

Deconstructing the legal contours of POFMA: *The Online Citizen Pte Ltd v Attorney-General and another appeal and other matters* [2021] SGCA 96

I. EXECUTIVE SUMMARY

The Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) (“**POFMA**”) is a critical piece of legislation addressing the electronic communication of falsehoods in Singapore. POFMA seeks to counter the rising spread of online falsehoods by conferring upon Government Ministers the authority to cause a “Part 3 Direction” to be issued to a maker of a false statement of fact (“**subject statement**”). A number of Part 3 Directions can be issued. *The Online Citizen Pte Ltd v Attorney-General and another appeal and other matters* [2021] SGCA 96 concerned the issuance of Correction Directions (“**CDs**”), a type of Part 3 Direction requiring the statement-maker to communicate a notice clarifying that the subject statement is false (“**correction notice**”).

The Singapore Democratic Party (“**SDP**”) and The Online Citizen (“**TOC**”) were separately issued CDs between 2019 to 2020. Having failed in their respective applications to cancel their CDs, both parties invoked section 17 of POFMA to commence proceedings in the High Court (“**HC**”) to set aside their Directions (the cases being *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 (“**the SDP case appeal**”) and *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 (“**the TOC case appeal**”), respectively). Upon dismissal of these applications, SDP and TOC appealed against the HC dismissals. The Court of Appeal (“**CA**”) allowed the SDP case appeal in part but dismissed the TOC case appeal.

This landmark decision was the first opportunity for the CA to consider the interpretation and application of the POFMA since its enactment in 2019. In doing so, the CA made conclusive findings regarding the constitutionality of the POFMA, the applicable burden of proof,¹ and the analytical framework to be used by courts when assessing if a Part 3 Direction ought to be set aside. Crucially, the CA established the constitutionality of POFMA in respect of Article 14 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) (“**the Constitution**”), which sets out the right to free speech. The CA also resolved the conflicting HC conclusions in the two case appeals as to which party bore the burden of proof: the statement-maker, or the Minister on whose authority the Part 3 Direction was issued. Ultimately, the CA concluded that the burden of proof lay with the statement-maker.

II. MATERIAL FACTS

The SDP case appeal. In June 2019, SDP published an online article (“**the SDP Article**”) discussing an SDP policy aiming to reform the Government’s prevailing policy. In SDP’s view, the Government’s policy had allowed too many foreign workers to displace “local PMETs”, *i.e.* professionals, managers, executives and technicians. Specifically, the SDP Article stated that “the SDP’s proposal comes amidst a rising proportion of Singapore PMETs getting retrenched” (“**the Relevant Sentence**”). SDP then published a Facebook post (“**the November Facebook post**”) in November 2019 hyperlinking the SDP Article. On December 2019, SDP published a subsequent Facebook post (“**the December Facebook post**”) which also hyperlinked the SDP Article, and contained text substantially similar to the November Facebook post. It also included a graphical illustration which sought to depict decreasing local PMET employment and increasing foreign PMET employment.

Pursuant to section 11 of POFMA, three CDs were issued to the SDP. The first CD (“**SDP CD–1**”) identified the subject statement arising from the SDP Article: “Local PMET retrenchment has been

¹ In civil matters, this refers to a party’s legal burden to prove the facts on which their cause of action, *i.e.* grounds for bringing forth a claim, are based.

increasing” (“**the first subject statement**”). As both Facebook posts had hyperlinked the SDP Article, the first subject statement also formed the basis of the second CD (“**SDP CD-2**”) directed at the November Facebook post, and the second half of the third CD (“**SDP CD-3**”) directed at the December Facebook post. Finally, the first half of SDP CD-3 identified an additional subject statement arising from the graphical illustration in the December Facebook post. This was the statement that “Local PMET employment has gone down” (“**the second subject statement**”).

