplock in *Abbott v. Attorney-General of Trinidad and Tobago* [1979] 1 W.L.R. 1342, 1346, that section 89 of the Constitution of Trinidad and Tobago (identical to article 92 of the Bahamian Constitution) imposes duties upon the designated minister and the advisory committee arising under public law; and further that no warrant of execution should be issued[:]
>
> > "until after the advisory committee has considered the case and proffered its advice to the designated minister and the designated minister has tendered his own advice (which may differ from that of the advisory committee) to the President" – in [t]he Bahamas, to the Governor-General.
>
> Even so, *their Lordships consider that the introduction of the advisory committee, and the statutory provisions governing the exercise of its functions in death sentence cases, reinforce Lord Diplock's analysis in* de Freitas *… [at] 247–248*. First of all, it is made plain that every death sentence case must be considered by the advisory committee. There is no question of such consideration depending on any initiative from the condemned man or his advisers. Second, despite the obvious intention that the advisory committee shall be a group of distinguished citizens, and despite the fact that the [designated] minister is bound to consult with them in death sentence cases, he is not bound to accept their advice. This provides a strong indication of *an intention to preserve the status of the [designated] minister's discretion as a purely personal discretion*, while ensuring that he receives the benefit of advice from a reputable and impartial source. Indeed it may be inferred that the reason why provision was made in the [Bahamian] Constitution for an advisory committee was to provide a constitutional safeguard in circumstances where the [designated] minister's discretionary power was of such a nature that it was not subject to judicial review. Third, the material which has to be taken into consideration at the meeting of the advisory committee is, apart from the trial judge's report, "such other information derived from the record of the case or elsewhere as the minister may require." This provision, which is consistent with the practice formerly applicable in England in the consideration of death sentence cases by the Home Secretary, is inconsistent with the condemned man having

a right to make representations to the advisory committee.

The point can be placed in a broader context. A man accused of a capital offence in [t]he Bahamas has of course his legal rights. In particular he is entitled to the benefit of a trial before a judge and jury, with all the rights which that entails. After conviction and sentence, he has a right to appeal to the [Bahamian] Court of Appeal and, if his appeal is unsuccessful, to petition for leave to appeal to the Privy Council. After his rights of appeal are exhausted, he may still be able to invoke his fundamental rights under the [Bahamian] Constitution. For a man is still entitled to his fundamental rights, and in particular to his right to the protection of the law, even after he has been sentenced to death. If therefore it is proposed to execute him contrary to the law, for example because there has been such delay that to execute him would constitute inhuman or degrading punishment, or because there has been a failure to consult the Advisory Committee on the Prerogative of Mercy as required by the [Bahamian] Constitution, then he can apply to the [Bahamian] Supreme Court for redress under article 28 of the [Bahamian] Constitution. But *the actual exercise by the designated minister of his discretion in death sentence cases is different. It is concerned with a regime, automatically applicable, under which the designated minister, having consulted with the advisory committee, decides, in the exercise of his own personal discretion, whether to advise the Governor-General that the law should or should not take its course. Of its very nature the [designated] minister's discretion, if exercised in favour of the condemned man, will involve a departure from the law. Such a decision is taken as an act of mercy or, as it used to be said, as an act of grace. As Lord Diplock said in* de Freitas *… [at] 247G: "Mercy is not the subject of legal rights. It begins where legal rights end." And the act of the advisory committee in advising the [designated] minister is of the same character as the act of the [designated] minister in advising the Governor-General*.

[emphasis added]

52 Approximately five years later, in 2000, in *Lewis*, an appeal from Jamaica, the majority of the Privy Council (namely, Lord Slynn of Hadley, Lord Nicholls of Birkenhead, Lord Steyn and Lord Hutton (collectively referred to hereafter as "the majority in *Lewis*")) departed from the earlier approach taken in *de Freitas* and *Reckley*. The material facts of *Lewis*, which involved six offenders who had been convicted of murder and sentenced to death ("the applicants in *Lewis*"), are, in simplified form, as follows.

53 Under s 90 of the Jamaican Constitution, the Governor-General, acting on the advice of the Jamaican Privy Council ("the JPC"), may grant clemency to an offender in a death sentence case. In this regard, the Governor-General must forward to the JPC the trial judge's written report of the case and such other information as he (the Governor-General) may require so that the JPC may advise him on whether or not mercy should be granted to the offender concerned.

54 The applicants in *Lewis*, after exhausting all their domestic avenues for reprieve from the death sentences imposed on them, applied to the United Nations Human Rights Committee ("the UNHRC") and the Inter-American Commission on Human Rights ("the IACHR") alleging breach of their human rights. Pending the decision of these two international human rights bodies, the JPC considered the clemency petitions of all the applicants in *Lewis* without their knowledge, without their seeing the materials before the JPC and without their making representations to the JPC. Acting on the JPC's advice, the Governor-General declined to grant clemency to all the applicants in *Lewis*, who then brought judicial review proceedings to challenge the Governor-General's decision on the basis that their constitutional right to the protection of the law had been violated since they had been denied natural justice by the JPC when it considered their clemency petitions.

55 The majority in *Lewis* (Lord Hoffmann dissenting) ruled in favour of the applicants in *Lewis*, holding that:

(a) Although there was no legal right to mercy, and although the merits of a decision of the Governor-General (acting on the JPC's advice) made pursuant to the prerogative of mercy were not reviewable by the courts, the prerogative of mercy should nonetheless, in the light of Jamaica's international obligations, be exercised pursuant to "procedures which [were] fair and proper and to that end … subject to judicial review" (*per* Lord Slynn at 79).

(b) In considering what natural justice required, it was relevant to have regard to international human rights norms laid down in treaties to which Jamaica was a party, regardless of whether or not the provisions of those treaties were independently enforceable under Jamaica's domestic law.

(c) In a death sentence case:

(i) The offender was entitled to have sufficient notice of the date on which the JPC would consider his case so that he or his legal advisers could prepare representations. The JPC was bound to consider such representations before deciding what recommendation to give to the Governor-General *vis-à-vis* whether or not clemency should be granted to the offender.

(ii) When a report by an international human rights body was available, the JPC should consider it and should give an explanation if it did not accept the recommendations in the report.

(iii) The offender should normally be given a copy of all the documents available to the JPC, and not merely the gist of those documents.

(d) The defects in the procedure adopted in relation to the clemency petitions of the applicants in *Lewis* had resulted in a breach of the rules of fairness and natural justice. Accordingly, the applicants in *Lewis* had been deprived of the protection of the law which they were entitled to either under s 13(a) of the Jamaican Constitution (which provides that every person in Jamaica is entitled to, *inter alia*, "the protection of the law") or at common law.

56 Lord Hoffmann issued a strong dissent in *Lewis*, stating (at 87–89):

There are three questions which arise. The first ("the Jamaican Privy Council issue") is whether the [JPC], before deciding whether or not to recommend to the Governor[-]General that a sentence of death be commuted, is required to disclose to the prisoner the information which it has received pursuant to section 91 of the [Jamaican] Constitution. The second ("the Inter-American Commission issue") is whether it would be unlawful to execute a sentence of death while the prisoner's petition remained under consideration by the [IACHR]. … [The third question set out by Lord Hoffmann is not relevant to the present appeal and has thus been omitted from this quote.]

All … these questions have been considered and answered in recent decisions of the Board. The Jamaican Privy Council issue was decided in the negative in *Reckley* …, when the Board decided not to depart from its earlier decision in *de Freitas* … The Inter-American Commission issue was decided in the negative in *Fisher v Minister of Public Safety and Immigration (No 2)* [2000] 1 AC 434 and most recently in *Higgs v Minister of National Security* [2000] 2 AC 228. …

> The Board now proposes to depart from its recent decisions on all [of the above] points. *I do not think that there is any justification for doing so*. It was appropriate in *Reckley* … for the Board to review its previous decision in *de Freitas* … Twenty years had passed, during which there had been important developments in administrative law. In particular, the notion once entertained that an exercise of the prerogative was, as such, immune from judicial review had been repudiated by the House of Lords in [*GCHQ*]. It was arguable that the reluctance of the courts to impose a general rule of audi alterem partem upon the exercise of the prerogative of mercy was a mere relic of outdated theory. But the Board decided in … *Reckley* … that there were still, in modern conditions, strong enough grounds for maintaining the old rule. In *Burt v Governor General* [1992] 3 NZLR 672 Cooke P similarly decided that although there were no conceptual obstacles to requiring the Governor[-]General to observe the principle of audi alterem partem in exercising the prerogative of mercy, pragmatic considerations in New Zealand pointed the other way. The Board in … *Reckley* … took the same view of conditions in the Caribbean in 1996. Nothing has happened since then which could justify revisiting the decision not to depart from *de Freitas* …
>
> On the Inter-American Commission issue, the majority have found in the ancient concept of due process of law a philosopher's stone undetected by generations of judges which can convert the base metal of executive action into the gold of legislative power. It does not however explain how the trick is done. *Fisher v Minister of Public Safety and Immigration (No 2)* [2000] 1 AC 434 and *Higgs v Minister of National Security* [2000] 2 AC 228 are overruled but the arguments stated succinctly in the former and more elaborately in the latter are brushed aside rather than confronted. In particular, there is no explanation of how, in the domestic law of Jamaica, the proceedings before the [IACHR] constitute a legal process (as opposed to the proceedings of any other non-governmental body) which must be duly completed. Nor can there be any question of the [applicants in *Lewis*] having a legitimate expectation (as that term is understood in administrative law) that the state would await a response to their petitions. All the petitions were presented after the [Jamaican] government had issued the instructions [prescribing time limits for applications to the UNHRC and/or the IACHR by offenders sentenced to death, and stipulating that no further postponement of execution would be granted after the expiry of those time limits] and a legitimate expectation can hardly arise in the face of a clear existing contrary statement of policy. …
>
> [emphasis added]

57 Despite Lord Hoffmann's powerful dissent, the legal position in the Caribbean States generally after *Lewis* is that the clemency power is subject to judicial review, although the merits of the clemency decision made in a particular case remain non-justiciable (see, *eg*, the decision of the Caribbean Court of Justice in *Attorney-General and Others v Joseph (Jeffrey) and Boyce (Lennox)* (2006) 69 WIR 104 ("*Joseph and Boyce*") and the decision of the High Court of Trinidad and Tobago in *Allan Henry and others v The Attorney General of Trinidad and Tobago and The Commissioner of Prisons* (1 December 2009, unreported)).

(3) The position in Canada

58 In Canada, the clemency power was held by Reed J in *Ivan William Mervin Henry v Minister of Justice* (1992) 54 FTR 153 to be reviewable. In this regard, it appears that the Canadian position is that the clemency power is reviewable on both procedural and substantive grounds, with the courts being prepared to review a clemency decision *on the merits* in an appropriate case. This emerges from the decision in *Wilbert Colin Thatcher v The Attorney General of Canada, The Honourable Allan Rock, Minister of Justice, and the Attorney General of Saskatchewan* [1997] 1 FC 289 ("*Thatcher*").

59 In *Thatcher*, Rothstein J pointed out (at [6]) that ever since the decision of the Supreme Court of Canada in *Operation Dismantle*, Cabinet decisions made pursuant to prerogative powers had been subject to judicial review for compatibility with the Canadian Charter. Specifically, Rothstein J cited the following passage from Dickson J's judgment in *Operation Dismantle* at 455:

> … [C]abinet decisions fall under s. 32(1)(*a*) of the [Canadian] Charter [this provision sets out the scope of application of the Canadian Charter] and are therefore reviewable in the courts and subject to judicial scrutiny for compatibility with the [Canadian] Constitution. … [T]he executive branch of the Canadian government is duty bound to act in accordance with the dictates of the [Canadian] Charter. [emphasis in original omitted]

In effect, Rothstein J held (in *Thatcher*) that the *merits* of a clemency decision and the *manner* in which the decision was made could be scrutinised for compatibility with, respectively, the substantive rights and the procedural rights set out in the Canadian Charter.

(4) The position in Australia

60 The traditional position in Australia was set out by the High Court of Australia in *Horwitz v Connor, Inspector General of Penal Establishments of Victoria* (1908) 6 CLR 38 ("*Horwitz v Connor*"). That case concerned an accused who had been sentenced to a total of six years' imprisonment. Midway through his term of imprisonment, a writ of *habeas corpus* was issued directing his immediate release from prison even though the Governor in Council had not ordered remission of any part of the imprisonment term. The Supreme Court of Victoria discharged the writ of *habeas corpus*. The High Court of Australia refused to grant the accused special leave to appeal against the Supreme Court of Victoria's decision on the ground that (at 40) "no Court ha[d] jurisdiction to review the discretion of the Governor in Council in the exercise of the prerogative of mercy".

61 The position laid down in *Horwitz v Connor* was upheld by both Lander J at first instance and the Court of Appeal of the Australian Capital Territory ("ACT") in *Eastman v Australian Capital Territory* (2008) 227 FLR 262 ("*Eastman* (*ACT*)"). It should be noted, however, that Lander J, while accepting that he was bound by *Horwitz v Connor*, also stated (see [78]–[79] of Lander J's judgment as reproduced at [40] of *Eastman (ACT)*):

> … I am not, I think, prevented … from concluding that the processes [pertaining to the exercise of the prerogative of mercy] … are subject to judicial review.
>
> I think therefore I am entitled to inquire into whether the decision-maker in the Executive discharged its obligations at law in reaching its decision. The decision itself is for the Executive and [is] not subject to review. However, if the Executive has not conducted itself in accordance with the law in reaching that decision and, in particular, [has] not observed the rules of natural justice, the decision must be set aside.

In contrast, the ACT Court of Appeal appeared to take a narrower view. It noted the Privy Council decisions (in appeals from the Caribbean States) departing from the traditional view set out in *Horwitz v Connor* (namely, that the prerogative of mercy was not reviewable), but stated (see *Eastman (ACT)* at [38]):

> … [W]e are reluctant to treat those decisions as necessarily offering a principled basis for departing from well-established legal propositions. Similarly, we are not persuaded that we may depart from the decision in *Horwitz v Connor* in the interests of promoting a consistent body of administrative law. Until the High Court [of Australia] holds to the contrary, the decision in

Horwitz v Connor is binding on us.

62 The High Court of Australia dismissed the application for special leave to appeal against the ACT Court of Appeal's decision (see *David Harold Eastman v Australian Capital Territory* [2008] HCASL 553) on the ground (*per* Heydon and Kiefel JJ) that it was pointless to allow the application since there was no reason to doubt the ACT Court of Appeal's decision on the particular issue which would form the crux of any appeal against that decision. It should, however, be noted that Kirby J, whilst agreeing with the decision to dismiss the application, stated (at [2]) that in a proper case, judicial review would be available as a matter of law (Heydon and Kiefel JJ did not comment on this point in their joint judgment). Thus, it would appear that in Australia, the law on whether the clemency power is reviewable by the courts is not settled.

(5) The position in New Zealand

63 Turning now to clemency cases from New Zealand, the New Zealand Court of Appeal examined the justiciability of the clemency power in *Burt v Governor-General* [1992] 3 NZLR 672 ("*Burt*"). The appellant in that case ("Burt") was convicted of murder and sentenced to life imprisonment. His petition to the Governor-General in Council for a full pardon was dismissed on the ground that the trial verdict could not be considered unsafe. Under s 406 of the Crimes Act 1961 (NZ), the Governor-General in Council, when considering a clemency petition, may (but is not required to) refer to the New Zealand Court of Appeal either a question relating to the petitioner's conviction or sentence or any other point arising in the clemency petition, whereupon the New Zealand Court of Appeal must rule on the matter referred to it. In *Burt*, the Governor-General in Council rejected Burt's clemency petition without referring any matter to the New Zealand Court of Appeal for its consideration. Burt commenced judicial review proceedings, alleging that the Governor-General in Council had failed to act fairly and reasonably in dealing with his clemency petition. The Governor-General in Council applied to dismiss the action on the ground that Burt had no reasonable cause of action since his complaint concerned the exercise of a prerogative, rather than a statutory, power. The Governor-General in Council's application was allowed at first instance, whereupon Burt appealed.

64 The New Zealand Court of Appeal dismissed Burt's appeal. Cooke P, who delivered the judgment of the court, acknowledged that the argument that the prerogative of mercy was justiciable, at least to the extent of ensuring that elementary standards of fair procedure were followed, "[could not] by any means be brushed aside as absurd, extreme or contrary to principle" (at 681), partly because the issues raised by a clemency petition were often not foreign at all to the judicial function. Nevertheless, after referring to the various safeguards in New Zealand against wrongful convictions and unfair procedures, Cooke P held that (at 683) "no pressing reason ha[d] been made out for altering the practice regarding the [r]oyal prerogative of mercy".

