Tan Seet Eng *v* Attorney-General and another matter
[2015] SGCA 59

Case Number	: Civil Appeal No 201 of 2014 and Summons No 263 of 2015
Decision Date	: 25 November 2015
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s)	: Hamidul Haq, Thong Chee Kun, Ho Li Fong and Istyana Putri Ibrahim (Rajah & Tann Singapore LLP) for the Appellant; Hay Hung Chun, Jeyendran s/o Jeyapal, Tan Eu Shan Kevin and Chou Xiujue Ailene (Attorney-General's Chambers) for the Respondent.
Parties	: Tan Seet Eng — Attorney-General

Administrative law – procedure

Administrative law – habeas corpus

Administrative law – remedies – certiorari

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2015] 2 SLR 453.]

25 November 2015 Judgment reserved.

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

Introduction

1 The rule of law is the bedrock on which our society was founded and on which it has thrived. The term, the rule of law, is not one that admits of a fixed or precise definition. However, one of its core ideas is the notion that the power of the State is vested in the various arms of government and that such power is subject to legal limits. But it would be meaningless to speak of power being limited were there no recourse to determine whether, how, and in what circumstances those limits had been exceeded. Under our system of government, which is based on the Westminster model, that task falls upon the Judiciary. Judges are entrusted with the task of ensuring that any exercise of state power is done within legal limits. In 2012, at the Rule of Law Symposium that was held in Singapore, Prof Brian Z Tamanaha observed that judges have the specific task of ensuring that the arms of government are held to the law, and in that sense, the ultimate responsibility for maintaining a system which abides by the rule of law lies with the Judiciary ("The History and Elements of the Rule of Law" [2012] SJLS 232 at p 244).

2 This is not new law. The underlying principle was aptly stated by Wee Chong Jin CJ almost three decades ago in *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR(R) 525 ("*Chng Suan Tze*") at [86]:

> … [T]he notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power. If therefore the Executive in exercising its discretion under an Act of Parliament has exceeded the four corners within which Parliament has decided it can

exercise its discretion, such an exercise of discretion would be *ultra vires* the Act and a court of law must be able to hold it to be so. … It must be clear therefore that the boundaries of the decision maker's jurisdiction as conferred by an Act of Parliament is a question solely for the courts to decide. … Further, it is … no answer to refer to accountability to Parliament as an alternative safeguard. …

3 In this appeal, Tan Seet Eng ("the Appellant"), who was detained on 2 October 2013, seeks an Order for Review of Detention ("ORD") pursuant to O 54 r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the ROC"). He was detained under s 30 of the Criminal Law (Temporary Provisions) Act (Cap 67, 2000 Rev Ed) ("the CLTPA"), which permits the Minister for Home Affairs ("the Minister") to detain without trial a person who has been associated with activities of a criminal nature for a period of not more than a year if the Minister deems it necessary in the interests of public safety, peace and good order. This, however, is subject to the consent of the Public Prosecutor.

4 The Appellant's application for an ORD was opposed by the Attorney-General ("the Respondent"). It was heard by a High Court judge ("the Judge") on 19 November 2014 and dismissed on the same day. The Judge's decision is reported as *Tan Seet Eng v Attorney-General* [2015] 2 SLR 453 ("the GD"), and the present appeal is brought against that decision.

5 We reserved judgment after hearing the parties' submissions and, in this judgment, we set out our decision and the reasons for it. This case is of course important for the Appellant individually as he has been detained without trial. But it is also important for society as a whole because here we set out:

(a) what the limits of the Executive's power under s 30 of the CLTPA are;

(b) what approach the court should adopt when hearing ORD applications; and

(c) how the court should carry out its constitutional responsibility in assessing whether the Executive has properly exercised its powers under the CLTPA.

The facts

6 On 16 September 2013, the Appellant was arrested for allegedly being involved in global football match-fixing activities (the GD at [3]). On the same day, he was also required to furnish a statement under s 27 of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) ("the PCA"). Assistant Superintendent Ho Kah King Joseph ("ASP Ho"), an officer from the Commercial Affairs Department ("CAD"), is said to have recorded this statement. ASP Ho also recorded statements from the Appellant on the second and third days of his arrest. On 18 September 2013, and within 48 hours of his initial arrest, the Appellant was re-arrested by ASP Ho under s 44(1) of the CLTPA and detained for a further 48 hours under s 44(2) (the GD at [4]). On 20 September 2013, and before the 48-hour detention period permitted under s 44(2) of the CLTPA expired, the Appellant was detained for a further period of 14 days under s 44(3) of the CLTPA.

7 On 27 September 2013, an ORD application was made by the Appellant's lawyers on his behalf. This application was withdrawn on 4 October 2013 (the GD at [5]).

8 On 2 October 2013, the Minister issued and served an order under s 30 of the CLTPA on the Appellant, requiring his detention for a period of 12 months starting from that day (the GD at [6]). The basis for the detention was the Minister's satisfaction that the Appellant had been associated with activities of a criminal nature and that his detention was necessary in the interests of public

safety, peace and good order. The grounds of detention issued with the order stated that between 2009 and 2013, the Appellant had been the leader and financer of a global football match-fixing syndicate operating from Singapore, which fixed football matches in many parts of the world. The grounds of detention also furnished the following particulars of his football match-fixing activities:

(a) the Appellant recruited runners in Singapore and directed match-fixing agents and runners from Singapore to assist in fixing football matches between 2009 and September 2013;

(b) the Appellant financed and assisted with match-fixing activities in Egypt between September and December 2010 by providing a contact for a corrupt referee;

(c) the Appellant financed football match-fixing activities in South Africa in May 2010;

(d) the Appellant directed and financed football match-fixing activities in Nigeria in June 2011;

(e) the Appellant financed football match-fixing activities in Turkey in February 2011; and

(f) the Appellant assisted with attempted football match-fixing activities in Trinidad and Tobago in mid-2011 by sending a match-fixing agent to provide support to another match-fixing agent in relation to match-fixing activities.

9 In respect of each of the foregoing particulars, neither the number of runners recruited nor the matches fixed were specified. Nor were any particulars given as to the activities said to have been committed between mid-2011, the time of the latest particularised allegations above, and 2013, the time until when, it was alleged, the Appellant was the leader and financer of a global match-fixing syndicate.

10 A two-day hearing before the Criminal Law Advisory Committee took place on 17 October 2013 and 5 November 2013 (the GD at [7]). The Appellant was legally represented at those proceedings and his lawyers made submissions on his behalf. On 5 November 2013, the advisory committee submitted its written report with its recommendations to the President in accordance with s 31(2) of the CLTPA. The President confirmed the detention order in accordance with s 31(3) of the CLTPA on 7 April 2014, and the Appellant's lawyers were informed of the President's decision by a letter dated 8 April 2014 (the GD at [8]). The advisory committee's report is not available to us. In any case, it is a body that performs only an advisory function and has no decision-making powers.

11 The Appellant's lawyers wrote to the Criminal Law Advisory Committee (Review) on 23 September 2014, requesting that it consider releasing the Appellant unconditionally or placing him under police supervision instead (the GD at [9]). The review committee replied on 29 September 2014, stating that it had reviewed the matter and submitted a report to the President. The President, after considering the matter, then extended the Appellant's detention order for a period of one year with effect from 2 October 2014, with reference to the review committee's report and on the advice of the Cabinet. The review committee's report was also not available to us.

The decision below

12 In the court below, the Appellant made submissions on four issues. We will set out in brief each of these submissions together with the Judge's holding thereon. First, the Appellant submitted that both the Minister's and the President's decisions to issue and confirm the detention order could be reviewed on the grounds of illegality, irrationality and procedural impropriety (the GD at [11]–[16]). The Respondent accepted that both decisions were susceptible to review, but took the view that, at

least as far as the Judge was concerned, the applicable test was set down in *Kamal Jit Singh v Ministry of Home Affairs and others* [1992] 3 SLR(R) 352 ("*Kamal Jit Singh*") where it was held that the applicant had to show probable cause that the detention was unlawful (the GD at [17]). The Respondent submitted that since *Kamal Jit Singh* was a decision of the Court of Appeal concerning s 30 of the CLTPA, the High Court was bound by it (the GD at [21]). The Judge held that the Appellant bore the burden of showing probable cause that the detention was unlawful on the grounds of illegality, irrationality or procedural impropriety, while the detaining authority bore the burden of establishing that the detention was lawful (the GD at [28]).

13 Second, the Appellant submitted that his detention was "illegal" on one or more of the following grounds: (a) the activities undertaken by the Appellant did not fall within the category of offences contemplated by the CLTPA; (b) the CLTPA was to be used as a measure of last resort and the Appellant should not have been detained since he could have been charged for other offences such as illegal betting for which evidence existed; (c) the CLTPA was not intended to target organised crime or criminal syndicates just because they were such; and (d) the alleged criminal activities had occurred outside of Singapore and had no impact on public safety, peace and good order in Singapore (the GD at [30]–[44]). The Judge rejected the argument on illegality and held that: (a) there was nothing to show that the CLTPA only applied to offences which caused "physical violence or harm to society"; (b) it was not for the court to determine whether a detainee ought to have been tried rather than detained and, in any case, the fact that there was sufficient evidence to prosecute the detainee for a lesser or some other offence did not mean that the CLTPA could not be invoked to address other criminal activities that the detainee was involved in; (c) the scope of "public safety, peace and good order" was a wide one; and (d) the Appellant was the leader and financer of a global football match-fixing syndicate operating from Singapore and involved in various supporting activities in Singapore, and he had not shown that the criminal activities he was allegedly involved in did not have an impact on the public safety, peace and good order in Singapore (the GD at [35], [40], [43] and [47]).

14 Third, the Appellant submitted that the detention was "irrational" (the GD at [48]). The Judge rejected this argument on the basis that the threshold for judicial intervention on the ground of irrationality was a high one, and it applied only when a decision was so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at that decision. The standard was not met in this case because there were at least *some* objective grounds for ordering the initial and continued detention of the Appellant since he had some involvement in the criminal activities relied upon by the authorities to found his detention (the GD at [50]).

15 Fourth, the Appellant submitted that the detention was procedurally improper because ASP Ho, who was an officer from the CAD rather than from the Corrupt Practices Investigation Bureau ("the CPIB"), had taken the Appellant's statements (the GD at [51]). The Appellant contended that this was contrary to s 27 of the PCA which provides as follows:

> **27**. Every person required by the Director or any officer to give any information on any subject which it is the duty of the Director or that officer to inquire into under this Act and which it is in his power to give, shall be legally bound to give that information.

16 The Appellant argued that the reference to "officer" in s 27 was to a CPIB officer and the statement was inadmissible in court as a result of such non-conformity with the provision. It therefore could not be relied upon by the Minister or the President when considering the Appellant's detention. The Judge rejected this submission, holding that there was nothing in the CLTPA which suggested that the Minister, the Criminal Law Advisory Committee, or even the President, when exercising their

respective functions were confined to considering only evidence that was admissible in court (the GD at [52]). This was reinforced by r 13 of the Criminal Law (Advisory Committees) Rules (Cap 67, R 1, 1990 Rev Ed) ("CLACR") which provides:

> **13**. An advisory committee may in its discretion hear any witness and may admit or reject any evidence adduced, whether oral or documentary and whether admissible or inadmissible under any written law for the time being in force relating to the admissibility of evidence.

The Judge therefore held that there was nothing procedurally improper in the relevant authorities considering the statements taken by ASP Ho.

17 The Judge declined to grant the order sought by the Appellant, who, in the event was also ordered to pay costs fixed at $8,500 (the GD at [54]).

The issues raised in this appeal

18 The Appellant's case in short is that the Judge erred on all four issues, while the Respondent's case is that although there are issues to be settled in respect of the appropriate approach the court should take towards an ORD application, the Judge was, in any event, correct to not grant the ORD. In our judgment, there are two broad issues that arise for our decision as follows:

(a) What is the appropriate approach the court should adopt when dealing with ORD applications?

(b) Is the Appellant's detention lawful taking the appropriate approach?

We will address them in turn, and set out the positions of the parties before giving our decision in respect of each issue.

19 Before we come to those two issues, however, we should first mention Summons No 263 of 2015 ("SUM 263/2015"), which was the Appellant's application to be present at the hearing of the appeal. That application was heard and allowed by Chao Hick Tin JA on 21 July 2015, which was several days before the substantive appeal was heard on 27 July 2015. We will first address, as a preliminary issue, why Chao JA allowed the Appellant's application to be present at the hearing of the appeal, before turning to the two substantive issues that we have set out above.

The preliminary issue: the Appellant's application to be present at the hearing of the appeal

20 Order 54 r 4(2) of the ROC provides that a detainee need not be brought before the court for the hearing of an ORD application unless otherwise directed by the judge who is hearing the application. The provision states as follows:

> (2) During the hearing of an application for an Order for Review of Detention, the person restrained need not be brought before the Court unless the Judge otherwise directs.

By SUM 263/2015, the Appellant sought an order directing that he be produced for the hearing of this appeal. We will first explain the procedure for applications under O 54 of the ROC and how it came to be. We will thereafter examine the approach in England and India before coming to our reasons.

The procedure under O 54 of the ROC and its historic origins

21 Order 54 of the ROC prescribes the procedure for ORD applications concerning CLTPA

detentions. A two-stage procedure is envisaged. The first consists of an *ex parte* leave hearing, and the second, a full merits hearing involving persons on whom the court directs the application to be served. *Singapore Civil Procedure 2015* vol 1 (G P Selvam, gen ed) (Sweet & Maxwell, 2015) notes (at para 54/1/4) as follows:

> **Application for the order**—Under the present procedure the application is made *ex parte* in the first instance. Upon the hearing, if the court gives leave, the application is usually adjourned for notice to be served on such persons as the court directs; and upon the adjourned hearing, if the application succeeds, the writ is ordered to issue. …

22 However, it is apparent that the two-stage procedure may be departed from in appropriate circumstances. Order 54 rr 2 and 4 of the ROC provide:

> **Power of Court to whom ex parte application made**
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> **2.—(1**) The Judge to whom an application under Rule 1 is made may —
>
> (a) make an Order for Review of Detention forthwith; or
>
> (b) direct that a summons for the Order for Review of Detention be issued.
>
> …
>
> **Power to order release of person restrained**
>
> **4.—(1**) Without prejudice to Rule 2(1), the Judge hearing an application for an Order for Review of Detention may in his discretion order that the person restrained be released, and such order shall be a sufficient warrant to any superintendent of a prison or other person for the release of the person under restraint.

