Wong Souk Yee *v* Attorney-General
[2019] SGCA 25

Case Number	: Civil Appeal No 73 of 2018
Decision Date	: 10 April 2019
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JA; Judith Prakash JA; Tay Yong Kwang JA; Steven Chong JA
Counsel Name(s)	: Peter Low, Elaine Low, Priscilla Chia and Ng Bin Hong (Peter Low & Choo LLC) for the appellant; Hri Kumar Nair SC, Hui Choon Kuen, Sivakumar Ramasamy and Andre Chong (Attorney-General's Chambers) for the respondent.
Parties	: Wong Souk Yee — Attorney-General

Administrative Law – Judicial review – Threshold for leave for judicial review

Civil Procedure – Costs – Whether public interest considerations justify departure from usual costs orders

Constitutional Law – Constitution – Interpretation

Elections – Parliament – Vacation of seat

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2018] SGHC 80.]

10 April 2019 Judgment reserved.

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

Introduction

1 On 7 August 2017, Mdm Halimah Yacob ("Mdm Halimah") resigned her seat as a Member of Parliament ("Member") for Marsiling-Yew Tee Group Representation Constituency ("MYT GRC") to stand for the presidential election which was to be held the following month ("the 2017 Presidential Election"). No by-election was called in the aftermath of her resignation. In *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 ("*Vellama*"), we held at [82] that the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution") imposes a duty upon the Prime Minister to call a by-election to fill casual vacancies of elected Members that might arise from time to time. That decision was made in the specific context of a Single Member Constituency ("SMC"), and we concluded there that the duty in question is premised on the proper interpretation of Art 49 of the Constitution. The central question in this appeal is whether a similar duty arises in the context of a vacancy in a Group Representation Constituency ("GRC").

Background

Article 49(1) and the introduction of the GRC scheme

2 Article 49(1) of the Constitution reads:

Filling of vacancies

49.—(1) Whenever the seat of a Member, not being a non-constituency Member, has become vacant for any reason other than a dissolution of Parliament, the vacancy shall be filled by election in the manner provided by or under any law relating to Parliamentary elections for the time being in force.

3 The proper interpretation of Art 49(1) in the present case is to be approached in the context of the introduction of the GRC scheme. As such, we begin by briefly setting out the broad historical developments pertaining to Art 49(1) and the introduction of the GRC scheme. This will provide the necessary background to the discussion that follows.

4 The drafting history of Art 49(1) was extensively discussed in *Vellama* at [58]–[72]. For present purposes, it is sufficient to note that Art 49(1) has remained substantively unchanged since its original enactment as Art 33 in 1965, save that: (a) it was renumbered from Art 33 to Art 49; and (b) some other amendments were made as a result of the introduction of non-constituency Members (see *Vellama* at [60]). At the time of Art 49's original enactment as Art 33, all electoral divisions in Singapore were SMCs, which, as the name implies, are constituencies represented by a single Member.

5 Twenty-three years after the original enactment of Art 49, the GRC scheme was brought into effect in 1988 by means of simultaneous amendments to both the Constitution and the Parliamentary Elections Act (Cap 218, 1985 Rev Ed). These were effected through the Constitution of the Republic of Singapore (Amendment) Act 1988 (Act 9 of 1988) ("the 1988 Constitution Amendment Act") and the Parliamentary Elections (Amendment) Act 1988 (Act 10 of 1988) ("the 1988 PE Amendment Act") respectively. The key amendment introduced by the 1988 Constitution Amendment Act was the insertion into the Constitution of Art 39A, which provides for the designation of constituencies as GRCs. Article 49, which, until then, had only ever applied to SMCs, was not, however, amended. The GRC scheme was introduced to ensure multi-racial representation in Parliament by requiring some constituencies (namely, GRCs) to be contested on a group basis, with each group of candidates having at least one candidate belonging to either the Malay, Indian or other minority community: see Art 39A(2)(*a*) of the Constitution.

The vacating of the seat in MYT GRC

6 The appellant ("the Appellant") is a resident of MYT GRC and a member of the Singapore Democratic Party ("SDP"). In the general election held in September 2015 ("the 2015 General Election"), she contested MYT GRC under the SDP's banner along with three other individuals. A team from the People's Action Party ("PAP") consisting of Mdm Halimah, Mr Ong Teng Koon, Mr Lawrence Wong and Mr Alex Yam also contested the GRC. Mdm Halimah was the only minority community candidate of that team. The PAP team won the election for MYT GRC.

7 On 6 February 2017, Mr Pritam Singh, an elected Member for Aljunied GRC, asked in Parliament whether a by-election would be called in a GRC in the event that a minority community Member ("minority Member") of that GRC were to step down in order to contest a presidential election. Mr Chan Chun Sing, then Minister in the Prime Minister's Office, replied that there would be no need to call a by-election if a single minority Member of a GRC were to resign.

8 As we have already noted, on 7 August 2017, Mdm Halimah resigned her seat as a Member for MYT GRC to stand for the 2017 Presidential Election. No by-election was called, and MYT GRC continues to be represented by the remaining Members of the PAP team which won that constituency

in the 2015 General Election.

The proceedings below

9 On 13 September 2017, the SDP and the Appellant filed Originating Summons No 1034 of 2017 ("OS 1034") in the High Court seeking leave to apply for the following reliefs:

(a) a mandatory order that the three remaining Members of MYT GRC vacate their seats, and that thereafter, a by-election be held "with all convenient speed" for MYT GRC;

(b) a declaratory order that s 24(2A) of the Parliamentary Elections Act (Cap 218, 2011 Rev Ed) ("the PEA") must be interpreted as requiring all the remaining Members of a GRC to vacate their seats when a Member of the GRC vacates his or her seat, or, in the alternative, where the only minority Member of the GRC vacates his or her seat; and

(c) in the alternative, a declaratory order that s 24(2A) of the PEA is void for inconsistency with Art 49(1) of the Constitution.

10 Initially, the Attorney-General ("the Respondent") indicated an intention to challenge the SDP's standing to make the application, but not that of the Appellant since she was a resident of MYT GRC. Since the Appellant's case remained the same regardless of the SDP's involvement as a party to the application, in the interest of saving time and costs, an amendment to OS 1034 was filed on 5 December 2017 removing the SDP as a party to the application. The rest of OS 1034 remained unchanged. As a result, there is no dispute before us as to the Appellant's standing to bring the application.

11 At the hearing before the High Court judge ("the Judge") on 22 January 2018, the parties agreed to have the leave application and the substantive application for relief heard together. This was because the leave application turned on whether the Appellant could show an arguable or *prima facie* case for granting the orders sought in OS 1034, and this involved a question of constitutional interpretation that would traverse the same issues as the substantive application, albeit with a different standard of persuasion being applicable.