(6) The position in India

65 In India, the clemency power is subject to judicial review. In *Maru Ram v Union of India and others* (1981) 1 SCC 107 ("*Maru Ram*"), a decision by a five-member bench of the Supreme Court of India, it was held in the joint judgment of three of the judges (*viz*, Y V Chandrachud CJ, P N Bhagwati J and V R Krishna Iyer J) that (at [62]):

> Wide as the power of pardon, commutation and release … is, it cannot run riot; for no legal power can run unruly like John Gilpin on the horse but must keep sensibly to a steady course. … [A]ll *public power*, including constitutional power, shall never be exercis[ed] arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power. We proceed on the basis that these axioms are valid in our constitutional order. [emphasis in

original]

The position laid down in *Maru Ram* was followed by a two-member bench of the Indian Supreme Court in *Epuru Sudhakar and another v Govt of A P and others* (2006) 8 SCC 161 ("*Epuru Sudhakar*"), where the court held (at [22]) that it was "fairly well settled that the exercise or non-exercise of pardon power by the President or Governor, as the case [might] be, [was] not immune from judicial review".

6 6 *Epuru Sudhakar* is an instructive case on the legal limits of judicial review of the clemency power. In that case, the sons of the deceased, who had been murdered by the second respondent, sought judicial review of the order of the Governor of Andhra Pradesh ("the Andhra Pradesh Governor") remitting seven years out of the ten-year imprisonment sentence which had been imposed on the second respondent upon his conviction for murder. The Andhra Pradesh Governor had made the remission order on the basis of, *inter alia*, erroneous statements that the second respondent was "a good Congress worker" [emphasis in original omitted] (see *Epuru Sudhakar* at [55]) and had been falsely implicated in the murder, which had allegedly been committed by another respondent. The Indian Supreme Court held that the clemency process had been tainted by not only the misleading information placed before the Andhra Pradesh Governor, but also the Andhra Pradesh Governor's conduct in taking into account the assertion that the second respondent was "a good Congress worker" [emphasis in original omitted] (see *Epuru Sudhakar* at [55]). That factor, the Indian Supreme Court held, had "no relevance to the objects sought to be achieved i.e. the consideration of the question whether pardon/remission was to be granted" (see *Epuru Sudhakar* at [56]). As the remission order had been made based on extraneous and irrelevant grounds, the Indian Supreme Court set it aside.

(7) The position in Hong Kong

67 In Hong Kong, the legal position on the justiciability of the clemency power is similar to the English position post-*Bentley*. This can be seen from the Hong Kong High Court case of *Ch'ng Poh v The Chief Executive of the Hong Kong Special Administrative Region* Case No 182 of 2002 (3 December 2003, unreported) ("*Ch'ng Poh*"), where Hartmann J held (at [38]) that while the *merits* of any clemency decision made by the Chief Executive of the Hong Kong Special Administrative Region of the People's Republic of China ("SAR Chief Executive") pursuant to Art 48(12) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ("the Basic Law") were not subject to judicial review, the *lawfulness* of the process by which such a decision was made was open to judicial review. His Honour explained that this was because although the Basic Law gave the SAR Chief Executive prerogative powers, it did not seek to place him above the law as his powers were defined and constrained by the Basic Law, the office of SAR Chief Executive being a creature of that law (at [35]).

(8) The position in Malaysia

68 In Malaysia, the courts have consistently held that both the clemency power and the merits of a clemency decision cannot be questioned by the courts. In *Public Prosecutor v Soon Seng Sia Heng* [1979] 2 MLJ 170, which concerned (*inter alia*) the decision of the Yang di-Pertuan Agong to commute the death sentence of an offender who had, at the age of 14, been convicted and sentenced to death under the Emergency (Security Cases) Regulations 1975, the Federal Court made no order on the application for the Yang di-Pertuan Agong's decision to be reviewed, stating (at 171 *per* Suffian LP):

When considering whether to confirm, commute, remit or pardon, His Majesty does not sit as a

> court, is entitled to take into consideration matters which courts bound by the law of evidence cannot take into account, and decides each case on grounds of public policy; such decisions are a matter solely for the executive. We cannot confirm or vary them; we have no jurisdiction to do so. The royal prerogative of mercy, as is recognised by its inclusion in Chapter 3 Part IV of the [Malaysian] Constitution, is an executive power …

69 The Federal Court took the same approach in *Chow Thiam Guan v Superintendent of Pudu Prison & The Government of Malaysia and Connected Appeals* [1983] 2 MLJ 116 ("*Chow Thiam Guan*"). That case concerned an application by the appellant for the execution of the death sentence imposed on him to be stayed pending the hearing of an appeal which he had filed in the Federal Court on the sole ground that the death sentence was unconstitutional. The Federal Court, citing *de Freitas*, held that the courts had no jurisdiction to deal with the stay application as "[a]ny stay of execution would be … an extension of the prerogative of mercy, [which was] exercisable only by His Majesty the Yang di-Pertuan Agong in accordance with Article 42 of the [Malaysian] Constitution" (at 119).

70 *Chow Thiam Guan* was followed in *Sim Kie Chon v Superintendent of Pudu Prisons & Ors* [1985] 2 MLJ 385, a decision of the Supreme Court of Malaysia. The appellant in that case ("Sim"), who had been sentenced to death and who had exhausted all his avenues of appeal, filed an action against (*inter alia*) the Pardons Board, alleging that it had not considered his clemency petition properly. The High Court of Malaysia struck out the action. On appeal, the Malaysian Supreme Court upheld that order, stating (at 387):

> … [P]roceedings in Court aimed at questioning the propriety or otherwise of such a decision [*viz*, a decision made in the exercise of the prerogative of mercy] are … not justiciable. By the same token[,] a contention of any violation of the fundamental right which rests wholly on or [is] dependent upon such an allegation is also not justiciable. It is our considered view that the power of mercy is a high prerogative exercisable by the Yang di-Pertuan Agong …, who acts with the greatest conscience and care and without fear of influence from any quarter … ([s]ee *Hanratty* …).

A second challenge by Sim to the rejection of his clemency petition was dismissed in *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494 ("*Sim Kie Chon (No 2)*") by the Malaysian Supreme Court, which held (at 497):

> … [W]hen the Constitution has empowered the nation's highest executive as the repository of the clemency power, the court cannot intervene and judicial review is excluded by implication.

71 The case which bears the closest factual correspondence to the present case is *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64 ("*Karpal Singh*"). In that case, the applicant applied for a declaration that a public statement allegedly made by the Sultan of Selangor ("the Selangor Sultan") and reported in two English newspapers – *viz*, that he would not pardon anyone who had been sentenced to the mandatory death sentence for drug trafficking in Selangor – was in violation of Art 42 of the Malaysian Constitution as the Selangor Sultan had effectively predetermined any clemency petition which might be filed by a convicted drug trafficker. The applicant contended that the Selangor Sultan could only reject a petition for clemency after considering the advice of the Selangor Pardons Board and then applying his mind to the petition before him. The Chief Justice of Malaysia dismissed the application on the ground that the allegation had not been proved, and, therefore, the issue was hypothetical. He also held, citing *Sim Kie Chon (No 2)*, that "an issue concerning the process of clemency … [was] clearly non-justiciable" (see *Karpal Singh* at 67), and stated that "mercy [was] not the subject of legal rights" (at 66).

72 Most recently, in *Juraimi bin Husin v Pardons Board, State of Pahang & Ors* [2002] 4 MLJ 529 ("*Juraimi bin Husin*"), the Federal Court applied Lord Roskill's *obiter dictum* in *GCHQ* that the prerogative of mercy was not justiciable. In *Juraimi bin Husin*, the appellant (who had been sentenced to death for murder) submitted a clemency petition to the Sultan of Pahang. His petition was rejected. He applied for a stay of execution of his death sentence pending his application to challenge the constitutionality of the rejection of his clemency petition. The High Court of Malaysia referred to the Federal Court for determination the question of whether the courts could review the decision-making process of the Sultan of Pahang *vis-à-vis* the clemency power in Art 15 of the Laws of the Constitution of Pahang, read with Art 42 of the Malaysian Constitution. The Federal Court answered this question in the negative, stating (at 537):

> … [T]he effect of making the decision making process justiciable would, in the final analysis, make the decision itself [vulnerable] to be held null and void. This would have the same effect as [making] the decision itself justiciable. Consequently, we are of the view that any attempt to make the decision process justiciable would indirectly make the decision itself justiciable.

In other words, the court held that since the clemency decision made in any given case was not justiciable, the process of making that decision was also not justiciable.

Analysis of the position in Singapore

73 I turn now to analyse what the legal position in Singapore is *vis-à-vis* the justiciability of the clemency power.

74 I start by stating that the clemency power is a legal power of an extraordinary character. It is unlike all other legal powers in that:

(a) It is an executive power which is exercised as an act of executive grace and not as a matter of legal right (see, *eg*, *de Freitas* and *Reckley*).

(b) A decision to grant clemency is "[a] determination of the ultimate authority that the public welfare will be better served by inflicting less [punishment] than what the judgment fixed" (*per* Oliver Wendell Holmes J in *Biddle, Warden v Perovich* 274 US 480 (1927) ("*Biddle v Perovich*") at 486). Conversely, a decision not to grant clemency represents a determination by the ultimate authority that the public welfare is better served by allowing the law to take its course, *ie*, by carrying out the punishment prescribed by the law.

(c) Ordinarily, the law should be allowed to take its course. However, when the clemency power is exercised in favour of an offender, it will "involve a departure from the law" (*per* Lord Goff in *Reckley* at 540) in that, in the interests of the public welfare, the law (in terms of the punishment mandated by the law) is prevented from taking its course.

(d) The considerations of public welfare that the ultimate authority deems relevant in making a clemency decision are entirely a matter of policy for it to decide. As was said by S H Kapadia J at [65] of *Epuru Sudhakar* (a decision relied upon by Mr Ravi), "[t]he President and the Governor [*viz*, the ultimate authority in the context of India's clemency regime] are the sole judges of the sufficiency of facts and of the appropriateness of granting … pardons and reprieves".

(e) In the specific context of a death sentence case (which is also the context of the present appeal), the grant of clemency to the offender confers a gift of life on him. This is because the offender has effectively already been deprived of his life by the law due to his conviction for a

capital offence. If clemency is granted to the offender, his life will be restored to him, whereas if clemency is not granted, his life will be forfeited as decreed by the law. In other words, in a death sentence case, the clemency decision made, be it in favour of or against the offender, *does not* deprive the offender of his life; the law (in terms of the conviction and death sentence meted out on the offender by a court of law) has already done so.

75 Given that the clemency power is a constitutional power vested exclusively in the Executive, it is not justiciable *on the merits*, firstly, on the basis of the doctrine of separation of powers (see sub-para (d) of [74] above) and, secondly, on the basis of established administrative law principles (see, *eg*, *Chandler* at 809–810 *per* Lord Devlin and *Operation Dismantle* at 470 *per* Wilson J). In our local context, this entails that, assuming the clemency power is exercised in accordance with law, the merits of the clemency decision made will fall outside the purview of our courts. Our courts cannot look into whether a clemency decision is wise or foolish, harsh or kind; neither can they substitute their own decision for the clemency decision made by the President simply because they disagree with the President's view on the matter. This principle is common ground between the parties in the present appeal.

76 However, this conclusion – *viz*, that the merits of a clemency decision are not reviewable by our courts – does not, in my view, entail that the clemency power in our constitutional context is therefore an "extra-legal" power in the sense of being a power beyond any legal constraints or restraints. In this regard, the following observations of the Indian Supreme Court in *Maru Ram* (another decision relied upon by Mr Ravi) are pertinent:

> 62. … Wide as the power of pardon … is, it cannot run riot; for no legal power can run unruly like John Gilpin on the horse but must keep sensibly to a steady course. … [A]ll *public power*, including constitutional power, shall never be exercis[ed] arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power. We proceed on the basis that these axioms are valid in our constitutional order.
>
> …
>
> 65. Pardon, using this expression in the amplest connotation, ordains fair exercise, as we have indicated above. Political vendetta or party favouritism cannot but be interlopers in this area. The order which is the product of extraneous or mala fide factors will vitiate the exercise. While constitutional power is beyond challenge, its actual exercise may still be vulnerable. Likewise, capricious criteria will void the exercise. For example, if the Chief Minister of a State releases everyone in the prisons in his State on his birthday or because a son has been born to him, it will be an outrage on the [Indian] Constitution to let such madness survive. …
>
> [emphasis in original]

77 In my view, the aforesaid observations of the Indian Supreme Court are equally applicable to the clemency power under Art 22P. They are substantially a restatement of the *Chng Suan Tze* principle that no legal power – including a constitutional power (see [79]–[80] below) – is beyond the reach of the supervisory jurisdiction of the courts if it is exercised beyond its legal limits (*ie*, *ultra vires* the enabling law) or if it is exercised *mala fide* (*ie*, for an extraneous purpose).

78 In *Chng Suan Tze*, this court formulated the *Chng Suan Tze* principle as follows (at [86]):

> In our view, 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.

More accurately stated, the principle is that "all *legal* powers … have legal limits[;] [t]he notion of a subjective or unfettered discretion is contrary to the rule of law" [emphasis added] (see *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 ("*Phyllis Tan*") at [149]; see also Raja Azlan Shah Ag CJ's statement in the Malaysian Federal Court case of *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 (at 148) that "[e]very legal power must have legal limits, otherwise there is dictatorship").

79 Significantly, after *Chng Suan Tze* was decided, Parliament enacted the Constitution of the Republic of Singapore (Amendment) Act 1989 (Act 1 of 1989) to amend Art 149 of the Constitution of the Republic of Singapore (1985 Rev Ed) by inserting what is now Art 149(3) of the Singapore Constitution. The effect of this constitutional amendment was to restrict our courts' supervisory jurisdiction, apropos national security decisions made under the Internal Security Act (Cap 143, 1985 Rev Ed), to reviewing such decisions for procedural improprieties only. Save for this limitation, Parliament left untouched the full amplitude of the *Chng Suan Tze* principle, and thereby implicitly endorsed it. Thus, in *Phyllis Tan*, this court stated that the *Chng Suan Tze* principle, which was applied to a *statutory* power in *Chng Suan Tze* (*viz*, the power to make detention orders and to suspend such orders under, respectively, s 8 and s 10 of the Internal Security Act), was also applicable to a *constitutional* power (*viz*, the Attorney-General's prosecutorial power under Art 35(8) of the Singapore Constitution).

80 Specifically, what this court said in *Phyllis Tan* was as follows (at [149]):

> The discretionary power to prosecute under the [Singapore] Constitution is not absolute. It must be exercised in good faith for the purpose [for which] it is intended, *ie*, to convict and punish offenders, and not for an extraneous purpose. As the Court of Appeal said in *Chng Suan Tze* … at [86], all legal powers, even a constitutional power, have legal limits. The notion of a subjective or unfettered discretion is contrary to the rule of law. In our view, the exercise of the prosecutorial discretion is subject to judicial review in two situations: first, where the prosecutorial power is abused, *ie*, where it is exercised in bad faith for an extraneous purpose, and second, where its exercise contravenes constitutional protections and rights (for example, a discriminatory prosecution which results in an accused being deprived of his right to equality under the law and the equal protection of the law under Art 12 of the [Singapore] Constitution).

On the basis of the *Chng Suan Tze* principle as elaborated on in *Phyllis Tan*, our courts must have the power to review the clemency power under Art 22P on the same legal basis as that stated in the above quotation.

81 A further reason (apart from the *Chng Suan Tze* principle) for holding that the clemency power is amenable to judicial review lies in the specific procedural safeguards prescribed by Art 22P for the conduct of the clemency process in death sentence cases. Article 22P, which is set out in full below, makes it clear that these procedural safeguards apply only to death sentence cases, and are inapplicable to non-death sentence cases:

> **22P**.—(1) The President, as occasion shall arise, may, on the advice of the Cabinet —
>
> > (*a*) grant a pardon to any accomplice in any offence who gives information which leads to the conviction of the principal offender or any one of the principal offenders, if more than one;

(*b*) grant to any offender convicted of any offence in any court in Singapore, a pardon, free or subject to lawful conditions, or any reprieve or respite, either indefinite or for such period as the President may think fit, of the execution of any sentence pronounced on such offender; or

(*c*) remit the whole or any part of such sentence or of any penalty or forfeiture imposed by law.

(2) Where any offender has been condemned to death by the sentence of any court and in the event of an appeal such sentence has been confirmed by the appellate court, the President shall cause the reports which are made to him by the Judge who tried the case and the Chief Justice or other presiding Judge of the appellate court to be forwarded to the Attorney-General with instructions that, after the Attorney-General has given his opinion thereon, the reports shall be sent, together with the Attorney-General's opinion, to the Cabinet so that the Cabinet may advise the President on the exercise of the power conferred on him by clause (1).