23 The ORD was formerly known as the writ of *habeas corpus*, the great prerogative writ. This terminology was updated by s 41B of the Statutes (Miscellaneous Amendments) (No 2) Act 2005 (No 42 of 2005), when it was renamed the "Order for Review of Detention". A good conspectus of the development of the writ of *habeas corpus* can be found in Judith Farbey & R J Sharpe with Simon Atrill, *The Law of Habeas Corpus* (Oxford University Press, 3rd Ed, 2011) ("*The Law of Habeas Corpus*") and a summary of this account follows:

> (a) By the early part of the 13th century, the words *habeas corpus* were used in civil procedure to refer to a command issued as part of the interlocutory process to have a defendant physically appear before the court. Its purpose was to order the relevant officer to physically produce the defendant in court, and was not originally concerned with subjecting detentions of persons to the court's scrutiny (at p 2).
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> (b) In the course of the 15th and 16th centuries, the writ of *habeas corpus* evolved from being a writ merely to secure the presence of a defendant in court to one that demanded the reason or an explanation for an applicant's *detention* so that the sufficiency of such reason or explanation could be adjudged (at p 4).
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> (c) By the time of Queen Elizabeth I, the writ was used for testing the validity of executive committals (at p 6). Later in 1627, the writ was used to challenge the decision of Charles I to detain a number of his subjects who had refused to contribute to a forced loan designed to raise

revenue without parliamentary sanction. This development led to the passage of the Petition of Right, which set out liberties that the King was precluded from infringing (at pp 8–9). Amongst them was that no free person could be detained arbitrarily (at p 11). After the English Civil War in the mid-17th century, it became accepted that the Petition of Right deprived the Executive of power to detain a person solely for reasons of state unless emergency legislation granted it such power (at p 12).

(d) In 1640, the Habeas Corpus Act 1640 (16 Car 1 c 10) was passed and provided that anyone imprisoned by order of the King or the Privy Council should have the right to seek *habeas corpus* and be brought before the court without delay whereupon the cause for the imprisonment would have to be shown. Within three days of the detainee being produced, the judges were required to pronounce on the legality of the detention and to grant bail to, discharge or remand the detainee (at p 13). The Habeas Corpus Act 1679 (31 Cha 2 c 2) (UK) was subsequently passed with a view to ensuring that procedural inadequacies did not stand in the way of prisoners obtaining the relief to which they were entitled. This latter Act sought to ensure that the writ was available at any time of the year from any court at Westminster; that the jailer obeyed the writ immediately; that judges would speedily decide the legality of the detention; and that the prisoner would not be re-detained if released. Prisoners were also not to be moved from prison to prison without proper authority, or taken to places beyond the reach of the writ (at p 16).

(e) In 1758, Wilmot CJ rendered his "Opinion on the Writ of Habeas Corpus" (1758) Wilm 77 ("*Wilmot's Opinion*") to the House of Lords at the second reading of the bill titled "An Act for giving a more Speedy Remedy to the Subject, upon the Writ of Habeas Corpus". In it, he explained the two-stage procedure which had developed for obtaining the writ of *habeas corpus* (see *Law of Habeas Corpus* at p 236 for a short summary of how this had developed). This is the foundation of the modern procedure for obtaining an ORD, and it is as follows:

(i) a detainee would have to show by affidavit probable cause that he was wrongfully detained (at 82); and

(ii) upon showing probable cause, the writ of *habeas corpus* would be issued so that a review of the detention could be carried out (at 92).

24 This procedure was designed to prevent the writ of *habeas corpus* from being used as an instrument of vexation and oppression against the authorities. Wilmot CJ wrote (at 90 and 92):

> The wisdom of our ancestors would not suffer this kind of authorities to be broken in upon wantonly, upon mere suggestion, and without seeing some reason for an interposition; because they saw it would have encouraged disobedience and rebellion in private families; and, at all events, must have abated that awe and respect which act so materially in the support of those authorities. They may be abused: if they are, the law says, let it be shewn, and the party shall have relief; but if he cannot shew they are abused, he is entitled to none. *The legal presumption is certainly in favour of these authorities; the law will not presume they are unduly or irregularly executed.*
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> …
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> *If all these persons were to have had these writs of habeas corpus of course, without shewing any cause or foundation for granting them, it would have been suffering this great remedial mandatory writ to have been used as an instrument of vexation and oppression …*

[emphasis added]

25 Over time, the writ came to acquire a dual functional meaning, and was said to be "issued" by the courts either to bring the detainee to court for a substantive review of the legality of the detention or for the detainee to be released after a substantive decision had been reached (*Hia Soo Gan Benson v Public Prosecutor and other matters* [2013] 4 SLR 57 at [42]).

26 Returning to the narrative on the applicable procedure, our rules are based on and similar to the rules that are currently in force in England. There *habeas corpus* applications are brought under what was formerly O 54 of English Rules of Supreme Court, which is now found in Schedule 1 to the English Civil Procedure Rules. These provisions are substantially similar to O 54 of the ROC. Under the English rules, an application is first brought without notice to a judge to enable the court to determine whether the matter has sufficient merit to warrant a full hearing (*The Law of Habeas Corpus* at p 233). At this stage, all that needs to be raised is a doubt in the judge's mind as to the validity or lawfulness of the detention or, to put it another way, an arguable case which deserves further consideration. However, as noted by Grahame Aldous & John Alder, *Applications for Judicial Review: Law and Practice of the Crown Office* (Butterworths, 2nd Ed, 1993) at pp 192–193, the two-stage procedure can be compressed into a single stage especially if considerations of urgency are at play.

27 Historically, therefore, the detainee was not allowed to attend the hearing of his application. This might seem sensible in the context of a preliminary hearing that is directed only at establishing whether an actual hearing on the merits would be required at all. But to the extent that the practice extended even to the second stage where the merits were dealt with, it seems to be the case that this emerged mainly out of concerns of administrative convenience. In our judgment, this position, which might continue to hold sway in other jurisdictions, was premised on historical factors which should not continue to apply in modern-day Singapore. To explain this, we briefly survey the position in England and India.

The present legal position in England and India

England

28 As we have noted above, a detainee in England seeking to have the lawfulness of his detention reviewed was not allowed to attend the hearing of his application. This was established in *In Re Greene* (1941) 57 TLR 533 ("*Re Greene*"), where the King's Bench Division of the English High Court cited with approval the following statement in Frederick Hugh Short & Francis Hamilton Mellor KC, *The Practice on the Crown Side of the King's Bench Division* (Stevens and Haynes, 2nd Ed, 1908) ("*The Practice of the Crown Office*") at p 321:

> The motion should be made by counsel, for the Court will not, as a rule, allow an applicant to move in person; but a wife has been allowed to move in person on behalf of her husband.

29 But when this is examined further, it becomes evident that this was premised on historical reasons that centred on administrative inconvenience. In this light, it is significant that *The Practice of the Crown Office* states as follows (at p 320):

> Although the writ is a writ of right upon ground being shown for it … it is more usual to grant an order *nisi* only in the first instance, *on account of its greater convenience and the saving of expense; for if, upon hearing the answer of the other side, the Court dismisses the application, both the inconvenience and expense of bringing a person up from a distance are thereby avoided.* … [emphasis added]

30 Thus the order *nisi* was a preliminary step that did not require that the detainee be physically produced until and unless cause had been shown and the order had been made absolute. And the reason for this was that it would be administratively inconvenient and expensive to have the detainee produced in court when the application might well be dismissed.

India

31 The position in India is similar. The matter was considered at some length in *Kanu Sanyal v District Magistrate, Darjeeling and Ors* [1974] 1 SCR 621 ("*Kanu Sanyal*"). There too the court noted that the reason for the rule was a practical one (at [4]–[5]):

> … The production of the body of the person alleged to be wrongfully detained is ancillary to this main purpose of the writ. It is merely a means for achieving the end which is to secure the liberty of the subject illegally detained. In the early days of development of the writ, as pointed out above, the production of the body of the person alleged to be wrongfully detained was essential, because that was the only way in which the courts of common law could assert their jurisdiction by removing parties from the control of the rival courts and thereby impairing the power of the rival courts to deal with the causes and persons before them. The common law courts could not effectively order release of the persons unlawfully imprisoned by order of rival courts without securing the presence of such persons before them and taking them under custody and control. But the circumstances have changed long since and it is no longer necessary to have the body of the person alleged to be wrongfully detained before the court in order to be able to inquire into the legality of his detention and set him free, if it is found that he is unlawfully detained. The question is whether in these circumstances it can be said that the production of the body of the person alleged to be unlawfully detained is essential in an application for a writ of habeas corpus. We do not think so. …
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> …
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> … Now, up to the end of the eighteenth century the procedure that was followed in application for the writ of habeas corpus was that when the applicant made out a prima facie case of an unlawful detention he would be entitled to issuance of the writ as of right. In obedience to the writ the respondent would produce the person detained before the court and file a return showing the cause of detention. At the hearing on the date named oral argument would take place, the burden of proving lawful justification for the detention being on the respondent. If no legal ground was made to appear justifying detention the person detained would be immediately discharged. On the other hand the application would be dismissed if the detention was shown to be justified. *But this procedure led to the inconvenience of unnecessarily bringing up the body of the person detained, sometimes from a long distance in case* [*sic*] *where it might ultimately be found, when correct facts are placed before the court by the respondent in the return filed by him, that the detention was perfectly lawful and the applicant had no case at all and the writ need not have issued. … Now, where is* [*sic*] *rule nisi is issued which is the normal event, and on the hearing of the rule nisi, the court finds that the detention is unlawful, it would be superfluous to issue a writ requiring the production of the body of the person detained in order merely to release him from detention, when he can even otherwise be effectively released without requiring such production. In fact in many cases the person detained would be able to obtain his actual release much earlier if an order of release were passed by the court on the hearing of the rule nisi than he would be able to obtain if a writ is issued, he is produced before the court on the day named in the writ and an order of release is passed on that day. The practice was, therefore, adopted not to go through the formality of the writ but to straight away order the release of the person detained if, on the hearing of the rule nisi, it was found that the detention was unlawful.* …

[emphasis added]

32 *Kanu Sanyal* explains that even at the substantive hearing, the practice was to dispense with the physical attendance of the prisoner. This was so because the real object of the writ was to secure the release of the prisoner and this could be achieved even without his being physically present in court.

33 It is evident from this brief account that the rationale for the rule that detainees are not entitled to attend ORD application hearings is a historical one directed at saving the prison authorities the trouble and the inconvenience of bringing a detainee to court, often from a distance. Otherwise, if the court were to rule that the detention *is* lawful, the detainee would then have to be returned to the place of detention. On the other hand, there was no need for the detainee to be present in order for the court's jurisdiction to be invoked, and if the court held the detention was unlawful, the detainee could just as easily be freed from the detention facility. This might all have made sense at a time when or in a place where transporting a prisoner involved much difficulty or great distances and entailed complicated security arrangements. However these conditions do not exist in modern Singapore at least, and account ought to be taken of these differences when referring to these older or foreign decisions. Against this backdrop, we turn to consider the submissions the parties made on this preliminary issue.

The parties' submissions

34 The Appellant relied on Jeffrey Pinsler, *Singapore Court Practice 2014* vol 1 (LexisNexis, 2014) at para 38/21/3 where it is said that the paramount consideration in a context such as this would be whether the detainee has relevant information to give to the court. The Appellant submitted that he should be allowed to attend the proceedings because:

(a) The case concerned his detention without trial and was quasi-criminal, involving a significant curtailment of his fundamental liberties. The paramount consideration in this case had to be that justice was seen to be done, and the starting point must be that the detainee should be allowed to attend the hearing of his own application unless there were circumstances that militated against it, such as security considerations, inordinate expense or prejudice to the opposing party. There was no evidence of any of this in the present case. Moreover, he had even undertaken to bear the cost of his being transported to the court.

(b) Unlike the majority of cases where a person was detained on account of matters that were unrelated to the hearing for which he was applying to be present in court, (such as where a prisoner was convicted of and in prison for a crime sought to attend court to deal with a separate suit for breach of contract), his detention formed the very subject-matter of the hearing which he was applying to attend.

(c) Allowing his attendance would be consistent with the right accorded to him (indeed the obligation imposed on him) to attend the advisory committee hearing as provided for under s 7A of the CLACR.

35 The Applicant therefore sought to be present in court to provide contemporaneous confirmation of his instructions and clarifications in the event that any new facts or matters arose so as to ensure that he was not prejudiced and also, so that he could listen to the arguments made and the court's determination. In this way, he submitted, justice would be seen to be done.

36 As against this, the Respondent submitted that the application should be denied because:

(a) It was the Appellant's burden to show why his attendance was *required* and his mere *wish* to attend was, in itself, insufficient. As all the matters relevant to the appeal had been placed before the court and copies of the materials had been made available to the Appellant and his lawyers, his presence was not *required* at the hearing.

(b) Should new matters arise in the course of the hearing, the Appellant could be contacted and a further affidavit or short adjournment be granted; there was no requirement for him to be available to give contemporaneous instructions.

(c) Under O 54 r 1 of the ROC, an ORD application had to be made by way of originating summons supported by affidavit. Each affidavit had to be served on every other party, and the very reason for this was so that the parties would not be caught by surprise in relation to *any* allegations raised. It would also be inappropriate to circumvent the rules governing the appeal and for new facts to be received by way of the Appellant's contemporaneous instructions at the hearing given that, under O 28 r 3 of the ROC, leave is needed for further affidavits to be received into evidence.

(d) As one of the very purposes of the Appellant's appeal was for him to be brought to court for a substantive review of the legality of his detention, he would effectively be obtaining the very remedy he sought in the substantive appeal if we ordered that he be present.

Our decision

37 We allowed the Appellant's application for three essential reasons. First, as a matter of principle, it seems incongruous that an accused person who has been charged with and is being tried for criminal offences generally has a right to be present at his trial and also at any appeal thereafter, even if he is not giving evidence (see, *eg*, ss 230, 298 and 387 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) and also *R v Jones* [1991] Crim LR 856 at [24] where the English Court of Appeal referred to the accused's right to be present at his trial and put forward his defence), while a person who has been detained on an executive order may not attend a hearing at which his own liberty is at stake. In our judgment, there is no principled basis for this difference, especially in the absence of exceptional reasons such as those pertaining to security or public safety. Instead, allowing the Appellant to attend the hearing would enable him to see the points which are being made by both sides and provide information or instructions to his counsel where it is necessary for him to do so. It also seems incongruous to us that a detainee who managed to obtain legal representation should not be allowed to attend the hearing, when a detainee who did not manage to do so would generally be allowed to be present, at least to enable him to present his case.