12 In the proceedings below, the main thrust of the Appellant's case was that the law required that the remaining Members of MYT GRC vacate their seats and that a by-election then be held in MYT GRC. The Appellant made three main arguments in support of her position:

(a) first, Art 49(1) of the Constitution mandates that a by-election must be called when any seat in a GRC falls vacant for any reason other than a dissolution of Parliament;

(b) second, Art 39A(2) of the Constitution requires that there must be a minority Member for a GRC until the dissolution of Parliament; and

(c) third, voters have the right to be represented by an elected Member of their choice until the dissolution of Parliament pursuant to an "implied right to representation" contained in the Constitution.

13 The Respondent, on the other hand, submitted that s 24(2A) of the PEA specifically prohibited a by-election from being called when any seat in a GRC became vacant unless all the other seats in that GRC had also been vacated. Hence, the Respondent submitted, the issue should correctly be framed in terms of whether s 24(2A) of the PEA was unconstitutional in the light of Art 49(1) of the

Constitution. The Respondent argued that on a proper interpretation of Art 49(1), it did not conflict with s 24(2A). The Respondent highlighted that Parliament, in debating the constitutional and legislative amendments that brought the GRC scheme into force, had expressly considered the issue of what would occur in the event that a Member vacated a GRC seat, and had arrived at the conclusion that was expressed in s 24(2A). In the Respondent's submission, Art 49(1) ought to be given an updating or rectifying construction to take into account the later introduction of GRCs; alternatively, Art 49(1) should be construed as being applicable only to SMCs and not to GRCs.

The Judge's decision

14 In *Wong Souk Yee v Attorney-General* [2018] SGHC 80 ("*Wong Souk Yee HC*"), the Judge held as follows:

(a) It was implicit in the Appellant's case that a by-election could not be held to fill just one seat in a GRC, and that any by-election in a GRC would have to be for the whole team of Members representing that GRC (at [15]).

(b) The Appellant's interpretation of Art 49(1) was unworkable because it required the remaining Members of MYT GRC to resign when there was no legal basis for compelling their resignation (at [25]–[26]).

(c) An updating or rectifying construction should be applied to Art 49(1) to reflect the changes introduced by Art 39A. This was consistent with the clear intent and will of Parliament (at [36], [38] and [41]).

(d) In relation to the Appellant's argument on Art 39A(2), the Appellant had clarified in oral submissions that her case was that a by-election *must* be held if any seat in a GRC (whether or not held by a minority Member) was vacated. It was therefore no longer necessary to consider her separate submission on Art 39A in relation to the special interest in ensuring minority representation. In any event, there was no basis in law to compel the remaining Members of a GRC to vacate their seats when a seat in the GRC became vacant (at [52]–[53]).

(e) Under the GRC scheme, voters in a GRC voted not for individual Members, but for the entire team of Members who would represent that GRC. Hence, voters did not lose their right to representation merely because one Member of a GRC team had vacated his or her seat (at [57]).

(f) The Appellant's substantive case thus did not succeed, and for the same reasons, the Appellant had not shown an arguable or *prima facie* case for granting the reliefs sought in OS 1034. Leave was therefore not granted for the Appellant to apply for those reliefs (at [61]–[62]).

15 The Judge awarded costs against the Appellant as the primary focus of her application was the mandatory order to compel the remaining Members of MYT GRC to vacate their seats and there was no basis at all for such an order (at [65]).

The parties' respective cases on appeal

16 The Appellant's and the Respondent's respective cases on appeal are broadly consistent with their cases in the court below. In the interest of brevity, we will only highlight certain key points of their arguments. We will elaborate on their respective arguments as necessary when dealing with the discrete issues.

17 The Appellant contends that an updating or rectifying construction of Art 49(1) as adopted by the Judge would entail the court overstepping its constitutional role. The Appellant also contests the Judge's decision to award costs against her on the basis that her application in OS 1034 raised "a legal question of genuine public concern" that needs to be answered by the court.

18 It is useful here to reiterate that the Appellant is not arguing that a by-election in a GRC:

(a) can be held for a single seat in a GRC; or

(b) can be held without first having the remaining Members of the GRC vacate their seats. Hence, she does not contend that it is even *possible* to hold such a by-election without first requiring the remaining Members of the incumbent team to vacate their seats.

19 Thus, the manner in which the Appellant has run her case requires that we must first find a legal basis to compel the remaining Members of MYT GRC to vacate their seats before an order can be made for a by-election to take place in respect of the GRC as a whole. This position is reflected in the mandatory order sought by the Appellant (see [9(a)] above).

20 The Respondent's case exploits this aspect of the Appellant's case. In addition to largely adopting the Judge's reasoning in *Wong Souk Yee HC*, the Respondent highlights that on the Appellant's own case, compelling the remaining Members of MYT GRC to vacate their seats is a necessary precondition for making an order that a by-election be held in MYT GRC. As such, the Respondent frames the critical issue in terms of whether there is any legal basis to grant the mandatory order that the remaining Members of MYT GRC vacate their seats. The Respondent contends that there is none.

The issues to be determined

21 The key issue in the present appeal is whether the proper interpretation of Art 49(1) of the Constitution mandates that a by-election must be called in MYT GRC. In addition, there are four other issues which fall to be addressed:

(a) whether Art 39A of the Constitution requires that a vacancy left specifically by a *minority* Member of a GRC other than by the dissolution of Parliament must in any event be filled by a by-election;

(b) whether, by reason of voters' implied right to representation in Parliament, the Appellant is entitled to an order for a by-election to be called in MYT GRC;

(c) even if the Appellant fails in obtaining the substantive reliefs sought, whether she has nonetheless made out an arguable or *prima facie* case for granting those reliefs such that leave ought to have been granted in the court below; and

(d) whether the Judge erred in ordering costs against the Appellant.

The applicable legal principles

22 Many of the issues in this appeal involve questions of constitutional interpretation. In this regard, the parties are in agreement that the principles which we laid down in *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*") govern. There, we summarised the principles as follows (at [54]):

(a) The purposive approach to statutory interpretation, which is mandated by s 9A of the [Interpretation Act (Cap 1, 2002 Rev Ed)], applies to the interpretation of provisions in the Constitution by virtue of Art 2(9) of the Constitution.

(b) The court must start by ascertaining the possible interpretations of the provision of the Constitution, *having regard not just to its text but also to its context within the Constitution as a whole*.

(c) The court must then ascertain the legislative purpose or object of the specific provision and the part of the Constitution in which the provision is situated. The court then compares the possible interpretations of the provision against the purpose of the relevant part of the Constitution. The interpretation which furthers the purpose of the written text should be preferred to the interpretation which does not.

...

(ii) The purpose should ordinarily be gleaned from the text itself. The court must first determine the ordinary meaning of the provision *in its context*, which might give sufficient indication of the objects and purposes of the written law, before evaluating whether consideration of extraneous material is necessary.

(iii) Consideration of extraneous material may only be had in three situations:

(A) If the ordinary meaning of the provision (taking into account its context in the written law and [the] purpose or object underlying the written law) is clear, extraneous material can only be used to confirm the ordinary meaning but not to alter it.

(B) If the provision is ambiguous or obscure on its face, extraneous material can be used to ascertain the meaning of the provision.