82 Unlike the position in non-death sentence cases, in a death sentence case, the President is required under Art 22P(2) to cause the report of the trial judge and (where there is an appeal from the trial judge's decision) the report of the presiding judge of the appellate court to be sent to the Attorney-General, who must give his opinion thereon. The Attorney-General's opinion and the aforesaid report(s), which collectively form the Art 22P(2) materials in a death sentence case, must then be sent to the Cabinet so that the Cabinet may advise the President on the exercise of the clemency power. In my view, the requirement that the trial judge's report, the report of the presiding judge of the appellate court (where there is an appeal) and the Attorney-General's opinion on the report(s) must be sent to the Cabinet for its consideration necessarily implies a constitutional duty on the Cabinet's part to consider those materials impartially and in good faith before it advises the President on the exercise of the clemency power.

83 It therefore follows that if, hypothetically speaking, conclusive evidence is produced to the court to show that the Cabinet never met to consider the offender's case at all, or that the Cabinet did not consider the Art 22P(2) materials placed before it and merely tossed a coin to determine what advice to give to the President (see, in this regard, the example given in *Lewis* at 76), the Cabinet would have acted in breach of Art 22P(2). If the courts cannot intervene to correct a breach of Art 22P of this nature, the rule of law would be rendered nugatory. In this regard, it should be noted that in Singapore (just as in many other common law jurisdictions which have elevated the clemency power from a common law prerogative power to a constitutional power under a written Constitution), the making of a clemency decision pursuant to Art 22P is now "not a private act of grace from an individual happening to possess power … [but] a part of the [c]onstitutional scheme" (see *Biddle v Perovich* at 486; see also *Epuru Sudhakar* at [62]).

84 My conclusion that the clemency power is subject to judicial review may also be said to be a corollary of the right to life and personal liberty guaranteed by Art 9(1) of the Singapore Constitution, which provides that "[n]o person shall be deprived of his life or personal liberty save in accordance with law". In *Reckley*, Lord Goff said at 540 (also reproduced at [51] above):

A man accused of a capital offence in [t]he Bahamas has of course his legal rights. In particular he is entitled to the benefit of a trial before a judge and jury, with all the rights which that entails. After conviction and sentence, he has a right to appeal to the [Bahamian] Court of Appeal and, if his appeal is unsuccessful, to petition for leave to appeal to the Privy Council. After his rights of appeal are exhausted, he may still be able to invoke his fundamental rights under the [Bahamian] Constitution. *For a man is still entitled to his fundamental rights, and in*

> *particular to his right to the protection of the law, even after he has been sentenced to death*. If therefore it is proposed to execute him contrary to the law, for example … because there has been a failure to consult the Advisory Committee on the Prerogative of Mercy as required by the [Bahamian] Constitution, then he can apply to the [Bahamian] Supreme Court for redress under article 28 of the [Bahamian] Constitution. [emphasis added]

85 I agree with this statement of law (interpreted *mutatis mutandis*) as regards the applicability of Art 9(1) of the Singapore Constitution to the clemency process, not because an offender has any constitutional or legal right or even any expectation with respect to the grant of clemency to him, but because the requirements of Art 22P(2) must be complied with as that is what the law mandates. As just pointed out at [82]–[83] above, in a death sentence case, the Cabinet must consider impartially and in good faith the Art 22P(2) materials submitted to it before it advises the President on how the clemency power should be exercised. That said, I reiterate that a decision not to exercise the clemency power in favour of the offender in a death sentence case does *not*, in the legal sense, deprive him of his life or personal liberty since he has already been sentenced to death by a court in accordance with law (see sub-para (e) of [74] above). If clemency is granted to an offender in a death sentence case, it restores to him his life, which the law has already decreed is to be forfeited.

The Natural Justice Issue

86 I turn now to the Natural Justice Issue, *ie*, the question of whether breach of natural justice is an applicable ground for reviewing the clemency process (as defined at sub-para (c) of [15] above), and, if it is, whether the clemency process *vis-à-vis* the Appellant has been tainted by apparent bias in the present case as a result of the Law Minister's statements.

The rules of natural justice in administrative law

87 In arguing that there has been a breach of natural justice in the present case, Mr Ravi relied on two specific rules applicable in Singapore as well as in Commonwealth jurisdictions to judicial review of administrative decisions (see William Wade & Christopher Forsyth, *Administrative Law* (Oxford University Press, 10th Ed, 2009) at p 372). In my discussion of the Natural Justice Issue, I shall refer to these two rules collectively as "the administrative law rules of natural justice" so as to distinguish them from the "fundamental rules of natural justice" discussed by Lord Diplock in the Privy Council cases of *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 ("*Ong Ah Chuan*") (at, *inter alia*, 671) and *Haw Tua Tau v Public Prosecutor* [1982] AC 136 ("*Haw Tua Tau*") (at, *inter alia*, 153), which rules will hereafter be termed "the *Ong Ah Chuan* rules of natural justice".

88 The two specific rules which make up the administrative law rules of natural justice are the following:

(a) the rule encapsulated by the maxim "*nemo iudex in sua causa*" ("no one shall be a judge in his own cause"), which I shall hereafter refer to as "the rule against bias", as this rule is more commonly known; and

(b) the rule encapsulated by the maxim "*audi alteram partem*" ("hear the other side"), which I shall hereafter refer to as "the hearing rule".

A breach of either of these rules in the course of making an administrative decision is an established ground for setting aside the decision in judicial review proceedings. The issue in the present appeal is whether the administrative law rules of natural justice apply to the clemency process as well.

89 Before I proceed to analyse this issue, I should highlight two points concerning my use of the terms "bias" and "the rule against bias" in this part of my judgment.

90 First, unless otherwise indicated, the word "bias" should be understood as denoting both actual bias and apparent bias since the legal objection to apparent bias applies *a fortiori* to actual bias, especially bias that amounts to a predetermination of the relevant matter to be decided. Correspondingly, the expression "the rule against bias" will, unless otherwise indicated, cover both actual bias and apparent bias. (In this regard, there will be instances in the discussion below where I shall refer to apparent bias and the rule against apparent bias specifically in keeping with the basis on which this case was argued in the court below.)

91 Second, the rule against bias is *different* from and should *not* be equated with the constitutional prohibition against *discrimination*, *ie*, the protection against unequal treatment conferred by Art 12 of the Singapore Constitution. What the rule against bias prohibits is *a person acting as a judge in his own cause in any matter where there is an actual or potential conflict of interest*. As stated in Lord Woolf, Jeffrey Jowell & Andrew Le Sueur, *De Smith's Judicial Review* (Sweet & Maxwell, 6th Ed, 2007) ("*De Smith*") at para 10-006:

> The principle expressed in the maxim *nemo iudex in sua causa* (no one should be a judge in his own cause) refers not only to the fact that no one shall adjudicate his own case; it also refers to the fact that no one should adjudicate a matter in which he has a conflicting interest. In order to give effect to those two aspects of the principle, the concern is not only to prevent the distorting influence of *actual bias*, but also to protect the integrity of the decision-making process by ensuring that, however disinterested the decision-maker is in fact, the circumstances should not give rise to the *appearance of bias*. As has been famously said: "justice should not only be done, but should manifestly and undoubtedly be seen to be done". [emphasis in original]

The parties' arguments

92 Before the Judge, Mr Ravi argued that the administrative law rules of natural justice applied to the clemency process, and that pursuant to (specifically) the rule against bias, apparent bias in the course of the clemency process would vitiate the clemency decision made at the end of that process. In contrast, the Respondent's position was that since the clemency power was not justiciable, apparent bias was not a ground which could be invoked to challenge the clemency process in any given case. The Judge held that "apparent bias [was] not an available ground on which to review the clemency process" (see sub-para (b) of [85] of the HC Judgment), but it is not clear from the context whether he was holding that the clemency power was not justiciable *per se*, or that it was not justiciable on the facts before him.

93 In the present appeal, Mr Ravi's contention is that the clemency process is an integral part of the process of depriving a person of his life "in accordance with law" for the purposes of Art 9(1) of the Singapore Constitution. According to Mr Ravi, the term "law" in Art 9(1) (and likewise Art 12(1), which protects a person from discriminatory laws and/or actions) incorporates the administrative law rules of natural justice, and, thus, the clemency process must comply with those rules.

94 As authority for his proposition, Mr Ravi cited Lord Diplock's pronouncement in *Ong Ah Chuan* (at 670–671) on the meaning of the word "law" as used in the then equivalent of Arts 9(1) and 12(1) of the Singapore Constitution, as follows:

> In a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or

> rights, references to "law" in such contexts as "in accordance with law," "equality before the law," "protection of the law" and the like … refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the "law" to which citizens could have recourse for the protection of fundamental liberties assured them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be [a] misuse of language to speak of law as something which affords "protection" for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by article 5) of articles 9(1) and 12(1) would be little better than a mockery.

Mr Ravi also referred to: (a) *Haw Tua Tau*, where the Privy Council (likewise *per* Lord Diplock) reiterated its views as set out in the above passage from *Ong Ah Chuan*; (b) the decision of the Caribbean Court of Justice in *Joseph and Boyce* (at [62]–[64]); and (c) the decision of the Court of Appeal of Guyana in *Abdool Salim Yasseen and Thomas v Attorney-General* (1996) 62 WIR 98, where George JA referred (at 113–114) to the above extract from *Ong Ah Chuan*.

95 In contrast, the Respondent's case on the Natural Justice Issue in this appeal is that, as argued in the court below, the administrative law rules of natural justice do not apply to the clemency process because the clemency power is not justiciable. The Respondent submits that the extraordinary nature of the clemency power renders it unsuitable for the clemency process to be subjected to the administrative law rules of natural justice, which sit most comfortably in the context of judicial and quasi-judicial decisions that involve the determination of rights and remedies. In support of this proposition, the Respondent cited *Ch'ng Poh*, where Hartmann J, in discussing the exercise of the clemency power set out in Art 48(12) of the Basic Law, said (at [111]) that "it would be wrong in principle for [the] court to impose judicial or quasi-judicial procedures and attitudes on what [was] the essence of an executive act". The Respondent also referred to *Thatcher* (a case cited by Mr Ravi as well), where Rothstein J made the point that the duty of fairness on the part of the Minister of Justice (*viz*, the ultimate authority in the Canadian context) must necessarily be "less than that applicable to judicial proceedings" (at [13]), and that even within the context of s 7 of the Canadian Charter (which expressly provides for the application of "the principles of fundamental justice"), all that the Canadian Charter required in the clemency context was that the Minister of Justice must "act in good faith and conduct a meaningful review" (at [13]) of each clemency case before him.

96 Another reason advanced by the Respondent as to why the rule against apparent bias specifically is not applicable to the clemency process is that this conclusion is supported by the very terms of Art 22P itself. In a death sentence case, Art 22P(2) requires the Attorney-General, who (in his capacity as the Public Prosecutor) initiated the criminal proceedings against the offender concerned, to give his opinion on the trial judge's report on the case and (if there is an appeal from the trial judge's decision) the report of the presiding judge of the appellate court. This, in the Respondent's view, is further indication that the rule against apparent bias has no application to the clemency process.

97 The Respondent argues that even if the clemency process is subject to procedural fairness as manifested in the administrative law rules of natural justice (which is what Mr Ravi contends), the only procedural requirements are those set out in Art 22P, and that to superimpose the administrative law rules of natural justice onto the clemency process would result in the unwarranted creation of new constitutional rights within the clemency regime by way of judicial pronouncement. In this regard, the Respondent emphasises that an offender has no legal right to mercy.

98 For the foregoing reasons, the Respondent contends that the administrative law rules of natural justice have no application to the clemency process, although he "*does not dispute that the rule against bias is a fundamental principle of natural justice*" [note: 15] [emphasis added].

Whether the administrative law rules of natural justice apply to the clemency process

The conceptual distinction between the administrative law rules of natural justice and the Ong Ah Chuan rules of natural justice

99 In assessing the merits of the parties' respective arguments on the applicability or otherwise of the administrative law rules of natural justice to the clemency process, it is important to bear in mind the *conceptual* difference between these rules and the *Ong Ah Chuan* rules of natural justice. This conceptual difference is best appreciated by examining the context in which the pronouncements on the *Ong Ah Chuan* rules of natural justice were made in *Ong Ah Chuan* and *Haw Tua Tau*.

100 In *Ong Ah Chuan*, one of the issues before the Privy Council was whether s 15 of the Misuse of Drugs Act 1973 (Act 5 of 1973), which provided that a person who had in his possession more than 2g of diamorphine would be presumed, unless the contrary was proved, to have had the drug in his possession for the purpose of trafficking, was unconstitutional. The appellants argued that the presumption in s 15 ("the s 15 presumption") violated the then equivalent of Art 9(1) of the Singapore Constitution as it replaced the presumption of innocence with the presumption of guilt, and also violated the then equivalent of Art 12(1) of the Singapore Constitution as it amounted to a denial of the equal protection of the law. In the course of the hearing, Lord Diplock asked counsel for the Public Prosecutor if the Public Prosecutor was contending that "provided a statute [was] an Act of the Singapore Parliament[,] then however unfair or absurd or oppressive it [might] be[,] it [was] justified by article 9(1)" (see *Ong Ah Chuan* at 659). Counsel for the Public Prosecutor replied that the issue was not relevant – to which Lord Diplock responded (at 659):

> Their Lordships cannot accept that because they will have to deal with the point. They are not disposed to find that article 9(1) justifies all legislation whatever its nature.

101 Proceeding on the basis that it was *not* the case that the then equivalent of Art 9(1) of the Singapore Constitution "justifie[d] all legislation whatever its nature" (at 659), the Privy Council examined whether the s 15 presumption contravened the then equivalent of either Art 9(1) or Art 12(1), and ruled in the negative. It was in this context that Lord Diplock propounded his famous formulation of the meaning of the word "law" as used in the then equivalent of Arts 9(1) and 12(1), as follows (at 670–671):

> … their Lordships are unable to accept the narrow view of the effect of articles 9(1) and 12(1) of the Constitution [*ie*, the then equivalent of the Singapore Constitution] for which counsel for the Public Prosecutor contended. This was that since "written law" is defined in article 2(1) to mean "this Constitution and all Acts and Ordinances and subsidiary legislation for the time being in force in Singapore" and "law" is defined as including "written law," the requirements of the Constitution are satisfied if the deprivation of life or liberty complained of has been carried out in accordance with provisions contained in any Act passed by the Parliament of Singapore, however arbitrary or contrary to fundamental rules of natural justice the provisions of such Act may be. To the full breadth of this contention one limitation only was conceded: the arbitrariness, the disregard of fundamental rules of natural justice for which the Act provides, must be of general application to all citizens of Singapore so as to avoid falling foul of the anti-discriminatory provisions of article 12(1).

> Even on the most literalist approach to the construction of the Constitution this argument in their Lordships' view involves the logical fallacy of petitio principii. The definition of "written law" includes provisions of Acts passed by the Parliament of Singapore only to the extent that they are "for the time being *in force* in Singapore"; and article 4 provides that "any law enacted by the legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void." So the use of the expression "law" in articles 9(1) and 12(1) does not, in the event of challenge, relieve the court of its duty to determine whether the provisions of an Act of Parliament … relied upon to justify depriving a person of his life or liberty are inconsistent with the Constitution and consequently void.
>
> In a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to "law" in such contexts as "in accordance with law," "equality before the law," "protection of the law" and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the "law" to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be [a] misuse of language to speak of law as something which affords "protection" for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by article 5) of articles 9(1) and 12(1) would be little better than a mockery.
>
> [emphasis in original]

102 In *Haw Tua Tau*, a similar challenge was made to the constitutionality of ss 188(2) and 195(1)–195(3) of the Criminal Procedure Code (Cap 113, 1970 Rev Ed) ("the 1970 CPC") as amended by the Criminal Procedure Code (Amendment) Act 1976 (Act 10 of 1976), which abrogated the common law right of an accused to make an unsworn statement from the dock without subjecting himself to cross-examination. It was argued that the aforesaid provisions of the 1970 CPC (as amended) were inconsistent with the then equivalent of Art 9(1) of the Singapore Constitution. The Privy Council rejected this argument, reiterating (at 147 *per* Lord Diplock) the formulation in *Ong Ah Chuan* (at 670–671) of the meaning of the word "law" as used in (*inter alia*) the then equivalent of Art 9(1).