38 Second, as earlier mentioned, the historical basis for holding that a detainee has no right to be present in court for these proceedings no longer exists today. The Appellant has been detained at the Changi Prison Complex, Cluster A. This is the same place where most accused persons are placed when they are in remand. There is nothing to suggest it would be administratively more difficult to produce the detainee in court than other accused persons who are routinely brought to court from the same premises for trial.

39 Third, it is not correct that allowing the Appellant to attend the hearing would effectively be granting him the very remedy that he sought. The real remedy he seeks is his unconditional release.

40 It is for these reasons, with which the other members of this court are in agreement, that Chao JA granted the Appellant's application and directed that he could attend the hearing of his appeal. We now turn to the issues raised in the substantive application.

Issue 1: What is the appropriate approach the court should adopt when dealing with ORD applications?

The parties' submissions

41 The Appellant submits that the court should approach an ORD application objectively. He submits that there must be facts which support on an objective basis the initial and continued detention of the Appellant.

42 The Respondent disagrees for three main reasons. First, the Respondent submits that the Appellant's reliance on the objective test conflates the issue of reviewability with the issue of the scope of review. In *Chng Suan Tze*, where we held that a court tasked with reviewing the lawfulness of executive action does so on an objective basis, all that was in fact decided was that the President's discretion under s 8 of the Internal Security Act (Cap 143, 1985 Rev Ed) ("the ISA") was reviewable, but this was not concerned with the scope of review, which the Respondent contends is the pertinent issue in this case. We elaborate on this below.

43 Second, the Respondent submits that the court can only look at the sufficiency of evidence in an ORD application in relation to a precedent fact, namely a fact, the existence of which, determines whether a power vested in the Executive may be exercised (see *Ng Swee Lang and another v Sassoon Samuel Bernard and others* [2008] 2 SLR(R) 597 at [29], citing *Mak Sik Kwong v Minister for Home Affairs, Malaysia (No 2)* [1975] 2 MLJ 175 at 177 and *Regina v Secretary of State for the Home Department, ex parte Khawaja* [1984] 1 AC 74 ("*Khawaja*") at 97, 99 and 108). Section 30 of the CLTPA is similar to s 8 of the ISA as it entrusts the assessment of whether the detention is necessary to the Minister. Because the application in the present case does not concern a precedent fact, there is no basis for inquiring into the sufficiency of evidence.

44 Third, the Respondent submits that there are two different approaches which have been adopted by the Court of Appeal in ORD applications, namely, (a) whether the applicant can impugn the decision on the usual judicial review principles of illegality, irrationality and procedural impropriety as set out in *Chng Suan Tze* at [119] (which we refer to as "the Traditional Test"); or (b) whether the applicant can show probable cause that his detention was unlawful as set out in *Kamal Jit Singh* at [28]–[29] (which we refer to as "the Probable Cause Test"). The Respondent considers that the Judge's holding at [28] of the GD might have developed a hybrid approach that combined both the Traditional and Probable Cause Tests and submits that the Judge must have meant that in order to show probable cause, an applicant has to show that his detention is unlawful by reference to the Traditional Test.

45 In light of this, the Respondent invites us to restate the test of reviewability in relation to ORD applications and submits that the Traditional Test should be preferred because:

(a) it is practical, defined and well-tested, unlike the Probable Cause Test;

(b) the differences between judicial review and ORD proceedings are insufficient to justify a different test being adopted for ORD proceedings; and

(c) as a matter of historical development, the Probable Cause Test has given way to a convergence of tests between judicial review and ORD proceedings.

Our decision

46 In our judgment, to address this issue, there are three sub-issues that we must address:

(a) what is the relevance of precedent facts;

(b) whether the court's inquiry into the decision-maker's decision is objective or subjective; and

(c) what is the appropriate scope of the review.

We take them in turn.

What is the relevance of precedent facts?

47 It will be helpful to begin with a brief observation as to the nature of judicial review. In the normal course of events, all controversies, whether of fact or of law, are resolved by the courts. This work is done in accordance with the applicable rules of adjectival and substantive law, and it is the function of the courts to determine what the facts are and also to apply the relevant rules of substantive law to those facts. Judicial review concerns an area of law in which the courts review the lawfulness of acts undertaken by other branches of the government. Where these acts relate to the exercise of powers vested in such other branches, the court must approach this with due regard to the fact that the primary responsibility for the exercise of such a power has been vested elsewhere. This then raises the need to adjust the approach that the court will take in undertaking this task. Judicial review is distinct from ORD proceedings although, as in the present case, it often and substantially overlaps with the inquiry that is undertaken in such proceedings where the detention in question is the result of the exercise of a discretionary power by the Executive.

48 The question of the approach the court should take when undertaking judicial review of executive action was raised in the seminal decision of this court in *Chng Suan Tze* on which the submissions of both parties focused. There, four detainees were conditionally released after having been detained without trial on suspicion that they were involved in a Marxist conspiracy to overthrow the Government. After their initial release, they issued a joint press statement on 18 April 1988, claiming that the allegations against them were untrue (at [16]). Following the issuance of that statement, revocation orders were made against them on 19 April 1988, and the four were rearrested under s 10 of the ISA (at [17]). Their applications for writs of *habeas corpus* were refused by the High Court, and they appealed (at [24]).

49 Before the Court of Appeal, counsel were *ad idem* that in ORD applications, the initial burden was on the detaining authority to justify the legality of the detention. The question was whether the requirements of s 8 of the ISA, under which the President's satisfaction as to the need for detention was a necessary pre-requisite to the issuance of a detention order, had been fulfilled (at [29]). The Court of Appeal found that the only evidence there was on the record to prove the fact of the President's satisfaction was the set of recitals contained in the detention orders and an affidavit from the Permanent Secretary to the Minister for Home Affairs stating that the President was "satisfied". This evidence was held to be inadmissible hearsay (at [31]). Wee CJ held that in order to prove the President's satisfaction, evidence was required from any Cabinet Minister or the Secretary to the Cabinet that the President, on the advice of the Cabinet, was satisfied as to the matters stipulated (at [38]–[39]). Since this burden was undischarged, the detainees were released from custody (at [39]).

50 Wee CJ then addressed the issue of whether the President's satisfaction could be presumed by the Latin maxim *omnia esse rite acta* (everything is presumed rightly and duly performed until the

contrary is shown). He held that it could not. He distinguished *Liversidge v Sir John Anderson and another* [1942] AC 206 ("*Liversidge*") and *Greene v Secretary of State for Home Affairs* [1942] AC 284 ("*Greene*"), both of which involved cases where the Secretary of State had exercised his discretion under reg 18B of the Defence (General) Regulations 1939 (SI 1939/927) (UK) to make a detention order against those whom the Secretary of State had reasonable cause to believe were of hostile association. Wee CJ observed that in those cases the person who made the detention orders was also the person whose belief had to be satisfied, and he went on to state (*Chng Suan Tze* at [36]):

> … [T]he essential fact which permitted the presumption to be raised there was the fact that the requisite belief was that of the same person who made the detention orders. There was evidence that the Secretary of State had made the orders; it was presumed that in doing so he had complied with the statute under which he purported to act, *ie* that he had complied with the requisite as to his belief. In the present cases before us, the requisite s 8(1) of the ISA satisfaction is not that of the person who made the detention orders but of someone else. The orders, signed by the Permanent Secretary, show that the Minister had made those orders; however, the requisite satisfaction which precedes his power to do so is not his satisfaction but that of the President. Direct evidence of the President's satisfaction would mean affidavit evidence deposed to by the President that, acting in accordance with the advice of the Cabinet or the authorised Minister as provided under Art 21 of the Constitution, he was satisfied that it was necessary to detain the appellants for any of the purposes specified in s 8(1) of the ISA. In our judgment, it cannot be presumed from the mere fact that the Minister has made a detention order under s 8(1) of the ISA, that the requisite satisfaction of someone else, *ie* the President, has been complied with.

51 Finally, Wee CJ addressed the issue of whether s 8(1) of the ISA concerned a precedent fact as the appellants had submitted that the President's satisfaction under it was subject to an objective jurisdictional fact being established, *ie*, that the appellants *were* likely as a matter of fact to act or continue to act in a manner which was prejudicial to Singapore's security (at [106]). This submission, which was based on *Khawaja*, was rejected by the Court of Appeal (at [106]–[107]).

52 We begin with a brief summary of *Khawaja*. There, the appellant had challenged the immigration authorities' determination that he was an illegal immigrant on which basis they acted to detain him with a view to removing him from the jurisdiction under para 16(2) of Schedule 2 of the Immigration Act 1971 (c 77) (UK). The House of Lords held that the power that was vested in the immigration authorities to detain and summarily remove a person depended upon the precedent fact being established that the person was in fact an illegal immigrant. As to the establishment of that fact, the court had to be satisfied that there was sufficient evidence to justify the conclusion that the person was an illegal immigrant and, for this purpose, the facts relied on had to be proved on a balance of probabilities (see *Khawaja* at 97, 105, 123, 124 and 128).

53 *Chng Suan Tze* held as follows:

(a) *Khawaja* was justified because the "illegal entrant" requirement was seen as a precedent fact to the authorities' power to detain and remove the appellant (at [107]).

(b) The House of Lords in *Khawaja* held that the nature of a court's role in judicial review depended on whether precedent facts were involved. Where no such facts were in issue, the scope of review was limited to what were referred to as *Wednesbury* principles. This is derived from the decision of the English Court of Appeal in *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223 ("*Wednesbury*"). We elaborate on this later. But where

precedent facts were involved, the scope of review extended to deciding whether the evidence established those facts (at [108]).

(c) Whether a discretionary power was subject to any precedent fact depended on the construction of the legislation conferring that power (at [108]).

(d) Discretionary powers may be subject to the requirement that they be exercised based on facts that were determined pursuant to a judicial process but Parliament could entrust all the relevant decisions including as to the determination of the facts as well as their application to the rules and any exercise of discretion to some other decision-maker. This was so even if the liberty of the subject was concerned and when this was the case, the scope of review would be limited to the traditional principles governing judicial review, including those set out in *Wednesbury* (at [108]).

(e) The President's discretion under s 8(1) of the ISA and the Minister's discretion under s 10 of the ISA fell outside the "precedent fact category" as s 8(1) stated expressly that it was for the President to be satisfied that detention was necessary in order to prevent a detainee from acting prejudicially to national security and s 10 gave the Minister the power to make revocation orders where the public interest so necessitated (at [117]).

54 It was not suggested to us that the foregoing analysis in *Chng Suan Tze*, including its acceptance of the position that Parliament could delegate fact-finding powers to some other branch than the Judiciary, was incorrect and we therefore do not examine this issue here. In the present case, s 30 of the CLTPA requires that the Minister be satisfied that the person's detention would be in the interests of public safety, peace and good order, and that he acts with the Public Prosecutor's consent. Whether this power falls within the "precedent fact category" and is subject to the "precedent fact principle of review" would depend on the construction of the relevant provision. *Chng Suan Tze* held (at [116]):

> … This would entail a construction of the relevant provisions to see if Parliament has expressed an intention in plain and unequivocal words to take these discretions out of the precedent fact category and exclude the precedent fact principle of review. It is, in the final analysis, the construction of the relevant provisions that determines the precise function of the court when reviewing decisions made under these provisions.

55 In our judgment, s 30 of the CLTPA is similar to ss 8(1) and 10 of the ISA in that power has been given to the Minister to make the decision as to whether the detention would be in the interests of public safety, peace and good order. If there is a precedent fact, it is that the consent of the Public Prosecutor is required before the Minister may exercise his discretion. The Appellant's counsel confirmed before the Judge that the processes under the CLTPA had been complied with and there was no indication that they were changing their position on appeal. There is therefore no issue arising from this. In the circumstances, because Parliament has conferred on the Minister the power to make the decision if he is satisfied it is called for, no question as to the existence or non-existence of a precedent fact arises.

What is the nature of the inquiry when reviewing the Minister's discretion?

56 The next question that arises is whether the nature of the inquiry into the Minister's exercise of his discretion is a subjective or an objective one. The former is limited to such things as whether the Minister (subjectively) did in fact believe he had the power and whether he did in fact believe he was acting within the scope of that power. The latter, on the other hand, raises questions as to whether

the Minister did in fact have the power to act and whether there is a reasonable basis for thinking that he was so acting.

57 A similar question arose under the CLTPA's predecessor statute, the Criminal Law (Temporary Provisions) Ordinance 1955 (Ord 26 of 1955) ("the 1955 Ordinance") and was considered by the High Court in *Re Ong Yew Teck* [1960] MLJ 67 ("*Ong Yew Teck*"). There, the detainee applied for a writ of *habeas corpus* and contended that s 55(1) of the 1955 Ordinance laid down an objective test, thus allowing the court to examine whether there were sufficient reasons for his detention (at 68). Chua J disagreed. He held that s 53 of the 1955 Ordinance precluded the Chief Secretary or any other public servant from disclosing facts if it was against the public interest to do so. Since the court required all the material evidence before it to decide on an objective basis whether the detaining authority had "reason to believe there are grounds which would justify the detention" of the detainee, and the detaining authority could not be required to set out the grounds of his belief or give information which led to him forming his opinion, Chua J held that a subjective test applied in reviewing the decision and declined to go behind the detaining authority's statement of belief in the reasons justifying the detainee's detention (at 69).