The TOC case appeal. In January 2020, Lawyers for Liberty (“**LFL**”), a Malaysian non-governmental organisation, published a press statement discussing the alleged “brutal and unlawful” hanging methods in Changi Prison (“**LFL press statement**”). TOC then published an article (“**the TOC Article**”) repeating most of the claims made in the LFL press statement. Pursuant to section 11 of POFMA, a CD was subsequently issued to TOC (“**the TOC CD**”). The subject statement from the TOC Article consisted of LFL’s claims about the alleged “brutal and unlawful” hanging method used by Changi Prison. This included a claim that, where the rope broke during a hanging, prison officers were instructed to kick the back of the prisoner’s neck to break it in a manner consistent with death by hanging.

III. ISSUES

As stated above, the CA addressed three main issues in this appeal:

- the constitutionality of Part 3 of POFMA;
- the applicable approach in determining whether a Part 3 Direction may be set aside; and
- the burden and standard of proof required in applications to set aside Part 3 Directions.

A. The constitutionality of Part 3 of the POFMA

A Singapore citizen’s right to freedom of speech and expression is protected under Article 14(1)(a) of the Constitution. However, enjoyment of the right to free speech may be restricted by Parliament on the grounds set out in Article 14(2)(a), *e.g.* public order, so long as Parliament considers it “necessary or expedient” to do so.

(1) The parties’ arguments on constitutionality

Under Section 10(1)(b) of POFMA, a Part 3 Direction may be issued if the Minister considers it “in the public interest”. Section 4 of POFMA further states “it is in the public interest to do anything if the doing of that thing is necessary or expedient” under certain specified circumstances. For instance, sections 4(d) and 4(f) consider to be in the public interest, respectively, the prevention of influence over the electoral process and the prevention of the diminution of public confidence in the Government and other public institutions. The question was whether this was consistent with Article 14 of the Constitution.

SDP’s main argument was that specific portions of Part 3 of POFMA were unconstitutional in purporting to limit the right to freedom of speech on grounds falling outside of Article 14(2)(a). Specifically, that the public interest as defined in sections 4(d) and 4(f) of POFMA were wider than the meaning of “public order” in Article 14(2)(a) of the Constitution. As such, sections 4(d) and 4(f) of POFMA could not be considered permissible grounds for restricting free speech. SDP further argued that Parliament had not considered whether restricting the right to free speech under the “public interest” limbs of sections 4(d) and 4(f) of POFMA was “necessary or expedient” to protect public order for the purposes of Article 14(2)(a) of the Constitution.

In turn, TOC argued that the right to free speech necessarily encompassed a *negative* right not to be required to speak. This negative right would be infringed upon by the issuance of a CD, which effectively compelled a statement-maker to defame itself by admitting it had made a false statement of fact. Thus,

the issuance of a CD under Part 3 of POFMA was a restriction of the right to free speech.

The Attorney-General responded that Article 14(1)(a) of the Constitution does not protect false speech. As such, a Part 3 Direction targeting a false statement of fact would not attract the Article's protection. Further, any limitations on the right to free speech imposed by Part 3 of POFMA were consistent with the grounds of restricting free speech set out in Article 14(2)(a) of the Constitution, *e.g.* public order.

(2) Whether subject statements enjoyed protection under Article 14(1)(a) of the Constitution

Although Article 14(1)(a) confers on Singapore citizens the right to freedom of speech, this does not extend to false statements. Thus, the CA first had to ascertain whether subject statements – *i.e.* statements considered by a Minister to constitute a false statement of fact – that had yet to be proven false in a court of law, were nonetheless protected by Article 14(1)(a). Here, the CA affirmed that until a statement was judicially determined to be a false statement of fact, it would continue to be protected under Article 14(1)(a) of the Constitution. It followed that the constitutionality of Part 3 of POFMA could be scrutinised under Article 14.

(3) Framework for ascertaining derogation

The CA then adopted the three-step framework established in *Wham Kwok Han Jolovan v Public Prosecutor* [2021] 1 SLR 476 (“**the Jolovan Wham framework**”) for determining whether a legislation impermissibly derogated (*i.e.* detracted from) from Article 14 of the Constitution.