103 It can be seen from the above outline of *Ong Ah Chuan* and *Haw Tua Tau* that in both cases, the *Ong Ah Chuan* rules of natural justice were articulated and applied in the context of a constitutional challenge to the validity of legislation, and not in the judicial review context, where what is challenged is an administrative decision made pursuant to *valid* legislation. For this reason, it is my view that a distinction must be made conceptually between the *Ong Ah Chuan* rules of natural justice and the administrative law rules of natural justice. This distinction stems from the difference in the juridical status of these two categories of rules of natural justice. As I have just mentioned, the *Ong Ah Chuan* rules of natural justice operate at the constitutional level in relation to the validity of legislation, whereas the administrative law rules of natural justice operate at an executive level in relation to the validity of administrative decisions.

104 To elaborate, the effect of the Privy Council's ruling in *Ong Ah Chuan* is that the *Ong Ah Chuan* rules of natural justice have been incorporated into the content or meaning of the term "law" as used in Arts 9(1) and 12(1) of the Singapore Constitution, and form part of "the 'law' to which citizens [can] have recourse for the protection of [the] fundamental liberties assured to them by the [Singapore] Constitution" (see *Ong Ah Chuan* at 670–671). It follows that these fundamental rules have the status of constitutional rules and, thus, can only be abrogated or amended by a

constitutional amendment under Art 5 of the Singapore Constitution. In contrast, the administrative law rules of natural justice, which apply to judicial review of administrative decisions made under valid legislation, can be abrogated or disapplied by ordinary legislation either directly or indirectly (see, *eg*, *De Smith* at para 8-003, *Regina v Dudley Justices, Ex parte Payne* [1979] 1 WLR 891, *Commissioner of Business Franchises v Borenstein and Another* [1984] VR 375, *Twist v Randwick Municipal Council* (1976) 12 ALR 379 (at 382–383 *per* Barwick CJ), *Selvaraju a/l Ponniah v Suruhanjaya Perkhidmatan Awam Malaysia & Anor* [2007] 7 MLJ 1 and *Public Services Commission Malaysia & Anor v Vickneswary a/p R M Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased)* [2008] 6 MLJ 1).

105 In drawing a conceptual distinction between the *Ong Ah Chuan* rules of natural justice and the administrative law rules of natural justice, I *do not* imply that these two categories of rules of natural justice are different rules. They are the same in nature and function, except that they operate at different levels of our legal order, one to invalidate legislation on the ground of unconstitutionality, and the other to invalidate administrative decisions on the ground of administrative law principles (as to which, see *Chng Suan Tze* at [119]).

106 I mentioned earlier (at [88] above) that the administrative law rules of natural justice consist of two specific rules, *viz*, the rule against bias and the hearing rule. In my view, these two rules are the same in nature as the *Ong Ah Chuan* rules of natural justice as incorporated in substantive legislation in the criminal justice context. This can be seen from the following passage in *Ong Ah Chuan* (at 671 *per* Lord Diplock):

> *One of the fundamental rules of natural justice in the field of criminal law is that a person should not be punished for an offence unless it has been established to the satisfaction of an independent and unbiased tribunal that he committed it*. This involves the tribunal being satisfied that all the physical and mental elements of the offence with which he is charged, conduct and state of mind as well where that is relevant, were present on the part of the accused. To describe this fundamental rule as the "presumption of innocence" may, however, be misleading to those familiar only with English criminal procedure. Observance of the rule does not call for the perpetuation in Singapore of technical rules of evidence and permitted modes of proof of facts precisely as they stood at the date of the commencement of the Constitution. These are largely a legacy of the role played by juries in the administration of criminal justice in England as it developed over the centuries. Some of them may be inappropriate to the conduct of criminal trials in Singapore. *What fundamental rules of natural justice do require is that there should be material before the court that is logically probative of facts sufficient to constitute the offence with which the accused is charged*. [emphasis added]

107 The above passage states, in substance, that our criminal justice system contains the following fundamental elements: (a) the accused can be convicted of the offence charged only if the ingredients of the offence have been proved by the Prosecution according to the standard of proof applicable to criminal proceedings (*ie*, the standard of beyond reasonable doubt); (b) the tribunal trying the accused must be independent and unbiased; and (c) the accused must be heard on his defence to the offence charged. Accordingly, legislation that abrogates any of these fundamental elements may be open to challenge on the ground of inconsistency with Art 9(1).

108 To return to the more immediate question raised by the Natural Justice Issue, since the administrative law rules of natural justice were part of the common law of Singapore even before the commencement of the very first predecessor of the Singapore Constitution, there is no reason why, in principle, they cannot apply to the making of a clemency decision, which is an executive decision, albeit one made under a constitutional power. In other words, even though the grant of clemency is a matter of executive grace and not of legal right, I see no reason why the administrative law rules of

natural justice should not apply to the clemency process, *provided* the application of these rules is not inconsistent with the terms of Art 22P – an issue which I shall now examine.

Whether applying the administrative law rules of natural justice to the clemency process would be inconsistent with Art 22P

(1) The rule against bias

109 As mentioned earlier (see [96] above), the Respondent argues (*inter alia*) that the rule against apparent bias is not applicable to the clemency process because Art 22P(2) requires the Attorney-General, who (in his capacity as the Public Prosecutor) initiated the criminal proceedings against the offender concerned, to give his opinion on the report of the trial judge and (if there is an appeal from the trial judge's decision) the report of the presiding judge of the appellate court on the case. This requirement, it is contended, is inconsistent with the rule against apparent bias; therefore, Art 22P itself has abrogated the rule.

110 With respect, I do not accept the logic of the above argument. When the Attorney-General decides whether or not to prosecute an offender for an offence, his decision is based on whether there is sufficient evidence to show that the offender committed that offence. In contrast, when the Attorney-General is giving his opinion under Art 22P(2), he is not giving an opinion on the same matter (as he has already decided that the offender should be prosecuted, and as the offender has already been charged, tried by a court of law and convicted), but is instead giving an opinion on whether there is a case for granting clemency to the offender. There is no conflict of interest involved. In any case, the issue of bias is relevant not so much to the opinion of the Attorney-General as to the decision of the ultimate authority on whether or not to grant clemency – it is the possibility of bias on the part of the ultimate authority that is relevant for the purposes of the rule against bias as applied to the clemency process.

111 In my view, the rule against bias does apply to the ultimate authority in the clemency regime. In our local context, it is clear from the terms of Art 22P that the ultimate authority is the President since it is in him that the clemency power is vested. What is disputed in this appeal (and this forms the Discretion Issue) is whether the President acts in his discretion in exercising the clemency power, or whether he is bound by the Cabinet's advice. If the former represents the correct constitutional position, then what is relevant, *vis-à-vis* the rule against bias, is the possibility of bias on the President's part; if, however, the latter is the correct constitutional position, then what is of concern is the possibility of bias on the Cabinet's part.

112 Regardless of whether it is the possibility of bias on the President's part or on the Cabinet's part that is relevant for the purposes of the rule against bias, I accept that it is not beyond the realms of possibility for the President or one or more members of the Cabinet to be placed in a position of conflict of interest *vis-à-vis* the clemency decision to be made (*eg*, if the President or a member of the Cabinet is related to the offender in question by blood or by other ties of kinship). But, it is also important to bear in mind that an allegation of bias or conflict of interest on the part of the ultimate authority is, in effect, a factual assertion. Given the evidentiary rule that "he who asserts must prove", such an assertion will be accepted by the court only if it is proved to the court's satisfaction. In this regard, I would add that the issue of bias is less likely to arise when clemency is *not* granted (see *Epuru Sudhakar*) than when it *is* granted: this is because in the former scenario, the ultimate authority has merely decided to let the law take its course.

(2) The hearing rule

113 In contrast to my ruling on the applicability of the rule against bias, I am of the view that the hearing rule does not apply to the clemency process. As mentioned at [27] above, the clemency power is derived from the prerogative of mercy, which is a *common law* power. Historically, at common law, an offender seeking mercy had no right to be heard during the clemency process (see, *eg*, *Horwitz v Connor*, *Hanratty*, *de Freitas* and *Reckley*). This was the position in Singapore when the clemency power was a prerogative power. After the clemency power in Singapore became a constitutional power (in the sense of a power entrenched in a written Constitution (as to which, see [169]–[171] below)), the common law position that an offender had no right of hearing during the clemency process continued to apply. In the words of Lord Diplock in *de Freitas* at 247 (as applied *mutatis mutandis* to our local context), "[e]xcept in so far as it may have been altered by the Constitution[,] the legal nature of the exercise of the royal prerogative of mercy in [Singapore] *remain[ed] the same as it was in England at common law*" [emphasis added].

114 In short, the hearing rule has never applied to the clemency process in Singapore, both during the time when the clemency power was a prerogative power and, subsequently, after this power became a constitutional power. This situation is reflected by the absence of any provision in Art 22P for an offender (regardless of the offence which he has been convicted of) to be heard during the clemency process. This is the position even in a death sentence case. All that Art 22P(2) specifically provides for in a death sentence case is that the Art 22P(2) materials relating to the offender must be considered by the Cabinet impartially and in good faith before it advises the President on the exercise of the clemency power (see [82]–[83] above). Notably, Art 22P(2) does not provide for any right on the part of the offender in a death sentence case to file a clemency petition. Furthermore, even if the offender files a clemency petition, under the terms of Art 22P(2), the petition does not form part of the Art 22P(2) materials. That said, it is an established procedure in death sentence cases for the Prisons Department to ask the offender (through his counsel) to file a clemency petition, if he wishes, within three months of his conviction (or of the conclusion of his appeal against conviction and/or sentence, as the case may be). If the offender does file a clemency petition, the Cabinet will no doubt consider it together with the Art 22P(2) materials relating to the offender before advising the President on the exercise of the clemency power.

115 For the foregoing reasons, I hold that whilst the rule against bias applies to the clemency process, the hearing rule does not.

Whether the Law Minister's statements created a reasonable suspicion of bias by reason of predetermination

116 With the foregoing analysis of the law in mind, I now examine Mr Ravi's argument that the Law Minister's statements have engendered "a reasonable suspicion of *bias by reason of predetermination*" [note: 16] [emphasis added]. Mr Ravi alleges that the Law Minister and, in turn, the rest of the Cabinet have already predetermined the advice to be given to the President *vis-à-vis* whether the Appellant should be granted clemency. The question before this court is whether there is any merit in this allegation.

117 In the court below, Mr Ravi contended that the Law Minister's statements gave rise to "a reasonable suspicion of bias by reason of predetermination" [note: 17] as they showed that:

(a) the Law Minister and, in turn, the rest of the Cabinet predetermined, even before receiving any fresh clemency petition which the Appellant might file, that the Appellant should not be granted clemency (see prayer 6 of OS 740/2010); and

(b) the Law Minister and his fellow Cabinet Ministers also predetermined, prior to the release of this court's judgment in *Yong Vui Kong (No 2)* on 14 May 2010, that the Appellant should not be granted clemency in the event of his appeal (*viz*, CCA 13/2008) being dismissed (see prayer 7 of OS 740/2010).

Those arguments were rejected by the Judge.

118 Mr Ravi reiterated the above arguments before this court. In order to evaluate their merits, it is necessary to examine closely the material parts of the Law Minister's statements as reported in the 10 May 2010 edition of *TODAY*. They are as follows: [note: 18]

> [The Law Minister] was replying to a resident during a dialogue session at Siglap South Community Centre who asked if there would be changes on *this policy* [*ie*, the mandatory death penalty for serious drug trafficking offences], in light of the case of [the Appellant].
>
> …
>
> "You save one life here, but 10 other lives will be gone. What will your choice be?"
>
> If [the Appellant] escapes the death penalty*, drug barons will think the signal is that young and vulnerable traffickers will be spared* and can be used as drug mules, argued [the Law Minister].
>
> [emphasis added]

The following passage from the 15 May 2010 edition of *TODAY* is also relevant: [note: 19]

> The resident had asked if [the Appellant]'s case would affect *Singapore's laws on the mandatory death penalty*.
>
> [The Law Minister] replied: "[The Appellant] (who was sentenced to hang for trafficking in 47g of heroin) is young. But if we say, 'We let you go', what's the signal we're sending?
>
> "We're sending a signal to all drug barons out there: Just make sure you choose a victim who's young or a mother of a young child and use them as the people to carry drugs into Singapore."
>
> [emphasis added]

119 In my view, there are four difficulties with Mr Ravi's attempt to make out a case of "reasonable suspicion of bias by reason of predetermination" [note: 20] based on the Law Minister's statements.

120 First, if one reads the material portions of the Law Minister's statements in their proper context and in good faith (*ie*, without attributing bad faith to the Law Minister as a starting point), it is plain that the Law Minister's statements were nothing more than an articulation of the Government's policy of adopting a tough approach to serious drug trafficking offences by imposing the death penalty as the mandatory punishment for these offences so as to check and deter them. Under s 213 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed), which was the applicable provision at the time of the Appellant's offence (see now s 314 of the Criminal Procedure Code 2010 (Act 15 of 2010)), the minimum age for imposing the death penalty on an offender is the age of 18 (taking the age of the offender at the time he committed the offence in question). Hence, when the Law Minister referred to the Appellant as "young", [note: 21] he was doing no more than restating the legislative policy on the

minimum age at which the death sentence can be imposed on an offender and pointing out that if clemency were to be shown to the Appellant simply because he was only 19 years old at the time of his offence, the aforesaid legislative policy would be undermined. The Law Minister was *not* in any way indicating that the Appellant, in the event of his appeal in CCA 13/2008 being dismissed, should not be granted clemency.

121 Second, in arguing that the Law Minister's statements have given rise to "a reasonable suspicion of bias by reason of predetermination", [note: 22] Mr Ravi has conveniently ignored in its entirety the reasoning of the High Court of Australia in *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 ("*Jia Legeng*") and *Hot Holdings Pty Limited v Creasy and Others* (2002) 210 CLR 438. *Jia Legeng*, in particular, is pertinent in the present appeal.

122 The facts of *Jia Legeng* are as follows. A Chinese national living in Australia ("Jia") applied for a Special Entry Permit. Pending the processing of his application, Jia committed a number of offences in Australia and was duly convicted. Subsequently, his application for a Special Entry Permit was rejected by the Minister for Immigration and Multicultural Affairs ("the Immigration Minister"). Jia appealed to the Administrative Appeals Tribunal ("the Tribunal"), which set aside the Immigration Minister's decision and remitted the matter to the Immigration Minister with a direction that Jia qualified for a Transitional (Permanent) Visa. Shortly after the Tribunal's decision, the Immigration Minister, in a radio interview, expressed his concern about the Tribunal's decision and the way in which the Tribunal had dealt with a number of cases similar to that of Jia. The Immigration Minister did grant Jia a Transitional (Permanent) Visa as the Tribunal directed, but then exercised his discretion under s 501 of the Migration Act 1958 (Cth) ("the 1958 Migration Act") to cancel the visa on the ground that Jia was not a person of good character; the Immigration Minister also exercised his discretion under s 502 of that Act to declare Jia an excluded person. Jia applied for judicial review of the Immigration Minister's decision, contending that it was affected by bias or, alternatively, had been made in circumstances where there was a reasonable apprehension of bias.

123 The High Court of Australia ruled that the Immigration Minister's decision was not vitiated by bias. In their joint judgment, Gleeson CJ and Gummow J explained their reasoning as follows (see *Jia Legeng* at [102]):

> … [L]awyers usually equate "bias" with a departure from the standard of even-handed justice which the law requires from those who occupy judicial, or quasi-judicial, office. The [Immigration] Minister is in a different position. The statutory powers in question [*ie*, the statutory powers under ss 501 and 502 of the 1958 Migration Act] have been reposed in a political official, a member of the Executive Government, who not only has general accountability to the electorate and to Parliament, but who, in s 502, is made subject to a specific form of parliamentary accountability. … The powers given by ss 501 and 502 … [enable] the [Immigration] Minister in effect to reverse the practical consequences of decisions of the Tribunal in the cases of the persons involved, even though no new facts or circumstances ha[ve] arisen; and even though the [Immigration] Minister [was] involved in the proceedings before the Tribunal. As the circumstances of the radio interview demonstrate, the [Immigration] Minister himself can be drawn into public debate about a matter in respect of which he may consider exercising his powers. He [may] equally well [be] asked questions about the cases in Parliament. *The position of the [Immigration] Minister is substantially different from that of a judge, or quasi-judical officer, adjudicating in adversarial litigation. It would be wrong to apply to his conduct the standards of detachment which apply to judicial officers or jurors*. There is no reason to conclude that the legislature intended to impose such standards upon the [Immigration] Minister, and every reason to conclude otherwise. [emphasis added]

124 In essence, what the High Court of Australia held in *Jia Legeng* was that where a Minister made a public statement on the Government's policy on any issue, the rule against bias ought not to be applied to him as though he were a judicial officer or a quasi-judicial officer should he later be required to exercise his discretion on a matter relating to that policy. I agree with this reasoning as, otherwise, no Minister would be able to speak on any governmental policy in public lest his statement be construed as a predetermination of any matter which he might subsequently have to decide in connection with the policy in question. As stated in *Thatcher* at [13] (see [95] above), the duty of fairness which the rule against bias imposes on a Minister must, by virtue of a Minister's position, be less onerous than the corresponding duty of fairness incumbent on a judge or a tribunal exercising a quasi-judicial function.