58 The next case to consider this issue was Suffian FJ's decision in *Karam Singh v Menteri Hal Ewal Dalam Negeri (Minister of Home Affairs), Malaysia* [1969] 2 MLJ 129 ("*Karam Singh*"). The detainee had been detained under s 8(1) of the Internal Security Act 1960 (Act 82 of 1960) (M'sia) ("the Malaysian ISA") and challenged his detention on the basis that the grounds for his detention were too vague. Suffian FJ held (at 150):

> … [W]hen the power to issue a detention order has been made to depend on the existence of a state of mind in the detaining authority, which is a *purely subjective condition, so as to exclude a judicial inquiry into the sufficiency of the grounds to justify the detention*, it would be wholly inconsistent to hold that it is open to the court to examine the sufficiency of the same grounds to enable the person detained to make a representation. … [emphasis added]

5 9 *Karam Singh* therefore also applied the subjective test, and this was then referred to and followed in *Lee Mau Seng v Minister for Home Affairs and another* [1971–1973] SLR(R) 135 ("*Lee Mau Seng*") where the detainee was detained under s 8(1) of the ISA. Wee CJ held (at [53]–[54]):

> 53 … In my judgment it is not open to a court in Singapore to examine the grounds and allegations of fact supplied to the applicant … for the purpose of deciding whether or not some or all of them are so vague, unintelligible or indefinite as to be insufficient to enable the applicant to make an effective representation against the order of detention. …
>
> 54 To hold otherwise would … be wholly inconsistent with the scheme of the [ISA] under which the power to issue a detention order has been made to depend upon the existence of a state of mind in the President acting in accordance with the advice of the Cabinet which is a *purely subjective condition so as to exclude a judicial enquiry into the sufficiency of the grounds to justify the detention.*
>
> [emphasis added]

60 This position remained the law until the Court of Appeal departed from it in *Chng Suan Tze*. There, this court held that an objective standard of review applied to the Minister's exercise of discretion (at [55]). The reasons for the departure from the previous line of cases may be summarised as follows:

(a) *Karam Singh* had applied *Liversidge* and *Greene*, from which the House of Lords had in recent years departed (at [56]). In *Lau Seng Poh v Controller of Immigration* [1985–1986] SLR(R) 180, the High Court had expressed doubt over the majority's decision in *Liversidge* (*Chng Suan Tze* at [64]). The more recent Malaysian cases also seemed to have moved away from a *strict* adherence to the subjective test (*Chng Suan Tze* at [65]).

(b) Judicial decisions in other jurisdictions held that the exercise of discretion by the Executive could be objectively reviewed in the context of preventive detention on national grounds (*Chng Suan Tze* at [70]).

(c) If the discretion in ss 8 and 10 of the ISA was subjective, arbitrary detention would be permitted. This was inconsistent with Art 12(1) of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution") (*Chng Suan Tze* at [82]).

(d) The Privy Council held in *Teh Cheng Poh alias Char Meh v Public Prosecutor, Malaysia* [1980] AC 458 that the discretion of the Yang di-Pertuan Agong under s 47 of the Malaysian ISA (which is almost identical to s 48 of the ISA) could be objectively reviewed (*Chng Suan Tze* at [83]).

61 Of these, we highlight the point which we have referred to at [60(c))] above. This court in *Chng Suan Tze* was undoubtedly conscious of the difficulty with adopting a purely subjective analysis because, in practical terms, it would result in the court being bound to accept whatever was put before it. It is in this context that the court equated the adoption of a purely subjective analysis to endorsing the possibility of arbitrary detention, and the court therefore rejected the subjective test on this basis. In any event, it follows from *Chng Suan Tze* that the Minister's discretion is to be reviewed objectively. This is the latest statement of the law and neither party has suggested we should depart from it.

What is the appropriate scope of review?

62 If the court's review of the Minister's discretion is to be undertaken as an objective exercise, what then is the appropriate *scope* of review? There are two aspects to this. First, some uncertainty arises by reason of the court's remarks in *Chng Suan Tze* pertaining to the scope of review for ISA detentions, which suggest that the Traditional Test (*ie*, the usual grounds of judicial review – illegality, irrationality or procedural impropriety) is the correct one; while on the other hand, *Kamal Jit Singh*, a case on all fours with the present, was decided on the basis of the Probable Cause Test. In our judgment, the correct test is the Traditional Test.

63 We start with the Court of Appeal's remarks pertaining to the scope of review for ISA detentions in *Chng Suan Tze* (at [103]–[121]). We have summarised that part of the court's decision at [53] above. The essential point for present purposes is the court's holding that where no precedent facts are involved, the scope of review will be limited to the usual ambit of judicial review, namely, illegality, irrationality and procedural impropriety.

64 This is at the heart of what is meant by the "scope of review". *Chng Suan Tze* accepts that Parliament may decide to entrust the power and the responsibility to make a decision to a particular decision-maker. This may extend to decisions as to what the facts are, the application of those facts to the relevant rules or considerations, and any consequential exercise of discretion. As we have noted at [54] above, we have proceeded on the basis that this statement is correct since nothing to the contrary was put to us. To this extent and on this basis, decisions such as *Ong Yew Teck* may be understood as being justified because what was sought there was a review (in effect an appeal) of

the sufficiency of the evidence for the facts. The court found in that case that that responsibility to determine the evidential sufficiency had been entrusted to Executive. As we have noted, in such settings which are outside the ambit of precedent or jurisdictional facts, the courts cannot inquire into the evidential basis for the facts found by the Executive. But the court even in such circumstances retains the duty to *review objectively* the decisions of the Executive, though the scope of such review is limited to the normal principles of judicial review on the basis of the facts established by the Executive (see at [116]–[119]).

65 On the basis of *Chng Suan Tze*, and given the similar threshold which the Minister has to meet under s 30 of the CLTPA, it would seem to follow that any review of the Minister's discretion under the CLTPA should in principle rest on what we have referred to as the Traditional Test. However, the matter is complicated only because in *Kamal Jit Singh*, a Court of Appeal decision which concerned the very section of the CLTPA with which the present case is concerned, a different test seemed to have been applied. Before the Judge, the Respondent took the position that the Probable Cause Test enunciated in *Kamal Jit Singh* is different from the Traditional Test and submitted that the Judge was bound to apply the Probable Cause Test.

66 This much may have been true because *Kamal Jit Singh* is a Court of Appeal decision on s 30 of the CLTPA, and the High Court was therefore bound by it. However, we are not bound in the same way and in our judgment, the Probable Cause Test is the wrong test in this context. Instead, the Traditional Test is that which should be applied and we hold this view for several reasons.

67 First, history supports the application of the Traditional Test. We are inclined to agree with the Respondent's suggestion that the Probable Cause Test might have stemmed from a failure to appreciate a historical difference between *habeas corpus* and judicial review proceedings. It is true, as noted in *The Law of Habeas Corpus* at p 18, that the scope of review for ORD applications depends largely on the general concept of judicial review, which in broad terms refers to the supervisory jurisdiction of the High Court to ensure that those holding Executive powers act lawfully and within the scope of their powers. But this is so because in the modern context when ORD applications are brought, they generally pertain to the lawfulness of detentions that are effected in the exercise of Executive powers.

6 8 *Kamal Jit Singh* relied on *Wilmot's Opinion* as the basis on which it seemed to adopt the Probable Cause Test (at [28]). In our judgment, what this in fact means is that the applicant has the obligation to raise a *prima facie* case as to the legality of his detention to warrant a substantive inquiry into the matter. We base this on a closer analysis of *Wilmot's Opinion* which, as we have noted above, was an opinion rendered by Wilmot CJ to the House of Lords in 1758 on the second reading of the bill entitled "An Act for giving a more Speedy Remedy to the Subject, upon the Writ of Habeas Corpus". The relevant parts of *Wilmot's Opinion* (at 88 and 92) are reproduced:

> But the writ of habeas corpus is not the commencement of a civil suit, where the party proceeds at the peril of costs, if his complaint is a groundless one: *it is a remedial mandatory writ, by which the King's Supreme Court of Justice, and the Judges of that Court, at the instance of a subject aggrieved, commands the production of that subject, and inquires after the cause of his imprisonment; and it is a writ of such a sovereign and transcendent authority, that no privilege of person or place can stand against it.* … And, as all these remedial mandatory writs were, originally, rather the suits of the King than of the subject, the King's Courts of Justice would not suffer them to issue upon a mere suggestion; *but upon some proof of a wrong and injury done to a subject*.
>
> …

The check upon the writ, by requiring a probable cause to be shewn ***before it issues*** *, is only saying, 'shew you want redress, and you shall have it:'* and *if a person cannot disclose such a case himself, as to shew he is aggrieved* ***when he tells his own story, and is not opposed or contradicted by any body;*** *it is decisive against his being in such a condition as to want relief.*

[emphasis added in italics and bold italics]

69 To like effect, Lord Goddard CJ held in *In re Corke* [1954] 1 WLR 899 at 899:

… It has always been the law as it was laid down by Wilmot C.J., in giving his opinion on the writ of habeas corpus, that the writ is a writ of right and not a writ of course. That means that, *before a writ can issue or leave can be given to apply for a writ, an affidavit must be before the court* ***showing some ground on which the court can see that the applicant may be unlawfully detained.*** [emphasis added in italics and bold italics]

70 This harks back to the two-stage procedure we alluded to at [21] above when reviewing whether the applicant should be excluded from the hearing of his application. The writ of *habeas corpus* has commonly been understood as a powerful weapon against oppression. The extract we have cited from *Wilmot's Opinion* above explains this: the writ itself is a command from the Crown against which no privilege or excuse can be raised, requiring that the subject be produced so that his imprisonment may be inquired into. This necessitates that some basis be shown for it before the writ is issued and that basis is shown by "probable cause". This pertains, of course, to the first stage of the inquiry. In keeping with this analysis, it may be noted that in *Khawaja*, Lord Scarman observed that the initial burden on an applicant was to demonstrate that "he [had] a case fit to be considered by the court" (at 111). In a sense the Probable Cause Test is concerned with the *burden* that the applicant must discharge at the initial stage of an ORD application whereas the Traditional Test is concerned with the *scope of judicial review* or the subject matter the court can inquire into in circumstances where the primary decision-making power or responsibility has been vested in the Executive.

71 Second, consistency also weighs in favour of the Traditional Test. The Traditional Test was held in *Chng Suan Tze* to apply in relation to judicial review of executive action under ss 8 and 10 of the ISA. As far as we can see, there is no basis for thinking that a different test or approach should apply to detentions under the CLTPA.

72 Third, the Respondent before us accepted that we should restate the scope of judicial review in ORD applications in the context of CLTPA detentions in terms of the Traditional Test. The Respondent submitted that the Traditional Test is better defined. We agree the Traditional Test offers the appropriate guidance. We would also add a further point. The Probable Cause Test says nothing about how unlawfulness is to be established. This is the precise issue that is addressed with the Traditional Test.

73 In our judgment, some confusion has prevailed because of the failure to situate *Wilmot's Opinion* in its proper context. That context as we have noted relates to the initial burden on the applicant for relief from alleged unlawful detention to establish probable cause that his detention is unlawful. Subsequent cases have held that probable cause is established by showing a *prima facie* case that his detention is unlawful. But this is separate and distinct from the question of the extent to which the court can inquire into unlawful detention. The correct scope of judicial review for this purpose, in the context of ORD applications concerned with detention under the CLTPA, is the Traditional Test. What an applicant must show is that his detention is unlawful on the grounds of illegality, irrationality or procedural impropriety. We add that in *Chng Suan Tze*, the court noted at

[119] that "irrationality" referred to a decision that was unreasonable in the *Wednesbury* sense, meaning a decision that is so outrageous and in defiance of logic or accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it.

74 This leads us to the second of the two aspects we referred to at [62] above. The CLTPA vests a potentially draconian power in the Executive. "Public safety, peace and good order" can cover a wide spectrum of possible scenarios. As was pointed out in the course of the oral hearing, even relatively minor regulatory offences could in theory be said to go against public safety, peace and good order. It is true that Parliament has vested this power in the Minister and as we have already noted, we have proceeded on the basis that that is permissible; but as we have just observed, the exercise of the power can and will be scrutinised objectively based on the usual principles. Such scrutiny begins with the grounds provided by the Minister as the basis on which he has acted. In our judgment, the proper ambit of the task of the court in these matters may be stated as follows: the court is to closely scrutinise the grounds put forward by the Minister and consider objectively whether on the face of these grounds, the decision is open to challenge on the basis of illegality, irrationality, or procedural impropriety.

75 This is no more than what was done in *Teo Soh Lung v Minister for Home Affairs and others* [1990] 1 SLR(R) 347 ("*Teo Soh Lung (CA)*"), which concerned a detention under the ISA. The grounds of detention and the allegations of fact on which the detention was based were as follows (see *Teo Soh Lung v Minister for Home Affairs and others* [1988] 2 SLR(R) 30 at [7]–[8]):

> Between 1984 and May 1987, you acted in a manner prejudicial to the security of Singapore by being involved in a Marxist conspiracy to subvert the existing social and political system in Singapore, using communist united front tactics, with a view to establishing a Marxist state.
>
> …
>
> (1) That you facilitated the infiltration of the Workers' Party in 1984 by a group of Marxists after discussions with Paul Lim Huat Chye, Tan Wah Piow's fellow Marxist, and other activists. You also actively assisted them in their efforts to make use of the Workers' Party as a vehicle to further the Marxist cause.
>
> (2) That you and Tang Fong Har made use of the Law Society of Singapore as a political pressure group at the suggestion of Paul Lim Huat Chye.

76 The detainee challenged her detention. For present purposes, what is relevant are the observations made by the Court of Appeal after reviewing the grounds of detention. Specifically, the Court of Appeal held that the factual allegations were inferences or judgments of facts on the basis of which the Government was well entitled to conclude, by reason of a Marxist plot to subvert the existing social and political system in Singapore, that there was a national security concern (*Teo Soh Lung (CA)* at [35] and [36]). In the same way, we too examine the grounds of detention in the present case and consider whether on the allegations of fact disclosed, the Appellant's detention is unlawful. On this basis, we turn to the second broad issue we need to deal with.

Issue 2: Is the Appellant's detention lawful taking the appropriate approach?

77 We pause to note that the doctrines of illegality and irrationality might have been conflated somewhat (see Daniel Tan, "An Analysis of Substantive Review in Singaporean Administrative Law" (2013) 25 SAcLJ 296 at paras 33–44 for a helpful discussion on the points of conflation). This is possibly due to the different expressions of Lord Greene MR and of Lord Diplock respectively in

Wednesbury and *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] 1 AC 374 ("*GCHQ*") (see Jeffrey Jowell & Anthony Lester, "Beyond *Wednesbury*: Substantive Principles of Administrative Law" [1987] PL 368).

78 In *Wednesbury*, Lord Greene MR said that he was doubtful that the permissible grounds of review could be defined under a single head and that many overlapped under the broad umbrella of unreasonableness including, in particular, the decision-maker's obligation to consider relevant considerations, not consider irrelevant ones, and not make a decision which was so absurd so that no sensible person would ever think the decision was one within the powers of the decision-maker to make (at 228–229).

79 In *GCHQ*, which followed *Wednesbury*, Lord Diplock seemed to take a different approach and made it clear that illegality and irrationality were focused on two different things (*GCHQ* at 410–411):

(a) Illegality meant the decision-maker had to correctly understand the law regulating his decision-making power and give effect to it.

(b) Irrationality meant *Wednesbury* unreasonableness and referred to decisions which were so outrageously defiant of logic or accepted moral standards that no sensible person who had applied his mind to the question would arrive at the impugned decision.

