

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

Originating Summons No. 740 of 2010/Q

In the Matter of Order 53 of the Rules of Court

And

In the Matter of Article 22P of the Constitution of the Republic of Singapore

And

In the Matter of the Article 9 of the Constitution of Republic of Singapore

And

In the Matter of YONG VUI KONG (G0623288X)

Between

**YONG VUI KONG
(G0623288X)**

... **Plaintiff**

And

**ATTORNEY-GENERAL
(No ID No. Exists)**

... **Defendant**

ATTORNEY-GENERAL'S WRITTEN SUBMISSIONS

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ATTORNEY-GENERAL'S WRITTEN SUBMISSIONS

A. INTRODUCTION

1. These are the Attorney-General's submissions made in respect of the Applicant's application for leave to apply for judicial review under Order 53 rule 1 of the Rules of Court (Cap. 322, R 5, 2006 Rev Ed) [**AG's BOA Tab 1**].
2. Order 53 rule 1(3) of the Rules of Court requires all applications for leave to apply for judicial review to be served on the Attorney-General. It is also well-established that the Attorney-General has a right to attend and be heard at the hearing of an application for leave to apply for judicial review "in the interest of the Government in particular and the public in general": see Prakash J's judgment in *Chan Hiang Leng Colin & Ors v. Minister for Information and the Arts* [1995] 2 SLR(R) 627 at 647 [**AG's BOA Tab 2**], citing *George John v. Goh Eng Wah Brothers Film Sdn Bhd* [1988] 1 MLJ 319 [**AG's BOA Tab 3**] with approval for the proposition that the Attorney-General has *locus standi* to appear and raise objections at such proceedings.
3. In this application, the Applicant prays for leave to be granted for a hearing of the following orders:
 - (a) A declaratory judgment that it is the elected President and not his advisors who make the final determination of the Applicant's petition for clemency (**Prayer 2** of the OS and **Paragraph 2(a)** of the Statement);
 - (b) An order of prohibition enjoining the elected President from abdicating his authority under Article 22P of the Constitution to the Cabinet (**Paragraph 2(b)** of the Statement and **Prayer 3** of the OS);
 - (c) An order enjoining the elected President from fettering his discretion to grant or refuse the Applicant's petition of clemency (**Paragraph 2(c)** of the Statement and **Prayers 4-5** of the OS);

- (d) An order of prohibition enjoining the Director of Prisons from executing the Applicant and granting the Applicant an indefinite stay of execution (**Paragraph 2(d)** of the Statement);
- (e) An order that the Applicant is entitled to be pardoned or is alternatively entitled not to be deprived of his life because the conduct of the Minister of Law has irreversibly tainted the clemency process with apparent bias (**Prayers 6-7, 10** of the OS and **Paragraph 2(f)** of the Statement);
- (f) An order that the Cabinet is disqualified from taking further part in the clemency process (**Prayer 8** of the OS);
- (g) An order that the Applicant is entitled not to be deprived of his life on account of he having been deprived of the possibility of a fair determination of the clemency process (**Prayer 9** of the OS and **Paragraph 2(e)** of the Statement);
- (h) An order that the Applicant is entitled to see all the materials that will be before the Cabinet on his clemency petition including and in particular the trial Judge's report, the Chief Justice's report or other reports of the Appellate Court and the Attorney-General's opinion so as to afford him an opportunity to make written representations before any decision is reached (**Prayer 11** of the OS); and
- (i) An order that the Applicant is entitled not to be deprived of his life on account of he having suffered grave injustice as a result of the actions of the President and Cabinet (**Prayer 12** of the OS and **Paragraph 2(g)** of the Statement).

4. At the leave stage, the test is whether the material before the court discloses a *prima facie* case of reasonable suspicion that the Applicant is entitled to the reliefs sought: *Chan Hiang Leng Colin & Ors v Minister for Information and the Arts* [1996] 1 SLR(R) 294 (CA) [AG's BOA Tab 4]. The Applicant must at least show that the grounds for judicial review are real as opposed to a theoretical possibility: *Regina v Secretary of State for Home Department, ex p Swati* [1986] 1 WLR 477 at 485 [AG's BOA Tab 5], cited with approval by Belinda Ang J in *Chai Chwan v Singapore Medical Council* [2009] SGHC 115 at [29] [AG's BOA Tab 6].
5. For reasons that are detailed below, the Attorney-General submits that the Applicant fails to meet the threshold requirement for the Court to grant him leave to proceed with his application, that is to say that the Applicant's case is **unarguable**.

B. BACKGROUND FACTS

6. The following facts are highlighted:
 - (a) On 14 November 2008, the Applicant was convicted of trafficking not less than 47.27 grams of diamorphine and sentenced to death.
 - (b) On 11 August 2009, the Applicant petitioned the President for clemency.
 - (c) The Applicant's Petition for Clemency was rejected by the President on 20 November 2009.
 - (d) On 30 November 2009 (four days before the Applicant was to have been executed), he filed a criminal motion to file an appeal against his death sentence.

