Gobi a/l Avedian and another *v* Attorney-General
[2020] SGHC 31

Case Number : Originating Summonses Nos 111 and 181 of 2020

Decision Date : 13 February 2020

Tribunal/Court : High Court

Coram : Valerie Thean J

Counsel Name(s) : Ravi s/o Madasamy (Carson Law Chambers) for the first and second plaintiffs; Wong Woon Kwong, Seah Ee Wei and Pavithra Ramkumar (Attorney-General's Chambers) for the defendant in OS 111/2020; Ng Yong Kiat, Francis SC, Seah Ee Wei and Pavithra Ramkumar (Attorney-General's Chambers) for the defendant in OS 181/2020.

Parties : Gobi a/l Avedian — Datchinamurthy a/l Kataiah — Attorney-General

Administrative Law – Judicial review

Constitutional Law – Equal protection of law

Constitutional Law – Fundamental Liberties

[LawNet Editorial Note: The appeals in Civil Appeals Nos 23 and 24 of 2020 were dismissed by the Court of Appeal on 13 August 2020. See [2020] SGCA 77.]

13 February 2020

Valerie Thean J (delivering the judgment of the court *ex tempore*):

1 The plaintiffs, both Malaysian citizens, were convicted in separate proceedings. Mr Gobi a/l Avedian was convicted on 25 October 2018 on appeal of a charge under s 7 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") for the importation of drugs and sentenced to death by the Court of Appeal on the same date. Mr Datchinamurthy a/l Kataiah was convicted of a charge under s 5(1)(*a*) of the MDA and sentenced to death by the High Court on 8 May 2015. His appeal against conviction and sentence was dismissed on 5 February 2016.

2 The plaintiffs filed two applications, Originating Summons No 111 of 2020 ("OS 111/2020") and Originating Summons No 181 of 2020 ("OS 181/2020"). As these applications were amended yesterday with additional prayers for OS 111/2020 to be stayed pending the resolution of OS 181/2020 or any appeals arising, I dealt with OS 181/2020 first.

OS 181/2020

3 OS 181/2020 was filed on 10 February 2020 and deals with matters that arose at the pre-trial conference ("PTC") held on 4 February 2020 for OS 111/2020. The plaintiffs sought a declaration pursuant to O 15 r 16 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") that a statement made by Mr Wong Woon Kwong ("Mr Wong"), who had appeared on behalf of the Attorney-General ("AG") at the said PTC, breached the plaintiffs' right to a fair hearing under Art 9 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("Constitution"). The statement made by Mr Wong was "I am also instructed to state that we are expressly reserving all our rights against Mr

Ravi".

4 For declaratory relief to be granted in this case, the prior question was whether there was in reality a breach of the plaintiffs' rights. The application failed because there was no basis for claiming that Mr Ravi had been threatened by the AG. First, by simply stating that the AG was reserving its rights against Mr Ravi, Mr Wong was merely communicating a position that should be familiar to all lawyers: the express reservation of existing legal rights that may be exercised in the future.

5 In my view, the statement served as a salutary reminder to Mr Ravi that he should conduct himself appropriately and in accordance with the standards expected of all counsel as officers of the court. I therefore could not see any basis for concluding that Mr Ravi would have felt threatened in any way, or that it would have been reasonable for him to do so or that Mr Wong's communication of the AG's position could have any bearing on how Mr Ravi would conduct the case. I found that OS 181/2020 lacked any factual basis and dismissed it accordingly. Given my findings, it was not necessary to discuss the further question of the scope of rights under Art 9 of the Constitution.

6 I therefore dismissed OS 181/2020. In the light of my findings on OS 181/2020, there was no reason to stay OS 111/2020 pending resolution of OS 181/2020. I saw no reason not to deal with both together, and having heard I parties now also deal with OS 111/2020.

OS 111/2020

7 In OS 111/2020, the plaintiffs seek leave to apply under O 53 of the ROC for primarily three forms of relief: first, a prohibiting order for the plaintiffs' executions to be stayed in the light of an allegation made about the protocol for execution; second, a mandatory order directing the Minister for Home Affairs ("the Minister") and the AG to grant immunity from criminal and civil liability to a former Singapore Prison Services ("SPS") officer; third, that the court grant the same immunity to the said former officer. There was a fourth prayer for a stay pending the outcome of OS 181/2020, including any appeal to the Court of Appeal. Given my earlier conclusion, the fourth relief is not in issue any longer.