125 Applying the reasoning in *Jia Legeng* analogously, I find it unrealistic to regard the Law Minister's statements as evidence of bias or as giving rise to "a reasonable suspicion of bias by reason of predetermination". [note: 23] To do so would mean, as I have just stated, that a government Minister cannot say anything in public (or, for that matter, even in Parliament) to explain the policy of any law which he has introduced or is about to introduce without creating the spectre of bias in relation to (and thereby disqualifying him from deciding) any particular matter apropos that law which might subsequently require his decision.

126 The third weakness in Mr Ravi's contention on predetermination arising from the Law Minister's statements is that Mr Ravi has side-stepped the difficulty of explaining how, even if those statements do indeed evince the Law Minister's predetermination not to grant clemency to the Appellant, such predetermination can be attributed to the other 20 Ministers who currently make up the Cabinet. In this regard, Mr Ravi's assertion that the Law Minister's statements have also infected the other members of the Cabinet with bias consists only of empty words, supported neither by facts nor by logic. That assertion has been advanced merely to get over the difficulty of attributing the Law Minister's bias (assuming it is indeed reasonably apprehended) to the other 20 members of the Cabinet. Although all Cabinet decisions are made collectively under our constitutional system, which is based on the Westminster model, in any discussion at a Cabinet meeting on what advice should be given to the President on the clemency decision to be made in a particular death sentence case, each Minister can only speak for himself. Hence, Mr Ravi's argument, even taken at its highest, cannot cross this much higher hurdle of having to show that when the Law Minister made the statements complained of (*ie*, the Law Minister's statements), he was speaking on behalf of his Cabinet colleagues in relation to the advice to be given to the President apropos whether or not clemency should be granted to the Appellant.

127 The fourth flaw in Mr Ravi's argument on predetermination arising from the Law Minister's statements is one that I mentioned during the parties' oral arguments before this court – namely, if one accepts Mr Ravi's arguments, the logical consequence would be that any articulation by a Cabinet Minister of the Government's policy on the death penalty would lead to the entire Cabinet being disqualified from advising the President under Art 22P(2) on the exercise of the clemency power in all death sentence cases. The result (as contended by Mr Ravi) would be that none of the death sentences imposed on convicted persons can be carried out. Effectively, the Appellant's death sentence (and, likewise, all other death sentences which have yet to be carried out) would have to be commuted. This would also in effect mean the abrogation or suspension of the death penalty, a consequence too absurd to contemplate.

128 For the aforesaid reasons, there is no merit in Mr Ravi's contention that the clemency process *vis-à-vis* the Appellant has been tainted by "a reasonable suspicion of bias by reason of predetermination" [note: 24] as a result of the Law Minister's statements.

The Disclosure Issue

129 I now move on to discuss the Disclosure Issue. To recapitulate, this issue concerns the question of whether the Appellant is entitled to disclosure of the Art 22P(2) materials relating to his case so as to afford him an opportunity to make adequate representations to the President on any fresh clemency petition which he (the Appellant) may file. In the present case, the Art 22P(2) materials consist of: (a) the report of the judge who heard *Yong Vui Kong (HC)*, (b) my report on CCA 13/2008 in my capacity as the presiding judge of the appellate court in that appeal; and (c) the opinion of the Attorney-General on these two reports. Mr Ravi relies strongly and *solely* on the majority judgment in *Lewis* (and its progeny) in support of his argument that the Appellant is entitled to such disclosure. As mentioned at sub-para (c)(iii) of [55] above, the majority in *Lewis* held that the offender in a death sentence case was entitled to be given a full copy – and not merely the gist – of all the materials placed before the JPC for consideration in connection with its constitutional duty to advise the Governor-General on the exercise of the clemency power; this was to enable the offender to make proper representations on clemency to the JPC for its consideration (for convenience, I shall hereafter refer to this holding as "the disclosure holding in *Lewis*").

130 In so ruling, the majority in *Lewis* departed from two previous decisions of the Privy Council, namely, *de Freitas* and *Reckley*, both of which held that the offender in a death sentence case was not entitled to disclosure of the materials placed before the advisory committee for consideration in connection with its constitutional duty to advise the ultimate authority on the exercise of the prerogative of mercy. In *de Freitas*, the reason given by Lord Diplock was that the decision of the ultimate authority (*viz*, the Governor-General of Trinidad and Tobago) as to how the clemency power should be exercised was "a purely discretionary act" (at 247). In *Reckley*, Lord Goff agreed with Lord Diplock on the ground (*inter alia*) that the relevant Bahamian constitutional provisions gave no right to an offender who had been sentenced to death to present a clemency petition to the ultimate authority (*viz*, the Governor-General of the Bahamas) – the clemency process was constitutionally required in a death sentence case, whether or not a clemency petition was made.

131 It is clear from the majority judgment in *Lewis* that the key reason for the majority's decision to depart from previous authorities was Art 4 of the American Convention on Human Rights of 1969 ("the 1969 American Convention"), which, at the time *Lewis* was decided, Jamaica had ratified but had yet to incorporate into its domestic law. Article 4(6) of this Convention provides as follows:

> Every person condemned to death shall have *the right to apply for amnesty, pardon, or commutation of sentence*, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority. [emphasis added]

Pursuant to Art 4(6), at the time *Lewis* was decided, Jamaica allowed offenders sentenced to death to present clemency petitions to the UNHRC and the IACHR, and also allowed the JPC to consider the recommendations of these international bodies for the purpose of advising the Governor-General on the exercise of the clemency power (see *Lewis* at 80). Given this context, it was unsurprising that the majority in *Lewis* held that the applicants in *Lewis* had a right to make representations to the JPC and to disclosure of the materials required to be placed before the JPC, including the reports of international human rights bodies such as the IACHR.

132 As mentioned at [56] above, Lord Hoffmann, who had also been a member of the Board in *Reckley*, delivered a powerful dissent in *Lewis*. His Lordship protested that the disclosure holding in *Lewis* was a mistake as there was no justification for departing from the legal position laid down in *Reckley*, given that nothing had changed in the intervening period of approximately five years since that case was decided (see *Lewis* at 88–90):

> The Board now proposes to depart from its recent decisions on all [the] points [raised in *Lewis*]. I do not think that there is any justification for doing so. …
>
> …
>
> I entirely accept that the Board is not, as a matter of law, bound by its previous decisions. And I respect the conviction of the majority that this is an occasion to exercise the Board's power to overrule the earlier cases. But I think it is a mistake. The fact that the Board has the power to depart from earlier decisions does not mean that there are no principles which should guide it in deciding whether to do so.
>
> …
>
> … If the Board feels able to depart from a previous decision simply because its members on a given occasion have a "doctrinal disposition to come out differently", the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean.

I also mentioned earlier (at [61] above) that in the Australian case of *Eastman (ACT)*, the ACT Court of Appeal likewise did not consider that the Privy Council decisions on appeals from the Caribbean States necessarily offered a *principled* basis for departing from the position laid down by *Horwitz v Connor* (which is *in pari materia* with the position laid down by *de Freitas* and *Reckley*).

133 In the present case, the Judge rejected the disclosure holding in *Lewis* (as well as the other aspects of the majority decision). At [64] of the HC Judgment, he said:

> The Jamaican position [post-*Lewis*] is based on the premise that the clemency process ameliorates the problems with a mandatory death penalty. It is therefore inapplicable to Singapore, where the Court of Appeal has held [in *Yong Vui Kong (No 2)*], in a challenge brought by [the Appellant] himself, that the mandatory death penalty is perfectly constitutional. The Jamaican position is also based on that jurisdiction's ratification of [the 1969 American Convention], a treaty which does not apply in the Singapore context.

134 I agree with the Judge's rejection of the majority judgment in *Lewis* as being irrelevant to our local context. That judgment was based on the finding that by virtue of the 1969 American Convention, the applicants in *Lewis* had a legal right to petition for clemency (see *Lewis* at 80, where Lord Slynn expressly pointed out that the majority in *Lewis* "ha[d] so far dealt with [the] matter *on the basis that there [was] a right to put in 'representations'*" [emphasis added]). In contrast, Lord Hoffmann, in his dissenting judgment, gave a very convincing explanation of why that Convention should not have been applied in that case.

135 In contrast to the legal backdrop against which *Lewis* was decided, the legal position in Singapore is absolutely clear. There is no Convention that binds Singapore to give a right of hearing to an offender during the clemency process in a death sentence case – as I held in my discussion of the Natural Justice Issue, an offender has no right to be heard during the clemency process. Further, the terms of Art 22P do not give an offender any right to petition for clemency. Since the existence of a right to disclosure of the Art 22P(2) materials is premised on the offender in a death sentence case having a right to petition for clemency and/or a right to be heard during the clemency process, it follows that no such right of disclosure exists under Art 22P. As Lord Goff explained in *Reckley* in rejecting the argument by TR (the offender in that case) that the principle of fairness entailed that he should be entitled to make representations to the advisory committee and should, for that

purpose, be entitled to see the materials placed before the committee (at 542):

> In support of this proposition, reliance was placed on the decision of the House of Lords in *Reg. v. Secretary of State for the Home Department, Ex parte Doody* [1994] 1 A.C. 531. That case was however concerned with a different subject matter, viz. the exercise by the Home Secretary of his statutory power to release on licence a person serving a sentence of life imprisonment. It was there held that the Home Secretary was bound to afford a prisoner serving a mandatory life sentence the opportunity to submit in writing representations as to the penal element in the sentence which he must serve, and further that, to enable those representations to be effective, he [*ie*, the Home Secretary] must make available to the prisoner the gist of the material upon which he will [rely] when making his decision. What is important for present purposes, however, is that Lord Mustill (with whose speech the remainder of the Appellate Committee agreed) was careful, at p. 556G–H, to distinguish that case from a case in which the prisoner is "essentially in mercy" where there is "no ground to ascribe to him the rights which fairness might otherwise demand:" see p. 556H. That is precisely the present case. Indeed it is clear from the constitutional provisions under which the advisory committee is established, and its functions are regulated, that *the condemned man has no right to make representations to the committee in a death sentence case*; *and, that being so, there is no basis on which he is entitled to be supplied with the gist of other material before the committee. This is entirely consistent with a regime under which a purely personal discretion is vested in the minister*. Of course the condemned man is at liberty to make such representations, in which event the minister can (and no doubt will in practice) cause such representations to be placed before the advisory committee, although the condemned man has no right that he should do so. [emphasis added]

This is likewise the position in our local context under Art 22P.

136 I am also of the view that the disclosure holding in *Lewis* is flawed in so far as it was influenced by considerations such as: (a) the possibility that false or incorrect materials might be placed before the advisory body tasked with advising the ultimate authority on how the clemency power should be exercised; and/or (b) the possibility that the advisory body's members might be unconsciously biased against the offender or might decide the matter in an arbitrary or perverse manner. The majority in *Lewis* expressed these concerns (at 76) as follows:

> On the face of it there are compelling reasons why a body which is required to consider a petition for mercy should be required to receive the representations of a man condemned to die and why he should have an opportunity in doing so to see and comment on the other material which is before that body. This is the last chance[,] and in so far as it is possible to ensure that proper procedural standards are maintained[,] that should be done. *Material may be put before the body by persons palpably biased against the convicted man or which is demonstrably false or which is genuinely mistaken but capable of correction. Information may be available which by error of counsel or honest forgetfulness by the condemned man has not been brought out before*. Similarly if it is said that the opinion of the [advisory body] is taken in an arbitrary or perverse way – on the throw of a dice or on the basis of a convicted man's hairstyle – or is otherwise arrived at in an improper, unreasonable way, the court should prima facie be able to investigate.
>
> Are there special reasons why this should not be so?
>
> In [*Reckley*] much importance was attached to the composition of the Advisory Committee on the Prerogative of Mercy. The experience, status, independence of the members is no doubt an important feature of the process. It provides a valuable protection and prevents the autocratic rejection of a petition by one person. Their Lordships do not however accept that this is a

conclusive reason why judicial review should be excluded. *[The members] may unconsciously be biased, there may still be inadvertently a gross breach of fairness in the way the proceedings are conducted*. …

[emphasis added]

137 In my view, these concerns may be relevant for the purpose of deciding whether, as a matter of principle, the clemency power is justiciable. However, they are not relevant to the question of whether the materials placed before the advisory body should be disclosed to an offender sentenced to death who has no right to present a clemency petition and no right to be heard during the clemency process.

138 More importantly, in my view, the risks highlighted by the majority in *Lewis* have no bearing on the clemency process under Art 22P(2) (*ie*, the clemency process in death sentence cases), where the persons directly involved in the making of a clemency decision are:

(a) the trial judge and, if there is an appeal, the presiding judge of the appellate court, who are required to write reports on the case;

(b) the Attorney-General, who is required to give his opinion on those reports;

(c) the members of the Cabinet, who are required to consider the aforesaid reports and the Attorney-General's opinion (*viz*, the Art 22P(2) materials) impartially and in good faith before advising the President on how the clemency power should be exercised; and

(d) the President, who is the ultimate authority in our local context.

139 Given the high constitutional offices held by these individuals, no court is justified in hypothesising that the trial judge and (where there is an appeal) the presiding judge of the appellate court may write biased or inaccurate reports, or that the Attorney-General may give a spiteful opinion on the offender's case, or that the Cabinet members and/or the President may be unconsciously prejudiced against the offender or may not give his case full and fair consideration. In my view, until the contrary is shown, the courts, instead of proceeding on such fanciful hypotheses, should proceed on the basis of presumptive legality encapsulated in the maxim "*omnia praesumuntur rite esse acta*" – all things are presumed to have been done rightly and regularly, *ie*, in conformity with the law.

140 For the above reasons, I hold that the Appellant has no right to disclosure of the Art 22P(2) materials relating to his case.

Conclusion

141 For the reasons given above, I would dismiss this appeal.

Andrew Phang Boon Leong and V K Rajah JJA:

Introduction

142 This appeal raises a very important issue as to whether the clemency power under Art 22P of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Singapore Constitution") is amenable to judicial review, and, if so, the extent to which the exercise of this power is subject to the legal principles applicable in judicial review proceedings. We have read the foregoing judgment of the Chief Justice ("Chan CJ"), and we fully agree with it. For convenience, we

will, in this judgment, use the same abbreviations as those used in Chan CJ's judgment.

143 As the background facts have been fully set out in the HC Judgment as well as in Chan CJ's judgment, we will not revisit them in this judgment. Suffice it to say that in this appeal, the Appellant is challenging the Judge's dismissal of his application for judicial review in OS 740/2010, which was made under O 53 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). OS 740/2010 is an extraordinary application because the principal relief sought by the Appellant is a declaration – a form of relief which is not provided for under O 53 of the Rules of Court (see [25] above and also [189] below). The specific declaratory order which the Appellant seeks is a declaration that "it is the … President and not his advisors [*ie*, the Cabinet, in the present context] who has the discretion to decide whether or not to grant the [Appellant]'s petition for clemency, this being a matter in respect of which the President may decide in his discretion under Article 21(2) of the [Singapore] Constitution". [note: 25] Together with this declaration, the Appellant seeks, *inter alia*, an order prohibiting the President from delegating to the Cabinet his discretion to grant clemency. The other reliefs sought by the Appellant are set out in the judgment of Chan CJ (at [8]–[9] above).

144 In his judgment, Chan CJ categorised the issues raised by the Appellant in this appeal under the following five heads (at [15] above):

(a) the Discretion Issue;

(b) the Justiciability Issue;

(c) the Natural Justice Issue;

(d) the Disclosure Issue; and

(e) the Declaratory Relief Issue.

In addition, as mentioned in Chan CJ's judgment (see [23] above), Mr Ravi raised the Legitimate Expectation Issue.

Mr Ravi's application for Chan CJ's disqualification

145 Before we consider the issues set out in the preceding paragraph, it is desirable that we express our views on Mr Ravi's surprising application, made right at the outset of the hearing of this appeal without any prior notice to either this court or the Respondent, to disqualify Chan CJ from hearing the appeal (for convenience, we will hereafter refer to this application as "Mr Ravi's disqualification application").