- (e) A Presidential Order of Respite (against the carrying out of the death sentence on the Applicant) was issued on 3 December 2009 to the Director of Prisons.
- (f) At the appeal, the Applicant challenged the constitutionality of the mandatory death penalty as being in violation of Article 9(1) and 12.
- (g) The Applicant's appeal against his sentence was dismissed by the Court of Appeal on 14 May 2010 and the Court delivered a judgment, see [2010] SGCA 20 [AG's BOA Tab 7].
- (h) To date, the Applicant has not filed a second Petition for Clemency and he has until 26 August to petition, if he so desires, the President for clemency.

C. ISSUES

- 7. The Applicant is essentially asking for judicial review of the clemency process. In this regard, he seeks (i) declaratory and prohibitory orders against the President, Cabinet and the Director of Prisons; (ii) a pardon in respect of his death sentence and (iii) an order that he is entitled to see all the materials that will be before the Cabinet on his clemency petition before any decision is reached.
- 8. The issues arising in this application are summarised as follows:
 - (i) Is the clemency process subject to judicial review?
 - (ii) Does the Court have the power to make a declaratory judgment that it is the elected President and not his advisors who make the final determination of the Applicant's petition for clemency?

- (iii) Does the Court have the power to make a prohibition order enjoining the elected President from abdicating his authority under Article 22P of the Constitution to the Cabinet?
 - (iv) Does the Court have the power to make an order enjoining the elected President from fettering his discretion to grant or refuse the Applicant's petition of clemency?
 - (v) Can the Court make an order of prohibition enjoining the Director of Prisons from executing the Applicant and granting the Applicant an indefinite stay of execution?
 - (vi) Whether the Applicant is entitled not to be deprived of his life on account of the deprivation of "the possibility of a fair determination of the clemency process" and the "tainting of the clemency process by the conduct of the Minister of Law".
 - (vii) Does the Court have the power to make an order to disqualify the Cabinet from taking further part in the clemency process?
 - (viii) Is the Applicant entitled to see all the materials that will be before the Cabinet on his clemency petition so as to afford him an opportunity to make written representations before any decision is reached?
9. Each of the issues in turn will be dealt with in turn. At this stage, it suffices to say that issues (vi), (vii) and (viii) will fall away if this Honourable Court accepts the Attorney-General's submission that the clemency process in Singapore is not subject to judicial review, i.e. the clemency process is non-justiciable.

D. SUBSTANTIVE ARGUMENTS

I. Preliminary Issue: Whether the clemency process is justiciable

10. The preliminary legal issue arising in this application is whether the clemency process is subject to judicial review. If the answer is “No”, many of the reliefs sought by the Applicant in this application fall away.

11. It is submitted that the clemency process or any issue concerning the clemency process is not and should not be justiciable. At this juncture, it is relevant to highlight that Article 22P of the Constitution [AG’s BOA Tab 8] which confers on the President the power to pardon (i.e., power of clemency) is taken from Article 42 of the Malaysian Federal Constitution 1957 [AG’s BOA Tab 9]. The Malaysian Federal Constitution applied to Singapore when the Federation of Malaysia was formed. When Singapore became an independent republic in 1965, Article 42 of the Federal Constitution of Malaysia ceased to apply to Singapore. However, section 8 of the Republic of Singapore Independence Act [AG’s BOA Tab 10] conferred on the President the power to grant a pardon. Article 22P of the Singapore Constitution is a repetition of section 8 of the Republic of Singapore Independence Act. Given that Article 22P of the Singapore Constitution originated from the Malaysian Federal Constitution, it is submitted that the Malaysian cases on the clemency process are highly relevant and applicable.

12. In the recent case of *Juraimi bin Husin v Pardons Board, State of Pahang & Ors* [2002] 4 MLJ 529 [AG’s BOA Tab 11] at [18], the Federal Court held that the clemency process is non-justiciable. According to the court, the effect of making the clemency *process* justiciable would have the same effect as making the clemency decision itself justiciable. The Federal Court followed its two earlier decisions in *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494 [AG’s BOA Tab 12] and *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1985] 2 MLJ 385 [AG’s BOA Tab 13]. In the latter case, the Supreme Court of Malaysia struck out the claim (as being obviously unsustainable) of the

plaintiff who had alleged that his petition for mercy had not been properly considered and this violated Article 8 of the Malaysian Federal Constitution (which is *in pari materia* with Article 12 of the Singapore Constitution). The Supreme Court of Malaysia held that the power to pardon is “a power of high prerogative of mercy which is an executive act but by its very nature is not an act susceptible or amenable to judicial review. ... In our judgment proceedings in Court aimed at questioning the propriety or otherwise of such a decision are therefore not justiciable. By the same token a contention of any violation of the fundamental right which rests wholly on or dependent upon such an allegation is also not justiciable.” See [1985] 2 MLJ at 386 and 387. Similarly, in *Chiew Thiam Guan v Superintendent of Pudu Prison & the Government of Malaysia* [1983] 2 MLJ 116 at 119 [AG’s BOA Tab 14], the Federal Court pointed out that the “Courts are without jurisdiction” to deal with this sort of application as mercy is not the subject of legal rights and mercy begins where legal rights end. It is also clear from *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64 at [67] [AG’s BOA Tab 15] that any *issue* concerning the process of clemency is also non-justiciable.

