AHQ *v* Attorney-General and another appeal
[2015] SGCA 32

Case Number : Civil Appeals Nos 109 and 110 of 2014

Decision Date : 22 June 2015

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JA; Tay Yong Kwang J

Counsel Name(s) : The appellants in person; Hui Choon Kuen and Zheng Shaokai (Attorney-General's Chambers) for the respondent.

Parties : AHQ — Attorney-General

Civil Procedure—Striking out

22 June 2015

Chao Hick Tin JA (delivering the grounds of decision of the court):

Introduction

1 Should a disgruntled litigant with a burning sense of grievance caused by his experience with the judicial process be entitled to sue the government in an action in tort for damages? Would he succeed if he sued the judge concerned personally? These were the questions which were at the core of the two appeals before us. Having heard the submissions of the parties, we dismissed both appeals. We now give the reasons for our decision.

The facts

2 The appellants in Civil Appeal No 109 of 2014 ("CA 109/2014") and Civil Appeal No 110 of 2014 ("CA 110/2014") were, respectively, AHQ and Ho Pak Kim Realty Co Pte Ltd ("HPK"). HPK's managing director is AHQ. The respondent in both CA 109/2014 and CA 110/2014 was the Government of the Republic of Singapore ("the Government"), represented by the Attorney-General.

3 These appeals arose out of certain court orders made against AHQ and HPK in two separate legal proceedings. The first set of orders, which concerned ancillary matters following the dissolution of the marriage between AHQ and his former spouse ("the Former Spouse"), may be summarised as follows:

(a) On 18 September 2009, District Judge Angelina Hing ("District Judge Hing") granted an interim personal protection order to the Former Spouse restraining AHQ from committing violence against her and their daughter.

(b) On 29 October 2009, District Judge Hing granted interim care and control of the son and the daughter to, respectively, AHQ and the Former Spouse. AHQ was given supervised access to the daughter on Sundays from 10.00am to 12.00pm. The Former Spouse was given access to the son on three weekdays during school holidays and two weekdays during school terms from 7.00pm to 9.30pm, as well as on Saturdays from 10.00am to 8.00pm.

(c) On 12 November 2009, District Judge Hing varied the terms of the order made on

29 October 2009, and granted interim care and control of the son to the Former Spouse too. AHQ was only granted supervised access to the son on Sundays from 10.00am to 12.00pm.

(d) On 8 April 2010, District Judge Hing made the following orders:

(i) the Former Spouse was given sole custody, care and control of both children;

(ii) AHQ was granted supervised access to the children on Sundays from 10.00am to 12.00pm;

(iii) AHQ was to pay the Former Spouse maintenance for the two children in the total sum of $1,500 per month; and

(iv) AHQ was to hand over the children's passports, birth certificates and health booklets to the counsel of the Former Spouse.

(e) On 6 October 2010, Kan Ting Chiu J dismissed AHQ's appeal against the orders made by District Judge Hing on 8 April 2010. On 14 February 2011, Kan J made no order in relation to AHQ's application for leave to appeal.

(f) On 20 December 2011, District Judge Emily Wilfred ("District Judge Wilfred") ordered AHQ and the Former Spouse to attend a mediation session on 23 December 2011. This was pursuant to the Former Spouse's application for enforcement of the maintenance order after AHQ failed to pay maintenance for the children. AHQ failed to turn up for the mediation session on 23 December 2011. District Judge Jocelyn Ong then issued a warrant for his arrest. On 15 March 2012, the Former Spouse confirmed that AHQ had paid the arrears in maintenance, whereupon District Judge Wilfred cancelled the warrant of arrest.

4 The second set of court orders were made pursuant to legal proceedings commenced as a result of a dispute between HPK, as the main contractor, and Revitech Pte Ltd ("Revitech"), as the developer, over a construction project. The case stretched over a long period of time, with a number of tranches of hearing touching on the questions of both liability and quantum. The relevant court orders made were as follows:

(a) On 13 November 2007, Lai Siu Chiu J ruled in favour of Revitech on the issue of whether certain documents formed part of the building contract between the parties (see *Ho Pak Kim Realty Co Pte Ltd v Revitech Pte Ltd* [2007] SGHC 194). HPK filed a notice of appeal (*viz*, Civil Appeal No 149 of 2007), but was deemed to have withdrawn its appeal pursuant to O 57 r 9(4) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) when it failed to file the requisite documents on time.

(b) On 8 April 2010, Lai J allowed HPK's claim for outstanding progress payments, but dismissed its claims for under-valuation of the works carried out and wrongful termination of the parties' contract (see *Ho Pak Kim Realty Co Pte Ltd v Revitech Pte Ltd* [2010] SGHC 106). Lai J also allowed the counterclaim by Revitech for delay in completion and defective works, and ordered (*inter alia*) that the costs of rectifying the defective works be assessed. On 30 September 2010, the Court of Appeal dismissed HPK's appeal against Lai J's decision of 8 April 2010, but made a minor variation to one of Lai J's orders.

(c) On 19 February 2013, Lai J dismissed HPK's appeal against the decision of Assistant Registrar Shaun Leong on the assessment of damages, and allowed Revitech's cross-appeal for

the sums awarded to it to be increased.

(d) On 29 October 2013, Assistant Registrar James Elisha Lee proceeded with the second tranche of the assessment of damages and awarded damages to Revitech.

