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Singapore: Can delaying an execution due to COVID-19 amount to unconstitutional discrimination?

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Syed Suhail bin Syed Zin, a convicted drug trafficker, was due to be executed on 18 September 2020. Two days before that, he applied for leave to commence judicial review proceedings challenging the timing of his execution. This began what has turned out to be a leading case on equality law in Singapore.

Syed Suhail (a Singapore citizen) alleged that there were foreigners who had been sentenced to death before he had been, yet were scheduled to be executed later than he would be. He claimed that their executions were delayed because COVID-19 restrictions “prevented their family members from entering Singapore [to visit them] and the repatriation of their remains”.¹ This, he said, violated Article 12(1) of the Constitution (“All persons are equal before the law and entitled to the equal protection of the law”), and resulted in nationality discrimination contrary to Article 12(2) “... there shall be no discrimination against citizens of Singapore on the ground only of religion, race, descent or place of birth...”)

It appears that Syed Suhail’s aim was to gain time to gather evidence with which he could, in what is known as a “review application”,² petition the Court of Appeal to review his conviction due to an alleged miscarriage of justice.³ Indeed, on 17 September 2020 – the same day on which the High Court dismissed Syed Suhail’s leave application – Syed Suhail filed such a review application. The same day, he appealed against the High Court’s decision on his leave application.

The Court of Appeal rejected the review application.⁴ However, it saw potential merit in the judicial review leave application (putting aside the issue of its practical utility). According to the Court of Appeal, Article 12(1) requires that those who are “equally situated” not be treated differently except for “legitimate reasons”.⁵ So, *ceteris paribus*, death-row prisoners must be executed in the order in which they have been sentenced to death. Another prisoner, Datchinamurthy a/l Kataiah, had been sentenced to death earlier than Syed Suhail, yet no date

¹ *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 (CA) at [7].

² Criminal Procedure Code, ss 394F-394K.

³ *Syed Suhail* [2021] 1 SLR 809 (CA) at [7(a)], [68].

⁴ *Syed Suhail* [2021] 1 SLR 159 (CA). The Court of Appeal also ordered that Syed Suhail’s counsel be personally liable for the Public Prosecutor’s costs: *Syed Suhail* [2021] 2 SLR 377 (CA) especially at [25]-[30].

⁵ *Syed Suhail* [2021] 1 SLR 809 (CA) at [62] (emphasis omitted).

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for his execution had been fixed.⁶ On this basis, the Court of Appeal granted leave to apply for judicial review.

The High Court, ruling on the judicial review application, found that Datchinamurthy and Syed Suhail were not “equally situated”. After both were convicted and exhausted their rights to appeal, the Court of Appeal handed down its decision in *Gobi a/l Avedian*⁷ which had changed the law relating to wilful blindness. The Public Prosecutor’s case against Datchinamurthy (but not Syed Suhail) appeared to have involved alleged wilful blindness.⁸ Therefore, the state was justified in delaying Datchinamurthy’s execution while the Public Prosecutor reviewed his case in the light of the *Gobi* decision.⁹

Nonetheless, the High Court remarked *obiter* that if Syed Suhail could prove that there was a foreigner who (unlike Datchinamurthy) was “equally situated” with him, yet who was scheduled to be executed later than he, that could amount to discrimination. Further, “COVID-19 restrictions may not be sufficient to amount to a legitimate reason” to justify that discrimination,¹⁰ and Article 12(1) of the Constitution could be breached. This is noteworthy for the following reasons.

First, Article 12(1) does not list any specific grounds on which unequal treatment is considered suspect. Yet, the High Court’s remarks imply that differential treatment on the basis of nationality, without more, is *prima facie* unlawful unless justified. One wonders why. The answer is not Article 12(2) of the Constitution, which, according to the High Court, only forbids discrimination *between one Singapore citizen and another* on the ground of “religion, race, descent or place of birth”, but not discrimination *between a citizen and a non-citizen*.¹¹ So the question remains.

The High Court’s only answer was that nationality “would bear no rational relation to the scheduling of executions”.¹² But “no rational relation” is a *conclusion* about whether differential treatment of two “equally situated” persons is justified. One may ask: could not the High Court have stopped at saying that persons of different nationalities are not “equally situated” in the first place? By not doing so, the High Court must have had in mind, as Kenny Chng puts it, some “normative judgment”¹³ as to “how to determine whether persons are indeed ‘equally situated’”.¹⁴ If, in future, the courts bring this “normative judgment” into the open, we may well witness the judicial creation of a list of grounds on which unequal treatment is suspect that *supplements* the list in Article 12(2).