13. The clemency process concerned the exercise of a prerogative power of mercy, which is not the subject of legal rights and begins where legal rights end, and is therefore not justiciable: see *Michael de Freitas v George Ramoutar Benny and Others* [1976] AC 239 at 247 [AG’s BOA Tab 16], cited in *Thomas Reckley v Minister of Public Safety and Immigration and others (No 2)* [1996] 1 AC 527 at 538 [AG’s BOA Tab 17].
14. The decision whether to grant a pardon is pursuant to Article 22P of the Constitution [AG’s BOA Tab 8] which is a policy decision to be made by the Cabinet, depending essentially upon political judgment. As Suffian LP pointed out in *PP v Soon Seng Sia Heng* [1979] 2 MLJ 170 [AG’s BOA Tab 18], “When considering whether to confirm, commute, remit or pardon, His Majesty does not sit as a court, is entitled to take into consideration matters which courts bound by the law of evidence cannot take into account, and decides each case on grounds of public policy; such decisions are a matter solely for the executive.” In like vein, it

was highlighted in *Superintendent of Pudu Prison & Ors v. Sim Kie Chon* [1986] 1 MLJ 494 at 497 [AG's BOA Tab 12] that "the power of pardon or otherwise to mete out clemency is an executive power" and that "when the Constitution has empowered the nation's highest executive as the repository of the clemency power, the court cannot intervene and judicial review is excluded by implication".

15. It was also noted by Chan Sek Keong JC, as he then was, in *Cheong Seok Leng v. PP* [1988] 2 MLJ 481 [AG's BOA Tab 19] that the Singapore Constitution is "based on the doctrine of the separation of powers (as modified to accommodate the Westminster model of parliamentary government)". Therefore the Courts should not interfere in questions of policy, such as the clemency process, as this would violate the separation of powers doctrine on which the Constitution is founded. Policy decisions, which call for the balancing of individual and community interests, are best left to the elected political representatives.

II. The Court has no power to make a declaratory judgment that it is the elected President and not his advisors who make the final determination of the Applicant's petition for clemency

16. In proceedings commenced under Order 53 of the Rules of Court, the Court has no power to make a declaratory order because a declaration is not a prerogative order: see *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294 at [5]-[6] [AG's BOA Tab 4], affirming *Re Application by Dow Jones (Asia) Inc* [1987] SLR(R) 627 [AG's BOA Tab 20]; and *Poh Kiong Kok v Management Corporation Strata Title 581* [1990] SLR(R) 617 [AG's BOA Tab 21].
17. The Court also has no power to make an order in respect of the elected President's official acts/omissions as Article 22K(1) of the Constitution provides that the elected President "shall not be liable to any proceedings whatsoever in any court in respect of anything done or omitted to be done by him in his official capacity" [AG's BOA Tab 22]. Thus, the court would be acting against Article 22K(1) of

the Constitution if it were to make a declaratory judgment in respect of the President's acts done in his official capacity.

18. In any event, there is currently no pending Petition for Clemency by the Applicant.

III. The Court may not make a prohibition order enjoining the elected President from abdicating his authority under Article 22P of the Constitution to the Cabinet

19. As Article 22K(1) of the Constitution provides that the elected President "shall not be liable to any proceedings whatsoever in any court in respect of anything done or omitted to be done by him in his official capacity" [AG's BOA Tab 22], the Court cannot review the elected President's actions/omissions done in his official capacity and has no power to make a prohibition order against the elected President personally. The constitutional scheme is such that it is only in certain specified matters set out in Article 22K(4) of the Constitution that the Court can exercise its power in regard to the President. The immunity of the President from court proceedings is in conformity with Article 22L of the Constitution which provides for a scheme to remove the President on *specified* grounds [AG's BOA Tab 22] – it is not for the Courts to supervise the official acts/omissions of the elected President. Thus, the Applicant's prayer for a prohibitory order against the President is misconceived in law as it is unconstitutional.
20. Further, Article 21 of the Constitution [AG's BOA Tab 22] expressly provides that the elected President is to act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet unless the Constitution expressly provides otherwise. Article 22P (1) of the Constitution expressly states that in deciding whether or not to grant a pardon, the elected President *acts on the advice of the Cabinet* [AG's BOA Tab 8]. Thus it is clear that the Constitution expressly provides that the President is to act in accordance with the advice of the Cabinet when deciding whether to grant a pardon and a

prohibitory order in the terms sought by the Applicant would be unconstitutional. The relief which the Applicant seeks in this prayer is simply unarguable.

IV. The Court has no power to make an order enjoining the elected President from fettering his discretion to grant or refuse the Applicant's petition of clemency

21. As stated in paragraph 19 above, Article 22K(1) of the Constitution prevents any court order being made against the elected President personally in respect of anything done or omitted to be done by him in his official capacity. The words in Article 22K(1) are emphatic, viz., "the President shall not be liable to any proceedings whatsoever in any court" That being the case, the order sought by the Applicant flies in the face of the clear words of Article 22K (1). Thus, the order sought by the Applicant is unconstitutional.

22. Further, under the common law, no injunction can be granted against the Crown (the Government) or officers of the Crown (Government): see *Factortame Ltd and Ors v Secretary of State for Transport* [1990] 2 AC 85 at 145–150 [AG's BOA Tab 23] and sections 27(1)(a) and (2) of the Government Proceedings Act (GPA) [AG's BOA Tab 24]. Section 27(1)(a) and (2) of the GPA provide that in any civil proceedings against the Government, the court shall not grant an injunction or make an order for specific performance; and the court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government. As the elected President represents the Government, the Court has no power to make an order to enjoin the elected President as sought by the Applicant as that would have the effect of granting an injunction against the elected President which is in contravention of section 27(2) of the GPA.