146 As can be seen from [16] above, Mr Ravi's objection to Chan CJ's hearing the appeal was based on Chan CJ's tenure as the Attorney-General of Singapore from 1992 to 2006 – a fact which was known to Mr Ravi long before this appeal was filed. Specifically, Mr Ravi's objection was directed at the Discretion Issue. Mr Ravi argued that Chan CJ, during his tenure as Attorney-General, must have

advised the President that he (the President) had no discretion in exercising the clemency power under Art 22P. That being the case, Mr Ravi submitted, should Chan CJ now decide that the President *has* a discretion in exercising the clemency power, he would have been remiss or negligent in his advice to the President regarding clemency decisions made during his tenure as Attorney-General. This, Mr Ravi contended, would put Chan CJ in conflict as regards any interpretation of the Singapore Constitution favourable to the Appellant's case on the Discretion Issue, *ie*, any interpretation to the effect that the President has a discretion in deciding whether or not to grant clemency to an offender under Art 22P. In effect, the implicit suggestion at the heart of Mr Ravi's disqualification application was that Chan CJ would have to decide against the Appellant on the Discretion Issue in order to cover up his remiss or negligence (if any) during his tenure as Attorney-General.

The law on judicial disqualification

147 The basic rule which underlies the law on judicial disqualification is that a judge is automatically disqualified from hearing a case if he has a personal interest in the outcome of the case (see *William Dimes v The Proprietors of the Grand Junction Canal, T E Skidmore, A Boham, and W W Martin* (1852) 3 HL Cas 759; 10 ER 301 ("*Dimes*")). The rationale of this rule ("the judicial disqualification rule") is that where a judge is personally interested in the outcome of the case before him, he will not be able to give an impartial and objective judgment on the case. If he were to be allowed to adjudicate on the case notwithstanding this risk, that would, without more, undermine public confidence in the integrity of the administration of justice (see *Dimes* at 793–794; 315). A more recent and well-publicised example of the application of this rule is the decision of a panel of the House of Lords in *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 setting aside the earlier decision of another panel of the House of Lords in *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte* [2000] 1 AC 61 on the ground of apparent bias on the part of one of the members of the panel in the earlier decision.

148 Although it is of the utmost importance that judges adhere scrupulously to the judicial disqualification rule, we are of the view that any attempt to recuse a judge from hearing a case on the ground of conflict of interest must be based on credible grounds, and must not be motivated by any extraneous purpose; otherwise, the rule could become a charter for abuse by manipulative advocates. In this regard, we respectfully endorse the English Court of Appeal's observation in *Locabail (UK) Ltd v Bayfield Properties Ltd and Another* [2000] QB 451 ("*Locabail*") that a judge "would be as wrong to yield to a *tenuous or frivolous objection* as he would [be] to ignore an objection of substance" [emphasis added] (at [21]).

This court's reasons for dismissing Mr Ravi's disqualification application

149 This court dismissed Mr Ravi's disqualification application for the reasons set out by Chan CJ at [17]–[22] above. We would only add that in our view, Mr Ravi's disqualification application was frivolous as it was based on the most tenuous of grounds (to echo the words of the English Court of Appeal in *Locabail* at [21]). Having regard to the timing of the application and the manner in which it was made, it appeared to us that the application was calculated to diminish the judicial process and disrupt the hearing of the appeal so that a fresh hearing had to be convened. Significantly, when pressed by this court to explain why he had made the application in a dramatic fashion only at the commencement of the hearing of this appeal when he had known as early as 4 January 2011 (some two weeks before the hearing) that Chan CJ would preside over this appeal, Mr Ravi admitted that he "*had thought about it, but … never seriously felt that it would be that serious*" [note: i] [emphasis added]. In our view, whatever concerns Mr Ravi might have had about Chan CJ's hearing this appeal could not have been as serious as he claimed.

150 Our conclusion that Mr Ravi's disqualification application was devoid of merit was reinforced by the consideration that Mr Ravi ought to have known that one of the central premises of his disqualification application – *viz*, that the President can act in his discretion in exercising the clemency power – was wholly untenable, notwithstanding that it had been boldly dressed up as a plausible *legal* argument. As we will show below, Mr Ravi, in seeking to derive support for his argument from the legislative history of the clemency power in this jurisdiction, referred (albeit in a piecemeal fashion) to materials that proved, at every juncture, that his argument was in fact flawed in its understanding of both the relevant legislative history as well as the very language of the relevant provisions of the Singapore Constitution. Mr Ravi's own research showed (although Mr Ravi failed to either recognise or accept this) that: (a) *it was established law in Singapore even before 9 August 1965 ("Singapore Day"), the day on which Singapore became an independent sovereign republic, that in our local context, the ultimate authority (as defined at*[33] *above) had no discretion in exercising the clemency power; and (b) this legal position was confirmed by Parliament on Singapore Day itself*. All the previous Presidents since Singapore Day have exercised the clemency power on the basis that they were bound by the advice of the Cabinet. As Chan CJ observed in his judgment (at [22] above), Mr Ravi wanted to overturn this aspect of our constitutional order for no reason other than that it suited his purpose in the present proceedings.

The Discretion Issue

151 Turning now to the Discretion Issue, this issue raises a very simple point of law, namely: under our constitutional framework, does the ultimate authority have a discretion in exercising the clemency power, or is he bound to follow the Cabinet's advice? In this regard, it should be noted that the Discretion Issue does *not* concern the question of who the ultimate authority is under our constitutional framework – it is clear from the wording of Art 22P (especially Art 22P(1)) that the ultimate authority in our local context is the President since it is he who carries out the formal act of either granting or refusing clemency to an offender (in this regard, see also [111] above).

The Judge's decision on the Discretion Issue

152 Mr Ravi's argument before the Judge was that the President did not necessarily have to act on the advice of the Cabinet in exercising the clemency power. His argument rested specifically on the word "may" in the phrase "may, on the advice of the Cabinet" in Art 22P(1). It was contended that Art 22P vested the clemency power in the President and not the Cabinet; therefore, in view of Art 21(2)(*i*) of the Singapore Constitution, the President could act in his own discretion in exercising the clemency power. Mr Ravi cited no authority for his argument, perhaps because he was unable to find any supporting authority and/or perhaps because he thought it was unnecessary to cite any authority in support, the law on this point being (in his view) clear and well established.

153 In the HC Judgment, the Judge rejected Mr Ravi's argument as follows:

> 69 Under the [Singapore] Constitution, the default position is that the President acts in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet. This is specifically provided for under Art 21(1) of the [Singapore] Constitution:
>
> **Discharge and performance of functions of President**
>
> **21**.—(1) Except as provided by this Constitution, the President shall, in the 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*.

…

The exceptions to this default position are exhaustively set out in Art 21(2), which provides that the President may act in his discretion for the following functions:

> (2) The President *may act in his discretion* in the performance of the following functions:
>
> (*a*) the appointment of the Prime Minister in accordance with Article 25;
>
> (*b*) the withholding of consent to a request for a dissolution of Parliament;
>
> (*c*) the withholding of assent to any Bill under Article *5A, 22E, 22H, 144(2) or 148A;
>
> *Article 5A was not in operation at the date of this Reprint.
>
> (*d*) the withholding of concurrence under Article 144 to any guarantee or loan to be given or raised by the Government;
>
> (*e*) the withholding of concurrence and approval to the appointments and budgets of the statutory boards and Government companies to which Articles 22A and 22C, respectively, apply;
>
> (*f*) the disapproval of transactions referred to in Article 22B(7), 22D(6) or 148G;
>
> (*g*) the withholding of concurrence under Article 151(4) in relation to the detention or further detention of any person under any law or ordinance made or promulgated in pursuance of Part XII;
>
> (*h*) the exercise of his functions under section 12 of the Maintenance of Religious Harmony Act (Cap. 167A); and
>
> (*i*) any other function the performance of which the President is authorised by this Constitution to act in his discretion.
>
> ...
>
> (5) The Legislature may by law make provision to require the President to act after consultation with, or on the recommendation of, any person or body of persons other than the Cabinet in the exercise of his functions other than —
>
> (*a*) functions exercisable in his discretion; and
>
> (*b*) functions with respect to the exercise of which provision is made in any other provision of this Constitution.
>
> …

70 Mr Ravi submitted that based on the saving clause under Art 21(2)(*i*), the President may act in his own discretion to grant pardons since the discretion to do so is vested with the President and not the Cabinet under [Art] 22P. However[,] on a plain reading of [Art] 22P(1), it is clear that the President does not have any discretion and can only act on the advice of the Cabinet in granting a pardon to a convicted offender …

[emphasis in original]

Our decision on the Discretion Issue

154 We agree with the Judge's interpretation of Art 22P as set out in the above extract from the HC Judgment. Mr Ravi's argument on the Discretion Issue is wholly misconceived. Mr Ravi pursued his argument even though he (and, presumably, his advisers) must have known that the position which he advocated was not the law under a Constitution based on the Westminster model (such as the Singapore Constitution (see *Ong Ah Chuan* at 669)) since he actually referred to (*inter alia*) a decision of the Supreme Court of India (*viz*, *Maru Ram*) in connection with his argument on the Justiciability Issue, (seemingly) without being aware that that decision made it abundantly clear that the ultimate authority had no discretion in the exercise of the clemency power (see below at [175]). Indeed, as alluded to at [150] above, in citing authorities which he believed to be supportive of his case on the Discretion Issue, Mr Ravi in fact undermined his own case.

155 In our view, there are four factors which render Mr Ravi's argument on the Discretion Issue untenable, namely:

(a) the wording of Art 22P;

(b) the legislative history of the clemency power in this jurisdiction;

(c) case law on the clemency power; and

(d) the nature of the President's powers under Singapore's constitutional framework.

We shall elaborate on these factors seriatim in the analysis which follows.

The wording of Art 22P

156 Taking the first of the aforesaid factors, the wording of Art 22P makes it clear that the President has no discretion as to how the clemency power should be exercised in a particular case. This Article provides as follows:

22P.—(1) The President, as occasion shall arise, *may, on the advice of the Cabinet* —

(*a*) grant a pardon to any accomplice in any offence who gives information which leads to the conviction of the principal offender or any one of the principal offenders, if more than one;

(*b*) grant to any offender convicted of any offence in any court in Singapore, a pardon, free or subject to lawful conditions, or any reprieve or respite, either indefinite or for such period as the President may think fit, of the execution of any sentence pronounced on such offender; or

(*c*) remit the whole or any part of such sentence or of any penalty or forfeiture imposed by law.

(2) Where any offender has been condemned to death by the sentence of any court and in the event of an appeal such sentence has been confirmed by the appellate court, the President shall

cause the reports which are made to him by the Judge who tried the case and the Chief Justice or other presiding Judge of the appellate court to be forwarded to the Attorney-General with instructions that, after the Attorney-General has given his opinion thereon, the reports shall be sent, together with the Attorney-General's opinion, to the Cabinet *so that the Cabinet may advise the President on the exercise of the power conferred on him by clause (1)*.

[emphasis added]

157 The words "on the advice of the Cabinet" in Art 22P(1) cannot be any clearer, especially when they are read in the light of the words "act in accordance with the advice of the Cabinet" in Art 21(1). The aforesaid words in Art 22P(1) mean what they say. They do not mean what Mr Ravi says they mean, *ie*, that the President may act *against* the advice of the Cabinet. Mr Ravi has made great play on the word "may" in the phrase "may, on the advice of the Cabinet" in Art 22P(1) as vesting a personal discretion in the President. Mr Ravi is wrong. The word "may" in that context does not connote a personal discretion which allows the President to reject the advice of the Cabinet as to how the clemency power is to be exercised in a particular case – otherwise, the advice of the Cabinet would be pointless. The word "may" in Art 22P(1) simply vests the President with the constitutional power to make a clemency decision (as defined at sub-para (c) of [34] above) on the advice of the Cabinet – *ie*, that word has an authorising or enabling effect, absent which the President would have no legal power to make any decision under Art 22P.

The legislative history of the clemency power in this jurisdiction

158 Our view that the President has no discretion in exercising the clemency power is incontrovertibly supported by the legislative history of the clemency power in this jurisdiction (presently embodied in Art 22P).

159 From 1819 to 1963, Singapore was part of the UK. The first direct election to the Legislative Council of Singapore was held in 1948 (Singapore having become a separate Crown colony in 1946) pursuant to the Singapore Colony Orders in Council 1946 to 1948, which comprised the Singapore Colony Order in Council 1946 (GN No S 2/1946), the Singapore Colony (Amendment) Order in Council 1947 (GN No S 128/1947), the Singapore Colony (Amendment) Order in Council 1948 (GN No S 75/1948) and the Singapore Colony (Amendment) (No 2) Order in Council 1948 (GN No S 113/1948). The first real change in Singapore's constitutional order came with the appointment in 1953 of the constitutional commission headed by Sir George Rendel (commonly known as "the Rendel Commission"), most of whose recommendations were implemented through the promulgation of the Singapore Colony Order in Council 1955 (GN No S 38/1955) ("the 1955 Order in Council").

(1) The 1955 Order in Council

160 Section 6 of the 1955 Order in Council provided for a Governor and Commander-in-Chief ("Governor") over the Colony of Singapore. Under s 19, the Governor was obliged to consult with the Council of Ministers (consisting of the Governor as President, three *ex officio* Ministers and six appointed Ministers (see s 17)), and had to act in accordance with the advice of the Council of Ministers in the exercise of all powers conferred upon him, except (*inter alia*) "in the exercise of any power which he [was] directed or empowered to exercise in his discretion" (see s 19(1)(i)). The power to grant pardon was conferred upon the Governor under s 14 as follows:

14. When any offence has been committed for which the offender may be tried in the Colony the Governor may, as he shall see fit, in Her Majesty's name and on Her Majesty's behalf, grant a pardon to any accomplice in such offence who shall give such information as shall lead to the

conviction of the principal offender, or of any one of such principal offenders if more than one; and further, may grant to any offender convicted of any such offence in any Court within the Colony a pardon, either free or subject to lawful conditions, or any respite, either indefinite or for such period as the Governor may think fit, of the execution of any sentence passed on such offender, and may remit the whole or any part of such sentence or of any penalties or forfeitures otherwise due to Her Majesty.

That power was expressly stated in s 15 to be exercisable by the Governor "*acting in his discretion*" [emphasis added].

161 The Instructions Passed under the Royal Sign Manual and Signet to the Governor and Commander-in-Chief of the Colony of Singapore dated 24 February 1955 ("the 1955 Royal Instructions"), which were published in the *Colony of Singapore Government Gazette Supplement* (GN No S 73/1955) on 4 March 1955, formed the constitutional framework for the Colony of Singapore at that time, along with the 1955 Order in Council. Under s 12 of the 1955 Royal Instructions, the exercise of the power of pardon in death sentence cases was regulated as follows:

> **12**.—(1)(*a*) Whenever any offender shall have been condemned by the sentence of any civil court in the Colony to suffer death, *the Governor shall call upon the Judge who presided at the trial to make to him a written report of the case of such offender, and shall cause such report to be taken into consideration at a meeting of the Council of Ministers*, and he may cause the said Judge to be specially summoned to attend such meeting and to produce his notes taken thereat.
>
> (*b*) The Governor shall not pardon or reprieve any such offender unless it shall appear expedient to him so to do *upon receiving the advice of the Council of Ministers* thereon; but *he is to decide either to extend or to withhold a pardon or reprieve according to his own deliberate judgment, whether the members of the Council of Ministers concur therein or otherwise*; entering, nevertheless, in the minutes of the Council his reasons at length in case he should decide … such question in opposition to the judgment of the majority of the members thereof.
>
> [emphasis added]

162 The terms of s 12 of the 1955 Royal Instructions made it plain that the Governor had a personal discretion in exercising the power of pardon. While he had the benefit of the advice of the Council of Ministers, he could decide, "*according to his own deliberate judgment*" [emphasis added] (see s 12(1)(*b*)), not to follow that advice. This was consistent with the Governor's express power to grant pardon "acting in his discretion" under s 15 of the 1955 Order in Council. However, as s 12(1)(*b*) of the 1955 Royal Instructions also made clear, the Governor's discretion in this regard was *not wholly unfettered*: in the event that the Governor decided to disregard the advice of the Council of Ministers, he was obliged to give his reasons for doing so "at length" (see s 12(1)(*b*)). It is noteworthy that such a situation obtained during a time when Singapore was still a British colony.

(2) The Singapore (Constitution) Order in Council 1958 (GN No S 293/1958)

163 Time did not stand still after the aforesaid constitutional framework was established. The British government decided to grant statehood to Singapore in 1959, leading to the Colony of Singapore being renamed "the State of Singapore" under the State of Singapore Act 1958 (c 59) (UK) ("the State of Singapore Act"). Although Singapore ceased to be called "the Colony of Singapore", its legislature remained subject to the provisions of the Colonial Laws Validity Act 1865 (c 63) (UK) (see O Hood Phillips, "The Constitution of the State of Singapore" [1960] PL 50 ("*Phillips*") at p 53).