(C) If the ordinary meaning of the provision (taking into account its context in the written law and the purpose or object underlying the written law) leads to a result that is manifestly absurd or unreasonable, extraneous material can be used to ascertain the meaning of the provision.

(iv) In deciding whether to consider extraneous material, and if so what weight to place on it, the court should have regard to the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision (taking into account its context in the written law and the purpose or object underlying the written law); and the need to avoid prolonging legal or other proceedings without compensating advantage. The court should also have regard to (A) whether the material is clear and unequivocal; (B) whether it discloses the mischief aimed at or the legislative intention underlying the statutory provision; and (C) whether it is directed to the very point of statutory interpretation in dispute.

[emphasis added]

Whether the proper interpretation of Art 49(1) of the Constitution mandates that a by-election must be called in MYT GRC

23 For convenience, we reproduce Art 49(1) of the Constitution again below:

Filling of vacancies

49.—(1) Whenever the seat of a Member, not being a non-constituency Member, has become vacant for any reason other than a dissolution of Parliament, the vacancy shall be filled by election in the manner provided by or under any law relating to Parliamentary elections for the time being in force.

24 The Appellant suggests that on a true construction of Art 49(1), any vacant seat, including one in a GRC, cannot be allowed to remain vacant but must be filled through a by-election. According to the Appellant, the ordinary meaning of Art 49(1) is clear, and hence does not invite recourse to extraneous material except to confirm this ordinary meaning. On this basis, the Appellant urges this court to give effect to the asserted requirement for a vacancy to be filled by:

(a) interpreting s 24(2A) of the PEA as impliedly containing a requirement that all the remaining Members of a GRC must vacate their seats if one seat in the GRC becomes vacant; and/or

(b) compelling all the remaining Members of a GRC to resign from their seats pursuant to Art 46(2)(*c*) of the Constitution, which provides that the seat of a Member shall become vacant if the Member writes to the Speaker of Parliament to resign his or her seat.

25 These arguments rest on a premise that is implicit in the Appellant's interpretation of Art 49(1): where one Member of a GRC vacates his or her seat, the applicable "election" that is called for by Art 49(1) is a by-election for all the seats in the GRC as a whole. To some degree, this view is mandated by the fact, which was common ground between the parties before us, that there is simply no mechanism for a contest for a single seat in a GRC in any of the applicable statutory instruments.

26 The reliefs sought by the Appellant are founded on her proffered interpretation of Art 49(1). Hence, whether the Appellant can succeed depends on a question of constitutional interpretation, to which the framework set out in *Tan Cheng Bock* applies. The first step involves ascertaining the possible interpretations of Art 49(1), having regard to its text and its context within the Constitution as a whole. In that exercise, it is also important to discern whether the ordinary meaning of the provision is "clear", "ambiguous or obscure on its face", or "leads to a result that is manifestly absurd or unreasonable" in order to determine the proper role of extraneous material.

27 In our judgment, the meaning of Art 49(1) is ambiguous, specifically in relation to whether and how it applies to GRCs.

Article 49(1) is ambiguous in relation to whether and how it applies to GRCs

28 The words of Art 49(1) comfortably apply in the context of SMCs. This is unsurprising since, as we have already noted, at the time Art 49(1) was enacted, SMCs were the only type of parliamentary constituencies that existed. Article 49(1) was thus obviously drafted with SMCs in mind. Further, as highlighted at [4] above, the wording of Art 49(1) has remained largely unchanged since its original enactment in 1965. In *Vellama* at [82], we held that on a plain reading of Art 49(1), the Prime Minister is required to call a by-election to fill casual vacancies of elected Members in SMCs within a reasonable time. The two key issues in that case revolved around the proper interpretation of the word "shall" in the phrase "shall be filled by election" in Art 49(1) (see *Vellama* at [76]) and the time frame within which the Prime Minister should be required to call a by-election (see *Vellama* at [83]). There was (and is) no serious dispute that Art 49(1) applied to SMCs.

29 However, the implementation of the GRC scheme in 1988, which required a number of changes

to the law, including the insertion of Art 39A into the Constitution, gives rise to the question of whether the directive contained in Art 49(1) applies to a GRC as it does to an SMC, and if so, how it should apply.

30 In *Public Prosecutor v ASR* [2019] SGCA 16 ("*ASR*"), we reiterated that in determining the ordinary meaning of the words of a provision, the court must begin by considering what those words were understood to mean at the time the provision was enacted (see *ASR* at [77]–[79]). As a starting point, therefore, the words "seat of a Member" in Art 49(1) would only refer to seats in SMCs (see [4] and [28] above).

31 However, we also clarified in *ASR* that the mere fact that a particular concept did not exist at the time a provision was originally enacted did not automatically mean that the words of the provision could not refer to the new concept. This is because it would not have been possible to say that the provision was not intended to refer to the new concept, given that such an intention could not have been formed at the time of the provision's enactment in the first place (see *ASR* at [80]). Thus, in the context of determining whether the concept of mental age, which emerged in 1905, could fall within the ordinary meaning of the word "age" in s 83 of the Penal Code (Cap 224, 2008 Rev Ed), we considered whether the ordinary meaning of this word at the time the Penal Code was adopted in 1872 could logically extend to the new concept (see *ASR* at [81]).

32 Focusing on whether the ordinary meaning of the words of a provision can logically be extended to a new concept is appropriate in the context of new phenomena that arise out of factors independent of the intervention of Parliament, such as the development of new technology. However, the central focus of all statutory and/or constitutional interpretation questions remains the directive contained in s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) ("the IA") to interpret the provision concerned in a way that gives effect to the intent and will of Parliament (see *Tan Cheng Bock* at [35]). As such, in the special context where new concepts arise out of changes made by Parliament to a statute or the Constitution, it is not sufficient to merely show that the ordinary meaning of the words of the provision concerned can logically be extended to the new concepts. Instead, the focus should be on whether the ordinary meaning of those words, read in their context (especially in the context of the amendments made by Parliament), express an intention that the provision should encompass the new concepts.

33 Article 49(1), when read in the context of the other relevant provisions of the Constitution, in particular, Art 39A and Art 46, does not clearly express the intention that Art 49(1) was meant to apply to seats in a GRC.

34 On the one hand, the words of Art 49(1) are wide enough to include the seats of GRC Members, which may suggest that this provision was intended to apply to seats in a GRC. The phrase "seat of a Member" in Art 49(1) is qualified only by the words "not being a non-constituency Member"; it does not draw a distinction between the seats of SMC Members and those of GRC Members.

35 On the other hand, there are other factors which suggest that Art 49(1) was not intended to apply to seats in a GRC. It may be noted that in Art 49(1), the "vacancy" that "shall be filled by election" refers only to the vacancy left in "the seat of a Member". The directive in Art 49(1) thus presupposes the existence of a *vacancy in a particular seat* before a by-election has to be called for that seat.