23. Further, an injunction is not one of the prerogative remedies that may be obtained in proceedings commenced pursuant to Order 53 of the Rules of Court.

V. **The Court may not make an order of prohibition enjoining the Director of Prisons from executing the Applicant and the Court may not grant the Applicant an indefinite stay of execution**

24. The Director of Prisons is required to act in accordance with the law. In this regard, in relation to a convict who has been sentenced to death (like the Applicant), the Director of Prisons has to act in accordance with the President's Order issued pursuant to section 220(e) of the Criminal Procedure Code (CPC) and the Court Warrant of Execution on a Sentence of Death issued under section 220(f)(i) of the CPC [AG's BOA Tab 25]. In these circumstances, the Court may not issue a prohibitory order enjoining the Director of Prisons from performing his duty as required under section 220 of the CPC to carry out the death sentence as ordered by the Court and the President. See *Chioh Thiam Guan v Superintendent of Pudu Prison & the Government of Malaysia* [1983] 2 MLJ 116 [AG's BOA Tab 14] where the Federal Court held that the courts have no jurisdiction to stay an execution as that is a power exercisable by the Yang Di Pertuan Agong in whom the prerogative of mercy is vested. Further, the Federal Court in *Chioh Thiam Guan v Superintendent of Pudu Prison & the Government of Malaysia* took the view that such a stay of execution is effectively an injunction to restrain the Superintendent of Pudu Prison from carrying into effect a sentence in regard to which a warrant has been directed to him under section 281(d)(iii) of the Malaysian Criminal Procedure Code (which is *in pari materia* with section 220(f)(iii) of the Singapore CPC).
25. Further, in as much as there is now in force a Presidential Order of Respite (issued on 3 December 2009), the Director of Prisons has presently no authority to execute the Applicant. The Presidential Order of Respite is issued pursuant to section 220(f)(ii) of the CPC.

26. It suffices to say that an order of prohibition would only issue in circumstances where the Director of Prisons has acted or will act in excess of his powers: *Estate and Trust Agencies Ltd v Singapore Improvement Trust* [1937] AC 898 [AG's BOA Tab 26] and *Tan Tiang Hin Jerry v Singapore Medical Council* [2000] 1 SLR(R) 553 [AG's BOA Tab 27]. It is clear that in this case, the Director of Prisons in this case has not acted or is not intending to act beyond his power and the law (in particular section 220 of the CPC). On the contrary, at all material times, the Director of Prisons is acting in accordance with the law. In the circumstances, it is submitted that no order of prohibition can be issued against him.
27. A grant of indefinite stay of execution is not a prerogative writ or order which can be issued under Order 53 of the Rules of Court. Such a grant cannot be classified as a mandamus as it does not lie within the authority of the Director of Prisons to grant an indefinite stay of execution. The power to grant such a stay lies only with the President acting on advice of the Cabinet: see Article 22P of the Constitution [AG's BOA Tab 8] and Section 220(e) of the CPC [AG's BOA Tab 25]. In the circumstances, the Court has no power to make an order for a grant of indefinite stay of execution. Indeed, if the Court were to grant an indefinite stay of execution, it would be usurping the President's power as conferred on the President (acting on the advice of the Cabinet) by Article 22P (1) of the Constitution.
28. If, by the prayer for an indefinite stay of execution, the Applicant means to obtain an interim stay of execution until the determination of this application, the Court has no power in proceedings commenced under Order 53 of the Rules of Court to grant such an interim stay of the execution of a death sentence: see *Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd* [1991] 1 WLR 550 at 556 [AG's BOA Tab 28].
29. Moreover, in so far as such a stay order sought by the Applicant has the effect of an injunction against the Director of Prisons, it contravenes section 27(2) of the Government Proceedings Act (GPA) which provides that "the court shall not in

any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government". Section 27(1)(a) of the GPA provides that in any proceedings against the Government, the Court shall not grant an injunction [AG's BOA Tab 24].

VI. Whether the Applicant is entitled not to be deprived of his life on account of the deprivation of "the possibility of a fair determination of the clemency process" and the "tainting of the clemency process by the conduct of the Minister of Law".

30. It is not clear from the Applicant's application whether the order he seeks is a declaratory judgment. If the Applicant seeks relief in the nature of a declaratory order, it is trite law that in proceedings commenced pursuant to Order 53, the Court has no power to make such a declaratory order: see *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294 at [5]-[6] [AG's BOA Tab 4], affirming *Re Application by Dow Jones (Asia) Inc* [1987] SLR(R) 627 [AG's BOA Tab 20].
31. In any case, as the order prayed for is predicated on the justiciability of the clemency process, the Applicant's case is unarguable. See the Attorney-General's submissions under the Preliminary Issue of whether the clemency process is justiciable (paragraphs 10 to 15 above). It suffices to say that in *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64 [AG's BOA Tab 15], it was unsuccessfully argued that the Sultan's statements to the press that he would not pardon anyone who has been sentenced to the mandatory death penalty for drug trafficking had pre-empted any appeal by such a person and consequently negated the constitutional right to being pardoned. The court held that it had no jurisdiction to deal with the matter as the clemency process was not justiciable.