164 On 3 June 1959 (following the general election held on 30 May 1959), the Singapore (Constitution) Order in Council 1958 (GN No S 293/1958) ("the 1958 Order in Council"), which was made pursuant to s 1 of the State of Singapore Act, came into force. Under the 1958 Order in Council, responsibility for internal security, finance and law was transferred from the UK to elected Ministers. Singapore thereby acquired *internal self-government*, with a Prime Minister and other Ministers forming the Cabinet, which was collectively responsible to the Legislative Assembly. The Instructions Passed under the Royal Sign Manual and Signet to the Yang di-Pertuan Negara, Singapore, dated 12 December 1958 ("the 1958 Royal Instructions"), which were published in the *Colony of Singapore Government Gazette Supplement* (GN No S 166/1959) on 10 April 1959, completed the constitutional instruments that were applicable to Singapore at that particular point in time.

165 Under s 4(1) of the 1958 Order in Council, the Queen's representative in Singapore was given the Malay title of "Yang di-Pertuan Negara" (*ie*, Head of State). The functions of the Yang di-Pertuan Negara were "similar to those of a Governor-General of a Dominion or Head of State as regards such matters as the appointment and dismissal of Ministers, assenting to Bills and dissolving the [Legislative] Assembly" (see *Phillips* at p 55). Under s 9 of the 1958 Order in Council, the Yang di-Pertuan Negara had the power to grant pardon as follows:

> 9. The Yang di-Pertuan Negara, as occasion shall arise, may, in Her Majesty's name and on Her Majesty's behalf —
>
> (i) grant a pardon to any accomplice in any offence (being an offence for which the offender may be tried in Singapore) who gives information which leads to the conviction of the principal offender or any one of the principal offenders if more than one;
>
> (ii) grant to any offender convicted of any offence in any court in Singapore a pardon, either free or subject to lawful conditions, or any respite, either indefinite or for such period as the Yang di-Pertuan Negara may think fit, of the execution of any sentence passed on such offender; and
>
> (iii) remit the whole or any part of any such sentence or of any penalty or forfeiture otherwise due to Her Majesty:
>
> Provided that the power conferred by this section shall not extend to any trial before, or any conviction in or any sentence, penalty or forfeiture imposed by any court-martial (however styled) other than a court-martial constituted by or under any law which was enacted (whether before or after the appointed day [as defined in s 1(1) of the 1958 Order in Council]) by any legislature in Singapore and which is applicable only to naval or military forces raised in Singapore by virtue of any law so enacted.

166 Unlike the 1955 Order in Council and the 1955 Royal Instructions, *neither* the 1958 Order in Council *nor* the 1958 Royal Instructions expressly provided that the power of pardon was exercisable by the Yang di-Pertuan Negara acting in his discretion. Instead, s 2(*a*) of the 1958 Royal Instructions required the Yang di-Pertuan Negara to consult with the Cabinet, or a Minister acting under the general authority of the Cabinet, in the exercise of all his powers and functions, other than: (a) those powers and functions which were expressed to be exercisable by him on the advice of any person or authority other than the Cabinet (for example, on the advice of the United Kingdom Commissioner or the Public Service Commission referred to in s 15 and s 76 respectively of the 1958 Order in Council); and (b) those powers and functions which were expressed to be exercisable by him in his discretion (for example, the appointment and the dismissal of the Prime Minister under s 21(1) and s 22(1)(*c*)

respectively of the 1958 Order in Council, and the dissolution of the Legislative Assembly under s 62(3) thereof). Where the Yang di-Pertuan Negara was required to consult with the Cabinet or a Minister or some other person or authority, he *must* act in accordance with the advice given (see ss 2(*b*) and 2(*c*) of the 1958 Royal Instructions). Particularly in relation to the exercise of *the power of pardon*, s 1 of the 1958 Royal Instructions provided for the following procedure:

> 1. Where any offender has been condemned to death by the sentence of any court, the Yang di-Pertuan Negara shall cause the report which is made to him by the Judge who tried the case to be forwarded to the State Advocate-General with instructions that, after the State Advocate-General has advised thereon, the report shall be sent, together with the State Advocate-General's advice, to the Cabinet, *so that the Cabinet may advise the Yang di-Pertuan Negara on the exercise of the powers conferred on him by section 9 of the [1958 Order in Council]*. [emphasis added]

(3) The Sabah, Sarawak and Singapore (State Constitutions) Order in Council 1963 (GN Sp No S 1/1963)

167 Singapore obtained its independence from the UK by joining the Federation of Malaya and the former British colonies of North Borneo and Sarawak to form the Federation of Malaysia ("the Federation") on 16 September 1963. Under s 4(2)(*c*) of the Malaysia Act (No 26 of 1963) (M'sia) ("the Malaysia Act"), Singapore became a State of the Federation. As a State of the Federation, Singapore operated the State Constitution set out in Sched 3 to the Sabah, Sarawak and Singapore (State Constitutions) Order in Council 1963 (GN Sp No S 1/1963) ("the Constitution of the State of Singapore") under the overarching purview of the Federation of Malaysia Constitution ("the 1963 Federal Constitution"). Under Art 5(3) of the Constitution of the State of Singapore, the Legislature was empowered to make provision for requiring the Yang di-Pertuan Negara to act after consultation with or on the recommendation of any person or body of persons other than the Cabinet in the exercise of his functions, other than functions exercisable in his discretion (see Art 5(3)(*a*) of the Constitution of the State of Singapore) and functions in respect of which provision for the exercise was made in any other provision of either the Constitution of the State of Singapore or the 1963 Federal Constitution (see Art 5(3)(*b*) of the Constitution of the State of Singapore).

168 Under Art 42(1) of the 1963 Federal Constitution, the Ruler or Governor of a State (which, under s 5 of the Malaysia Act, included the Yang di-Pertuan Negara in Singapore) had the power to grant pardon in respect of all offences committed in his State, except offences tried by court martial. Under Art 42(4)(*b*), this power was to be exercised on the advice of a Pardons Board constituted for that State. There was no provision expressly stating that the power to grant pardon was exercisable by the Yang di-Pertuan Negara acting in his personal discretion.

(4) The Republic of Singapore Independence Act 1965 (Act 9 of 1965) and Art 22P

169 When Singapore left the Federation on Singapore Day (*ie*, 9 August 1965) and became an independent sovereign republic, the Singapore government retained the Constitution of the State of Singapore and supplemented it with specific Articles from the 1963 Federal Constitution via the Republic of Singapore Independence Act 1965 (Act 9 of 1965) (referred to hereafter as "Act 9 of 1965" for short) (see *Evolution of a Revolution: Forty Years of the Singapore Constitution* (Li-ann Thio & Kevin Y L Tan eds) (Routledge-Cavendish, 2009) at p 1). This is not surprising in view of the fact that the Constitution of the *State* of Singapore, as its very title suggests, was incomplete at that particular point in time inasmuch as it was intended for a *State* within a federation, and not for a fully independent nation as such.

170 More significantly for the purposes of the present appeal, Act 9 of 1965 reserved to the President the power to grant pardon as follows:

> **Grant of pardon**.
>
> **8**.—(1) The President, as occasion shall arise, may, on the advice of the Cabinet —
>
> (*a*) grant a pardon to any accomplice in any offence who gives information which leads to the conviction of the principal offender or any one of the principal offenders, if more than one;
>
> (*b*) grant to any offender convicted of any offence in any court in Singapore, a pardon, free or subject to lawful conditions, or any reprieve or respite, either indefinite or for such period as the President may think fit, of the execution of any sentence pronounced on such offender; or
>
> (*c*) remit the whole or any part of such sentence or of any penalty or forfeiture imposed by law.
>
> (2) Where any offender has been condemned to death by the sentence of any court and in the event of an appeal such sentence has been confirmed by the appellate court, the President shall cause the reports which are made to him by the Judge who tried the case and the Chief Justice or other presiding Judge of the appellate court to be forwarded to the Attorney-General with instructions that, after the Attorney-General has given his opinion thereon, the reports shall be sent, together with the Attorney-General's opinion, to the Cabinet so that the Cabinet may advise the President on the exercise of the power conferred on him by subsection (1).

Sections 8(1) and 8(2) of Act 9 of 1965 were subsequently reproduced as ss 8(1) and 8(2) of the Republic of Singapore Independence Act 1965 (1985 Rev Ed) ("the RSIA").

171 Sections 8(1) and 8(2) of Act 9 of 1965/the RSIA have since been incorporated, verbatim, into the Singapore Constitution as Arts 22P(1) and 22P(2) respectively (see *Halsbury's Laws of Singapore* vol 1 (LexisNexis, 2008 Reissue) at para 10.843, fn 1). The specific procedure laid down in Art 22P(2) is the same as the procedure which has been adopted since the 1958 Order in Council and the 1958 Royal Instructions came into force, *viz*: the President (previously, the Yang di-Pertuan Negara) shall cause the report made to him by the trial judge and (in the event of an appeal from the trial judge's decision) the report made to him by the presiding judge of the appellate court to be forwarded to the Attorney-General (previously, the State Advocate-General) for the Attorney-General to provide his opinion thereon, and, thereafter, the aforesaid report(s) shall be sent, together with the Attorney-General's opinion, to the Cabinet for its consideration so that it may advise the President on the exercise of the clemency power.

172 Mr Ravi, in trying to make good his argument on the Discretion Issue, traced the historical development of the clemency power in this jurisdiction from the time when the clemency power was a prerogative power exercisable by the Governor of Singapore and then the Yang di-Pertuan Negara right through to Singapore Day, when this power was enacted via s 8 of Act 9 of 1965. In the course of doing so, Mr Ravi referred to the speech in Parliament of the then Prime Minister, Mr Lee Kuan Yew ("Mr Lee"), at the second reading of the Bill to enact Act 9 of 1965 (*viz*, the Republic of Singapore Independence Bill 1965 (Bill 43 of 1965) ("Bill 43/1965")), as follows (see *Singapore Parliamentary Debates, Official Report* (22 December 1965) vol 24 at col 439):

> Clause 8 [which later became s 8 of Act 9 of 1965] invests the power of pardon [i]n the President *who will exercise it in accordance with the advice of the Cabinet*. [emphasis added]

173 Nothing can be clearer than the above words in showing that the clemency power, although exercised by and in the name of the President, is to be exercised *in accordance with* the advice of the Cabinet. In this regard, it is also significant that the Explanatory Statement to Bill 43/1965 stated that "[t]he power of pardon [was to be] made exercisable by the President *on the advice of the Cabinet*" [emphasis added]. Mr Ravi cited Mr Lee's speech in Parliament at the second reading of Bill 43/1965 ("Mr Lee's parliamentary speech on Bill 43/1965") to support his argument (*vis-à-vis* the Justiciability Issue) that the clemency power was subject to judicial review, but it failed to register in his mind that the same statement completely undermined his other argument (*vis-à-vis* the Discretion Issue) that the President was not bound by the advice of the Cabinet in exercising the clemency power.

174 Therefore, as the legislative history of the clemency power in Singapore clearly demonstrates, apart from ss 14 and 15 of the 1955 Order in Council and s 12 of the 1955 Royal Instructions (which made it abundantly clear that the Governor could act in his discretion according to his own deliberate judgment when exercising the clemency power, albeit with certain significant conditions (see above at [160]–[162])), none of the legislative predecessors of Art 22P since 1958 (when, significantly, Singapore was on the cusp of embarking on the incipient steps of its journey towards full independence) expressly stated that the President could exercise the clemency power acting in his discretion. The legislative history of the clemency power in this jurisdiction indicates plainly that Art 22P excludes any role for the President's personal discretion in the exercise of the clemency power.

Case law on the clemency power

175 Let us now turn to the relevant case law on the exercise of the clemency power which supports our conclusion that the President has no discretion in exercising the clemency power. In the context of the Justiciability Issue, Mr Ravi referred to two Indian Supreme Court decisions (*viz*, *Maru Ram* and *Epuru Sudhakar* (see [65]–[66] above)) as authorities in support of his argument that the clemency power was not immune from judicial review. However, he appeared to have overlooked the following passage from [61] of *Maru Ram*, which undermined his argument, *vis-à-vis* the Discretion Issue, that the President could act in his own discretion in exercising the clemency power and was not bound by the advice of the Cabinet. At [61] of *Maru Ram*, three members of the court (namely, Y V Chandrachud CJ, P N Bhagwati J and V R Krishna Iyer J) stated in their joint judgment:

> It is fundamental to the Westminster system that the Cabinet rules and the Queen reigns being too deeply rooted as foundational to our system no serious encounter was met from the learned Solicitor-General whose sure grasp of fundamentals did not permit him to controvert the proposition, that ***the President and the Governor, be they ever so high in textual terminology, are but functional euphemisms promptly acting on and*** *only* ***on the advice of the Council of Ministers have in a narrow area of power*** . The subject is now beyond controversy, this Court having authoritatively laid down the law in [*Samsher Singh v State of Punjab and another* AIR 1974 SC 2192]. So, we agree, even without reference to Article 367(1) [of the Indian Constitution, which provides for the application of the General Clauses Act 1897 (Act No 10 of 1897) (India) to the interpretation of the Indian Constitution] and Sections 3(8)(*b*) and 3(60)(*b*) of the General Clauses Act, 1897 [which define the terms "Central Government" and "State Government" respectively as used in Indian legislation], that, in the matter of exercise of the powers under Articles 72 and 161 [*ie*, the power vested in, respectively, the President and the Governor of a State to grant clemency], ***the two highest dignitaries in our constitutional***

> ***scheme act and must act not on their own judgment but in accordance with the aid and advice of the ministers*** . Article 74, after the 42nd Amendment [which states that the President shall, in the exercise of his functions, act in accordance with the advice of the Council of Ministers] silences speculation and obligates compliance. The Governor vis-à-vis his Cabinet is no higher than the President save in a narrow area which does not include Article 161. ***The constitutional conclusion is that the Governor is but a shorthand expression for the State Government and the President is an abbreviation for the Central Government*** . [emphasis in original in italics; emphasis added in bold italics]

176 In *Kehar Singh and another v Union of India and another* AIR 1989 SC 653 ("*Kehar Singh*") (which Mr Ravi did not cite to us), the Supreme Court of India (consisting of a bench of five judges) said (at [7] *per* R S Pathak CJ):

> The power to pardon is a part of the constitutional scheme … in the Indian Republic. It has been reposed by the people through the Constitution in the Head of the State, and enjoys high status. It is a constitutional responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context. It is not denied, and indeed it has been repeatedly affirmed in the course of argument by [counsel for the petitioners] that the power to pardon rests on the advice tendered by the Executive to the President, who subject to the provisions of Art. 74(1) of the Constitution, must act in accordance with such advice. We may point out that the Constitution Bench of this Court held in [*Maru Ram*] that *the [clemency] power under Art. 72 is to be exercised on the advice of the Central Government and not by the President on his own, and that the advice of the Government binds the Head of the State*. [emphasis added]

177 In our view, what was stated by the Supreme Court of India in *Maru Ram* and *Kehar Singh* is elementary constitutional law that any student of the subject must know, namely: under a Constitution based on the Westminster model, like ours, the President is a constitutional Head of State and must act on the advice of the Cabinet in the exercise of his executive powers, except for those powers that, by express constitutional authority, he may exercise acting in his discretion, such as the appointment of the Prime Minister and the dissolution of Parliament. This also brings us to the next factor which rebuts Mr Ravi's argument on the Discretion Issue, namely, the nature of the President's powers under our constitutional framework. Specifically, what we will examine below is whether the clemency power is one of the powers which the Singapore Constitution permits the President to exercise in his discretion.

The nature of the President's powers under Singapore's constitutional framework

178 Prior to the establishment of the elected Presidency via s 4 of the Constitution of the Republic of Singapore (Amendment) Act 1991 (Act 5 of 1991), which came into effect on 30 November 1991, the position under our constitutional framework was that "[t]he President was a constitutional Head of State with very little discretionary powers, save in the appointment of the Prime Minister and the dissolution of Parliament at the request of the Prime Minister" (see Kevin Y L Tan & Thio Li-ann, *Constitutional Law in Malaysia and Singapore* (LexisNexis, 3rd Ed, 2010) at p 362; see also the authorities cited by Chan CJ at [19] above). In contrast, after the establishment of the elected Presidency, the President was vested with certain additional discretionary powers ("the additional discretionary powers"). These are now specified in Art 21(2) of the Singapore Constitution (reproduced in the extract from [69] of the HC Judgment quoted at [153] above), which explicitly declares that the President "*may act in his discretion*" [emphasis added] in exercising such powers. These words clearly serve to distinguish the additional discretionary powers from the President's traditional pre-existing powers prior to the establishment of the elected Presidency, the latter powers

being exercisable by the President only "in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet" (see Art 21(1)).