36 Article 39A(1)(*a*) of the Constitution reads:

> **Group representation constituencies**

39A.—(1) The Legislature may, in order to ensure the representation in Parliament of Members from the Malay, Indian and other minority communities, by law make provision for —

(*a*) any constituency to be declared by the President, having regard to the number of electors in that constituency, as a group representation constituency to enable any election in that constituency *to be held on a basis of a group* of not less than 3 but not more than 6 candidates …

…

[emphasis added]

37 Article 39A(1)(*a*) makes clear that elections in a GRC must be held "on a basis of a group". Read together, Art 49(1) and Art 39A(1)(*a*) suggest that a by-election in a GRC can only be conducted if all the Members representing that GRC have vacated their seats. The question is, what happens when only one Member of a GRC vacates his or her seat?

38 Neither Art 49 nor Art 39A expressly provides for the vacating of the seats of the other Members of that GRC in such a situation.

39 Additionally, Art 46 of the Constitution, which appears to exhaustively set out the circumstances in which Members are required to vacate their seats, similarly does not contemplate that all the seats in a GRC as a whole would be deemed vacant where only one Member of that GRC vacates his or her seat. Article 46(1) provides:

Tenure of office of Members

46.—(1) Every Member of Parliament shall cease to be a Member at the next dissolution of Parliament after he has been elected or appointed, or previously thereto if his seat becomes vacant, *under the provisions of this Constitution*.

[emphasis added]

40 On a plain reading of Art 46(1), where there are grounds for the vacating of a Member's seat, such grounds would be found in the provisions of the Constitution. Articles 46(2), 46(2A) and 46(2B) of the Constitution list various circumstances that would cause a Member to vacate his or her seat. However, none of these pertain to the situation where one Member of a GRC vacates his or her seat.

41 Article 49(2)(*a*) further provides:

(2) The Legislature may by law provide for —

(*a*) the vacating of a seat of a non-constituency Member in circumstances other than those specified in Article 46 …

…

42 Article 49(2)(*a*) is worded as a special extension to the grounds provided in Art 46 for the vacating of a Member's seat. This is apparent from the use of the words "in circumstances other than those specified in Article 46". This fortifies the conclusion that Art 46 is intended to contain all the grounds for the vacating of parliamentary seats, save for express exceptions made in the

Constitution. Other than Art 46 and Art 49(2)(*a*), no other provisions in the Constitution provide grounds for the vacating of parliamentary seats.

43 Hence, based solely on the words of Art 49, Art 46 and Art 39A, it is unclear whether Art 49(1) may apply to GRCs at all. It is phrased in terms that may be wide enough to include the interpretation that a by-election *shall* be called when a single seat in a GRC has been vacated. Yet, the Constitution is conspicuously silent and does not expressly compel the other Members of the affected GRC to vacate their seats in such a scenario, and this is a necessary precondition before any by-election in a GRC can be held.

44 One further point fortifies our view that Art 49(1) is ambiguous. Within Art 49(1) itself, the phrase "shall be filled by election" is immediately followed by the phrase "in the manner provided by or under any law relating to Parliamentary elections for the time being in force". Hence, a question arises as to whether there is any law relating to parliamentary elections that is relevant to the specific situation presented in this case. In this regard, there is *no* such law. On the contrary, s 24(2A) of the PEA expressly *prohibits* the holding of a by-election in a GRC so long as not all the seats in the GRC have been vacated, for it states:

> (2A) In respect of any group representation constituency, no writ shall be issued under subsection (1) for an election to fill any vacancy unless all the Members for that constituency have vacated their seats in Parliament.

45 As to this, the Appellant contends that Parliament cannot alter the effect and intent of Art 49(1) by enacting ordinary legislation. She submits that if Parliament desired to prevent a by-election from being called in a GRC unless all the Members in that GRC had vacated their seats, it was incumbent on Parliament to have amended Art 49(1) instead to provide for this.

46 Implicit in this argument is the premise that the absence in the Constitution of any provision to the effect of s 24(2A) of the PEA must have been due to a legislative oversight: the Appellant accepts that Parliament intended that a by-election would only be called in a GRC if *all* the Members of the GRC had vacated their seats (as reflected in s 24(2A) of the PEA), but contends that the court must approach this matter on the footing that Parliament omitted to include a provision in the Constitution to achieve this intended result. At the hearing before us, both parties in fact confirmed that their common position was that there was indeed such a legislative oversight in the implementation of the GRC scheme. This in itself strongly militates against a finding that the ordinary meaning of Art 49(1) is "clear". If the amendments made to the Constitution in 1988 to put in place the GRC scheme were insufficient to achieve their intended outcome, then it is all the more likely that the relevant provisions of the Constitution, when read together, would appear ambiguous or unclear.

47 In the circumstances, having regard to Art 49(1) when read in its context, and the fact that it is common ground that there must have been a legislative oversight in the drafting of the amendments to the Constitution that were enacted in order to implement the GRC scheme, we are satisfied that Art 49(1) is ambiguous on its face. There are at least three possible interpretations of Art 49(1) and how it was intended to apply in the context of a single vacancy arising in a GRC:

> (a) the vacancy, *as and when it arises*, shall be filled by a by-election for all the seats in the GRC;
>
> (b) the vacancy shall *only* be filled by a by-election *if and when* all the seats in the GRC have been vacated; or

(c) the "seat of a Member" in Art 49(1) refers only to the seat of a Member of an SMC, and Art 49(1) does not apply to seats in a GRC at all.

48 In the light of this ambiguity, the Appellant's suggestion that extraneous material can only be relied upon to *confirm* the ordinary meaning of Art 49(1) (see [24] above) cannot be sustained. On the contrary, it is permissible to rely on extraneous material to *ascertain* the true meaning of Art 49(1) in relation to its application to GRCs (see *Tan Cheng Bock* at [54(c)(iii)(B)]).

The extraneous material

49 When we turn to the extraneous material, Parliament's intention as to how the GRC scheme was envisioned to operate in circumstances such as the present becomes abundantly clear. In short, it was never intended that a single vacancy in a GRC would trigger the obligation to call a by-election.

50 We first observe that the parliamentary debate on the Bill which later became the 1988 PE Amendment Act (namely, the Parliamentary Elections (Amendment) Bill (Bill 23 of 1987) ("the PE Amendment Bill")) immediately preceded the debate on the Bill which later became the 1988 Constitution Amendment Act (namely, the Constitution of the Republic of Singapore (Amendment) Bill (Bill 24 of 1987) ("the Constitution Amendment Bill")). In this connection, there is a critical factual point that should be noted. During the second reading of the Constitution Amendment Bill, then First Deputy Prime Minister Goh Chok Tong ("DPM Goh") stated (see *Singapore Parliamentary Debates, Official Report* (12 January 1988) vol 50 at col 345):

> Mr Deputy Speaker, Sir I do not propose to speak at length. All the points in [the Constitution Amendment Bill] are also found in the [PE Amendment Bill] which Parliament has just debated. *The two Bills should be read together. As we have had a full debate running over two days on the concept of Group Representation Constituencies, we need not and we should not repeat the arguments.* [emphasis added]

51 It follows from this that Parliament regarded the passage of the amendments to the Constitution and the PEA as part of a single package of changes that would effect the implementation of the GRC scheme. It is explicit from the portion of DPM Goh's speech which we have emphasised that the statements made in relation to the legislative intent behind the amendments to the PEA were equally to apply to the amendments to the Constitution. In a sense, this is unsurprising since both sets of amendments were meant to work in tandem in order to bring the GRC scheme into force.