32. Nonetheless, for the sake of completeness, the Attorney-General will address the issues of prejudgment or apparent bias, and prejudicial information. The reference to the Minister's conduct raises the prejudgment or apparent bias issue. With regard to prejudicial information, the Applicant contends that the Ministry of Law, in its press release dated 9 July 2010, highlighted prejudicial information based on charges that were never brought against the Applicant.
33. The Applicant also alleges that there is a lack of transparency of the clemency process (**Prayer 11** of the Originating Summons) where it is asserted that the Applicant is "entitled to see all the materials that will be before the Cabinet on his clemency petition including and in particular the Trial Judge's report, the Chief Justice's report or other reports of the Appellate Court and the Attorney-General's opinion so as to afford him an opportunity to make written representations before any decision is reached". The Applicant's allegation is adequately met by *Michael de Freitas v Benny* [1976] AC 239 at 248 [**AG's BOA Tab 16**] where Lord Diplock said that a convicted criminal was not entitled to have disclosed to him any material furnished to the Minister and the Advisory Committee when they are exercising their respective functions under the relevant constitutional provisions in advising the Governor-General in regard to the exercise of the powers of clemency. It suffices to say that *Michael de Freitas v Benny* has been followed in many Malaysian cases – see the cases cited in paragraph 12 above.
34. The Attorney-General submits that the clemency process in Singapore is non-justiciable as the Constitutional framework is such that the Courts do not have any power (because of Article 22K (1) of the Constitution) to compel the elected President to furnish to the Applicant the "Trial Judge's report, the Chief Justice's report or other reports of the Appellate Court and the Attorney-General's opinion". Thus, the non-justiciability of the clemency process in Singapore is demonstrated by the absence of any judicial means to compel the elected President to furnish documents relating to the clemency process.

35. The legal system and Constitutional framework in place in Singapore is such that while it is the Courts that decide on the guilt and punishment of the person, it is the Executive (the elected President acting on advice of the Cabinet) that decides whether or not a pardon should be granted to any particular person sentenced to death who has petitioned for clemency. The constitutional framework is such that the Courts have no power to review the consideration and exercise of the Executive's power to grant clemency. This was the legal system and constitutional framework when the Singapore Constitution came into being. Given the constitutional framework in Singapore, it is incorrect to apply the majority judgment in *Neville Lewis and others v Attorney General of Jamaica and Anor* [2001] 2 AC 50 [AG's BOA Tab 29] which represents a development in the law occurring after the Singapore Constitution came into being. As Lord Hoffmann cautioned in *Neville Lewis and others v Attorney General of Jamaica and Anor*, "the power of final interpretation of a constitution must be handled with care. If the [court] ... depart from a previous decision simply because its members on a given occasion have a "doctrinal disposition to come out differently", the rule of law itself will be damaged and there will be no stability in the administration of justice" .
36. On the Applicant's complaint that the Minister's press release dated 9 July 2010 set out information prejudicial to him, based on charges that were never brought against the Applicant, it is evident that the complaint is misconceived. It is factually misconceived because these 8 charges were brought against the Applicant and were tendered in court and form part of the court record. These 8 charges were stood down and subsequently withdrawn when the court meted out the death sentence. These 8 charges were also expressly set out in paragraph 2 of the submission of the Prosecution in court on 15 March 2010 [AG's BOA Tab 30]. In any event, as stated above, the grant of clemency is a policy decision by the Executive and not a judicial or quasi-judicial decision. The Cabinet is entitled to consider all relevant information and take into account public policies and public interests. See *PP v Soon Seng Sia Heng* [1979] 2 MLJ 170 at 171 [AG's BOA Tab 18] where the Federal Court held that in the exercise of the prerogative

of mercy, each case is decided “on grounds of public policy: such decisions are a matter solely for the executive”.

37. At this stage, it is opportune to set out the Applicant’s argument on there being a reasonable suspicion of bias. The Applicant asserts that there is bias because:

- (a) The Minister, on 9 May 2010, purportedly made remarks at a public event which was widely reported that “Yong Vui Kong is young. But if we say ‘We let you go’, what is the signal we are sending?”;
- (b) The Minister holds an important position in the Cabinet and has influence within the Cabinet;
- (c) There have not been any contrary views of other Cabinet members;
- (d) The previous petition for clemency had been rejected by the Cabinet;
- (e) The Ministry of Law, in its press release dated 9 July 2010, highlighted prejudicial information based on charges that were purportedly never brought against the Applicant;
- (f) Therefore, the Minister’s remarks and the Ministry of Law’s press release have created a reasonable apprehension that the views that were expressed represent those of Cabinet and that any advice which Cabinet may give in this matter has already been:
 - (i) predetermined prior to the receipt of the Applicant’s clemency petition and accordingly the Constitutional process for handling the Applicant’s clemency petition has been irreversibly tainted to the Applicant’s prejudice, and

- (ii) predetermined prior to the sentence being “confirmed by the appellate court” and before such reports were transmitted to the Cabinet for consideration as required under Article 22P of the Constitution.