8 It is common ground that there are three requirements for leave to be granted under O 53 of the ROC: (a) the matter must be susceptible to judicial review; (b) the plaintiffs must have sufficient standing; and (c) the material before the court must disclose an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought. It is also not disputed that the burden is on the plaintiffs to satisfy this *prima facie* standard: see *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 at [36] and [39].

9 Regarding the prohibiting order, the plaintiffs filed an affidavit relying on a press statement dated 16 January 2020 by a Malaysian non-governmental organisation, Lawyers for Liberty, which contained allegations by a former SPS officer that, in the event that the rope used for execution breaks during the hanging, prison officers were trained and instructed to execute the prisoner by kicking the back of the prisoner's neck (termed the "the alleged contingent protocol" in the application). Such media reports are not reliable evidence which may be used in judicial proceedings. In the Annex to the affidavit, there is also exhibited an affidavit by a Malaysian lawyer, Mr Zaid bin Abd Malek ("Mr Zaid"), stating that he has met this former SPS officer and recounting the former SPS officer's allegations. All this is hearsay. The plaintiffs and Mr Zaid have no personal knowledge of matters alleged. The AG has also in addition pointed out that the press statement's contentions and what Mr Zaid apparently heard from the former SPS officer are not consistent: to my mind, those hazards are expected when comparing unreliable hearsay with unreliable hearsay.

10 In my view, affidavits used in applications for leave to commence judicial review must comply with O 41 r 5(1) of the ROC, such that an "affidavit may contain only such facts as the deponent is able of his own knowledge to prove". O 41 r 5(2) of the ROC does not apply to such applications because they are not considered interlocutory proceedings. In *OpenNet Pte Ltd v Info-communications Development Authority of Singapore* [2013] 2 SLR 880 at [21], the Court of Appeal held that such applications are not interlocutory applications within the scope of the Fifth Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed). The same reasoning applies here. Indeed, such applications "decide the rights of the parties" and are therefore not interlocutory proceedings: see *Singapore Civil Procedure 2020* vol 1 (Chua Lee Ming gen ed) (Sweet & Maxwell, 10th Ed, 2020) at para 41/5/2. Therefore, the plaintiffs have simply not presented any admissible evidence to support their claim.

11 As Tay Yong Kwang J (as he then was) recognised in *Zheng Jianxing v Attorney-General* [2014] 3 SLR 1100 at [35], citing *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue* [2006] 3 SLR(R) 507 at [24], the fact that there is a low threshold for such applications does not mean that plaintiffs can come before the court with "skimpy or vague" arguments and evidence. In this case, we have only bare and unsubstantiated assertions.

12 Although that would be sufficient in and of itself to settle the matter, I note that, in contrast, Deputy Assistant Commissioner See Hoe Kiat, an SPS officer and the Deputy Commander of Cluster A of Changi Prison, has filed an affidavit attesting that the SPS has never carried out training or given instructions as described by the plaintiffs, and further, there has been no past occasion in which the rope used in executions has broken before. Further, every execution is witnessed by the superintendent of the prison and a medical officer. There is simply no credible basis for leave, much less a *prima facie* case of reasonable suspicion.

13 Regarding the mandatory order to the Minister and the AG to grant immunity from civil and criminal liability, Mr Ravi accepts in his written submissions that the court cannot compel the Minister or the AG not to prefer charges: see also *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2014] 4 SLR 773 at [33]. He asks the court instead to compel them to consider exercising their discretion to provide immunity. I note the AG has exercised his discretion. Mr Kow Keng Siong, Chief Prosecutor in the Crime Division of the Attorney-General's Chambers ("AGC"), on behalf of the AG, affirms that the AG would not be granting immunity from criminal prosecution to the former SPS officer referred to by the plaintiffs. In relation to the Minister, the application for leave also fails. I assume this aspect of the prayer only relates to civil liability, as prosecutorial discretion is the sole province of the AG under Art 35(8) of the Constitution. In any event, first, the plaintiffs have not in fact sought any decision from the Minister, and second, in any case, there is no basis in law to impose a duty on the Minister to consider granting immunity in the manner sought.

14 The third prayer, added yesterday, for the court to grant an immunity order, has no basis in law. Nor is it a prayer for a prerogative order of any sort that comes within O 53 of the ROC. Given the manner in which the prayer was framed, Mr Ravi's reference to s 134 of the Evidence Act (Cap 97, 1997 Rev Ed) does not provide a basis for a request for the court to grant immunity.

15 I therefore dismiss OS 111/2020.