52 In debating the PE Amendment Bill, the very issue that now confronts us – namely, whether a by-election should be called when the only minority Member, or any other Member, of a GRC vacates his or her seat – was addressed by DPM Goh (see *Singapore Parliamentary Debates, Official Report* (12 January 1988) vol 50 at cols 334–335):

> We know that the GRC, whilst it is the most appropriate solution to our problem, is not ideal. It is still not perfect. We do not claim that it is a perfect solution. Hence I can understand the reservations raised by Members of Parliament and I shall now deal with the major reservations raised by Members.
>
> …
>
> There was a comment that whilst a team is selected on a multi-racial slate, after the election, should the minority Member vacate his seat for whatever reason and we are not providing for by-election, that team would not [be] a multi-racial team. Should we have a by-election or should

we not have a by-election to fill that post? ***Bear in mind that GRCs are meant to ensure a multi-racial Parliament, not a multi-racial team in the constituency.*** I do not expect in practice that all 13 – should we opt for 13 in number – MPs from the minorities would vacate the seat for one reason or other. I think it is unlikely. ***We will not want to provide for by-election to replace somebody who has vacated his office and there is a reason for this. If you provide for compulsory by-election to fill that vacancy, you are introducing the possibility that one MP can hold the other two to ransom*** . The minority candidate, for example, can hold the other two to ransom because if he resigns both the other MPs would have to resign with him. I do not think you want to allow that to happen. ***All three MPs were elected by the people. If one resigns, so be it, or even if two retire, for whatever reason. If both MPs were to vacate office, the other one who has been duly elected by the people … should remain*** . Otherwise you introduce the possibility of an MP using his position [in] the GRC or on the team to extract concessions from the other Members. This is to be discouraged.

[emphasis added in bold italics]

53 Two important points can be drawn from DPM Goh's statement. First, in designing the legislative architecture to give effect to the GRC scheme, Parliament intended that there would be *no* requirement to call a by-election if one or even more than one Member of a GRC were to vacate his or her seat. Instead, a by-election in a GRC would only have to be called if all the Members representing that GRC were to vacate their seats. This intention was reflected in the express provision in s 24(2A) of the PEA to this effect (see [44] above). Second, Parliament was well aware that the GRC scheme which it had designed was not perfect and that there would have to be trade-offs in implementing the scheme. What is crucial is that Parliament had weighed those considerations which were thought to be relevant to the safeguards that it had chosen in crafting the GRC scheme. In the context of this specific issue, namely, whether it would be obligatory for the Government to call a by-election in a GRC when not all the Members of the GRC had vacated their seats, the extraneous material makes it clear that Parliament had decided that there would be no such obligation because this was preferable to the alternative, which was the possibility that one Member of a GRC team could hold the other Members of the team to ransom.

54 However, while the extraneous material is clear on the intended *outcome* in this situation, it is unclear as to how Parliament thought it would *effect this outcome*. It certainly expressed this intended outcome in the PEA, but did not expressly do so in the Constitution. In our judgment, this gives rise to at least three distinct possibilities:

(a) First, Parliament intended to amend Art 49(1) to reflect its intention that no by-election would be held in a GRC so long as not all the Members of the GRC had vacated their seats, but inadvertently omitted to do so.

(b) Second, Parliament intended that Art 39A would be the operative provision in regulating all matters pertaining to GRCs, including the filling of vacancies, and contemplated that Art 39A incorporated a sufficient reference to s 24(2A) of the PEA to achieve the result that it desired. Article 39A(1) states that Parliament may "by law make provision" for, among other things, any constituency to be declared and then contested as a GRC. On this view, Art 49(1) would not have any application to GRCs at all.

(c) Third, Parliament intended that Art 49(1) would apply to GRCs, but was satisfied that the phrase "in the manner provided by or under any law relating to Parliamentary elections" would sufficiently incorporate the reference to s 24(2A) of the PEA so as to qualify the operation of Art 49(1) in this context.

55 Having considered the extraneous material, we could not discern with any degree of certainty which of these three possibilities was clearly to be preferred; and the Deputy Attorney-General, who appeared for the Respondent, also conceded before us that there was nothing in the relevant parliamentary debates that would shed light on this.

56 There is an important distinction between the first possibility and the second and third possibilities set out at [54] above. The first possibility suggests that Parliament intended to *amend the Constitution* but inadvertently omitted to do so; whereas the other two possibilities suggest that Parliament did not intend to amend Art 49(1) because it considered that the language of that provision, or, alternatively, that of Art 39A, was sufficient to achieve its intended outcome by incorporating the necessary reference to the explicit language in s 24(2A) of the PEA. Flowing from this distinction are two points that have a significant bearing on the question of how we should give effect to Parliament's intention in the light of the available extraneous material. First, if there is a reasonable possibility that Parliament *did not* intend to amend a particular statutory provision to put an intended outcome into practice, this raises the question of whether it is permissible for us to read in such an amendment. It was suggested to us, on behalf of the Respondent, that we could do so by adopting what has been referred to as a rectifying construction. We consider this further below, but observe that questions may fairly be raised as to whether this is even an available avenue when the statutory provision in question is not ordinary legislation but the Constitution itself. Second, there may well be a difference in the practical outcome of the matter, depending on which possibility is chosen. As highlighted by the Deputy Attorney-General, interpreting Art 49(1) in a manner which is consistent with the third possibility at [54] above would hypothetically allow a simple majority in Parliament to denude a constitutional provision (in this case, Art 49(1)) of its effect. As an illustration, this could result if Parliament were to amend s 24(2A) of the PEA to state that "No writ shall be issued for an election to fill a vacancy in the seat of a Member". This seems implausible since it would enable Parliament to act contrary to the limits imposed by the Constitution without first amending it. Having regard to the principle of constitutional supremacy that is enshrined in Art 4, we do not think it would be permissible to construe Art 49(1) as if it allowed Parliament, in effect, to act contrary to the limitations on Parliament that are contained in and imposed by the Constitution.

57 With these preliminary observations, we turn to address the proper meaning that should be placed on Art 49(1) in the light of the extraneous material.

The proper interpretation of Art 49(1) in the light of the extraneous material

58 To recapitulate, there are three possible interpretations of Art 49(1) in the context of a vacancy arising in a single seat in a GRC (see [47] above):

(a) the vacancy, *as and when it arises*, shall be filled by a by-election for all the seats in the GRC ("the Appellant's Interpretation");

(b) the vacancy shall *only* be filled by a by-election *if and when* all the seats in the GRC have been vacated ("the Respondent's First Interpretation"); or

(c) the "seat of a Member" in Art 49(1) refers only to the seat of a Member of an SMC, and Art 49(1) does not apply to seats in a GRC at all ("the Respondent's Second Interpretation").