38. At the outset, the Attorney-General does not agree with the Applicant’s claims (as set out in the affidavit filed in support of this application) as to the statements purportedly made by the Minister on 9 May 2010 and the meanings being attributed by the Applicant to those statements. In the Minister’s press release dated 9 July 2010, the Minister has pointed out that the Applicant’s counsel had incorrectly attributed statements to him. If this application should proceed further, the Attorney-General reserves the right to lead evidence to show the actual statements made by the Minister on 9 May 2010 and the context in which these statements were made. On the Minister’s alleged statements that the Applicant claims are objectionable, it is evident that they pertain to the legislative policy of the Government (Cabinet). The policy concerning the death penalty for certain types of drug offences is a matter of public importance, and the Minister (and every member of the Cabinet) is entitled to comment on such policies, including whether the policy should be more lenient towards young offenders. As the Minister’s press release dated 9 July 2010 show, the Minister’s statements were only confined to the Government’s legislative policy and whether that policy will change, and the extent to which youthfulness or other personal factors are relevant in the formulation of Government policy to tackle the drug menace. The Minister, in response to a specific question, was merely reiterating the Government’s policy and philosophy on having the mandatory death penalty for a number of offences, such as drug trafficking, and why Singapore adopted such a tough stance. The Government’s policy on the death penalty for certain drug offences is a matter of public importance. The articulation of a policy does not preclude the Minister or the Cabinet from giving genuine consideration to any petition of clemency that the Applicant decides to file, or for that matter, any other convicted persons intend to file in future. Moreover, as pointed earlier in these submissions, the grant of clemency is a policy decision by the Executive and not a judicial or

quasi-judicial decision and the Cabinet is entitled to consider all relevant information and take into account public policies and public interests. See *PP v Soon Seng Sia Heng* [1979] 2 MLJ 170 at 171 [AG's BOA Tab 18] where the Federal Court held that in the exercise of the prerogative of mercy, each case is decided "on grounds of public policy: such decisions are a matter solely for the executive".

39. It is trite that the Government (including the Cabinet) will have a policy position on the death penalty. On the case law, the fact that the Minister and the Cabinet have such a policy, whether or not articulated in public, cannot amount to bias or apparent bias in individual cases of clemency as long as the Minister and the Cabinet does not have a closed mind to the Applicant's (future) petition for clemency. See *British Oxygen Co. Ltd v Minister of Technology* [1971] AC 610 [AG's BOA Tab 31] and *City Developments Ltd v Chief Assessor* [2008] SGCA 29 [AG's BOA Tab 32]. In the latter case, the Court of Appeal accepted that it was not unusual or irrational for a decision-maker to have regard to a general policy. The requirement that a decision-maker is not to have a closed mind does not mean that he is to have an empty mind – this was clearly laid down by Chan Sek Keong J (as he then was) in *Re Singh Kalpanath* [1992] 1 SLR(R) 595 at 623 [AG's BOA Tab 33] where he stated "One would neither expect nor want judges, let alone other decision-makers, to approach their tasks devoid of any sense of social, political, moral, economic or legal direction."
40. Further, as the Minister and the Cabinet is not a court or quasi-judicial tribunal, the principles of natural justice that have been held to apply to persons exercising judicial or quasi-judicial functions are not to be transplanted wholesale to the Minister and the Cabinet: see *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] 205 CLR 507 [AG's BOA Tab 34] where the High Court of Australia held that the Minister "was not required to avoid conducting himself in such a way as would expose a judge to a charge of apprehended bias". In that case, it was also held that "the state of mind described as bias in the form of prejudgment is one so committed to a conclusion already formed as to be

incapable of alteration, whatever evidence or arguments may be presented. Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion.” The general principle to be derived from *Minister for Immigration and Multicultural Affairs v Jia Legeng* is that one should not “over-judicialise” the Minister’s role when he is tasked with executive power of decision-making. Thus, the Applicant’s case is misconceived in law as he seeks to “over-judicialise” the clemency process that falls within the exclusive domain of the Executive.

41. Even if one were to apply the test for apparent bias pertaining to judicial or quasi-judicial bodies, the Attorney-General submits that no reasonable fair minded observer knowing all the relevant facts would have a reasonable suspicion that the Minister or the Cabinet would not give genuine consideration to any future clemency petition of the Applicant. See *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 at [76] and [77] [AG’s BOA Tab 35] where the court held that the question to be asked, where apparent bias is alleged, is “whether a reasonable and fair-minded person sitting in the court and knowing all the relevant facts would have a reasonable suspicion that a fair trial was not possible.” In this regard, it is trite that the onus of demonstrating bias lies with the person who is alleging its existence. It is submitted that no reasonable observer knowing all the relevant facts (including the fact that the Cabinet had previously considered and decided on the Applicant’s petition of clemency) would reasonably conclude there would be a reasonable apprehension or suspicion of bias arising from the Minister’s statements. Indeed, in *Re Singh Kalpanath* [1992] 1 SLR(R) 595 at 633 [AG’s BOA Tab 33], Chan Sek Keong J pointed out that “A judge who believes strongly in capital punishment for murder and who makes known such views is not thereby disqualified from hearing murder cases. There is no reasonable basis for concluding thereby that he will not consider the evidence of each murder case before him.”