1. Whether the issuance of a Part 3 Direction restricted Article 14 rights

First, the court must assess whether the legislation in question derogated from or restricted any of the rights conferred by Article 14 of the Constitution. The CA held that the issuance of a Part 3 Direction did not restrict the statement-maker's right to free speech under Article 14. Upon receipt of a CD, the statement-maker would not be prevented from modifying or publishing the communicated material, including the alleged falsehood. The statement-maker remained free to speak in respect of the communicated material, save for the fact that a correction notice would need to be put up. Consequently, a statement-maker's *positive* right to free speech under Article 14 would not be infringed upon.

The CA also dismissed TOC's argument that the issuance of a CD infringed upon a statement-maker's *negative* right to free speech. TOC was not prevented from communicating that the TOC CD was being challenged, nor was TOC prevented from stating that it remained subject to judicial determination whether there were any grounds to set aside the CD.

Given the CA's finding that the issuance of a Part 3 Direction did not restrict the right to free speech, there was no need to proceed further with an analysis using the *Jolovan Wham* framework. Nonetheless, the CA continued with its analysis under the *Jolovan Wham* framework.

2. Whether Parliament considered it “necessary or expedient” to impose the restriction

If the legislation indeed derogated from or restricted any rights conferred by Article 14 of the Constitution, the inquiry would proceed to the second stage of the *Jolovan Wham* framework. The court must determine if Parliament considered such derogation or restriction to be “necessary or expedient” in the interests of one or more of the purposes set out in Article 14(2). The CA held that it was clear that Parliament considered POFMA to be “necessary or expedient” in the interests of national security and public order. It therefore rejected SDP's argument that Parliament had not so considered such concerns.

The opening address by the Minister for Law at the second reading of the POFMA Bill (*Singapore Parliamentary Debates* (7 May 2019) vol 94) had referred to the threat of “a serious loss of trust in

governments”. This concern was reflected by section 4(f) of POFMA, which expressed the public interest in preventing diminution of public confidence in the Government and other public institutions. The Minister had also highlighted the impact of online falsehoods on the public perception of elections. This corresponded with section 4(d) of POFMA, which set out the public interest in preventing improper influence over the electoral process. Given that Parliament had amply expressed concerns over the “public interest” identified in sections 4(d) and 4(f) of POFMA, the CA found that Parliament had indeed considered POFMA to be necessitated on the grounds of national security and public order.

3. Nexus between the purpose of POFMA and the exceptions to free speech under Article 14(2)(a)

Under the last stage of the *Jolovan Wham* framework, there must be a nexus (or connection) between the purpose of the legislation and one or more of the permitted grounds for derogation or restriction under the relevant part of Article 14(2) of the Constitution. The CA identified such a nexus between the purpose of POFMA, reflected by the public interest concerns in sections 4(d) and 4(f) of POFMA, and the public order exception to free speech under Article 14(2)(a) of the Constitution.

SDP contended that the public order exception to free speech under Article 14(2)(a) ought to be narrowed to laws targeting issues of public safety and tranquillity. Thus, the public interest identified in sections 4(d) and 4(f) of POFMA fell outside the ambit of the public order exception. However, the CA stated that such laws concerning public safety and tranquillity were not exhaustive of the proper ambit of the public order exception. The proliferation of online falsehoods could likewise threaten the preservation of public order by undermining trust in the Government and public institutions, as well as in the electoral process. Such effects could not be seen as being compatible with public order. Therefore, a nexus could be found between the ‘public interest’ expressed in sections 4(d) and 4(f) of POFMA and public order.

In any case, having found at the first stage of the *Jolovan Wham* framework that a Part 3 Direction did not restrict the freedom of speech enshrined in Article 14 of the Constitution, the CA affirmed the constitutionality of POFMA.