5 On 3 January 2014, AHQ and HPK commenced, respectively, Suit No 3 of 2014 ("Suit 3/2014") and Suit No 4 of 2014 ("Suit 4/2014") against the Government in respect of the orders/acts of the courts alluded to at [3] and [4] above. The Government applied via separate applications in Suit 3/2014 and Suit 4/2014 to strike out the statement of claim in both suits. The senior assistant registrar allowed the Government's applications. Both AHQ and HPK appealed against that decision (AHQ's and HPK's respective appeals will hereafter be referred to collectively as "the two Registrar's Appeals").

The decision below

6 The judge who heard the two Registrar's Appeals ("the Judge") upheld the decision of the senior assistant registrar (see *AHQ v Attorney-General* [2014] 4 SLR 713 ("*AHQ v AG*") in relation to Suit 3/2014, and *Ho Pak Kim Realty Co Pte Ltd v Attorney-General* [2014] SGHC 176 ("*HPK v AG*") in relation to Suit 4/2014). The Judge found that it was obvious that AHQ and HPK did not have any reasonable cause of action against the Government because: (a) judges were immune from suit in relation to the exercise of their judicial power and responsibilities; and (b) the Government was likewise immune from suit in relation to acts carried out by any person in the discharge of judicial duties ("judicial acts").

7 AHQ and HPK appealed against the decision of the Judge via, respectively, CA 109/2014 and CA 110/2014, both of which we dismissed (see [1] above). As this appears to be the first time that the issue of state liability for judicial acts is canvassed before this court, and although the point is obvious, we shall now briefly explore the principles which formed the basis for our decision on the present appeals.

The issue before this court

8 In both Suit 3/2014 and Suit 4/2014, AHQ and HPK respectively named only the Government as the defendant. The critical issue before us was whether the Government was entitled to rely on s 6(3) of the Government Proceedings Act (Cap 121, 1985 Rev Ed) ("GPA") to resist the claims. Under s 6(3):

> No proceedings shall lie against the Government by virtue of section 5 [which sets out the Government's liability in tort] in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.

The rationale for s 6(3) of the GPA cannot be considered without first examining the doctrine of judicial immunity, which forms the bedrock for what is provided in s 6(3). Accordingly, we shall begin by briefly considering the concept of judicial immunity, followed by the related concept of state immunity for judicial acts as reflected in s 6(3).

Our analysis and decision

Development and rationale of judicial immunity and state immunity

The concept of judicial immunity

9 The concept of judicial immunity is one of considerable antiquity. In the seminal English Court of Appeal decision of *Sirros v Moore and Others* [1975] QB 118 ("*Sirros*"), Lord Denning MR alluded to the concept of judicial immunity, and highlighted the distinction between acts which fell within the jurisdiction of the judge and acts which did not (at 132–136):

> *The liability of the judge*
>
> 1. *Acts within jurisdiction*
>
> Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action. … The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear. It was well stated by Lord Tenterden C.J. in *Garnett* v. *Ferrand* (1827) 6 B. & C. 611, 625:
>
> > "This freedom from action and question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be."
>
> Those words apply not only to judges of the superior courts, but to judges of all ranks, high or low. …
>
> 2. *Acts without jurisdiction*
>
> … I must now turn to acts done outside [a judge's] jurisdiction. And here a distinction must be drawn between the inferior courts and the superior courts of record.
>
> (i) *Inferior courts*
>
> *So far as inferior courts are concerned, it was established for centuries that a judge of an inferior court was only immune from liability when he was exercising – albeit wrongly – a jurisdiction which belonged to him. It did not exist when he went outside his jurisdiction.* …
>
> …
>
> That principle has been repeated a thousand times, but it was only applied, so far as I can discover, to the inferior courts. The judges of the superior courts were very strict against the courts below them. …
>
> (ii) *The superior courts*
>
> But *the superior courts were never so strict against one of themselves*. There is no case in our books where a judge of a superior court has ever been held liable in damages. *Even though a judge of a superior court has gone outside his jurisdiction, nevertheless he is not liable, so long as he is acting judicially.*

…

> Some attempt has been made to reconcile the immunity of the judges of the superior courts with that of [the judges of] the inferior courts. It has been said that a judge of a superior court is the arbiter of his own jurisdiction. It is so extensive that he can never be said to have gone outside it. At most he has only exercised – albeit wrongly – a jurisdiction which belongs to him. So he is not to be made liable in damages. I can see no justification for this theory. …
>
> (iii) *The modern courts*
>
> In the old days, as I have said, there was a sharp distinction between the inferior courts and the superior courts. Whatever may have been the reason for this distinction, it is no longer valid. There has been no case on the subject for the last one hundred years at least. And during this time our judicial system has changed out of all knowledge. So great is this change that it is now appropriate for us to reconsider the principles which should be applied to judicial acts. *In this new age I would take my stand [as] this: as a matter of principle the judges of superior courts have no greater claim to immunity than the judges of the lower courts. Every judge of the courts of this land – from the highest to the lowest – should be protected to the same degree, and liable to the same degree.* …
>
> [emphasis added]