42. It suffices to say that the concept of the fair-minded and informed observer means that the observer must be taken to have a balanced approach, neither naive or complacent nor unduly sensitive or suspicious or cynical. The requirement that the observer be informed means that he does not come to the matter as a stranger or complete outsider; he must be taken to have a reasonable working grasp of how things are usually done: see *Johnson v Johnson* (2000) 201 CLR 488 at 509, [53] [AG's BOA Tab 36]. In *El Farargy v El Farargy and others* [2007] EWCA 1149 [AG's BOA Tab 37], Ward LJ gave sufficient credit for the robustness of the phlegmatic fair-minded observer, a feature of whose character is not to show undue sensitivity.
43. The Attorney-General submits that the Applicant's case on prejudice or apparent bias is entirely speculative and is misconceived in law. It is misconceived in law because the Applicant has "over-judicialised" the Minister's role and the Cabinet's role in advising the President on the exercise of the prerogative of mercy.
44. Further, the facts show that the Cabinet had previously considered the Applicant's petition for clemency (the Applicant submitted a petition for clemency on 11 August 2009 which was rejected by the President on 20 November 2009). Given that the only issue before the Court of Appeal was one of law, viz., the constitutionality of the mandatory death penalty, there were no new or additional factual issues relating to the Applicant's case that the Cabinet was not already aware of. Thus, it is simply incorrect to say that the Minister's statements on 9 May 2010 have "prejudged" the issue of clemency when that issue was the subject matter of the Cabinet's judgment some 7 months before and the Applicant's case before the Court of Appeal was solely on a point of law. No reasonable fair-minded person knowing all these facts would have a reasonable suspicion that the Minister's statements have prejudiced the Applicant in any way if he were to make another petition for clemency.

45. For completeness, the Attorney-General points out that the Applicant's argument that the Minister's apparent bias "infects" the Cabinet is simplistic. It is unrealistic and does not take into account what the reasonable and fair-minded observer would be taken to know. The reasonable and fair-minded observer would know that there was no prejudgment of the clemency process as there are other Ministers in the Cabinet, other than the Minister for Law, who will advise the President on the Applicant's (future) clemency petition. It is submitted that a reasonable and fair-minded person, knowing that there are other Ministers in the Cabinet besides the Minister for Law, would not have a reasonable suspicion that a genuine consideration of the Applicant's (future) clemency process is not possible. Hence, the Applicant's allegation that there was a reasonable suspicion that the *entire* Cabinet had prejudged the Applicant's (future) clemency petition is speculative and is merely a hypothesis which is fanciful. In these circumstances, the Attorney-General submits that the clemency process has **not** been tainted with apparent bias to the Applicant's prejudice.

VII. The Court has no power to make an order to disqualify the Cabinet from taking further part in the clemency process

46. Article 21 of the Constitution provides that the elected President is to act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet unless the Constitution expressly provides otherwise and Article 22P(1) of the Constitution states that in deciding whether or not to grant a pardon, the elected President *acts on the advice of the Cabinet* [AG's BOA Tab 8]. As the Constitution expressly provides that the Cabinet is to advise the President when deciding whether to grant a pardon, it would be unconstitutional to prohibit the Cabinet from taking further part in the clemency process. Thus the court has no power to order the Cabinet not to take further part in the clemency process if the Applicant were to make another petition to the President for clemency.

47. It is also not clear whether the order prayed for by the Applicant is a prohibitory order or an injunction against the members of the Cabinet. A prohibitory order would only issue in circumstances where the members of the Cabinet have acted or will act in excess of their powers: see *Estate and Trust Agencies Ltd v Singapore Improvement Trust* [AG's BOA Tab 26] and *Tan Tiang Hin Jerry v Singapore Medical Council* [AG's BOA Tab 27] and there is no evidence that they have done so. In advising the President on any petition for clemency, and it should be emphasised that there is currently no pending petition for clemency by the Applicant for consideration, the Cabinet is merely acting in accordance with the provisions of the Constitution.
48. If the prayer seeks an injunction against the Cabinet, it contravenes section 27(2) of the Government Proceedings Act [AG's BOA Tab 24], and is also inconsistent with the common law that an injunction does not lie against the Crown (Government) – the Cabinet constitutes part of the Government in Singapore. Further, an injunction is not one of the prerogative remedies that may be obtained in proceedings commenced under Order 53 of the Rules of Court.
49. In the circumstances, the Applicant's prayer for an order to prevent or disqualify the Cabinet from taking further part in the clemency process is without any legal foundation and obviously unsustainable.

VIII. Is the Applicant entitled to see all the materials that will be before the Cabinet on his clemency petition so as to afford him an opportunity to make written representations before any decision is reached?

50. There is no legal entitlement for the Applicant to have disclosed to him all the materials that will be before the Cabinet on his petition for clemency. The Constitution does not contain any provision to this effect. As stated in paragraphs 10 to 15 above, the clemency process is not susceptible to judicial review. Further, the decision whether to grant a pardon pursuant to Article 22P of the

Constitution [AG's BOA Tab 8] is a policy decision to be made by the Cabinet, depending essentially upon political judgment. The Attorney-General also refers to paragraphs 33 to 36 above. This being so, the Applicant has no legal right to have disclosed to him all the materials that will be furnished to the Cabinet or to be given an opportunity to make written representations. It should also be noted that the Applicant had already raised this issue in his appeal in Criminal Appeal No. 13 of 2008 but the Court of Appeal did not in its judgment deal with it.