B. Applicable approach for when a Part 3 Direction may be set aside under section 17 of POFMA

The CA then established a new five-step framework to determine whether a Part 3 Direction may be set aside under sections 17(5)(a) and/or 17(5)(b) of POFMA:

- (a) First, the court should objectively construe the subject statement identified in the Part 3 Direction to determine the Minister’s intended meaning in respect of the statement, *i.e.* the meaning that the Minister intended to act against in framing the subject statement.
- (b) Second, the court should determine whether the subject material makes or contains the subject statement(s) identified in the Part 3 Direction. The subject material must be objectively interpreted in its proper context. There must be at least an appreciable segment or particular class of the subject material’s audience in Singapore who would construe it as making or containing that subject statement, or regard the subject statement as a reasonable interpretation of the subject material. The court was unconcerned with the subjective intention of the statement-maker.
- (c) Third, the court should objectively determine if the subject statement constituted a “statement of fact” under section 2(2)(a) of POFMA, such that a reasonable person would consider the statement a representation of fact.
- (d) Fourth, the court should objectively determine if the subject statement would be considered “false” under section 2(2)(b) of POFMA.
- (e) Fifth, the court should consider whether the subject statement “has been or is being communicated in Singapore” as required under section 10(1)(a) of POMA, such that it has been or is being published on or through the Internet, *and* has been or is being accessed by at least one end-user in Singapore.

(1) The subject statement and the meaning that the Minister intended to place on it

To begin with, the court must objectively ascertain the meaning that the Minister intended to place on the subject statement (“**the Minister’s intended meaning**”). This is also the meaning which the Minister intended to act against, thus forming the basis upon which the Part 3 Direction is issued.

As a starting point, the court should look to the words used by the Minister to frame the subject statement. If such words might give rise to multiple interpretations, the court ought to have regard to the correction notice set out in the Direction to shed light on the Minister’s intended meaning. In case of a real doubt as to the Minister’s intended meaning, the court should err in favour of how the recipient of the Direction would reasonably have understood the Minister’s intended meaning.

Additionally, the court could not uphold a Part 3 Direction on the basis of a subject statement that has not been identified by the Minister in the Direction. *First*, the validity of a Part 3 Direction necessarily stood or fell based on the identified subject statement and whether there was indeed a false statement of fact made or contained in the subject material. *Second*, a recipient of a Part 3 Direction would only be able to meaningfully challenge a Minister’s decision to issue the Direction if, based on the Minister’s identification of the subject statement, the recipient knew of the case against it and the meaning attributed to the subject statement which it allegedly communicated. *Third*, section 10(1) of POFMA required the Minister to be of the opinion that it was in the public interest to issue a Part 3 Direction in respect of a subject statement. This discretion clearly lay with the Minister alone, and not the courts.

(2) Whether the subject material makes or contains the subject statement

The court must next determine whether the subject material makes or contains the subject statement identified by the Minister in the Part 3 Direction. The subject statement is understood as the Minister’s intended meaning (as ascertained in the previous step). This requires an objective approach as POFMA is concerned with how the subject material may be understood by the public, rather than the meaning the statement-maker subjectively intended to place on the subject material.

Where the subject material could give rise to multiple reasonable interpretations as to whether it made or contained the subject statement in question, the CA held that the single meaning rule would not apply. This rule would entail that, out of the various interpretations of the subject material, a Part 3 Direction would be issued or upheld where “the single and the right meaning” of the subject material amounted to a false statement of fact. The CA found that the legislative purpose of POFMA was, amongst others, to swiftly respond to the circulation of online falsehoods. Therefore, it would be more consistent with such a purpose if measures under Part 3 of POFMA could be taken so long as at least *one* of the multiple reasonable interpretations of the subject material amounted to a false statement of fact.