10 It is clear from the observations of Lord Denning in *Sirros* that judicial immunity has long been entrenched in the common law. Lord Denning also highlighted the historical distinction between judges of superior courts and judges of inferior courts – under the common law, only judges of superior courts were absolutely immune from suit for acts within *as well as* acts *outside* their jurisdiction, and this was so even if the superior court judge concerned acted maliciously or in bad faith (see *Fray v Blackburn* (1863) 3 B & S 576 at 578); in contrast, judges of inferior courts were immune from suit *only* for acts *within* their jurisdiction. The reason for this would appear to be that a superior court judge is the sole arbiter of his jurisdiction, and therefore, no question of excess of jurisdiction can arise (see Sir William Holdsworth, *A History of English Law Vol VI* (Methuen & Co Ltd, 2nd Ed, 1937) at pp 238–239). Thus, under the common law, an inferior court judge – but not a superior court judge – could be liable if he acted outside the confines of his jurisdiction. In *Sirros*, Lord Denning opined (at 136) that this distinction was no longer valid, and that "as a matter of principle the judges of [the] superior courts have no greater claim to immunity than the judges of the lower courts". The House of Lords, however, did not agree with his view. In *Re McC* [1985] AC 528 ("*McC*") at 550, Lord Bridge of Harwich reiterated the historical common law position that unlike superior court judges, inferior court judges could be liable if they acted beyond their jurisdiction – according to Lord Bridge, this historical distinction (which Lord Denning sought to eradicate in *Sirros*) was "so deeply rooted in our law" that it could only be changed by appropriate legislation. This historical distinction between the immunity from suit of judges of superior courts as compared to judges of inferior courts is now of limited significance in Singapore in the light of legislative intervention which, as we shall explain below, expanded the scope of judicial immunity for judges of inferior courts.

The concept of state immunity

11 Having briefly alluded to the development of judicial immunity under the common law, we now turn our attention to the related concept of state immunity for judicial acts. Traditionally, the Crown could not be sued for a claim in tort, while a claim in contract could only be brought by a petition of right (see Glanville L Williams, *Crown Proceedings* (Stevens & Sons Limited, 1948) at pp 2–3 and 16–19; see also Peter W Hogg, *Liability of the Crown* (The Law Book Company Limited, 2nd Ed, 1989)

("*Liability of the Crown*") at pp 5–6). This was the position in the United Kingdom until the enactment of the Crown Proceedings Act 1947 (c 44) (UK) ("the UK CPA"). The rationale for this shift was explained at the second reading of the Bill introducing this Act ("the UK Crown Proceedings Bill") as follows (see *United Kingdom Parliamentary Debates, Official Reports* (4 July 1947) vol 439 at col 1678):

> … [A]t a time when the Crown operating through Government Departments or public authorities is coming more and more into contact with the citizen and the subjects of the country, it was inappropriate that the citizen's right to legal remedies should be less effective against the Crown than they would be in any other ordinary case. …

12 The UK CPA permitted the Crown to be sued in the same manner as a private person, subject to certain exceptions (see *Liability of the Crown* at pp 7 and 19). At the second reading of the UK Crown Proceedings Bill, the then Attorney-General of the United Kingdom, Sir Hartley Shawcross, explained that "the general effect of the Bill [was] to place the Crown in exactly the same position as the subject", but there were some exceptions (see *United Kingdom Parliamentary Debates, Official Reports* (4 July 1947) vol 439 at cols 1678–1680):

> The private citizen does not have the same kind of responsibility for protecting the public, such as the Crown possesses; he does not have the care of the public safety; he does not have the defence of the realm to consider; he is not responsible for the organisation of such great services as the Post Office. *In these matters – and there are others which will occur to hon. Members – the functions of the Crown, under our constitution, involve duties and responsibilities which no subject is required to undertake, and these distinctions are inevitably, necessarily and properly reflected by various provisions of this Bill*. But, *subject to necessary and inevitable distinctions of that kind* the broad purpose and effect of this Bill is to enable the citizen to take exactly the same kind of proceedings against the Crown, and in the same circumstances, as if the Crown were a fellow citizen. [emphasis added]

13 One of the exceptions in the UK CPA is in relation to the performance of judicial functions (see s 2(5) of the UK CPA). The UK CPA was discussed by Sir Thomas Barnes, the then Procurator General and Treasury Solicitor, in an article which he wrote shortly after the UK CPA was enacted (see Thomas Barnes, "The Crown Proceedings Act 1947" (1948) 26 Canadian Bar Review 387). In relation to s 2(5) of the UK CPA, which is *in pari materia* with s 6(3) of our GPA, Sir Thomas wrote (at pp 391–392):

> Clearly, the Crown ought not to interfere in the manner in which judicial functions are exercised; for, to the extent to which the Crown interferes, the functions cease to be judicial. … If the Crown, therefore, cannot interfere with the acts of a servant of the Crown in these cases, it seems wrong that the Crown should be liable for those acts; the basis of a master's vicarious liability is the power of the master to control and direct the servant.

14 More recently, H W R Wade and C F Forsyth, the learned authors of the leading textbook *Administrative Law* (Oxford University Press, 2014) ("*Wade and Forsyth*"), explained at p 697 that:

> The Crown has one general immunity in tort which is *a matter of constitutional propriety*. The [UK CPA] provides against Crown liability in tort for any person discharging judicial functions or executing judicial process. *This expresses the essential separation of powers between executive and judiciary.* Judges and magistrates are appointed by the Crown or by ministers. They are paid (if at all) out of public funds, and so may be said to be servants of the Crown in the broad sense – a sense that was brought home to them when their salaries were reduced as "persons in His