51. The Applicant relies on the Privy Council decision in *Neville Lewis v. Attorney-General of Jamaica and Anor* [2001] 2 AC 50 [AG's BOA Tab 29] in support of his contention that he is entitled to see the materials furnished to the Cabinet and to respond. It should be noted that the majority decision in this case was a significant departure from the previous Privy Council decisions in *de Freitas v Benny* [AG's BOA Tab 16] and *Thomas Reckley v Minister of Public Safety and Immigration and others (No. 2)* [AG's BOA Tab 17]. Both these cases had found that the prerogative of mercy is something beyond the oversight of the Courts, a matter of grace and favour.

52. In *de Freitas v Benny* [1976] AC 239 at 248 [AG's BOA Tab 16], Lord Diplock stated that a convicted criminal had no legal right to have disclosed to him any material furnished to the Minister and the Advisory Committee when they are exercising their respective functions under the relevant constitutional provisions in advising the Governor-General in regard to the exercise of the powers of clemency. In *Thomas Reckley v Minister of Public Safety and Immigration and others (No. 2)* [1996] 1 AC 527 at 541-542 [AG's BOA Tab 17], Lord Goff said that "it is clear from the constitutional provisions under which the advisory committee is established, and its functions are regulated, that the condemned man **has no right to make representations to the committee in a death sentence case; and that being so, there is no basis on which he is entitled to be supplied with the gist of other material before the committee. This is entirely consistent with a regime under which a purely personal discretion is vested in the minister.**"

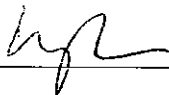
53. It is submitted that *Neville Lewis v. Attorney-General of Jamaica and Anor* [AG's BOA Tab 29] should be distinguished from the present application as the decision was clearly influenced by Jamaica's obligation under the American Convention on Human Rights 1969. Lord Slynn of Hadley, delivering the majority judgment, said at 78 to 79: "*Jamaica ratified the American Convention on Human Rights 1969 on 7 August 1978 and it is now well established that domestic legislation should as far as possible be interpreted so as to conform to the state's obligation under such a treaty... it seems to their Lordships that the states' obligation internationally is a pointer to indicate that the prerogative of mercy should be exercised by procedures which are fair and proper and to that end are subject to judicial review.*"
54. Therefore, it is clear that a key factor taken into consideration by the majority in *Neville Lewis* in reaching their conclusion is not applicable to Singapore. Singapore Courts should not take into account international conventions when Parliament has not seen it fit to accede to or ratify such conventions. There is no compelling reason for the court to expand on its powers of judicial review in accordance with these international conventions which Singapore is not a party to. It also bears highlighting that the majority in *Neville Lewis* who decided in favour of the convicted persons were English Law Lords who are more receptive to liberal human rights concepts when interpreting the Jamaican Constitution in light of the significant developments in the English law on judicial review since 1977: see *O'Reilly & Ors v Mackman & Ors* [1983] 2 AC 237 [AG's BOA Tab 38] and the enactment of the United Kingdom Human Rights Act 1998 (which came into force in 2000). It is therefore submitted that this Honourable Court should not trudge down the same path – to do so would be to find cure for which there is no disease.
55. Much reliance was also placed by the majority in *Neville Lewis* on the cases of *R v Secretary of State for the Home Department, ex parte Bentley* [AG's BOA Tab 39] and *Burt v Governor-General* [1992] 3 NZLR 672 [AG's BOA Tab 40]. However, neither case was directly concerned with the possibility of judicial review of the exercise of the prerogative of mercy in a death sentence case.

56. Moreover, in *ex parte Bentley*, where the application was made for the review of a decision of the Home Secretary not to recommend a posthumous free pardon for a youth hanged for murder forty years previously on the ground that he considered only an unconditional pardon and failed to take account of other possibilities, the English Divisional Court made no order or declaration and merely invited the Home Secretary to look at the matter again. The United Kingdom is also a party to the European Convention of Human Rights. As for *Burt v Governor-General* [AG's BOA Tab 40], it must also be noted that the New Zealand Court of Appeal's decision was heavily influenced by the provisions of the New Zealand Bill of Rights Act.
57. Based on the above, it is submitted that this Honourable Court should not adopt the decision of the majority in *Neville Lewis*, as that decision was clearly influenced by considerations irrelevant to Singapore, but should adopt the decisions in *de Freitas v Benny* [1976] AC 239 and *Thomas Reckley v Minister of Public Safety and Immigration and others (No. 2)* [1996] 1 AC 527 instead. Thus, the Applicant has no legal right to have disclosed to him the material furnished to the Cabinet on his petition for clemency or to respond to the said material.

E. CONCLUSION

58. In conclusion, the Attorney-General respectfully submits that the applicant's application under Order 53 for leave to seek various reliefs should be dismissed with costs as the Applicant has failed to show any legal basis for any of the orders sought. The Applicant's case is simply unarguable and legally untenable.

Dated this 27th day of July 2010



Mr David Chong, SC / Mr Shawn Ho Hsi Ming / Ms Tan Shin Yi

Attorney-General's Chambers