(3) Whether the subject statement is a “statement of fact”

Next, the court must determine if the subject statement identified by the Minister in the Part 3 Direction, as understood by the Minister’s intended meaning, is a “statement of fact”. Failing that, the Direction may be set aside under section 17(5)(b) of POFMA. Section 2(2)(a) of POFMA defines a “statement of fact” with reference to “a reasonable person”. Thus, the court must objectively ascertain if the subject statement identified by the Minister is a “statement of fact” such that a reasonable person would consider it a representation of fact.

(4) Whether the subject statement is “false”

Similarly, the court must also determine if the subject statement identified by the Minister in the Part 3 Direction, as understood by the Minister’s intended meaning, is “false” under section 2(2)(b) of POFMA.

Failing that, the Direction may be set aside under section 17(5)(b). An objective approach is necessary to give effect to POFMA's legislative purpose of preventing the communication of online falsehoods, regardless of whether the statement-maker believed the statement to be true.

(5) *Whether the subject statement “has been or is being communicated in Singapore”*

Finally, the court must ascertain if the subject statement identified by the Minister in the Part 3 Direction, as understood by the Minister's intended meaning, “has been or is being communicated in Singapore”. Failing that, the Direction may be set aside under section 17(5)(a) of POFMA. The court noted that “communication” in section 3(1) of POFMA would likely be made out in respect of Internet published materials, *e.g.* through passive repetition of a statement on or through the Internet.

C. Burden and standard of proof to set aside Part 3 Directions under section 17 of POFMA

The HCs in the SDP case appeal and the TOC case appeal came to different conclusions on the issue of which party bore the burden of proof in proceedings to set aside a CD under section 17 of POFMA. The HC in the SDP case appeal held that the burden of proof lay with the Minister on whose authority the Part 3 Direction was issued to show the Direction ought to be maintained. In contrast, it was held in the TOC case appeal that the burden of proof rested with the statement-maker to establish that it was entitled to have a Direction set aside on any of the grounds in section 17(5) of POFMA.

The CA held that the burden of proof lay with the recipient of a Part 3 Direction. *First*, there existed a presumption in administrative law that constitutional office holders and other officials conformed with the law when exercising their public functions. Anyone alleging otherwise would need to establish at least a *prima facie* case of reasonable suspicion to rebut this presumption. It would be inconsistent with such a presumption to allow the recipient of a Direction to baselessly challenge the Minister's issuance of a Direction.

Second, instances of abuse may arise without any requirement for a recipient challenging the issuance of a Part 3 Direction to first show some objective basis for its complaint. Significantly, if a recipient were to communicate false allegations pertaining to matters of public interest, there would be no bar to bringing frivolous or unmeritorious applications in the High Court to set aside a Part 3 Direction which may be issued to him. The Minister would nonetheless have to prove that the legal requirements for issuing the Direction were satisfied, even if such applications were frivolous or unmeritorious.

The CA also considered the nature of section 17 of POFMA, which allowed the recipient of a Part 3 Direction to challenge the Minister's decision in issuing the Direction. Similar to the process of judicial review in administrative law, the appeals process in section 17 was an avenue for a dissatisfied party to challenge an executive action, *e.g.* the Minister's decision to issue a Direction. In form and in substance, the applicant in proceedings under section 17 was the effective claimant, and the Minister, the effective defendant. Thus, the notion that the burden of proof must lie with the Minister from the outset was inconsistent with Parliament's intention as regards the nature of section 17.

Finally, in interpreting Regulation 6(b) of the POFMA Regulations,² the CA found that the Minister was required to provide his grounds for regarding the subject statement identified in the Part 3 Direction as a false statement of fact. Hence, a recipient of the Direction seeking to challenge those grounds must explain their reasons for doing so. The recipient thus bears the burden of showing their entitlement to have the Direction set aside under one or more grounds set out in section 17(5) of POFMA.

² This refers to one of POFMA's subsidiary legislation which sets out the requirements for issuing a Part 3 Direction.