> Majesty's service" under the National Economy Act 1931. But the relationship between the Crown and the judges is entirely unlike the relationship of employer and employee on which liability in tort is based. *The master can tell his servant not only what to do but how to do it. The Crown has no such authority over the judges since the days of Coke's conflicts with James I.* The master can terminate his servant's employment, but the superior judges are protected by legislation, dating from 1700, against dismissal except at the instance of both Houses of Parliament. *Their independence is sacrosanct, and if they are independent no one else can be vicariously answerable for any wrong that they may do*.
>
> It is virtually impossible for judges of the superior courts to commit torts in their official capacity, since they are clothed with absolute privilege, and this privilege has now been extended to lower judges, such as magistrates. But the [UK CPA] comprehensively protects the Crown in the case of anyone "discharging or purporting to discharge" judicial functions. …
>
> [emphasis added]

15 The position in New Zealand is similar to that in the United Kingdom. Section 6(5) of New Zealand's Crown Proceedings Act 1950 (No 54) ("the NZ CPA"), like s 6(3) of our GPA, is closely modelled after s 2(5) of the UK CPA. In the New Zealand Supreme Court decision of *Attorney-General v Chapman* [2012] 1 NZLR 462, McGrath and William Young JJ explained the rationale for s 6(5) of the NZ CPA as follows (at [175]):

> … Indeed, we think it clear that the Crown's vicarious liability in tort does not extend to acts of persons discharging functions of a judicial nature. Unlike those in the executive branch, the judiciary are not employees or agents of the Crown. The independence of the judiciary from the executive branch, within a constitution that reflects the separation of powers, has long been seen as inconsistent with judges being employees or agents of the Crown who act on its behalf. Nor has the Crown otherwise been seen as having the type of relationship with the judges that would cause vicarious liability to be involved.

16 In *Liability of the Crown*, the learned author considered (at pp 92–93) that the Crown would not be vicariously liable for the torts of judges even without the statutorily-conferred immunity as judges "would probably not be characterized as servants of the Crown". It was explained that the judicial office was not an employment "because of the absence of control by the appointing government".

17 Bearing in mind these developments and the rationale underlying the two interrelated concepts of judicial immunity and state immunity, we now turn to consider the position in Singapore.

The position in Singapore

Judicial immunity in the Singapore context

18 We have shown from the foregoing that historically, under the common law, judges of superior courts occupied a different position from judges of inferior courts. An essential feature which differentiates these two categories of judges is the fact that the jurisdiction of superior courts is *unlimited*, but that is not the case with regard to inferior courts. As a result of this distinction, under the common law, judges of inferior courts were not accorded the same extent of protection from suit as judges of superior courts (as noted earlier at [10] above, Lord Denning attempted, in *Sirros* at 136, to eradicate this distinction; see, however, Lord Bridge's contrary view in *McC* at 541–542 and 550).

19 Presumably because of the aforesaid distinction under the common law, and in order to place it

beyond doubt that the judges of our inferior courts (as well as the judicial officers of all Singapore courts) would have the same immunity from suit as the judges of our superior court (namely, the Supreme Court of Singapore ("the Supreme Court")), our Legislature deemed it necessary to enact s 68(1) of the State Courts Act (Cap 321, 2007 Rev Ed) ("the SCA"), s 79(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA") and, more recently, s 45(1) of the Family Justice Act (Act 27 of 2014) ("the FJA"). These provisions accord to the following judges and judicial officers immunity from suit (if the stipulated prerequisites are satisfied):

(a) in the case of s 68(1) of the SCA, District Judges, Magistrates, the Registrar and Deputy Registrars of the State Courts of Singapore;

(b) in the case of s 79(1) of the SCJA, the Registrar, the Deputy Registrar and Assistant Registrars of the Supreme Court; and

(c) in the case of s 45(1) of the FJA, District Judges and Magistrates who are designated as judges of the Family Court or the Youth Court, as well as the Registrar, the Deputy Registrar and Assistant Registrars of the Family Justice Courts.

Our Legislature did not, however, enact similar provisions to deal with the immunity from suit of the judges of our superior court (namely, High Court judges (including Senior Judges and Judicial Commissioners), Judges of Appeal and the Chief Justice).

20 In contradistinction to the statutory position in Singapore (where, as just mentioned, there are no express provisions covering the immunity from suit of superior court judges), both Malaysia and India have expressly conferred immunity from suit on judges via legislation which is worded broadly enough to cover superior court judges as well. Section 14(1) of Malaysia's Courts of Judicature Act 1964 (Act 91, 1972 Rev Ed) states as follows:

Protection of Judges and other judicial officers

14.(1) No *Judge* or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, *whether or not within the limits of his jurisdiction*, nor shall any order for costs be made against him, *provided that he at the time in good faith believed himself to have jurisdiction* to do so or order the act complained of.

[emphasis added]

The corresponding provision in India is s 1 of India's Judicial Officers Protection Act 1850 (Act No XVIII of 1850) ("the JOPA"), which reads as follows:

No *Judge*, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, *whether or not within the limits of his jurisdiction*, nor shall any order for costs be made against him, *provided that he at the time in good faith believed himself to have jurisdiction* to do so or order the act complained of. [emphasis added]

21 It can be seen that the Malaysian provision follows very closely the wording of the Indian provision. Because our Legislature did not expressly enact any provision to confer immunity from suit on the judges of our superior court (*ie*, the Supreme Court), a view has been advanced that the judges of the Supreme Court might be covered by the catch-all words "other person acting judicially"

in s 79(1) of the SCJA. That provision reads:

> **Protection of Registrar and other officers**
>
> **79.**—(1) The Registrar, the Deputy Registrar or an Assistant Registrar or *other person acting judicially* shall not be liable to be sued in any court exercising civil jurisdiction for any act done by him in the discharge of his judicial duty whether or not within the limits of his jurisdiction, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.
>
> [emphasis added]