80 In our judgment, illegality and irrationality are separate, though overlapping, heads of review because at their core, each serves a different purpose. A decision may be legal in the sense that it is within the legislative scheme, but nevertheless impugned for being substantively unlawful (Thio Li-ann, "Law and the Administrative State" in *The Singapore Legal System* (Kevin Y L Tan ed) (Singapore University Press, 2nd Ed, 1999) ("*Law and the Administrative State*") at p 185). This is because illegality serves the purpose of examining whether the decision-maker has exercised his discretion within the scope of his authority and the inquiry is into whether he has exercised his discretion in good faith according to the statutory purpose for which the power was granted, and whether he has taken into account irrelevant considerations or failed to take account of relevant considerations (Harry Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 7th Ed, 2013) ("*De Smith's Judicial Review*") at para 5–001). Conversely, irrationality is a more substantive enquiry which seeks to ascertain the range of legally possible answers and asks if the decision made is one which, though falling within that range, is so absurd that *no reasonable decision-maker could have come to it* (see *Law and the Administrative State* at p 186). In short, illegality examines the source and extent of the Minister's power and whether the power has been informed by relevant and *only relevant considerations*, while irrationality looks at the decision that was made and asks if it was so unreasonable that after considering the correct factors, no reasonable decision-maker could have come to it.

81 It is appropriate for us to emphasise that although we have sought to preserve the relevance of this dichotomy, it is by no means a strict one as certain decisions may be both illegal and irrational at the same time. A good example is seen in *Wednesbury* at 229–230, where Lord Greene MR alluded to the decision to sack a teacher on the basis of her red hair, a decision which can fall within both illegality and irrationality. We now turn to the facts.

82 The Appellant submits that his detention is unlawful on all three grounds encapsulated in the Traditional Test. We begin with illegality. He contends his detention is illegal for two reasons. First, he submits that recourse to the powers under the CLTPA is confined to criminal activities which pose a threat to public safety, peace, and good order *within* Singapore. Unless on an objective reading of the facts it is evident that there was such a threat, the Minister had no power to detain him and his

detention was therefore illegal. Second, he argues that the scope of activities contemplated by the CLTPA does not include illegal match-fixing activities. He submits that corruption and match-fixing offences do not present a *sufficiently serious threat* to public safety, peace and good order to be caught under the CLTPA. Hence, he contends the Minister had no power to detain him under the CLTPA because (a) his activities did not impact Singapore; and (b) they were not sufficiently serious. He says each of these is an essential element to be satisfied before the Minister could act under the CLTPA. We first set out the submissions of the parties in respect of these two issues raised, before setting out our views on the law and its application to the facts.

The parties' submissions on whether match-fixing activities harm public safety, peace and good order within Singapore

83 The Appellant submits that the CLTPA deals with public safety, peace and good order *within Singapore*. There must be such a threat before the CLTPA may be invoked; and this is so regardless of whether the criminal activities in question occurred within or outside Singapore. To the extent that reliance has been placed on actions carried out abroad, the Appellant says not all associations with criminal activities abroad prejudices public safety, peace and good order *within Singapore*, and there must be a nexus between the two. However, he submits that no such nexus is shown in the facts on which his detention is grounded.

84 The Respondent, on the other hand, submits that as long as the Minister is acting within the boundaries of his power, and is satisfied that the Appellant's activities have an impact on public safety, peace and good order *within Singapore*, that settles the question. Alternatively, the Respondent contends that the Appellant has failed to show that the Minister did not understand or give effect to the requirement that the activities were a threat to public safety, peace and good order *within Singapore* because:

(a) the Minister must be taken to have specifically directed his mind towards the impact of the Appellant's activities in Singapore as is evident from the grounds of detention, which show that attention was directed at his activities *in Singapore*;

(b) it is the Appellant who bears the burden of showing the unlawfulness of his detention and not the Minister who must justify the detention; and

(c) for the purposes of the CLTPA, global match-fixing activities are generally to be regarded as threats to public safety, peace and good order in Singapore. The fact that the activities are global in nature and that many of these took place outside of Singapore is insufficient to render the detention unlawful.

The parties' submissions on whether match-fixing activities are sufficiently serious to fall within the remit of the CLTPA

85 The Appellant submits that the power to order detention without trial is a draconian one to be exercised as a last resort. He contends that "the CLTPA was never intended to target corruption offences in general and match-fixing activities in particular". In this regard, he submits that the Judge erred in finding that the words "public safety, peace and good order" were words capable of encompassing a wide range of situations, or that "good order" could include the interest of having football participants playing to win and not according to the source or the size of bribes (the GD at [35]).

86 The Appellant further submits that a purposive interpretation of the CLTPA must mean that the

phrase "public safety, peace and good order" is to be read conjunctively to refer to public and social order on a wide scale and would not extend to sporting integrity. Its legislative purpose should be understood as being to forestall threats to life, limb or public security. This is borne out by the following:

(a) the CLTPA was originally meant to be a temporary addition to the existing criminal laws to deal with communism and secret societies, which were on the rise. That was the background and context in which the words *public order* appeared in the long title to the CLTPA;

(b) the Senior Minister of State for Home Affairs Assoc Prof Ho Peng Kee ("Assoc Prof Ho") said in Parliament that while the CLTPA was meant to deter overseas criminal syndicates from setting up in Singapore, secret societies and drug syndicates remained the key targets of the CLTPA, along with loansharking activities (*Singapore Parliamentary Debates, Official Report* (13 February 2009) vol 85 ("*The 13 February 2009 Debate*") at cols 3277–3282);

(c) the CLTPA is to be used only as a last resort when a serious crime affecting the public order and safety in Singapore has been committed and court prosecution is not possible because of a lack of evidence by reason of intimidation and oppression.

87 The Appellant further submits that since match-fixing activities do not involve any apparent threat to life, limb and security, there can be no threat to Singapore's public safety, peace and good order. He submits that this same point was raised by a Member of Parliament, Mr Hri Kumar Nair, in Parliament (see *Singapore Parliamentary Debates, Official Report* (11 November 2013) vol 90) ("*The 11 November 2013 Debate*"). The Appellant further contends that the his actions are akin to economic crimes such as insider trading or market manipulation, offences for which it would be inconceivable that the Minister could detain a person under the CLTPA.

88 The Respondent, on the other hand, submits that the Appellant's detention is lawful because, as the Appellant has accepted, there is no necessity for the threat to public safety, peace and good order to result from *criminal activities within Singapore*. All that is needed is that *the Minister be satisfied* that the Appellant's activities have an *impact* on public safety, peace and good order *in Singapore*. The Respondent further submits that the Appellant has not shown that the Minister failed to understand or give effect to this since:

(a) the Minister must be taken to have specifically directed his mind to the impact of the Appellant's activities in Singapore;

(b) the Appellant is required to prove illegality and he has failed to do so; and

(c) the intent underlying the CLTPA is broad enough to contemplate global match-fixing activities which can threaten public safety, peace and good order. Just because they are global in nature and many of the activities took place beyond Singapore is insufficient to establish illegality.

Our decision

89 We will set out our reasons and our decision as follows:

(a) we begin with some preliminary observations that flow from our holding that the appropriate approach to an ORD application requires us to closely scrutinise the grounds of detention on an objective basis;

(b) we then examine the proper scope of the CLTPA in terms of the circumstances in which it may be invoked; and

(c) we then turn to the facts that are before us.

In each of these sections, we will deal with both aspects of the Appellant's case where it is necessary or relevant to our discussion.

Preliminary observations

90 We began this judgment by observing that the specific responsibility for pronouncing on the legality of government actions falls on the Judiciary. It is appropriate at this juncture to parse this. To hold that this is so is not to place the Judiciary in an exalted or superior position relative to the other branches of the government. On the contrary, the Judiciary is one of three co-equal branches of government. But though the branches of government are co-equal, this is so only in the sense that none is superior to any other while all are subject to the Constitution. Beyond this, it is a fact that each branch of government has separate and distinct responsibilities. In broad terms, the Legislature has the power to make the laws of our land, and this power extends even to amending the foundation of our entire legal system and indeed, of our nation, the Constitution. The Executive has the power and the responsibility of governing the country within the framework of the laws established by the Legislature. And the Judiciary has the responsibility for the adjudication of controversies which carries with it the power to pronounce authoritatively and conclusively on the meaning of the Constitution and all other laws. It is the nature of this latter responsibility that results in the Judiciary being tasked with the role of pronouncing on the legality of government actions.

91 It has to be acknowledged, however, that the relationship between the arms of government is a complex one (see Jonathan Sumption QC, "Judicial and Political Decision-making: The Uncertain Boundary" [2011] JR 301 at paras 10–13). To this may be added the following passage from *De Smith's Judicial Review* at para 11–004:

> The question of the appropriate measure of deference, respect, restraint, latitude or discretionary area of judgment (to use some of the terms variously employed) which the courts should grant the primary decision-maker under this head of review is one of the most complex in all of public law and goes to the heart of the principle of the separation of powers. This is because there is often a fine line between assessment of the *merits* of the decision (evaluation of fact and policy) and the assessment of whether the principles of "just administrative action" have been met. The former questions are normally matters for the primary decision-maker, but the latter are within the appropriate capacity of the courts to decide. … [emphasis in original]

92 A case such as the present highlights this complexity, involving as it does considerations of public order, peace and security. These are areas that on their face are within the province of the Executive branch of government. This raises the issue of the deference that the Judiciary should accord to another branch of government in relation to a subject matter that is more comfortably situated within the latter's province. In this regard, it is worth recalling the observation of Sir Thomas Bingham MR in *Regina v Secretary of State for Defence*, *ex parte Smith* [1996] QB 517 at 556:

> … The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational. …

93 The reason that underlies this is a pragmatic one: courts and judges are not the best-equipped

to scrutinise decisions which are laden with issues of policy or security or which call for polycentric political considerations. Courts and judges are concerned rather with justice and legality in the particular cases that come before them.

94 Lord Diplock, speaking extra-judicially at the Second Tun Abdul Razak Memorial Lecture, expressed his reservations about judges reviewing the substance of policy-centric executive decision-making in eloquent terms ("Judicial Control of Government" [1979] MLJ cxl at cxlvii):

> The control which the judges are enabled to exercise over the two other branches of government, the legislature and the executive, because of their exclusive function under the constitution to interpret the written and declare the unwritten law carries with it great responsibilities. In dealing with matters of public law, modesty I believe to be the most important of judicial virtues — the recognition that judges, however eminent in the law, are not the ultimate repositories of human wisdom in answering the kinds of social, economic and political questions with which parliament and administrators have to deal. Few of these questions are of a kind to which the best solution can be found by applying a judicial process or which the experience and training which a judge has acquired in the course of his career equips him to deal with better than other men. … *The judge above all must resist a temptation to turn sociologist, economist, and politician, and in interpreting the written law to restrict that range of choice so as to exclude solutions which give effect to policies of which he himself strongly disapproves.* He should be slow too to find that an administrative authority in reaching a particular decision has taken into consideration some matter that it should not have taken into consideration or omitted to consider some matter that it should. *But judicial modesty must go hand in hand with judicial courage. … [I]f any executive or administrative authority … has so acted that it has failed to observe or to apply the law, it is the responsibility of the Judiciary … so to declare and to refuse to give legal effect to such* ultra vires … *administrative act; for this is the only way in which the rule of law will continue to be preserved*. [emphasis added]

95 On matters concerning national security, our courts have traditionally accorded deference to the Executive's determination. Practically, this has meant that the courts have undertaken a less intense standard of review (Thio Li-ann "The Theory and Practice of Judicial Review of Administrative Action in Singapore" in *SAL Conference 2011 — Singapore Law Developments (2006–2010)* (Yeo Tiong Min *et al*, gen eds) (Academy Publishing, 2011) at para 31). Such an approach may be seen in *Chan Hiang Leng Colin and others v Public Prosecutor* [1994] 3 SLR(R) 209, which concerned a case where the appellants were tried and convicted for possessing banned publications of the religious group known as the Jehovah's Witnesses. The appellants argued that the bans, among other things, constituted an irrational exercise of the Executive's power. Yong Pung How CJ noted (at [68]) as follows:

> 68 In my view, *it was not for this court to substitute its view for the Minister's as to whether the Jehovah's Witnesses constituted a threat to national security*. As I have outlined earlier, the appellants had the burden of showing that the Minister had exercised his powers wrongly. This court was not here to review the merits of the decision and conclude that the Jehovah's Witnesses were or were not a threat to public order. From the evidence adduced, it appeared that the Minister was of the view that the continued existence of a group which preached as one of its principal beliefs that military service was forbidden was contrary to public peace, welfare and good order. … [emphasis added]

96 Where does this leave detention without trial under the CLTPA? On one hand, the Legislature has placed the power to impose such detention in the hands of the Executive when this is thought to be mandated by considerations of public order, peace and security. On the other, such detention

entails the individual being deprived of his liberty, and it is a matter for the Judiciary to determine whether this has been done lawfully.

97 In our judgment, while it is one thing to say that the court must not substitute its view as to the way in which the discretion that is vested in the Minister should be exercised, it is quite another to say that the Minister's exercise of discretion may not be scrutinised by the court at all. It has to be said that in the course of oral arguments, Mr Hay Hung Chun, who appeared for the Respondent, did not go so far. We asked him if he was contending that the function of the court was confined to verifying, as a clerical matter, that the paperwork was in order and included at least a bare recitation by or on behalf of the Minister that formally complied with the statutory formula. Mr Hay said that was not his position, and in our judgment, rightly so. We have already referred to the decision of this court in *Chng Suan Tze* where an objective approach was laid down. This plainly runs counter to any suggestion that the court is confined to so narrow a role. Indeed, this recognises that a court may and indeed should examine whether the power that is vested in the Minister is being properly invoked. Here, it is worth repeating the key passage from the judgment in *Chng Suan Tze* at [86]:

> 86 There is one other reason for *rejecting the subjective test. In our view, the notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power. If therefore the Executive in exercising its discretion under an Act of Parliament has exceeded the four corners within which Parliament has decided it can exercise its discretion, such an exercise of discretion would be* ultra vires *the Act and a court of law must be able to hold it to be so.* In *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, s 19(3) of the Agricultural Marketing Act 1958 (c 47) merely provided for a committee of investigation to consider and report on any complaint made to the Minister 'if the Minister in any case so directs'; nothing was expressed as to the nature or extent of the Minister's discretion. Even then, the House of Lords held that the Minister's discretion was not unfettered and could not be exercised such as to frustrate the policy of the Act. Lord Reid expressly rejected the 'unreasonable proposition that it must be all or nothing — either no discretion at all or an unfettered discretion'. It must be clear therefore that *the boundaries of the decision maker's jurisdiction as conferred by an Act of Parliament is a question solely for the courts to decide*. There is also, as counsel for the appellant has pointed out, no ouster clause in respect of s 8 or 10 of the ISA. *Adopting the objective test in respect of ss 8 and 10 of the ISA would also be consistent with Arts 9(2) and 93 of the Constitution*. Further, it is, in our view, no answer to refer to accountability to Parliament as an alternative safeguard. As Lord Diplock put it in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 644:
>
> > It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. ***They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge*** …
> >
> > [emphasis added in italics and bold italics]

98 It is true that *Chng Suan Tze* was subsequently legislatively overruled by amendments to the Constitution and the ISA (see *Teo Soh Lung (CA)* at [20]–[21] which confirmed that the post-amendment position was that stated in *Lee Mau Seng* at [53]), but those amendments do not affect the position before us because we are not concerned with the ISA. In our judgment, the following propositions flow from the foregoing passage in *Chng Suan Tze*, and continue to be relevant to this

case:

(a) Unfettered discretion is contrary to the rule of law. All power has legal limits and it is within the province of the courts to determine whether those limits have been exceeded.