The CA then addressed the standard of proof required in applications to set aside a Part 3 Direction. It held that a recipient of the Direction must show a *prima facie* case of reasonable suspicion that one or more of the grounds for setting aside the Direction under sections 17(5)(a) and/or 17(5)(b) of POFMA is satisfied. The evidential burden would then shift to the Minister to show that none of the grounds under sections 17(5)(a) and/or 17(5)(b) relied upon by the recipient of the Direction were made out. The final determination would be made by the court based on the balance of probabilities.

D. Applying the five-step framework to the SDP and TOC case appeals

First subject statement in the SDP appeal. The CA upheld SDP CD-1, SDP CD-2 and the second half of SDP CD-3, all of which pertained to the first subject statement arising from the Relevant Sentence. At the first step of the framework, the CA identified the Minister’s intended meaning in respect of the first subject statement to be that “local PMET retrenchment has been increasing in *absolute numerical terms*”. Subsequently, the remaining steps of the framework were answered in the affirmative by the CA.

The SDP Article, and consequentially, the November and December Facebook posts – both of which had hyperlinked the SDP Article – did make or contain the first subject statement. On the balance of probabilities, an appreciable segment or a particular class of the SDP Article’s potential audience would have interpreted the Relevant Sentence in the SDP Article as referring to a rising *number*, as opposed to a rising *proportion*, of “Singapore PMETs getting retrenched”. Similarly, the CA found no issue in establishing that the first subject statement constituted a statement of fact that was false. It also found that the first subject statement had been communicated in Singapore.

Second subject statement in the SDP appeal. The CA set aside the first half of SDP CD-3, which pertained to the second subject statement, under section 17(5)(a) of POFMA. The CA had identified the Minister’s intended meaning in respect of the subject statement to be that “the employment of PMETs who are *either* Singapore citizens *or* Singapore Permanent Residents (“**SPRs**”) has decreased”. However, at the second step of the framework, the CA disagreed that the second subject statement was made or contained in the December Facebook post. On the balance of probabilities, an appreciable segment or particular class of the December Facebook post’s potential audience would not have construed the word ‘local’ in the graphical illustration as anything other than *Singapore citizens, excluding SPRs*. The text of the post had referred to “*home-grown* Singaporean talent” being displaced by “foreign talent”. However, SPRs would typically not be regarded as “home-grown Singaporeans”. There was also no mention of SPRs who had been similarly displaced.

Since the December Facebook post did not make or contain the second subject statement, by extension, the second subject statement was not communicated in Singapore. The CA concluded by setting aside the first half of SDP CD-3 under section 17(5)(a) of POFMA, and allowing the SDP appeal in part.

The TOC appeal. The CA held that there was no basis for the CA to set aside the TOC CD. It was irrelevant that the allegations originated from LFL and were subsequently repeated by TOC as a neutral report in the TOC Article. This did not detract from the CA’s finding at the third step of the framework that the allegations amounted to a statement of fact. Additionally, at the fourth step regarding whether the subject statement was false, the CA stated that there was no basis for finding otherwise. LFL’s allegations were baseless, and TOC had not proffered any evidence to prove the truth of the allegations. Accordingly, the TOC appeal was dismissed.

IV. LESSONS LEARNT

Three crucial lessons may be gleaned. Firstly, POFMA does not infringe on a statement-maker’s right to free speech and is consistent with Article 14 of the Constitution. Secondly, a new five-step analytical

framework has been established for use by future courts in determining whether a Part 3 Direction ought to be set aside. This provides much needed clarification as to how courts ought to assess applications to set aside a Direction. Notably, in adopting an objective approach to the framework, the CA has emphasised the legislative intention behind POFMA, *i.e.* to combat the deleterious effects of online falsehoods, regardless of what the statement maker subjectively intended. Finally, the CA has conclusively affirmed that the statement maker now bears the burden of proof: individuals wishing to challenge the issuance of a Direction must be prepared to present a *prima facie* case satisfying section 17(5) of POFMA in order for their application to proceed.

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