22 In the court below, the Judge did not accept the argument that the words "other person acting judicially" in s 79(1) of the SCJA would cover the judges of the Supreme Court. In brief, his reasons were that:

> (a) As pointed out at [20]–[21] above, unlike the Malaysian and the Indian statutes, which make express reference to the immunity from suit of "Judge[s]", a term that is broad enough to encompass superior court judges, s 79(1) of the SCJA is silent on whether the judges of the Supreme Court are covered (see *AHQ v AG* at [17]–[18] and *HPK v AG* at [14]).
>
> (b) The principle of *ejusdem generis*, as well as the extra-judicial comments made by then Chief Justice Chan Sek Keong in the article "Securing and Maintaining the Independence of the Court in Judicial Proceedings" (2010) 22 SAcLJ 229 ("*Independence of the Court*") at para 11, support a narrower construction, *ie*, that s 79(1) of the SCJA does not cover the judges of the Supreme Court (see *AHQ v AG* at [21]–[22] and *HPK v AG* at [14]).

23 We agree with the Judge's analysis and conclusion. We would add that his interpretation of s 79(1) of the SCJA is consistent with the legislative intent, which must have been to eliminate, via that provision coupled with s 68(1) of the SCA and s 45(1) of the FJA, the historical distinction between the judges of our superior court as opposed to the judges of our inferior courts (as well as the judicial officers of all Singapore courts) in so far as immunity from suit was concerned. In this regard, it is pertinent to note that s 3 of the SCJA states that the Supreme Court shall be a "superior court of record". As judges of a superior court of record, the judges of the Supreme Court have all along been regarded as being immune from suit for both acts done within *and* acts done *outside* the limits of their jurisdiction, pursuant to the historical position under the common law. This was obviously the reason why our Legislature did not think it was necessary to enact an express provision to confer immunity from suit upon the judges of the Supreme Court.

24 The same historical distinction between inferior courts and superior courts explains the enactment of the JOPA in India. Prior to 1850, under the common law, the judges of India's inferior courts were *not* accorded immunity from suit for acts outside the limits of their jurisdiction. This necessitated statutory intervention in the form of s 1 of the JOPA. The historical position in India and the purpose of the JOPA is set out in Law Commission of India, *The Judicial Officers' Protection Act, 1850* (104th Report, 10 October 1984) at paras 2.1–3.1. For convenience, we reproduce these paragraphs below:

> **CHAPTER 2**
>
> **HISTORY**

2.1. Prior to 1850, in India, there was no comprehensive legislation relating to judicial immunity. A British statute, dealing with a very limited area of the subject, provided as follows:—

> "And, whereas it is reasonable to render Provincial Magistrates, as well as natives as British subjects, more safe in execution of their office; be it enacted, that no action for wrong or injury shall lie in the Supreme Court, against any person whatsoever exercising a judicial office in the Country Courts, for any judgment, decree or order of the said Court, nor against any person for any act done or in virtue of the Order of the said Court."

2.2. The object of that section of the British statute was to protect persons exercising a judicial office for things done within *their jurisdiction*, though erroneously or irregularly done, leaving them [liable] for things done wholly *without jurisdiction*. It was so held by the Privy Council.

2.3. The Privy Council further laid down that the statute referred to above (protecting Provincial Magistrates from India from actions for any wrong or injury done by them in the exercise of their judicial offices) did not confer unlimited protection on Magistrates. It placed them on the same footing as English courts of similar jurisdiction. The Privy Council saw no reason why Indian judges should be "more or less protected than English judges of general and limited jurisdiction under the like circumstances."

According to the Privy Council, to give them (Indian judges) an exemption from liability when acting bonafide [*sic*] but *without jurisdiction* would be to place them on a better footing than the English judges, and would leave the injured individual wholly without remedy. The Privy Council further observed:

> "For, English Judges, when they act wholly without jurisdiction, whether they may suppose they had it or not, have no privilege; and the justice of the peace, whether acting as such, or in their judicial character, in case of summary conviction, have no other privileges than that of having notice of action, a limitation of time for bringing it, a restriction as to the venue, the power of tendering amends, and of pleading the general issue, with certain advantages as to costs."

2.4. Thus, prior to the passing of the Act of 1850, the protection for judges in India existed only for acts within jurisdiction, as held by the Privy Council. As will be pointed out later, the Act of 1850 has expanded the protection available to the judges.

CHAPTER 3

PRESENT LAW

3.1. The Act of 1850 makes more definite provision as to the protection of judges than the earlier law. In the first place, it covers all judicial officers, by enumerating them specifically. Secondly, it protects the judicial officers from suits, not only for acts done or ordered to be done by them in the discharge of their duties *within the limits of their jurisdiction*, but also for acts done *beyond the limits of their jurisdiction*, provided that, in the latter case, the officer, at the time of doing the act or ordering it to be done, in good faith believed himself to have such jurisdiction. Thirdly, the act also protects persons acting in pursuance of the orders of a judicial officer, if acting in good faith, *even if* the judicial officer had no jurisdiction to pass that particular order.