Second, the High Court in effect said that even if a facially neutral policy (such as ‘executions are to take place as soon as COVID-19 restrictions allow’) is applied to two persons, the court

⁶ *Ibid* at [75].

⁷ *Gobi a/l Avedian v Public Prosecutor* [2021] 1 SLR 180 (CA).

⁸ *Syed Suhail* [2021] 4 SLR 698 (HC) at [35]-[38].

⁹ *Ibid* at [26], [35]. (The Court of Appeal has dismissed an appeal against the High Court’s decision.)

¹⁰ *Ibid* at [62].

¹¹ *Ibid* at [69]-[71].

¹² *Ibid* at [66].

¹³ Kenny Chng, ‘A reconsideration of equal protection and executive action in Singapore’ (2021) *Oxford University Commonwealth Law Journal* (advance access) 7.

¹⁴ *Ibid* at 6.

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can still find that the effect would amount to *indirect* discrimination.¹⁵ In other words, it is not true (as certain previous cases suggested¹⁶) that unequal treatment can be unlawful only if it is deliberate.

These developments are interesting, particularly given the Prime Minister's recent announcement that the Government plans to introduce workplace discrimination legislation in Parliament.¹⁷ Few details are available so far, but one wonders whether inspiration will be taken from the developments just mentioned.

Two more points about executions should be made. First, should delaying foreigners' executions due to COVID-19 restrictions really count as impermissible nationality discrimination? The reason why COVID-19 restrictions matter at all has nothing to do with the (necessary) task of repatriating executed persons' remains.¹⁸ Rather, it is the authorities' discretionary practice of "facilitat[ing]" visits by condemned convicts' family members.¹⁹ In doing so, they consider the "time required for the next-of-kin to travel to Singapore".²⁰ If, therefore, delaying executions on the ground of travel restrictions is unlawful discrimination, the authorities may be pushed to respond by simply 'levelling down' and denying *all* death-row inmates visits by relatives living overseas (or, worse, by any relatives at all). That may be more equal, but less humane.

Second, an apparent motive for Syed Suhail's application – to gain time to argue that the conviction was unsound – played no part in the courts' reasoning. But having such time matter. Consider Datchinamurthy, whose execution was delayed because – in an unrelated case – the Court of Appeal handed down a decision that might call into question the legal basis of Datchinamurthy's conviction.²¹ This was somewhat fortuitous: What if Datchinamurthy had been executed before that decision? What role, if any, does the law have in the distribution of opportunities to take advantage of such occurrences?²² The Court of Appeal's response – that the "mere hope" that grounds to challenge the conviction may arise later "cannot give rise to a right under Art 12(1) of the appellant to have an equal chance of being the beneficiary of such an eventuality materialising compared to other prisoners"²³ – raises difficult questions that go well beyond equality law.

¹⁵ *Syed Suhail* [2021] 4 SLR 698 (HC) at [66].

¹⁶ See *Syed Suhail* [2021] 1 SLR 809 (CA) at [52]-[61] and the cases discussed therein.

¹⁷ National Day Rally speech by Prime Minister Lee Hsien Loong (29 August 2021) <<https://www.pmo.gov.sg/Newsroom/National-Day-Rally-2021-English>>.

¹⁸ See *Syed Suhail* [2021] 1 SLR 809 (CA) at [27], citing evidence from a representative of the Ministry of Home Affairs.

¹⁹ *Ibid* at [65].

²⁰ Statement by Desmond Lee, Senior Minister of State for Home Affairs (on behalf of the Minister for Home Affairs), in *Singapore Parliamentary Debates, Official Report*, vol 94, "Oral Answers to Questions: Adequate Advance Notice for Families of Death Row Inmates before Executions" (6 February 2017) <<https://sprs.parl.gov.sg/search/sprs3topic?reportid=oral-answer-1605>>.

²¹ A subsequent "change in the law" may form a basis to argue that there has been a "miscarriage of justice" that can found a review application: Criminal Procedure Code, s 394J(4) read with s 394J(2). That said, the Court of Appeal later found that there was no "miscarriage of justice" in Datchinamurthy's case: [2021] SGCA 30.

²² In the first place, *should* a convicted person be able to take advantage of a subsequent change in the law? Can it not be said that one ought to be convicted in line with the law prevailing at the time, and not law created (or, if that law is common law, pronounced) later? See generally *Public Prosecutor v Pang Chie Wei* [2021] SGCA 101.

²³ See *Syed Suhail* [2021] 1 SLR 809 (CA) at [68].

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