(b) It follows that if discretion is vested in the Executive branch by the Legislature, it remains a matter for the courts to decide:

(i) what the boundaries are of the jurisdiction or power that is vested in the Executive; and

(ii) whether the Executive has acted within the ambit of that jurisdiction or power.

(c) This follows also by reason of Art 93 of the Constitution, which vests the judicial power in the courts.

(d) Therefore, the courts, in the final analysis, are the arbiters of the lawfulness of actions including government actions.

99 Where the Executive is acting within the ambit of the powers that have been vested in it by Parliament, then the court's concern is not with whether it agrees with the way in which the powers have been exercised. To suggest otherwise is to displace the choice that has been made by Parliament as to which branch of the government is to be entrusted with the powers in question. The court's role in judicial review which engages the manner in which the power is exercised will then be limited to such things as illegality, irrationality, and procedural impropriety. This perspective is premised on a proper understanding of the role of the respective branches of government – especially, in this context, the Executive and the Judiciary – in a democracy where the Constitution reigns supreme.

100 The issue of judicial deference to executive action has been considered, together with the somewhat connected issue of justiciability, in two recent decisions, namely, *Lee Hsien Loong v Review Publishing Co Ltd and another and another suit* [2007] 2 SLR(R) 453 ("*Review Publishing*") and *Yong Vui Kong v Attorney-General* [2011] 1 SLR 1 ("*Yong Vui Kong*") (affirmed by the Court of Appeal in *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189).

101 In *Review Publishing*, the plaintiffs, the Prime Minister and the Minister Mentor, sued the defendants for publishing allegedly defamatory news articles (at [3]). The defendants were not present in Singapore and so the plaintiffs sought leave to serve the writs of summons out of jurisdiction in the Hong Kong Special Administrative Region, where the first defendant was incorporated and the second defendant was resident (at [4]).

102 The defendants challenged the manner of service of the writs. One of the grounds relied on was that service had not been effected in accordance with the procedure stipulated by the Treaty on Judicial Assistance in Civil and Commercial Matters between the Republic of Singapore and the People's Republic of China (28 April 2007), GN No T2/2001, Bilateral Treaty No B459 (ratified by Singapore 29 April 1998) ("the Treaty") (at [5]). The plaintiffs insisted that service was proper, and they produced a letter from the Ministry of Foreign Affairs ("the MFA") which stated that the application of the Treaty to Hong Kong was governed by Hong Kong law. The letter further stated that under Hong Kong law, such matters were to be decided by the Central People's Government after seeking the views of the Hong Kong Government, and that the Hong Kong Department of Justice had in fact confirmed that the Treaty did not apply in that case (at [71]). The defendants contended

that the question of whether the Treaty extended to Hong Kong was one of public international law (at [72]), and so, a question arose as to the effect of the MFA's letter and whether the MFA's views espoused therein were justiciable. The court observed as follows (*Review Publishing* at [100]–[103]):

> 100 This description of what is at stake in these appeals removes us from almost all the cases cited by Mr Singh. Those cases concerned the recognition of foreign governments, boundary disputes, sovereign immunity and the deployment of troops overseas – all involving exercises of sovereign or legislative prerogative in matters of "high policy". The issue that concerns the present appeals, on the other hand, does not implicate the exercise of executive prerogative at all. The concern here is not with the *making* of the Treaty, but with its *effect*. To put it another way, the MFA letter does not represent an exercise of prerogative powers; it is essentially a statement of the MFA's opinion as to what the effect of the Treaty is.
>
> 101 The closest of the foregoing principles relevant to the present appeals is the holding of Simon Brown LJ in [*R (on the application of Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin)] that the courts should not expound on the meaning of an international document operating purely on the international plane. But, as I read that case, the true concerns there were that the judiciary should not be involved in policing the government's conduct of its international affairs, and that it would be arrogant to assume that it should interpret a treaty that affects the international community, particularly given that there is the International Court of Justice to do so. Moreover [that case] involved considerations of foreign policy.
>
> 102 The present appeals are different. They do not engage any sort of foreign policy considerations. … Neither does the case involve the policing of the government's conduct of international affairs. Quite the opposite: we are concerned only with the procedures to be adopted when private litigants wish to serve the process of this court on defendants resident in Hong Kong.
>
> 103 Furthermore, to the extent that this court is required to construe a bilateral treaty in the light of international law principles and certain international instruments, it is only to determine the domestic legal obligations applicable to litigants seeking to invoke this court's jurisdiction pursuant to the Rules [of Court] and the SCJA. … In my view, such an inquiry would comfortably fall within the proper sphere of judicial inquiry.

103 Having established that the issue was "comfortably within the proper sphere of judicial inquiry", the court then went to analyse and rule upon the question presented.

104 *Yong Vui Kong*, on the other hand, concerned the issue of whether the clemency process in Art 22P of the Constitution could be judicially reviewed. This process involved the President forwarding the reports, that were to be submitted to him by the relevant judges, to the Attorney-General's Chambers so that the Attorney-General could give his opinion to the Cabinet, which in turn would then advise the President on the exercise of clemency. While Steven Chong J recognised that the courts could, and indeed, were obliged to police the legal limits of a power (at [61]–[63]), he held that this said nothing about what the legal limits of a particular power were. That could only be ascertained on a case-by-case basis having regard to the nature of the power under examination and the relevant provision under which it arose. With respect to Art 22P, he held that if a petitioner was able to show that the relevant reports had not been furnished to the Attorney-General, or that Cabinet had not advised the President, there would be a judicial remedy in that the requirements of Art 22P would not have been fulfilled. However the court should not review the actual decision whether to grant a pardon as this would entail illegitimate legislation on its part (at [63]). To put it

another way, that would simply fall outside the judicial sphere. He accordingly held Art 22P was not justiciable (at [67]).

105 *Review Publishing* and *Yong Vui Kong* illustrate the point that the degree and extent of scrutiny that is applied by a court engaged in judicial review will be sensitive to the true nature of the question raised. In this regard, we find the following observations in Aileen Kavanagh, "Defending deference in public law and constitutional theory" (2010) 126 LQR 222 at p 241 helpful:

> Both deference and non-justiciability are based on concerns about the institutional limits of the judicial role when compared to the competence, expertise and democratic legitimacy of the elected branches. This is what makes them similar doctrines. However, deference and non-justiciability also differ in significant ways. As Professor Allan rightly observes, the doctrine of non-justiciability … "insulates" certain types of governmental action from judicial review. It declares that those actions are inherently unreviewable. Thus, when the courts decline to make their own assessment of the issue, they are deciding that an issue is non-justiciable. Deference, on the other hand, is a more flexible doctrine which is not antithetical to judicial scrutiny. There are degrees of deference and establishing the appropriate degree is a matter of balancing all the relevant factors in the individual case. Rather than being a blanket rule preventing scrutiny, deference maintains some flexibility by requiring the courts to assess their institutional competence to deal with a particular issue, and to show restraint to the extent that their competence is limited.

106 In keeping with this, even for matters falling within the category of "high policy", the courts can inquire into whether decisions are made within the scope of the relevant legal power or duty and arrived at in a legal manner (*De Smith's Judicial Review* at para 1–035). Indeed, this is apparent in *Yong Vui Kong* at [63] where Chong J commented that there would be a judicial remedy available if the procedures under the clemency process had not been abided by. In such circumstances, the question of deference to the Executive's discretion simply does not arise.

The proper scope of the CLTPA

107 Against the backdrop of those preliminary observations, we turn to examine the proper scope of the CLTPA. For this purpose, it is necessary to reach into the history of the CLTPA.

108 The Respondent's submissions before the Judge provide a good summary of the legislative history of the CLTPA. The 1955 Ordinance was enacted for the purpose of dealing with the threat posed by secret societies and gangsters (*Singapore Parliamentary Debates*, *Official Report* (3 October 1956) vol 2 at cols 234–235 (W A C Goode, Chief Secretary)). This was done in the context of rising gangsterism in Singapore, with law-abiding citizens being put in fear of reporting crimes due to the threat of reprisals from gang members. In such times, the CLTPA served as a means to combat "a very widespread form of terrorism" which inhibited law-abiding citizens from assisting in law enforcement (*Singapore Parliamentary Debates*, *Official Report* (13 August 1958) vol 7 at cols 605 (E B David, Chief Secretary)). In 1958, Mr E B David, the then Chief Secretary said in Parliament (at cols 606 and 609) that:

> The powers … to detain for a limited period without trial, are designed to be used against the ringleaders of these gangs and those who are primarily responsible for their activities. *I would emphasise that it is not intended to use these powers indiscriminately.* They will be used selectively to break the gang organisation and to remove the leaders to a place where they can no longer coerce the less vicious members of their gangs as well as the general public. …

…

… *[I]t is only the exceptional gravity of the present state of gang lawlessness which compels the Government to seek these exceptional powers for immediate use. No democratic government will lightly curtail the liberty of any individual by executive action, nor would it wish to curtail that liberty for a moment longer than is absolutely necessary.* This Government is no exception but when there is no other means of restoring ***peace and good order*** to the island, and removing the dark shadow of terrorism which is spreading over the lives of innocent citizens, then the Government has not only no alternative, but a positive duty to take that action. …

[emphasis added in italics and bold italics]

109 The use of the CLTPA to fight gangsterism and thuggery was again emphasised in Parliament in 1959. The then Minister for Home Affairs, Mr Ong Pang Boon, said (*Singapore Parliamentary Debates*, *Official Report* (2 September 1959) vol 11 at cols 575–576):

… But when we are dealing with unruly and unprincipled thugs and gangsters and because of the terrorism they have spread, the ordinary process of law is inadequate to deal with the crimes and misdeeds committed by them. Special powers such as those contained in this Bill are therefore necessary.

In adopting these measures the Government is conscious of that they provide but temporary remedies …

…

The potential threat of violence is still with us and we still have need for the continuance of this Ordinance. Furthermore, the knowledge that the Ordinance will be in force for another five years will be a deterrent to both present and potential gangsters and … will also make them seriously consider the advantages of reforming themselves.

[emphasis added]

110 It is evident from the foregoing passages that at its inception, the CLTPA was intended to deal with real and physical threats of harm *within Singapore*. In our judgment, this has largely remained constant over the years, even though the ambit of the CLTPA has gradually broadened to cover a wider range of offences.

111 In 1979, the re-enactment of the CLTPA saw it being extended specifically to drug traffickers. The then Minister for Home Affairs, Mr Chua Sian Chin, noted in Parliament that the CLTPA had contributed significantly to the suppression of drug trafficking in Singapore by disrupting the distribution of drugs in Singapore (*Singapore Parliamentary Debates*, *Official Report* (21 September 1979) vol 39 at col 449). In 1982, Prof S Jayakumar ("Prof Jayakumar"), speaking for the Minister for Home Affairs, reaffirmed in Parliament that the reason why the CLTPA was used to detain people was because normal judicial proceedings, which assumed that witnesses would be willing to come forth to testify, were totally ineffective in dealing with gangsters, secret society members, and drug traffickers with underworld and international syndicate connections (*Singapore Parliamentary Debates*, *Official Report* (3 March 1982) vol 41 at cols 384–386). Hence, the justification that was advanced pertained to the inability of the traditional legal and judicial processes to deal with these criminal elements and the methods they deployed.

112 In 1989, the CLTPA was once again renewed, but not without two backbenchers voicing concerns about its use. Mr K Shanmugam ("Mr Shanmugam") and Mr Davinder Singh raised concerns about the CLTPA's continued use (*Singapore Parliamentary Debates, Official Report* (4 August 1989) vol 54 ("*The 4 August 1989 Debate*") at cols 458–460 and 462) as follows:

> **Mr K. Shanmugam (Sembawang GRC):** Sir, it cannot be denied that this Criminal Law (Temporary Provisions) Act (CLTPA) nags our conscience. We call it a temporary provision because we hope that someday we will do away with it. The question that has to be answered is: *under what circumstances we will do away with it? That must be explained carefully and clearly and we have to set out what are the parameters, what are the social conditions under which this Act will cease to be necessary.* ***This is because the original justification for the CLTPA and, in particular, the powers of administrative detention, was that Singapore was a struggling country, gangsters and secret societies were a serious threat, and our Asian psyche was such that people would not willingly testify in court. The only way then to tackle the problem was to lock up gangsters, people involved in secret societies, without trial.*** …
>
> … For the CLTPA, there may be more questions[.] And it has to be accepted that we cannot ever eliminate crime. We can only control it within acceptable tolerable limits. So the Minister has to focus on that and tell the House whether at the present stage the situation is such that secret societies, gangsters, the original justification continues to exist at the same level of seriousness which justifies powers of administrative detention. …
>
> …
>
> This is not to suggest that it has been abused, ***but only to prevent the CLTPA from being a convenient route where the Police do not have sufficient evidence against common criminals to prosecute them in court and therefore use the CLTPA*** . The Minister is a busy man. He has to rely on the reports that are put up to him by his Police Force. *And the Police do not have a monopoly of virtue or morality more than any of us.* So that is an important point and that particular provision worries me.
>
> …
>
> **Mr Davinder Singh (Toa Payoh GRC):** Mr Speaker, Sir, what my colleague, Mr Shanmugam, has said has much force in it. I share his views and his concern in relation to the applicability of the Act to our modern day conditions in Singapore. I also share his concern in connection with whether the Act ought to continue in its present form or ought to be watered down and if structural reforms ought to be made.
>
> Sir, I would, however, take a different stand from him for one reason, and one reason only which, I suggest, is justification for the continuation at least, in the first instance, for five years of this Act, and that is, the liberalization in the policy of admitting foreigners to Singapore.
>
> [emphasis added in italics and bold italics]

113 Prof Jayakumar, the then Minister for Home Affairs, replied to Mr Shanmugam's question by stating that the CLTPA could be done away with when both the secret society and drug trafficking elements had been reduced to such small proportions that it could safely be said that the CLTPA would no longer be required (*The 4 August 1989 Debate* at col 467). Presumably, in the continued absence of this state of affairs, the CLTPA was extended in 1994. It also became evident that the

CLTPA was not confined in its operation to secret societies, gangsters, and drug traffickers. The then Minister for Home Affairs, Mr Wong Kan Seng, said that the CLTPA had been used effectively to deal with criminals who had committed serious crimes such as *murder, gang rape and robbery with firearms* where *witnesses were not prepared to testify in court* (*Singapore Parliamentary Debates*, *Official Report* (25 August 1994) vol 63 at col 464). The fact that the CLTPA would only be used when witnesses were unavailable to testify against detainees due to fear of reprisals and intimidation was again emphasised (at col 471).