[emphasis in original]

25 Prior to the enactment of the JOPA, India's inferior court judges were not entitled under the common law to judicial immunity for acts outside the limits of their jurisdiction. To address this, s 1 of the JOPA was enacted with an express reference to "Judge" – this was intended to expand the protection hitherto afforded to India's inferior court judges. As mentioned earlier (at [19] and [23] above), the same extension of immunity from suit to the judges of Singapore's inferior courts as well as the judicial officers of all Singapore courts was effected through s 68(1) of the SCA, s 79(1) of the SCJA and s 45(1) of the FJA. A statutory provision similar to s 1 of the JOPA was not, however, thought to be necessary in so far as the judges of our superior court were concerned as they were already (and are still) well protected under the common law.

26 In view of the foregoing, we are satisfied that the legislative intent of s 79(1) of the SCJA was simply to accord the judicial officers of our superior court the same judicial immunity as that which the judges of our superior court enjoyed (and currently still enjoy) under the common law. Our Legislature could not have intended that the words "other person acting judicially" in s 79(1) of the SCJA should be read expansively to include the judges of the Supreme Court. Such a reading of the provision would amount to the tail wagging the dog.

27 At the heart of the concept of judicial immunity lies the need to safeguard the administration of justice through upholding judicial independence and finality in the judicial process. It is the judicial process, and not judges, that judicial immunity seeks to protect, even though the two are inseparable. This is supported both by authorities and in principle. In James Goudkamp, *Tort Law Defences* (Hart Publishing, 2013) ("*Tort Law Defences*") at para 5.3.1.1, the learned author considered that:

> Immunities against liability are held by certain participants in the judicial process, most notably judges … Persons who play one of these roles are not liable for anything that they say or do in connection with court proceedings. In particular, they cannot be held responsible in negligence or defamation. *These immunities exist not for the personal benefit of the persons entitled to them, but in order to safeguard the administration of justice. They ensure that the aforementioned participants in the judicial process are not hindered in the discharge of their duties to the court by litigation, or the threat thereof, by disappointed litigants.* They also prevent decided issues from being re-agitated outside of appellate routes. [emphasis added]

28 In the same vein, Chan CJ, in *Independence of the Court* at para 11, was of the view that judicial immunity was an "important element" that facilitated the independence of the Judiciary. Apart from judicial independence, finality in the judicial process is another important tenet that is foundational to the administration of justice, and would clearly weigh in favour of conferring immunity from suit on judges (as well as judicial officers). An aggrieved litigant who has exhausted his right of appeal should not be allowed to commence actions against judges and judicial officers in an attempt to re-litigate issues that have already been conclusively decided.

29 We appreciate that there are other considerations, such as accountability and remedy for wrongs, which are germane to the issue and which may weigh against judicial immunity. However, at the end of the day, it is a matter of balancing competing policy considerations. On the one hand, the law seeks to provide an effective remedy to an aggrieved litigant. Nevertheless, this must be weighed against the fact that genuine cases of judicial misconduct are few and far between (if at all); and in any event, there are appropriate methods of recourse available to an aggrieved litigant such as the appellate process, or even the setting aside of the decision concerned or the rehearing of the case in question in extremely limited circumstances (see *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [2011] 1 SLR 998 at [55]–[61]). The countervailing policy consideration is that the proper functioning of the judicial system demands that the Judiciary is not harassed by

frivolous claims, and that finality in the judicial process is not undermined by collateral attacks against the Judiciary. We are of the firm view that the balance in Singapore tilts in favour of this countervailing policy consideration. The same balance has been reached in other jurisdictions such as the United Kingdom (see *Hinds v Liverpool County Court and others* [2009] 1 FCR 474 ("*Hinds*") at [13]) and New Zealand (see New Zealand Law Commission, *Crown Liability and Judicial Immunity: A Response to Baigent's Case and Harvey v Derrick* (Report 37, May 1997) at pp 46–48). It is also noteworthy that other common law jurisdictions such as Australia (see *Gallo v Dawson* (1989) 63 ALJR 121), Malaysia (see *Indah Desa Saujana Corp Sdn Bhd and others v James Foong Cheng Yuen, Judge, High Court Malaya and another* [2008] 2 MLJ 11) and Canada (see *Taylor v Canada (Attorney-General)* [2000] 3 FC 298) have similarly recognised the common law rule of judicial immunity.

30 In tandem with the position under the SCA, the SCJA, the FJA and the common law in relation to judicial immunity, and in accordance with the doctrine of separation of powers between the Executive and the Judiciary (see [35] below), s 6(3) of the GPA provides that the Government shall be immune from being sued in tort for judicial acts. It is this issue that we now turn to examine.

State immunity for judicial acts under s 6(3) of the GPA

31 In Singapore, the general rule is that the Government may be liable for, *inter alia*, the tortious acts of its public officers. This is the effect of s 5 of the GPA, which has been considered by this court in two earlier cases. In the first case, *Swee Hong Investment Pte Ltd v Swee Hong Exim Pte Ltd and another (Kiaw Aik Hang Land Pte Ltd and another, third parties) and another appeal* [1994] 3 SLR(R) 259, this court explained at [32] that "[t]he main principle of s 5 is that, in respect of wrongful acts and omissions of any public officer, the Government's liability is equated with that of a private principal for the acts or omissions of his agents". In the second case, *Attorney-General v R Anpazhakan* [1999] 3 SLR(R) 810, this court held at [27] that s 5 of the GPA "renders the Government vicariously liable for the wrongful act or neglect of any public officer in the same way as a private employer would be liable for the act or neglect of an employee". Put simply, s 5 of the GPA renders the Government liable for the tortious acts of its public officers in the same manner as would have been the case if the Government were an ordinary employer.