179 According to *Constitutional Amendments to Safeguard Financial Assets and the Integrity of the Public Services* (White Paper, Cmd 10 of 1988, 29 July 1988), the purpose of conferring the additional discretionary powers on the President was to enable him to "[protect] the Republic's financial assets, and [preserve] the integrity of the public services" (at para 20). In a subsequent White Paper explaining the proposed constitutional amendments to provide for the elected Presidency, *Safeguarding Financial Assets and the Integrity of the Public Services: The Constitution of the Republic of Singapore (Amendment No 3) Bill* (Cmd 11 of 1990, 27 August 1990), the additional discretionary powers were summarised as follows:

> **Summary of Discretionary Powers**
>
> 48. The President will have the discretion to withhold concurrence to:
>
> a. the budgets of the Government, and of key Government companies and statutory boards;
>
> b. any debt, guarantee or loan to be incurred, given or raised by the Government;
>
> c. certain appointments to office;
>
> d. requests to issue a Proclamation of Emergency;
>
> e. detentions under the Internal Security Act, contrary to the recommendations of the Advisory Board; and
>
> f. decisions by a Minister under the Maintenance of Religious Harmony Bill, contrary to the recommendations of the Presidential Council for Religious Harmony.
>
> 49. The President can also authorise Director CPIB to carry out any inquiries or investigations into a Minister if the Prime Minister had withheld consent to such investigations.

The power to pardon is conspicuously absent from this list of personal discretionary powers. This is manifestly understandable, given that that power is not a power or function which is related to the President's ultimate duty of protecting Singapore's financial assets and preserving the integrity of the public services.

180 In the light of all these considerations, on a plain reading of the Singapore Constitution, the President may not exercise the clemency power acting in his personal discretion. Instead, the clemency power falls under the default position with regard to the President's powers as stated in Art 21(1), *ie*: "the President shall … act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet". Thus, the President may only exercise the clemency power in favour of an offender in circumstances where the Cabinet has advised him to do so. Where the Cabinet has advised him not to grant a pardon, there is no provision under either Art 22P or elsewhere in the Singapore Constitution that confers upon the President the power to act in his own personal discretion contrary to the advice of the Cabinet.

Summary of our views on Mr Ravi's argument on the Discretion Issue

181 The four factors analysed above – namely, the wording of Art 22P, the legislative history of the

clemency power in this jurisdiction, case law on the clemency power and the nature of the President's powers under our constitutional framework – demonstrate the fallacy of Mr Ravi's argument on the Discretion Issue (*ie*, that the President may exercise the clemency power in his own discretion and is not bound by the Cabinet's advice). What undermined this argument completely was that Mr Ravi himself rebutted it (albeit unwittingly) when he read to us Mr Lee's parliamentary speech on Bill 43/1965 in the mistaken belief that that speech supported his argument (see [172]–[173] above). In this regard, we would caution that whilst counsel has unfettered licence to raise all arguable points of law in support of a client's case, it is improper for counsel to make an obviously hopeless argument (*ie*, an argument which any reasonable lawyer would know is bound to fail), especially if he advances the argument for an extraneous purpose. Such conduct may (depending on the facts in question) amount to a serious abuse of process, even if it occurs in a situation where counsel is acting for a client in a case of the utmost gravity for the client, as in the present case.

The Legitimate Expectation Issue

182 Having dealt with the Discretion Issue, we now turn to the related matter of the Legitimate Expectation Issue. As pointed out by Chan CJ at [23] above, Mr Ravi raised the Legitimate Expectation Issue only in the course of his oral submissions before this court, and did not give advance notice to the Respondent even though he knew beforehand that he was going to bring up the issue. He claimed that, as in the case of his objection to Chan CJ's hearing this appeal, it did not occur to him until very late in the day that the Legitimate Expectation Issue was an issue which "would be that serious". [note: ii]

183 Be that as it may, we reproduce below in full Mr Ravi's argument on the Legitimate Expectation Issue as set out in the "First Speaking Note on Behalf of the Appellant" ("the First Speaking Note"):

> 14. Further, a legitimate expectation has arisen to the effect that it is the President who will make the clemency decision.
>
> 15. It is well-established that: "Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so": *Nadarajah v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68]. This principle is in the interests of "good administration" and such expectations may "go beyond enforceable legal rights, provided they have some reasonable basis": *Attorney General v Ng Yuen Shiu* [1983] 2 W.L.R. 735 at **638F** (Privy Council).
>
> 16. The legitimate expectation in the present case derives from two sources.
>
> 17. In the first place, the Respondent himself in the present proceedings has accepted that "in theory it is the President who exercises the prerogative of mercy" (**exhibit MR-3 at** [31])[.]
>
> 18. In additions [*sic*], reliance is placed on the following newspaper articles relating to the clemency power (emphasis added):
>
> a. "Reprieve for Death Row woman":
>
> **THE President has granted clemency** to Siti Aminah binti Jaffar, 24, a prisoner convicted and sentenced to death under the Misuse of Drugs Act, 1973.
>
> She is the first person in Singapore to obtain **reprieve from the President** for a death

sentence in a drug case …

b. "Drugs woman told she will not hang": *The Straits Times*, 19 February 1983, page 9:

… A WOMAN who was sentenced to death five years ago has been told she will not be hanged …

… **President Devan has granted Siti Aminah clemency**. Instead she will serve life imprisonment.

c. **"President Wee pardons Somkid**": *The Straits Times*, 22 July 1989, page 1:

PRESIDENT Wee Kim Wee yesterday granted clemency to Somkid Kamjan, the Thai illegal worker whose sentence of caning and jail provoked an uproar in Bangkok …

d. **"President grants clemency** to mum on death row", *The Straits Times*:

A MOTHER of two who was in [*sic*] death row for more than six years escaped the gallows after she was **granted clemency by the President** on Saturday.

It was only the fourth time in more than three decades that **such a reprieve was granted by a head of state** in Singapore …

e. "Youth on murder rap escapes gallows", *The Straits Times*, 5 May 1998, page 3:

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A 19 YEAR-OLD youth, who was awaiting the death sentence for murder, was spared from the gallows after **receiving a pardon from President Ong Teng Cheong**.

19. In relation to these articles it is important to note that *The Straits Times* is under the direct control of the government and therefore its contents constitute statements of State practice authorised by the government. As a result, and in accordance with the principle of legitimate expectation, the law will require the State to abide by its repeatedly expressed statement of practice that the clemency decision is to be taken by the President, and not the Cabinet.

[underlining and emphasis in bold in original]

184 It is unnecessary for us to discuss at length the law in Singapore as regards legitimate expectations for the purposes of dealing with Mr Ravi's argument on the Legitimate Expectation Issue. This is because Mr Ravi himself destroyed his own case on this issue when, in contradiction of his stance that the Appellant had a legitimate expectation that the clemency power would be exercised by the President in his discretion, he read out to us a newspaper article (*viz*, Sue-Ann Chia, "Drug trafficker asks for clemency" *The Straits Times* (19 March 2005) at p 42), in which President S R Nathan ("President Nathan") was reported to have said:

… It is the Cabinet that considers all the factors involved before making a decision on [a] plea for clemency …

… I am constitutionally bound to adhere to the rules of [the] Cabinet and [its] recommendations. …

By the above statements, President Nathan was clearly reiterating to the public the constitutional position that he was under a duty to act in accordance with the advice of the Cabinet in exercising the power of clemency, and had no discretion in the matter, even if he personally wished to grant clemency to an offender. In view of President Nathan's statements, it was impossible for Mr Ravi to argue that the Appellant had a legitimate expectation that the President would do what he had said he could *not* do, *ie*, exercise the clemency power in his discretion.

185 Indeed, we found Mr Ravi's argument on the Legitimate Expectation Issue to be absolutely without merit, both on the facts *and* on the law. With regard to the facts relied on by Mr Ravi (*ie*, the newspaper reports mentioned at para 18 of the First Speaking Note), those newspaper reports do not in any way show that the President or the Cabinet previously promised the public that the clemency power would be exercised by the President in his discretion, as opposed to on the Cabinet's advice. None of the aforesaid newspaper reports conveys a representation or promise of any kind, whether by the President or the Cabinet, other than a representation of fact that, as reported, an offender had been granted clemency. Mr Ravi's contention that "*The Straits Times* is under the direct control of the government and therefore its contents constitute statements of State practice authorised by the government" [note: 26] clearly rests on misconceived assumptions of the relationship between the press and the elected government in Singapore. Thus, any purported expectation on the Appellant's part that the President exercises the clemency power in his own discretion is neither legitimate nor well founded.

186 Apropos the law on legitimate expectations, for an alleged legitimate expectation to give rise to enforceable legal rights, it is not enough that the alleged expectation exists; it must, in addition, be legitimate. An expectation is legitimate only if it is founded upon a promise or practice by a public authority that can be said to be bound to fulfil the expectation. Clear statutory words will override any expectation (see the House of Lords decision of *Regina v Director of Public Prosecutions, Ex parte Kebilene and Others* [2000] 2 AC 326 at 368 *per* Lord Steyn). In this regard, we have demonstrated above (at [156]–[157]) that it is clear from the words "on the advice of the Cabinet" in Art 22P(1) that the President cannot possibly make any promise to an offender that he will act in his discretion in deciding whether or not to grant clemency to that offender.

187 In short, Mr Ravi has failed to show, both on the facts and on the law, that the expectation relied on by the Appellant exists. That expectation existed only as a theoretical argument advanced by Mr Ravi. It is devoid of any merit, and we reject it. We are also minded to observe that the lack of even a scintilla of legal substance in Mr Ravi's submissions on this issue (as well as on the Discretion Issue), coupled with the manner in which the submissions were made, borders on an abuse of process.

The other issues arising in this appeal

188 The other issues in this appeal which we have to decide are the Justiciability Issue, the Natural Justice Issue, the Disclosure Issue and the Declaratory Relief Issue (see [15] and [144] above). With regard to all these four issues, we agree with Chan CJ's carefully reasoned judgment. We would only add a few observations of our own.

189 *Vis-à-vis* the Declaratory Relief Issue, as Chan CJ pointed out at [25] above, O 53 of the Rules of Court does not provide for declaratory relief (see also [143] above). Accordingly, the declaration sought by the Appellant (reproduced at [143] above) was a non-starter from the outset, and the same applies to all the other reliefs prayed for in OS 740/2010 which are dependent on that declaration being granted.

190 In so far as the Justiciability Issue is concerned, we agree with Chan CJ that the clemency power is subject to judicial review if it is exercised contrary to the *Chng Suan Tze* principle as elaborated on in *Phyllis Tan* (see [80] above).

191 With respect to the Natural Justice Issue, we agree with Chan CJ that the rule against bias applies to the clemency process in principle, whereas the hearing rule does not (see, respectively, [111] and [113] above). We would also point out that, given the nature of the clemency power, the Cabinet, when advising the President on the exercise of this power, cannot be held to the same standard of impartiality and objectivity as that applicable to a court of law or a tribunal exercising a quasi-judicial function. All that is required of the Cabinet is that it must abide by the process set out in Art 22P, and must give its consideration fairly and objectively to the matter at hand, having regard to the purpose of the clemency power.

192 In this regard, it is important to bear in mind that the grant of clemency is an act of grace on the part of the ultimate authority. That being so, the Cabinet, in advising the President (the ultimate authority in our local context) on whether or not to grant clemency in a particular case, is entitled to take into account the public policy considerations concerning the nature of the offence in question and the legislative policy underlying the imposition of the prescribed punishment for that offence. The Cabinet is not expected to ignore these policy considerations, and its conduct in giving effect to such considerations by advising the President not to grant clemency in a particular case cannot, without more, amount to bias, whether actual or apparent.

193 With respect to the Disclosure Issue, as noted by Chan CJ, Mr Ravi relied heavily on the disclosure holding in *Lewis* (as defined at [129] above) to support the argument that the Appellant should be given disclosure of the Art 22P(2) materials relating to his case so that he can make adequate representations to the President on any fresh clemency petition which he may wish to file. One of the reasons underlying the disclosure holding in *Lewis* was the concern of the majority in *Lewis* that the advisory body which was to advise the ultimate authority on the exercise of the clemency power might act "in an arbitrary or perverse way … or … in an improper, unreasonable way" (see *Lewis* at 76).

194 Apropos the aforesaid risk, we agree with Chan CJ that it would be unjustifiable for our courts to regard it as a factor favouring Mr Ravi's argument on the Disclosure Issue, given the constitutional standing of the persons involved in the clemency process in our local context. Indeed, in our view, it would be not only unjustifiable, but also wholly improper for our courts to be influenced by this risk. Anything is possible, but the courts should not give countenance to fanciful fears of unfair or unjust practices in the exercise of the clemency power when there is not a single iota of evidence to warrant such fears – which is the position in the present case. Mr Ravi's argument apropos the aforesaid risk is pure conjecture without any factual foundation whatsoever. In this connection, we would also refer to the decision of the Supreme Court of India in *Maru Ram* at [62] (reproduced at, *inter alia*, [65] above) which Mr Ravi relied on to support his argument on the Justiciability Issue. It would appear that, as in the case of his reliance on Mr Lee's parliamentary speech on Bill 43/1965 to support his argument on the Discretion Issue (see [172], [173] and [181] above), Mr Ravi overlooked the following sentence in the concurring judgment of Fazal Ali J, which undermined his argument on the Disclosure Issue (see *Maru Ram* at [94]):

> It cannot be doubted as a proposition of law that where a power is vested in a very high authority, it must be presumed that the said authority would act properly and carefully after an objective consideration of all the aspects of the matter.

195 In our view, it is clear that the decision of the majority in *Lewis* (*viz*, that the offender in a

death sentence case is entitled to the full disclosure of all the materials placed before the advisory body tasked with advising the ultimate authority on the exercise of the clemency power) was based on considerations which have no application here. On the other hand, the decisions of the Privy Council in *de Freitas* and *Reckley* (*viz*, that there is no such right of disclosure for the offender in a death sentence case) were based on considerations which continue to be applicable here. We agree with Chan CJ that the Appellant is not entitled to disclosure of the Art 22P(2) materials relating to his case because an offender seeking clemency has no constitutional right of hearing during the clemency process and does not even have the constitutional right to present a clemency petition (although, as pointed out by Chan CJ (at [114] above), in practice, an offender in a death sentence case is always given the opportunity to present, if he wishes, a clemency petition to the President for consideration under Art 22P).

Conclusion

196 For the reasons given above, like Chan CJ, we are of the view that this appeal has no merit and we dismiss it. There will be no order as to costs, having regard to the subject matter of this appeal.

[note: 1] See the Appellant's Core Bundle ("ACB") at vol 2, Tab 5.

[note: 2] *Ibid*.

[note: 3] *Ibid*.

[note: 4] See ACB at vol 2, Tab 3.

[note: 5] See ACB at vol 2, Tab 4.

[note: 6] See prayer 7 of OS 740/2010 (at ACB vol 2, Tab 3).

[note: 7] See prayer 8 of OS 740/2010 (at ACB vol 2, Tab 3).

[note: 8] See prayer 10 of OS 740/2010 (at ACB vol 2, Tab 3).

[note: 9] See the Respondent's Case filed on 30 November 2010 ("the Respondent's Case") at para 10(A)(ii).

[note: 10] See the Appellant's Case at pp 1–2.

[note: 11] See the court's notes taken at the hearing of the appeal ("the CA's notes of Arguments") at pp 1–5.

[note: 12] See the CA's Notes of Arguments at p 4.

[note: 13] See the CA's Notes of Arguments at p 5.

[note: 14] See the CA's Notes of Arguments at p 2.

[note: 15] See the Respondent's Case at para 252.

[note: 16] See prayer 8 of OS 740/2010 (at ACB vol 2, Tab 3).

[note: 17] *Ibid*.

[note: 18] See ACB at vol 2, Tab 5.

[note: 19] *Ibid*.

[note: 20] See prayer 8 of OS 740/2010 (at ACB vol 2, Tab 3).

[note: 21] See the 15 May 2010 edition of *TODAY* (at ACB vol 2, Tab 5).

[note: 22] See prayer 8 of OS 740/2010 (at ACB vol 2, Tab 3).

[note: 23] *Ibid*.

[note: 24] *Ibid*.

[note: 25] See prayer 2 of OS 740/2010 (at ACB vol 2, Tab 3).

[note: i] See the CA's Notes of Arguments at p 3.

[note: ii] *Ibid*.

[note: 26] See para 19 of the First Speaking Note.