59 The Respondent urges this court to give full effect to the intent and will of Parliament, and submits that the Respondent's First Interpretation should be adopted. The Respondent submits that this result can be achieved through the use of either of two tools of statutory interpretation: an updating construction or a rectifying construction. This was the interpretation and the approach

preferred by the Judge in the decision below (see *Wong Souk Yee HC* at [36], [38] and [41]). In the alternative, the Respondent submits that we should adopt the Respondent's Second Interpretation.

60 The Appellant argues, on the other hand, that the Appellant's Interpretation should be preferred because the interpretation adopted by the Judge effectively rewrites Art 49(1) in a manner that its language cannot bear. The Appellants suggests that the proper approach would be for the Legislature to amend Art 49(1) instead.

61 The guiding principle that applies when a court must choose from among competing interpretations of any legislative enactment is that it should prefer that interpretation which furthers the purpose of the written text (see *Tan Cheng Bock* at [54(c)] and s 9A(1) of the IA).

62 It is evident from a consideration of the relevant extraneous material that the Respondent's First Interpretation is most closely aligned with Parliament's intention as to what should occur where there is a vacancy of a single seat in a GRC. However, it is common ground that the Respondent's First Interpretation depends on a "strained" interpretation of Art 49(1), in the sense that the express words of Art 49(1) cannot fairly bear the meaning put forward. The words "seat of a Member" do not distinguish between the seat of a GRC Member and that of an SMC Member, and hence cannot be interpreted to cover both types of seats while at the same time mandating different outcomes in the event of a vacancy in the two different types of seats. In order to arrive at such a meaning, the first portion of Art 49(1) would have to be construed as if it reads: "Whenever the seat of a Member in a single member constituency, or the seats of all Members in a group representation constituency …".

63 The Respondent submits that we could permissibly do this by applying either a rectifying construction or an updating construction. A rectifying construction involves the addition or substitution of words to give effect to Parliament's manifest intentions. It is founded on the basis of rectifying "obvious drafting errors" and "plain cases of drafting mistakes" on the part of the Legislature (see Diggory Bailey & Luke Norbury, *Bennion on Statutory Interpretation* (LexisNexis, 7th Ed, 2017) ("*Bennion*") at pp 425–426). An updating construction, on the other hand, does not rest on the existence of any drafting error, but is premised instead on the assumption that Parliament intends that the court will apply, in respect of a continuing statute, a construction which continuously updates the wording of the statute so as to allow for its application to circumstances as they change after the time the statute was initially framed (see *Comptroller of Income Tax v MT* [2006] 3 SLR (R) 688 ("*CIT*") at [44]).

64 In our judgment, there are questions as to whether these tools of statutory interpretation, which were developed in the context of ordinary legislation, may or should apply to the extent of modifying the express words of a constitutional provision. Constitutional provisions are designed to be more deeply entrenched and are generally regarded as fundamental in nature, and there may be a concern that applying such tools of statutory interpretation may not be consistent with the nature of constitutional provisions. This concern is exacerbated in the context of an updating construction because it rests on the assumption that the statutory provision in question is designed to be "always speaking". It is on this basis that the court may interpret the provision in the light of changing circumstances (see *Bennion* at pp 409–410). However, in the context of a constitutional provision, we noted in *Lim Meng Suang and another v Attorney-General and another appeal and another matter* [2015] 1 SLR 26 ("*Lim Meng Suang*") at [92] that amending the Constitution to reflect changing *social mores* is more properly the remit of Parliament exercising the power of amendment granted to it under Art 5(2) of the Constitution.

65 Having made those observations, we do not think it is necessary in the present case to decide whether a rectifying or an updating construction may be applied to a constitutional provision, and if

so, whether this is subject to any limits. This is because even if constitutional provisions and ordinary legislation were to be examined on the same footing, neither a rectifying nor an updating construction would be appropriate in the present case, as we will explain below.

A rectifying construction is not appropriate in the present case

66 The test for when the adoption of a *rectifying* construction is permitted was most recently summarised in *Nam Hong Construction & Engineering Pte Ltd v Kori Construction (S) Pte Ltd* [2016] 4 SLR 604 at [55] as follows:

> (a) first, it must be possible to determine from a consideration of the provisions of the Act concerned, read as a whole, what the mischief was that Parliament sought to remedy with that Act;
>
> (b) second, it must be apparent that the draftsman and Parliament had inadvertently overlooked, and so omitted to deal with, the eventuality that was required to be dealt with so that the purpose of the Act could be achieved; and
>
> (c) third, it must be possible to state with sufficient certainty what the additional words would be that the draftsman would have inserted but for the inadvertence, and that Parliament would have approved those words had its attention been drawn to the omission.

67 In our judgment, the third requirement of sufficient certainty poses an insurmountable barrier to the adoption of a rectifying construction in the present case. As we highlighted earlier (at [54]–[56] above), while the result which Parliament intended to achieve is clear (namely, that a vacancy in the seat of a GRC Member would not give rise to an obligation on the part of the Government to call a by-election), it is far from clear *how* Parliament thought it would effect this result. In the circumstances, it is impossible to state with certainty the words which the draftsman would have inserted and whether Parliament would have approved of the insertion because it is unclear whether Parliament wanted to amend the language of the Constitution at all. To add to this, the entrenched and fundamental nature of the Constitution compounds our hesitancy to act in the face of this uncertainty.

An updating construction is also not appropriate in the present case

68 The application of an updating construction is similarly problematic. The applicable test was stated in *CIT* at [46]–[47] as follows in the context of two related statutes, only one of which is later amended by Parliament:

> (a) At the first stage, the court ascertains the nature of the amendment effected in the amended statute ("the first statute").
>
> (b) At the second stage, the court's inquiry is directed at whether the amendment to the first statute gives rise to any ambiguity or uncertainty in the interpretation and application of the related statute ("the second statute") as it stands, by reason of which, or for some other reason, there is potentially a need to apply an updating construction to the second statute.
>
> (c) If the inquiry at the second stage is answered in the affirmative, then at the third stage, it becomes necessary to consider whether, in the circumstances, an updating construction ought to be applied, and if so, how it should be applied. It will be relevant to have regard to the objects of the second statute, how it has hitherto been applied, how the draftsman has chosen to frame

the linkage between the two statutes, and whether an updating construction would entail such a substantive change to the operation of the second statute that it would be best left to the Legislature to effect the change or whether the change is such as may appropriately be imported into the second statute by way of an updating construction.

69 The difficulty in the application of this test lies again with the third stage of the analysis. To import the proposed amendments to Art 49(1) would undoubtedly be a significant substantive change to the operation of the provision. Article 49(1) would be transformed into a provision which differentiates between GRCs on the one hand and SMCs on the other as to the circumstances in which a by-election must be called. In our judgment, effecting such a substantive change by way of an updating construction cannot be justified, given that it is unclear whether Parliament intended for Art 49(1) to be amended in this fashion to begin with (see [54]–[56] above).