32 However, there are exceptions to the Government's liability in tort under s 5 of the GPA. In particular, we note that s 5 of the GPA is expressly stated to be "[s]ubject to the provisions of [the GPA]". For present purposes, we are only concerned with s 6(3) of the GPA (see [8] above). We reproduce this provision again below for ease of reference:

> No proceedings shall lie against the Government by virtue of section 5 in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.

33 As stated earlier at [15] above, it appears that s 6(3) of the GPA is closely modelled after s 2(5) of the UK CPA. Thus, our earlier discussion at [11]–[16] above on s 2(5) of the UK CPA and s 6(5) of the NZ CPA (which is similarly modelled after s 2(5) of the UK CPA) is highly pertinent in construing s 6(3) of our GPA.

34 We should also mention the High Court of Ireland case of *Kemmy v Ireland and another* [2009] IEHC 178 ("*Kemmy*"). Ireland does not have a statutory provision on state immunity for judicial acts like s 6(3) of the GPA. Nevertheless, we find the discussion in *Kemmy* on the rationale for the common law rule of state immunity for judicial acts illuminating. In that case, the plaintiff was convicted of rape and sexual assault, and was sentenced to a total of three years' imprisonment. The

conviction was subsequently set aside on the basis that the trial had been unfair, but by then, the plaintiff had already been released from prison. The plaintiff therefore sued for infringement by the State, through its judicial organ, of his constitutional right to a fair trial. McMahon J dismissed the plaintiff's claim. He considered, firstly, that because of the separation of powers and the independence of the Judiciary, the State could not be vicariously liable for any errors which a judge might commit in the administration of justice. Next, he opined that the State would in any event be immune from suit given that "state immunity in these circumstances is a corollary of the personal immunity conferred on the judges". His reasoning, which we consider to be instructive, is reproduced in full below:

> … I am of the view that many of the reasons which support personal judicial immunity – the promotion of judicial independence, the desirability of finality in litigation, the existence of an appeal and other remedies as well as the public interest – can also support the argument for state immunity in cases such as [that] before this court. Indeed it is my view that not to extend the immunity to the state in the present circumstances would represent an indirect and collateral assault on judicial immunity itself.
>
> To make the state liable in such a situation would indirectly inhibit the judge in the exercise of his judicial functions and this, in turn, would undermine his independence as guaranteed by the Constitution. It would introduce an unrelated and collateral consideration into the judge's thinking which could prevent him from determining the issue in a free unfettered manner. It might, for example, encourage the other organs of government to monitor the conduct of the judges in this regard, thereby resulting in "a chilling effect".
>
> The fundamental reason for supporting this conclusion, however, is that *when the judge is exercising judicial authority he is acting in an independent manner and not only is he not a servant of the state in these circumstances, he is not even acting on behalf of the state. He is not doing the state's business.* He is acting at the behest of the people and his mission is to administer justice. In most cases he is merely exercising his discretion and his actions cannot amount to "torts" at all. For the most part he is immune from civil liability. From this perspective, the state is not directly involved with his activities, does not write his mission and cannot intervene with the judge's exercise of his functions. *While in one sense, it may be appropriate to describe the judiciary as an organ of government in the broad constitutional representation of the state, in another sense, when exercising its jurisdiction, the judiciary is truly decoupled from the state.* In a sense, there are two principals involved at a constitutional level in the administration of justice, and if the judiciary is immune from suit it seems logical that the state when facilitating the exercise of judicial power through the judiciary should also be entitled to state immunity in that regard.
>
> In a constitutional sense, the state merely provides the scaffolding for judicial activity. The state is no longer involved once the judge begins his work. The state may be liable for failing to erect the appropriate scaffolding, but once this is up, and the judge goes about his business, the only liability that arises is that of the judge. To speak of the state's liability for judicial acts in that context is somehow to re-introduce in disguise the concept of vicarious liability, something that I have already rejected.
>
> Finally, it is somewhat contradictory, since these proceedings are taken against the state on the basis that the judge is part of the state apparatus, for the Plaintiff to suggest that the established immunity which the judge enjoys ought not to benefit the state also in such circumstances. He is arguing that the judge should be identified with the state on the one hand, when liability is considered, and should, on the other hand, be distinguished from the state when

immunity is at issue.

[emphasis added]

35 We are of the view that s 6(3) of the GPA exists to safeguard the administration of justice by protecting judicial independence and finality in the judicial process. As McMahon J stated in *Kemmy*, a judge, in discharging the judicial responsibilities vested in him, is not acting as a servant of the Government or on behalf of the Government. Instead, he is acting for the common good of the State and the society in administering justice. In that regard, the Government does not (and should not) interfere with the judge's performance of his judicial function. This is a basic premise which underlies Singapore's constitutional framework. It is clear that judicial independence is a fundamental tenet of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Singapore Constitution"). As observed in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [143], the separation of powers under the Singapore Constitution mandates that "[e]ach arm of the government operates independently of the other and each should not interfere with the functions of the other". Furthermore, this court in *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [31] implicitly acknowledged, albeit in relation to a discussion on the issue of justiciability, that judicial independence flowed from the separation of powers under the Singapore Constitution. The independence of the Judiciary is one of the foundational pillars of Singapore's constitutional framework and must not be shaken. To this end, the Government should not be liable for the acts of the Judiciary, over which it has no control or influence. To adopt the contrary position would, as observed by McMahon J in *Kemmy*, indirectly inhibit the exercise of the judicial function and, in turn, undermine judicial independence. The same was noted by Sir Thomas and the learned authors of *Wade and Forsyth* (see [13]–[14] above). Apart from judicial independence, the other justifications for judicial immunity (such as finality in the judicial process) would equally apply to s 6(3) of the GPA. In this regard, we agree with McMahon J in *Kemmy* that to refuse to extend the immunity to the Government would represent "an indirect and collateral assault on judicial immunity itself" (see also *Tort Law Defences* at para 5.3.1.8).