114 The CLTPA was re-enacted in 1999. It was only then that first mention was made of secret society members who were involved in *syndicated criminal activities*. The illustrations given of these activities were extortion, unlicensed moneylending and smuggling illegal immigrants (*Singapore Parliamentary Debates*, *Official Report* (15 April 1999) vol 70 at col 1217 (Assoc Prof Ho, Minister of State for Law)). Assoc Prof Ho also emphasised the deterrent effect of the CLTPA, which prevented East Asian gangs from gaining a foothold in Singapore. He further noted that while secret society and drug trafficking activities had declined considerably, the CLTPA offered a bulwark against the very real risk of resurgence (at col 1220).

115 In 2004, the CLTPA was renewed again with similar objectives (*Singapore Parliamentary Debates*, *Official Report* (1 September 2004) vol 78 at cols 388–392 (Assoc Prof Ho, Minister of State for Law)). Another Member of Parliament, Assoc Prof Chin Tet Yung, queried if a schedule listing the serious crimes which the CLTPA was to deal with should be in place so that the public and the Legislature would know the limits of the CLTPA's application. He thought that would be good for the rule of law (at col 394). Assoc Prof Ho replied as follows (at cols 401–402):

> … *[T]he requirement and the common thread under which offences fall within the Bill are situations where witnesses fear to testify because of reprisal* … [W]here we can prosecute, we will prosecute because the court process in open court is the norm. And that is indeed a core principle of our legal system. But as all the speakers have said, there are situations where, particularly, syndicates are involved. So that if you have witnesses to come and testify against that person who goes in, there are people outside especially underlings, who will harass him, his family members and people who know him. That is a real fear. … [emphasis added]

116 Pausing there, Parliament having opted not to specify the list of offences for which the CLTPA would be deployed, the position as at 2004 may be summarised as follows:

(a) It had been and would remain the case that the normal course for dealing with criminals would be by way of prosecution in court.

(b) This would be departed from as a last resort when recourse to the CLTPA would be permitted in certain limited circumstances where the normal legal processes could not be utilised or relied upon because witnesses would not come forward due to the threat of reprisals.

(c) The specific types of crimes mentioned were gangsterism and secret societies, drug trafficking, violent crimes such as murder, gang rape, robbery with firearms, syndicated crime organisations involved in extortion, unlicensed moneylending and human trafficking.

117 These types of offences are unified in three ways. First, they all feature the use of violence or the threat of reprisals to intimidate and prevent witnesses from testifying. This, indeed, was said to be "the *requirement* and common thread" [emphasis added] of the offences that fall within the CLTPA (see [115] above). The CLTPA would therefore be available only against persons involved in criminal activities where the normal criminal process is found not to be adequate or sufficiently robust to deal

with them because of the threat of harm to witnesses or their families.

118 Second, the point has repeatedly been made that detention under the CLTPA is an alternative to imprisonment after trial. Because of the need to be satisfied that prosecution in the normal way is not viable due to the threat of reprisals, it seems clear that the *sine qua non* of detention under the CLTPA is the Minister's satisfaction that the detainee has been associated with a criminal activity of the requisite nature and gravity.

119 What does this entail? It is clearly not *any* criminal activity. In our judgment, the criminal activities in question must necessarily be of a sufficiently serious nature. This flows from two points: first, the list of offences that have been mentioned in Parliament have all been of such a serious nature; and second, it would be unthinkable that the fear of reprisals against testimony, which has been expressed to be the foundational requirement for the invocation of the CLTPA, could reasonably be thought to exist or arise for offences that were not of such a level of gravity.

120 The third unifying feature of these offences pertains to the harm to public order *in Singapore* that is posed by these offences. The activities of gangsters, secret societies and syndicated crime gangs involved in violent crimes all affect the peace, safety and public order of the people of Singapore. This seems almost too obvious to have to be stated but for reasons that will shortly become evident, it is an important point.

121 In keeping with this, in 2009, when the CLTPA was again extended, Assoc Prof Ho, then Senior Minister of State for Home Affairs, outlined the continuing relevance of the CLTPA in today's context as a tool that was directed at: (a) preventing a gang culture emerging in Singapore; (b) combating drug traffickers; (c) going after syndicate kingpins; and (d) crippling loansharking syndicates (*The 13 February 2009 Debate* at cols 3277–3280). Assoc Prof Ho also repeated the assurance that the CLTPA would remain a remedy of last resort; where possible, prosecution would be the primary mode of enforcement (at cols 3280–3281). In his speech, we see also the renewed emphasis on the CLTPA's true object – the nullification of the threat that these groups pose to the Singaporean way of life where law-abiding citizens should not have to live in fear against "acts of violence and blatant lawlessness" (at cols 3281–3282).

122 This was the position in terms of the Parliamentary intention that had been expressed as to the scope of the powers conferred under the CLTPA at the time the Appellant was arrested and first detained under s 30 of the CLTPA on 2 October 2013 (see [8] above).

123 On 21 October 2013, Ms Sylvia Lim, a Member of Parliament, raised the Appellant's detention in Parliament and questioned the detention of four suspects of global football match-fixing activities under the CLTPA (*Singapore Parliamentary Debates*, *Official Report* (21 October 2013) vol 90). Mr Teo Chee Hean ("Mr Teo"), the Minister for Home Affairs, responded as follows:

> … Like drug-trafficking and unlicensed money-lending, illegal soccer match-fixing activities are carried out by *organised criminal syndicates with complex and layered structures motivated by financial gain. Witnesses able to provide testimony against the syndicate are unwilling to do so.*
>
> Additionally, where cross-border illegal activities are involved, the difficulties of securing evidence and witnesses willing to co-operate and testify against the syndicate in open court are amplified.
>
> Given these circumstances, the Minister for Home Affairs issued Detention Orders on 2 October 2013 to four persons involved in the case. …

[emphasis added]

124 Subsequently, the CLTPA was re-enacted on 11 November 2013. At that time, Mr S Iswaran ("Mr Iswaran"), the Second Minister for Home Affairs, said as follows (*The 11 November 2013 Debate*):

> More recently, in October 2013, the CLTPA was used to deal with five persons for their involvement in global soccer match-fixing activities. Of these, four were issued Detention Orders and one was issued a Police Supervision Order. *The underlying nature of these match-fixing activities was no different to those of other criminal activities that have necessitated the use of the Act.* Such criminal activities are often carried out by organised syndicates with complex and layered structures, and extensive networks which make full use of technology. Also, where cross-border illegal activities are involved, the difficulties of securing witnesses who are willing to co-operate and testify in open court are amplified.
>
> …
>
> I wish to emphasise and assure Members that prosecuting offenders is, and will always be, the first and preferred course of action. However, this may not be possible in every instance … especially in cases where *witnesses, who may be victims or fellow syndicate members, are unwilling to come forward and testify in open court*. The Act is used as a last resort in such circumstances.
>
> [emphasis added]

125 From Mr Iswaran's statement, it seems that the CLTPA was presented to Parliament, at least in 2013, on the basis that in principle, it could be used against match-fixing syndicates. But this gave rise to a number of concerns that were expressed by Members of Parliament concerning the potential for abuse of the CLTPA. Was match-fixing wherever it took place a sufficiently serious crime to warrant the invocation of the CLTPA? Were the safeguards that were in place sufficient? Was the CLTPA being used to plug gaps in law enforcement especially in relation to international crimes? Was it too convenient a means to get around the usual legal processes? These were all questions posed to Mr Iswaran. His response is significant. He said, among other things:

> I want to assure … all Members … that the powers under the Act are *used judiciously against serious criminal activities* and where it is necessary to do so as stated in the Act, in the interest of public safety, peace and good order. …
>
> Neither should we, as Ms Sylvia Lim suggested, interpret public safety, peace and good order as merely referring to danger to life and limb. That is one important consideration. But … there are many other elements that contribute to an assessment of what constitutes a threat to public safety, peace and good order.
>
> … *The fundamental tenet remains that court prosecution is the first and preferred course of action, and the Act is used in a calibrated and targeted manner only as a last resort.*
>
> These were the same considerations in the decision to use the CLTPA to deal with the members of a match-fixing syndicate in October 2013. … Fundamentally, match-fixing syndicates operate no differently from those involved in drug trafficking or unlicensed moneylending. They share some of the most egregious characteristics that render them a threat to public order. Yes, some Members have said they have complex and layered structures, use technology and other means

to avoid detection, and are motivated by financial gain. And the implied question is, "But, so what?"

They also have links to other transnational criminal syndicates. They are also known to resort to violence and other means to settle scores against those who stand in their way.

At the same time, the transnational nature of the activities does aggravate the *difficulties we have in securing witnesses willing to cooperate and testify against the syndicates in our Courts*. This is a fact. We cannot afford to consider match-fixing or transnational crime another country's problem.

Organised crime syndicates often collaborate and have links with syndicates in other countries and are involved in a whole plethora of businesses. If allowed to take root, this kind of criminal activity will cause a profound decay in public order in Singapore.

…

I want to caution against taking the view that match-fixing is simply a case of cheating or corruption with no threat to life, limb and security. On that basis, unlicensed moneylending is also simply a financial transaction between two parties. However, we are all well aware of the *deeply harmful spillover effects of the scourge of loansharking and associated activities*, and the threat that they pose to public safety, peace and good order.

[emphasis added]

126 On the basis of these further statements, the CLTPA was extended again in 2013. In our judgment, Parliament's intention as restated in 2013 on the whole affirms the conclusions we have set out above at [116]–[120]. First, the point had been made in the past and was again restated in 2013 that the first and preferred course of action was prosecution in court and that recourse to the CLTPA was a last resort that could be used in a "calibrated and targeted manner" (see [125] above). The fact that a person may exceptionally have been deprived of his liberty in this way stems from a Parliamentary determination that this is justified by reason of a particular and identified set of circumstances. This is the context in which it is said that recourse may be had to the CLTPA as a "last resort".

127 In so far as we have said at [116(c)] and [118] above that the CLTPA may be availed of for offences of sufficient seriousness, it is not evident to us that Parliament watered this down in 2013. On one hand, it is true that mention was made of the fact that public safety, peace and order should not be interpreted as being confined "to danger to life and limb" but on the other, it is also the case that:

(a) Mr Teo in October 2013 spoke of this being the work of organised criminal syndicates and of "witnesses able to provide testimony against the syndicate [but who] are unwilling to do so"; and

(b) Mr Iswaran in November 2013 also made reference to the following facts and considerations:

(i) witnesses were unwilling to come forward and testify and the CLTPA would be used as a last resort in such exceptional circumstances;

(ii) although danger to life and limb was an important consideration, there were other elements that contributed to the consideration of public order, peace and security;

(iii) match-fixing syndicates had links to other transnational criminal syndicates and were known to resort to violence and settle scores against those who stand in their way; and

(iv) there was a danger of these syndicates linking with other such syndicates, resulting in organised crime taking root in Singapore.

128 On the whole, we consider that subject to the addition of match-fixing as a relevant criminal activity, the position remains as we have summarised it at [116]–[120] above. This is unsurprising. The scheme of the CLTPA is such that the evidentiary basis for the detention is not scrutinised by the courts. As long as the detention is within the ambit of the legislation, the power to determine the factual basis for detention as well as whether this is warranted in the circumstances falls upon the Executive, subject only to review by the courts on the basis of the Traditional Test. This is a significant departure from the normal situation where individuals are not to be deprived of their liberty save upon a judicial determination of guilt following an open trial. It is to be expected in the circumstances that the CLTPA will only be availed of sparingly and in limited circumstances.

Application to the facts

129 Against that understanding of the ambit of the CLTPA, we turn to the facts. We begin with two preliminary points. First, as we have mentioned earlier, and subject to the fact that the contrary was not argued before us, as we have noted at [54], [64] and [74] above, the court is generally not to review the truth of the allegations of fact found in the grounds of detention. It nonetheless remains incumbent upon us to closely scrutinise the grounds on which the Appellant's detention is thought to be justified, in order to determine whether, on that basis, the Minister was acting within the scope of his powers in detaining the Appellant. For the avoidance of doubt, the scope of this power is as we have determined it at [116]–[120] above.

130 Second, it is incumbent on the Minister to state all the grounds relied on as justifying the detention so that the exercise of his power can be properly understood and assessed. Section 31(1) of the CLTPA states:

> **31.**—(1) Every order made by the Minister under section 30 shall, *together with a written statement of the grounds upon which the Minister made the order*, be referred by the Minister to an advisory committee constituted as provided in section 39, within 28 days of the making of the order. The committee shall submit to the President a written report on the making of the order and may make therein such recommendations as it shall think fit. [emphasis added]

131 It is not open to the courts to fill in any gaps in the narrative of the facts by surmise or supposition. For convenience, we reproduce in full the Minister's grounds for detaining the Applicant:

> (a) You have between 2009 and 2013 been the leader and financer of a global soccer match-fixing syndicate operating from Singapore that carried out soccer match-fixing activities in many parts of the world, the particulars of which are as stated in paragraph (b) below.
>
> (b) Particulars of soccer match-fixing activities:
>
> (i) You were recruiting runners in Singapore and directing match-fixing agents and runners from Singapore to assist in the conduct of soccer match fixing activities between 2009 and

September 2013.