Our decision on the proper interpretation of Art 49(1)

70 Given that neither a rectifying nor an updating construction can be applied to Art 49(1), only two possible interpretations remain: the Appellant's Interpretation and the Respondent's Second Interpretation. It is common ground that both of these interpretations would not require adjustments to the language of Art 49(1).

71 The Appellant's Interpretation is severely hampered by the fact that it is *antithetical* to the purposive approach mandated by s 9A(1) of the IA. It involves compelling all the remaining Members of a GRC to vacate their seats in the event of a vacancy in a single seat in the GRC, thereby forcing a by-election to be held. It is common ground that this would lead to the one result that Parliament had expressly intended to avoid when it implemented the GRC scheme (see [46] and [52]–[53] above).

72 This leaves the Respondent's Second Interpretation, which we accept is not ideal, in that it results in leaving the Constitution silent on the filling of a vacant seat in a GRC. However, three points should be borne in mind. The first is that the role of the court is not to fashion the ideal formulation of the words of Art 49(1). Instead, we are constrained to work with the text as it stands and to pick from the range of permissible interpretations the interpretation that would best accord with the underlying purpose of Art 49(1). The second is that the Respondent's Second Interpretation accurately reflects the reality that when Art 49(1) was enacted in its present form in 1965, Members of SMCs were the only type of Members that the drafters of the provision would have had in mind since the GRC scheme had yet to come into existence. The third is that the mere fact that an express provision in the Constitution does not exist for the filling of vacancies in a GRC does not necessarily mean that all the seats in a GRC can be left vacant without an obligation on the part of the Government to call a by-election in that GRC. Without expressing a definitive opinion on the matter, it appears to us at least arguable that an implied right to representation might be invoked to fill this *lacuna* in the Constitution (see *Vellama* at [79]). It would, we add, obviously be more desirable for this *lacuna* to be addressed by an amendment to the Constitution to expressly deal with vacancies in the seats of GRC Members.

73 For the foregoing reasons, we are satisfied that the proper interpretation of Art 49(1) is that the words "seat of a Member" therein refer only to the seat of an SMC Member. In the circumstances, there is no requirement pursuant to Art 49(1) for a by-election to be called in MYT GRC. We turn now to address the remaining issues raised in the appeal.

Article 39A of the Constitution and minority Members of GRCs

74 The Appellant argues that since the stated purpose of the GRC scheme is to ensure the representation in Parliament of minority Members, it would undermine the purpose of Art 39A to give effect to either of the Respondent's proposed interpretations. This is because in the event that a minority Member of a GRC vacates his or her seat, minority representation in Parliament would be diminished and the force of Art 39A would be reduced if the vacancy is not filled. On this basis, the Appellant urges the court to adopt the Appellant's Interpretation.

75 This argument ignores the fact that Parliament, in debating the amendments to the Constitution and the PEA to put in place the GRC scheme, had specifically considered the risk of minority representation being diminished in this situation, and had decided that this risk was an acceptable trade-off for preventing a Member of a GRC from otherwise being able to hold the rest of the Members of that GRC to ransom (see [53] above). To accept the Appellant's argument on this point would run contrary to Parliament's intention by importing into the GRC scheme a risk that Parliament had explicitly intended to avoid, in exchange for removing a risk that Parliament had explicitly expressed its willingness to accept. Such a reversal of the policy choice that Parliament had expressly made strikes at the heart of the concern behind judicial legislation, and would result in our overstepping our constitutional role. It is not for us to debate the best policy to enshrine minority representation in Parliament, much less when Parliament itself has already chosen a particular model for this, with all its attendant risks. We therefore reject this argument.

The implied right to representation in Parliament

76 The Appellant's argument based on voters' implied right to representation in Parliament relies on the decision in *Vellama* at [79], where we said that "the form of government of the Republic of Singapore as reflected in the Constitution is the Westminster model of government … [t]he voters of a constituency are entitled to have a Member representing and speaking for them in Parliament"; as well as the decision in *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 ("*Yong Vui Kong*"), where, at [69]–[70], we noted the contention that the right to vote might be part of the "basic structure" of the Constitution. On this basis, the Appellant suggests that voters have a right to representation in Parliament founded on the basic structure of the Constitution, and that this basic structure includes the right to be represented by the full slate of elected Members returned at each general election. The Appellant thus suggests that a single vacant seat in MYT GRC results in a state of affairs which violates the Constitution and so must be rectified to ensure that all the seats in MYT GRC are filled until the dissolution of Parliament.

77 It must first be noted that in *Yong Vui Kong*, we expressly refrained from determining whether the basic structure doctrine laid down in the seminal decision of the Supreme Court of India in *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461 forms part of Singapore law, and even if it does, what its extent or effect would be. It was unnecessary to do so on the facts of *Yong Vui Kong* because "in order for a feature to be considered part of the basic structure of the Constitution, it must be something fundamental and essential to the political system that is established thereunder", and we were satisfied that the right contended for in that case did not possess those characteristics (see *Yong Vui Kong* at [71]–[72]).

78 It is similarly clear in the present case that even if the basic structure doctrine does apply in Singapore, the right as framed by the Appellant would not form part of that basic structure. The Appellant's contention, taken to its logical conclusion, implies that the GRC scheme as conceived by Parliament is inconsistent with the basic structure of the Constitution. Even if the right to representation forms part of the basic structure of the Constitution, it does not follow that there is a particular *form* of representation that is "fundamental and essential" to the Westminster model of government such that it cannot be departed from. In our judgment, there is nothing in principle that

would prevent Parliament from devising the GRC scheme in such a way that a GRC could be left to be represented by less than its full complement of Members where one or more of them has vacated his or her seat. It is therefore unnecessary to consider the existence and scope of the basic structure doctrine for the purpose of disposing of this appeal.

79 The Appellant added a gloss to her argument on the implied right to representation, which is that Art 39(1)(*a*) of the Constitution provides evidence that voters have the right to be represented by the full slate of elected Members returned at each general election. Article 39(1)(*a*) reads:

> **Parliament**
>
> **39.**—(1) Parliament *shall* consist of —
>
> (*a*) such number of elected Members as is required to be returned at a general election by the constituencies prescribed by or under any law made by the Legislature …
>
> …
>
> [emphasis added]

80 The Appellant argues that the word "shall" in Art 39(1)(*a*) creates a requirement that the total number of elected Members in Parliament must comprise the number required to be returned at each general election. Since 89 elected Members were returned in the 2015 General Election, Parliament must always comprise that number of elected Members until it is dissolved and any vacant seat must thus be filled by a by-election.

81 We reject this argument. A similar contention was considered and rejected by this court in *Vellama* at [91]. The Appellant submits that the arguments in *Vellama* are irrelevant because the court in that case was concerned with whether Parliament had the competence to legislate in the event of a vacancy. However, this ignores the fact that the appellant in *Vellama* was also seeking a similar remedy, which was a declaration that a by-election had to be called to fill a vacant seat, albeit in the context of an SMC. In examining Art 39(1)(*a*) in *Vellama*, we did not find anything in the provision which would suggest that a by-election had to be called.