36 In view of the foregoing, it does not come as a surprise that Singapore is among the many common law jurisdictions which have made express statutory provision on state immunity for judicial acts. Some of these jurisdictions include:

(a) the United Kingdom (see s 2(5) of the UK CPA, applied in *Hinds*, *Branch and others v Department for Constitutional Affairs* [2005] EWHC 550 and *Mendel v Jacobs and others* [2009] EWHC 121);

(b) New Zealand (see s 6(5) of the NZ CPA, applied in *Crispin v Registrar of the District Court* [1986] 2 NZLR 246, *Young v Attorney-General* [2003] NZAR 627 as well as *Payne v Attorney-General* [2005] NZFLR 846);

(c) Canada (see, *eg*, s 5(6) of Ontario's Proceedings Against the Crown Act (RSO 1980, c P27) and s 4(6) of Manitoba's Proceedings against the Crown Act (RSM 1970, c P140));

(d) Hong Kong (see s 4(5) of Hong Kong's Crown Proceedings Ordinance 1957 (Cap 300), applied in *Cheng Chen Sing v R and others* [1983] 2 HKC 500);

(e) Trinidad and Tobago (see s 4(6) of Trinidad and Tobago's State Liability and Proceedings Act (Ch 8:02), acknowledged in *Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385); and

(f) Malaysia (see s 6(3) of Malaysia's Government Proceedings Act 1956 (Act 359)).

Application to the present facts

37 We now turn to consider the facts in the present appeals. Having regard to the language of s 6(3) of the GPA as well as the case law interpreting statutory provisions which are *in pari materia* with s 6(3), it is clear to us that the acts of judges and judicial officers in the course of judicial proceedings would fall squarely within the scope of s 6(3) of the GPA.

38 At this juncture, it is apposite to consider the English decision of *Hinds* (cited at [29] above), which bears some similarity to the facts in the present appeals. There, the claimant father commenced proceedings against various parties, including the Liverpool County Court, in connection with the adoption and care proceedings regarding his three children. His claims were based on, *inter alia*, negligence and breach of his rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("the European Convention on Human Rights"). The claimant's complaint against the first defendant, Liverpool County Court (being the court which handled the care and adoption matters), was that its decisions were (*inter alia*) unsupported by any or any reliable evidence, contrary to the law or his rights, as well as based upon bias, prejudice and sexual discrimination (at [7(a)]). As a result, he was deprived of contact with his three children for a period of approximately ten years. The defendants applied for the claimant's claim to be struck out. Akenhead J agreed with the defendants. He accepted the first defendant's primary contention that the decisions of judges were not vulnerable to challenge either under the common law or under human rights legislation, and noted that s 2(5) of the UK CPA "underpins the common law immunity of judges" (at [13]–[14]). He further observed at [14]–[15] that:

> … [G]iven the wording of s 2(5), statute does not permit proceedings to be bought against the Crown for or in respect of even a "bad" decision of a judge acting, as in this case, within her jurisdiction or purportedly within it.
>
> Mr Hinds does not (on analysis or otherwise) suggest that the two judges in question acted outside their jurisdiction or behaved in a corrupt way. He believes, however, very firmly that they were wrong and came to conclusions which, he argues, no reasonable fair minded judge could or should have reached. I have no hesitation in finding that, even if he is right in such belief, that factor does not found any claim against those judges or their employer, in effect the Ministry of Justice: the judges were acting within their jurisdiction and even if wrong, unfair, careless, negligent, malicious or corrupt, they, their conduct or decisions or their employer are not liable and are not impugnable. I hasten to say that I have seen nothing which suggests that they acted in any such way.

39 In addition, Akenhead J also noted at [16] that the claimant had been entitled to appeal against the decisions which he felt were wrong, but had not done so. Specifically, he observed that the appellate process would have provided an adequate redress for the claimant's grievances, if any. Having found that the judges and the Ministry of Justice were immune from proceedings, and that there were no properly pleaded grounds for establishing breaches of the European Convention on Human Rights, Akenhead J struck out the claim against the first defendant.

40 In the present case, AHQ and HPK have either exhausted their right of appeal (see [3(e)] and [4(b)] above) or refused to pursue the proper means of seeking recourse (see *AHQ v AG* at [4]). To any reasonable person, that should have been the end of the matter. Regrettably, AHQ and HPK did not think so. Unable to achieve the outcome that they wanted, and seeing that there were no real alternatives left, they decided to sue the Government. There is no doubt that the complaints of AHQ

and HPK related to acts done by judges and judicial officers while discharging their judicial responsibilities. The court orders which AHQ and HPK were aggrieved with were made in the course of judicial proceedings. Accordingly, s 6(3) of the GPA was applicable. It follows, therefore, that AHQ and HPK had no reasonable cause of action against the Government, and the Judge was right in dismissing the two Registrar's Appeals.

Conclusion

41 For the reasons set out above, we dismissed both CA 109/2014 and CA 110/2014 with costs and the usual consequential orders.