(ii) You were financing and assisting, by providing a contact who could arrange for a corrupt referee, in soccer match-fixing activities in Egypt between September and December 2010.

(iii) You were financing soccer match-fixing activities in South Africa in May 2010.

(iv) You were directing and financing soccer match-fixing activities in Nigeria in June 2011.

(v) You were financing soccer match-fixing activities in Turkey in February 2011.

(vi) You were assisting in attempted soccer match-fixing activities in Trinidad and Tobago in mid-2011 by sending a match-fixing agent to provide support to another match-fixing agent in relation to match-fixing activities.

In our judgment, the Minister's action on the basis of these facts fell outside the limits of his power for the reasons that follow.

132 From the recital of the grounds, the following points may be noted:

(a) Paragraph (a) states that the Appellant was the leader and financier of a global soccer match-fixing syndicate ("the Syndicate").

(b) The Syndicate operated *from* rather than *in* Singapore.

(c) The Appellant was the leader of the Syndicate between 2009 and 2013. But it does not appear from the grounds that the Syndicate had any operations between the middle of 2011 and late 2013 when the Appellant was arrested.

(d) Paragraph (b) states that the Appellant recruited runners in Singapore and that from here he directed the activities of agents and runners between 2009 and September 2013.

(e) But as we have noted, the only particulars of actual match-fixing activities are those in a 13-month period between May 2010 and mid-2011.

133 To begin with, we questioned Mr Hay at the oral hearing as to whether there was any limit on the criminal activities that the CLTPA could encompass. He submitted that there was no such limit though he accepted that whatever their nature, these activities had to be such as to pose a threat to public safety, peace and good order. Mr Hay submitted that the CLTPA was designed as a flexible tool. He pointed to fact that the CLTPA had been used for an increasing number of types of offences as time went by, and relied on this as evidence of the widening of the scope of the CLTPA over time. He contended that this showed that Parliament had considered which developments posed a threat to society from time to time and so empowered the Minister to address those threats by recourse to the CLTPA if he so wished and as he deemed fit. Furthermore, Mr Hay submitted that it was not necessary for the Minister to obtain a mandate from Parliament if and when he wished to further widen the scope of the CLTPA and deploy it for offences not hitherto contemplated.

134 With respect, we are unable to agree with these contentions. In our judgment, a correct reading of scope of activities which fall under the CLTPA is as we have set it out at [119]–[120] above. Even if the precise range of activities caught by the Act has broadened over time, their core characteristics have not. Hence, we do not accept that the CLTPA has a loose or open-ended remit,

much less that it is for the Minister to use it as he chooses or deems appropriate without the need to get the approval of Parliament if he wishes to extend its operation beyond the tight limits within which the CLTPA has always been presented to and been approved by Parliament. Furthermore, as we have already emphasised, the question of the scope of the power conferred on the Executive by the Legislature is centrally one for the Judiciary.

135 Second, it is true that under s 30 of the CLTPA, the Minister's power extends to "person[s] … *associated with activities of a criminal nature*" [emphasis added]. This phrase is plainly wider than persons who have committed a crime. In our judgment, the CLTPA is structured in this way to confer on the Minister a degree of latitude to enable its objects to be achieved. But we are satisfied that such involvement must be in activities of a *sufficiently serious nature*. It seemed to us at points that Mr Hay was treating the requirement of being "associated with activities of a criminal nature" as a separate one that stood alone with no further need for an inquiry into the seriousness of the nature of the activities in question. In our judgment, that cannot be so. The relevant activities must be of a sufficiently serious nature that it leads the Minister to be satisfied that it is necessary to act in the interests of public safety, peace and good order.

136 We digress to deal with one point. There was a suggestion that if the Appellant could be charged with and convicted of offences such as illegal betting, that should be pursued and it was not open to the Minister to resort to the CLTPA. In our judgment, this is misconceived. If the Minister is acting within the scope of his power, he is entitled to proceed under the CLTPA even if the detainee offers to plead guilty to a less serious offence. Any other view would undermine the efficacy of the scheme since a detainee can always choose a softer or more expedient option.

137 This brings us to the last and perhaps most important of the points we have highlighted at [120] above, which is that the activities must have a prejudicial effect on the "public safety, peace and good order" *of Singapore*. This is the entire *raison d'être* of the CLTPA. The activities need not themselves have occurred here, but they must threaten *our* public safety, peace and order.

138 Against that backdrop, we return to the facts. We are prepared to accept that the facts narrated in the grounds suggest that the Appellant did engage in activities of a criminal nature. We are also prepared to accept in principle that leading a match-fixing syndicate *could* entail activities of a sufficiently serious criminal nature given that Parliament did not reject this idea when it was presented in November 2013, and also having regard to the sort of considerations mentioned by Mr Iswaran at [127(b)] above.

139 But beyond this, it appears to us from the facts recited in the grounds that there is nothing to indicate that the Appellant *did* engage in any activities of so serious a nature as those alluded to by Mr Iswaran (see [125] above), that brought his actions *within* the contemplated scope or remit of the CLTPA. The only facts cited in the grounds of detention are that the Appellant recruited runners and agents over a 13-month period that ended almost two and a half years before he was served with a detention order. There is also an averment that he led a match-fixing syndicate that was engaged in financing and/or directing unspecified match-fixing activities in Egypt, South Africa, Nigeria, Turkey and Trinidad and Tobago. At their highest, these facts amount to a slew of corrupt practices and, as reprehensible as they undoubtedly are, in our judgment, the facts stated in the grounds cannot be said to rise to the level of gravity that they would have to in order to come within the scope of the Minister's power to act.

140 Beyond this, there is perhaps a more fundamental concern. We have said that the *raison d'être* of the CLTPA is the protection of public safety, peace and good order *in Singapore*. This was at the heart of the submission of the Appellant, who said at para 22 of his submissions:

> Absent any express provisions in the CLTPA conferring extraterritorial jurisdiction, the invocation of the CLTPA to detain the Appellant for alleged offences of corruption occurring overseas which have *no impact* in Singapore is illegal. [emphasis added]

The Appellant submits that while he might have committed criminal acts abroad, these did not have any impact on the public safety, peace and good order *in* Singapore. A similar case, *Re Wong Sin Yee* [2007] 4 SLR(R) 676 ("*Wong Sin Yee*"), was cited by both parties.

141 In *Wong Sin Yee*, the applicant was detained on suspicion for being the head of a drug trafficking syndicate leader. The grounds of detention read (at [5]):

> 2 The nature of your criminal activities is as follows:
>
> (a) You have been involved in activities relating to or connected with trafficking of ketamine.
>
> (b) Particulars of drug trafficking:
>
> Between early 2004 and Apr 2005, you were a syndicate leader smuggling ketamine from Malaysia to Taiwan and from Malaysia to China via Hong Kong.

142 The applicant contended that even if the allegations against him were true, they affected the public safety, peace and good order of *other countries* (at [15]). The Attorney-General, who opposed the application, submitted that the CLTPA was not an "offence-creating" statute. The court agreed. In the court's view, detention under the CLTPA was dependent on the Minister's satisfaction that there was a threat to public safety, peace and good order. It neither followed that such a threat had to result from criminal activities in Singapore, nor that a person, because of his criminal activities which had hitherto only occurred abroad, must be afforded some time to become involved in criminal activities in Singapore before he can be detained under s 30 of the CLTPA (at [21]). The applicant's challenge thus failed.

143 In our judgment, *Wong Sin Yee* must be understood in its proper context. It appears from the judgment that the point advanced by the applicant's counsel was that criminal acts committed outside of Singapore did not fall within the scope of the CLTPA (at [15]–[18]). We set out the arguments of the applicant's counsel as follows:

> 15 The plaintiff asserted that s 30 of the CLTPA did not authorise the detention of a person for criminal activities *outside* Singapore. He emphasised that, even if the allegations against him were true, the activities in question affected public safety, peace and good order in other countries, but not in Singapore.
>
> 16 The court was urged to consider the preamble of the CLTPA, which is as follows:
>
> An Act to make temporary provisions for the maintenance of public order, the control of supplies by sea to Singapore, and the prevention of strikes and lock-outs in essential services.
>
> 17 It was also pointed out that when the CLTPA (Amendment) Bill was discussed in Parliament (*Singapore Parliamentary Debates, Official Report* (4 August 1989) vol 54 at cols 450–452), the then Minister for Home Affairs, Prof S Jayakumar, had informed Parliament as follows:

> Over the years, it has proved to be an effective weapon for the suppression of secret society activities, drug trafficking activities and other serious crimes *in Singapore*. …
>
> …
>
> … The Act has substantially contributed to the maintenance of law and order *in Singapore*. …
>
> [emphasis added]

18 The applicant's counsel, Mr Jimmy Yim SC, submitted that a criminal law statute generally operated within the territorial limits of the country enacting it. He referred to *PP v Taw Cheng Kong* [1998] 2 SLR(R) 489, where the Court of Appeal approved of Lord Russell of Killowen CJ's statement in *The Queen v Jameson* [1896] 2 QB 425 at 430 that 'if there be nothing which points to a contrary intention, the statute will be taken to apply only to the United Kingdom'. He also referred to other English cases, including *Air-India v Wiggins* [1980] 1 WLR 815 where Lord Diplock stated at 819 as follows:

> [I]n construing Acts of Parliament there is a well-established presumption that, in the absence of clear and specific words to the contrary, an 'offence-creating section' of an Act of Parliament (to borrow an expression used by this House in *Cox v. Army Council* ...) was not intended to make conduct taking place outside the territorial jurisdiction of the Crown an offence triable in an English criminal court. [emphasis added]

144 The judge agreed with the proposition that in the absence of clear and specific words stating otherwise, an "offence-creating" provision relates to offences committed within Singapore. However, he considered that s 30 of the CLTPA was not an offence-creating statute and if the Minister was so satisfied the requirements of s 30 were met, a person could be detained under s 30 regardless of whether his acts were committed in Singapore. The judge held (at [19] and [21]):

> 19 Undoubtedly, in the absence of clear and specific words to the contrary, an 'offence-creating' statutory provision relates to offences committed in Singapore. However, as was rightly pointed out by Senior State Counsel Ms Mavis Chionh, the CLTPA is not an 'offence-creating' statute. The true nature of the CLTPA was explained by the Court of Appeal in *Kamal Jit Singh v Minister for Home Affairs* [1992] 3 SLR(R) 352 ('*Kamal Jit Singh*') at [20] as follows:
>
> > … The detention is … not punitive in the sense of being for the purpose of punishing a past act of the detainee, but preventive in the larger interests of society. This fundamental distinction between detention and imprisonment is well expressed in the judgment of Ray CJ giving the judgment of the Supreme Court of India in *Haradhan Saha v The State of West Bengal* AIR 1974 SC 2754 at 2160:
> >
> > > The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. …
>
> …
>
> 2 1 *While the Minister must be satisfied that a detention order is required in the interests of public safety, peace and good order in Singapore, it does not follow that the threat to public safety, peace and good order must result from criminal activities in Singapore. Otherwise, a person who is believed to be a threat to public safety, peace and good order in Singapore*

because of his criminal activities abroad must be given some time to become involved in criminal activities in Singapore before he can be detained under s 30 of the CLTPA. The applicant's first ground for challenging the Detention Order thus fails.

[emphasis added]

145 The judge did not then go on to consider whether the grounds given for the detention showed *how* the detainee's acts of trafficking drugs between foreign jurisdictions could impact the public safety, peace and good order of Singapore in a detrimental manner, but seemingly relied on the Minister's satisfaction to this effect. In the present appeal, the question that is squarely raised is whether the grounds provided by the Minister afford a legal basis for detaining the Appellant on the grounds that the Appellant is a threat to the public safety, peace and good order *of Singapore*. It is only if this is the case that the Minister can be said to be acting within his power. *Wong Sin Yee* does not appear to us to have been squarely faced with this point, which is now raised before us.

146 Returning to the facts before us, the grounds given for the detention set out few connections with Singapore. These are based on the Appellant's running of the syndicate *from* Singapore and his recruitment of runners *in* Singapore. While, as we have noted, these acts are reprehensible and should not be condoned, there is nothing to suggest whether (or how) these activities could be thought to have a bearing on the public safety, peace and good order *within* Singapore. The matches fixed, whether or not successfully, all took place beyond our shores. There is nothing in the grounds to indicate that the Appellant was working with overseas criminal syndicates or to suggest that such activities are likely to take root in Singapore by reason of anything the Appellant has done or threatens to do. Nor is there anything to suggest that witnesses are being intimidated, resulting in their unwillingness to testify against the Appellant. We are thus unable to see how the grounds that have been put forward can be said to fall within the scope of the circumstances in which the power to detain under the CLTPA may be exercised by the Minister.

147 At the hearing, Mr Hay urged us to consider that there were other activities behind match-fixing activities which *could* have an impact in terms of Singapore's public safety, peace and security. While these activities were not mentioned explicitly, he referred us to *Ding Si Yang v Public Prosecutor* [2015] 2 SLR 229, which, in his submission, illustrated that besides referees being told to fix matches, there were other criminal activities that took place as well. Reference was also made to Mr Iswaran's statement that we have already referred to at [125] and summarised at [127] above. We are unable to accept this. The court may not have a role in examining the evidential sufficiency of the factual allegations upon which the detention is sought to be justified. But the court cannot proceed on the basis of supposition to fill in gaps in the factual narrative. If there are other criminal activities that were in fact relied upon to justify the detention, then as we have already observed these would need to be and should have been stated. Moreover, even assuming the existence of such activities, and assuming further that these could in theory undermine public safety, peace and good order, there is nothing in the grounds of detention to indicate in the present circumstances that this threat exists *in Singapore* by reason of these activities.

148 We therefore hold that the Appellant's detention was unlawful because it was beyond the scope of the power vested in the Minister, which was to detain persons in the circumstances where activities of a sufficiently serious criminal nature threatened to or did undermine public safety, peace or good order in Singapore.

Conclusion

149 For these reasons, we allow the appeal. The conclusion we have reached makes it unnecessary

for us to deal with two other grounds of challenge raised by the Appellant, namely, irrationality and procedural irregularity. As to the argument on irrationality, this raises a number of difficult questions including the proper limits of illegality and irrationality which we have touched on above at [80]. In any case, the central contention even in this part of the Appellant's case rests on the argument that the detention could not be justified because there was nothing to suggest a threat to public safety, peace or public order *in Singapore*. As it was not necessary for us to reach these issues, we leave them for another occasion.

150 It follows that the Appellant should be freed and the costs order made against him below should be set aside. We will hear the parties on any other issues that remain outstanding, including the question of costs.