82 In our judgment, Art 39(1)(*a*) is not a provision that deals with how mid-term vacancies are to be filled (that being the province of Art 49(1)); nor is it about by-elections at all. Rather, it is meant to be descriptive of the composition of Parliament. Insofar as the argument is that a failure to adhere to the number of elected Members specified in Art 39(1)(*a*) may appear to cause Parliament to be improperly constituted and that Parliament would then lack the competence to enact laws, this is an argument that was squarely considered and rejected in *Vellama*, and for the same reasons, we do likewise here.

Whether leave should have been granted in the court below

83 Having found that the Appellant has failed to prove that the Constitution requires that a by-election must be held in MYT GRC, we turn to consider the question of whether there is nonetheless an arguable or *prima facie* case for granting the substantive reliefs which she sought in OS 1034, such that leave ought to have been granted in the court below.

84 The Appellant argues that the Judge erred in finding that there was no arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought in OS 1034, and hence, his

refusal to grant her leave to apply for judicial review (see [62] of *Wong Souk Yee HC*) was erroneous.

85 There are three requirements that must be satisfied before an applicant may be granted leave to commence judicial review proceedings (see *AXY and others v Comptroller of Income Tax* [2018] 1 SLR 1069 ("*AXY*") at [33]). Only one of the requirements is in dispute before us, namely, that the materials before the court must disclose an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought by the applicant.

86 The requirement to obtain leave to bring judicial review proceedings is meant to "filter out groundless or hopeless cases at an early stage", and the threshold for granting leave is a low one (see *AXY* at [34]). We are satisfied that this low threshold has been met here. The Appellant's case, while ultimately unsuccessful, does disclose points on the proper interpretation of Art 49(1) which warranted further consideration. In particular, we note that it is common ground that there was a legislative oversight in the implementation of the GRC scheme (see [46] above). Further, we have found that the text of Art 49(1) is ambiguous on its face (see [47] above).

87 We therefore accept the Appellant's argument that she should have been granted leave in the court below, although the point is academic since she has ultimately failed to obtain any of the substantive reliefs sought.

Whether the Judge erred in ordering costs against the Appellant

88 The Appellant contends finally that because OS 1034 concerned public law issues of general importance, she should not have been penalised in costs in the court below, nor, for that matter, before us.

89 The Appellant's argument is founded on the decision of the High Court in *Vellama d/o Marie Muthu v Attorney-General* [2013] 1 SLR 797 ("*Vellama (HC)*"), where, on the question of costs, the court held as follows:

> 39 … The Singapore courts have invoked public interest as a basis to depart from the general rule that costs follow the event with respect to proceedings involving unsuccessful regulators. …
>
> …
>
> 43 Turning to the essential characteristics of public interest, it has been held that where a matter raises a legal question of genuine public concern, it may be inappropriate to make a costs order against the applicant even where the judicial review is wholly unsuccessful …
>
> 44 At their very core, ***court proceedings carry public interest where they raise public law issues of general importance, and in which the applicant is not seeking to protect some private interest.*** It is important to emphasise that public interest dimensions are not established for the purposes of costs by reason only that public law issues are raised or that leave has been granted to proceed with the judicial review hearing. Ultimately whether public interest warrants departure from the general rule that costs follow the event will depend entirely on the particular facts in each case.
>
> [emphasis added in bold italics]

90 The High Court in *Vellama (HC)* extended the category of proceedings in which public interest could be relied on to justify departing from the usual costs orders made in litigation. Such a departure

was recognised in *Law Society of Singapore v Top Ten Entertainment Pte Ltd* [2011] 2 SLR 1279 at [24] in respect of situations where public bodies were performing public duties which they had been charged to carry out. In *Vellama (HC)*, the court considered that public interest would also be engaged where court proceedings raised public law issues of general importance, and where the applicant was not seeking to protect some private interest. This broader test was drawn from the English High Court decision of *Regina v Lord Chancellor, Ex parte Child Poverty Action Group* [1999] 1 WLR 347 (see *Vellama (HC)* at [43]).

91 In our judgment, the decision in *Vellama (HC)* was wrong and should not be followed.

92 The requirement that "the applicant is not seeking to protect some private interest" sits uneasily with our recent jurisprudence on the standing requirements for judicial review. In *Vellama* at [33], we held that where an applicant asserts no more than a public right which is shared in common with other citizens, standing to pursue judicial review proceedings would accrue only if the applicant can demonstrate "special damage" to himself or herself. In *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 ("*Jeyaretnam*") at [64], we clarified that in the "rare case" where a public duty which does not generate correlative private rights is breached and the breach is of sufficient gravity such that it would be in the public interest for the courts to hear the case, an applicant may have standing. The point to be made is that under the present standing framework in Singapore, if an applicant is not seeking to protect some private interest, it is unlikely that he or she would have standing. Yet, paradoxically, if the position in *Vellama (HC)* were accepted, such an applicant would be more likely to be able to avoid an adverse costs order should his or her application ultimately be unsuccessful.

93 At [48]–[50] of *Jeyaretnam*, we juxtaposed Singapore's "green-light" approach towards administrative law with the UK's "red-light" approach. Briefly, the approach in Singapore is principally not about stopping bad administrative practices, but about encouraging good ones, and hence, the implication is that good governance should be sought through the political process and public avenues rather than through combat in the courts. In contrast, the approach in the UK reflects what might perhaps be seen as a somewhat more adversarial relationship between the courts and the Executive. Thus, UK law incentivises and encourages administrative actions through lower standing requirements and by shielding applicants from adverse costs consequences, whereas Singapore takes the opposite approach. This distinction explains why the test imported in *Vellama (HC)* from the UK is at odds with the established Singapore law on standing.

94 Having said that, we accept that where a serious question of constitutional law is raised, the court may in its discretion depart from the usual rule that costs follow the event. It may be noted that no order for costs was made against the unsuccessful applicant in some recent decisions concerning serious questions of constitutional law: see *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 and *Lim Meng Suang*. We do not intend to be unduly prescriptive in setting out the circumstances in which the discretion may be exercised in this manner, save to say that a court proposing to depart from the usual rule that costs follow the event should explain its reasons for doing so.

95 In the present case, we note that we have:

(a) concluded that the issues raised in this appeal warranted leave being given to the Appellant to commence judicial review proceedings;

(b) rejected the Respondent's primary case, which was to urge us to adopt a rectifying or an updating construction in order to arrive at the Respondent's First Interpretation of Art 49(1); and

(c) reversed the basis and the effect of the Judge's decision, even though the result, at least as far as the Appellant is concerned, remains the same.

96 In the circumstances, we consider that there should be no order as to costs either here or in the court below.

Conclusion

97 We therefore dismiss the appeal, save on the issue of leave, and save that we set aside the Judge's order as to the costs of the proceedings below and make no order as to the costs of the appeal. The usual consequential orders will apply.