

Unlawful disclosure of prisoners' correspondence:
Syed Suhail bin Syed Zin & 12 Ors v AG [2024] SGCA 39; [2024] 2 SLR 588

I. Executive Summary

In *Syed Suhail Bin Syed Zin & 12 Ors v AG [2024] SGCA 39*, the Singapore Prison Service (“**SPS**”) disclosed 13 prisoners’ correspondence with various governmental agencies, organisations, legal advisors, and individuals, without their consent or a court order, to the Attorney-General's Chambers (“**AGC**”). In response, the claimant-prisoners filed claims against the Attorney-General (“**AG**”) to clarify the law and determine the legal position of the parties (“**declarations**”), as well as compensation (“**damages**”) for their claims. These included claims concerning: the unlawful disclosure of their correspondence, breach of confidence, and copyright infringement. On appeal, the Court of Appeal (“**CA**”) partially ruled in favour of the prisoners, granting declarations that both the AGC and the SPS acted unlawfully by requesting and disclosing prisoners’ letters and that the AG had breached confidentiality.

II. Material Facts

The 13 claimants were all prisoners in Changi Prison who had received death sentences. It was undisputed that the SPS disclosed 68 documents of correspondence belonging to the prisoners to the AGC. The correspondence included: (a) correspondence with various public or governmental agencies (e.g., letters to the Supreme Court Registry, the Singapore Police Force (“**SPF**”), to the President of Singapore); (b) correspondence with other organisations such as the Law Society of Singapore and the Malaysian High Commission; (c) correspondence between the prisoners and their counsel; and (d) personal letters from one of the prisoners, Mr Syed Suhail bin Syed Zin (“**Mr Suhail**”) to his uncle.

Prior to this case, the CA had held in *Gobi a/l Avedian and another v AG and another appeal [2020] SGCA 7* (“**Gobi**”) that while the SPS was authorised to make copies of prisoners’ correspondence under Regulation 127A(2) of the Prisons Regulations (Cap 247, 2002 Rev Ed) (“**the Prisons Regulations**”), this authority did not extend to permitting the SPS to forward these copies to the AGC. Following on from *Gobi*, the prisoners variously sought the following claims before the General Division of the High Court (“**HC**”):

- a. a declaration that the AG acted unlawfully in requesting the disclosure of personal correspondence belonging to the First, Third and Eighth prisoners without their consent (“**Claim 1**”);
- b. a declaration that the AG acted unlawfully when the SPS disclosed correspondence belonging to the First to Thirteenth prisoners without their consent, even though there was no request from the AGC (“**Claim 2**”);
- c. a declaration that the AG committed a breach of confidence by disclosing and retaining confidential correspondence belonging to the First, Third, Fourth, Fifth, Ninth and Eleventh prisoners (“**Claim 3**”);
- d. an order for damages and/or equitable relief for the First to Thirteenth prisoners for breach of confidence (“**Claim 4**”);
- e. a declaration that the AG infringed the Third, Fifth and Seventh prisoners’ copyright in their letters (“**Claim 5**”); and
- f. an order for nominal damages payable by the AG for copyright infringement (“**Claim 6**”).

The HC dismissed Claims 1 to 5. In respect of Claim 6, it granted nominal damages of \$10 to the prisoners who claimed for copyright infringement. The prisoners appealed against the entirety of the HC's decision.

III. Issues

On appeal, the CA considered the following matters:

- a. the appropriate administrative law remedies arising from the unauthorised disclosure of the prisoners' correspondence (Claims 1 and 2);
- b. the prisoners' claims for declaratory relief and damages for breach of confidence (Claims 3 and 4); and
- c. the prisoners' claims for a declaration and damages in respect of a breach of copyright (Claims 5 and 6).

Before discussing these matters, the CA first set out the practice of document disclosure ("**the Practice**"), based on the Deputy Attorney General's ("**DAG**") explanation. As a general matter, the Ministry of Home Affairs ("**MHA**") and the SPS schedule executions for Prisoners Awaiting Capital Punishment ("**PACP**") when there are no relevant pending proceedings or issues that require the execution to be delayed. The PACPs' specific documents were shared by the SPS with the AGC to ensure that the AGC, as the Government's legal advisor, remained informed of developments regarding PACPs, and to seek advice on any such proceedings affecting the execution timeline. As the SPS and the MHA officers were not legally trained, they would send documents that appeared to be legal to the AGC for advice. The SPS and the MHA believed in good faith that prisoners' correspondence could be shared with the AGC to seek legal advice despite their confidential or privileged nature.

The CA found that almost all the disclosures were explainable by the Practice. The documents concerned past, pending, or contemplated proceedings arising from the prisoners' convictions and sentences. For the instances of disclosure that had not occurred pursuant to the Practice, the DAG explained that the MHA disclosed the documents to the AGC to obtain legal advice on how to respond to the requests made by the prisoners. The CA found this explanation consistent with the nature of the correspondence and the circumstances in which they were disclosed.

However, there was one significant disclosure that fell outside the Practice. This was the disclosure to the AGC of letters from Mr Suhail to his uncle. In these letters, Mr Suhail was seeking to elicit evidence from his uncle to prove his absence of guilt. The Deputy Public Prosecutors involved in Mr Suhail's unsuccessful criminal appeal had requested copies of these letters and seen them. The CA expressed concern over how Mr Suhail's letters were handled, but held that the effect of such disclosure on criminal proceedings was not a concern arising in this appeal.

A. *The appropriate administrative law remedies arising from the unauthorised disclosure of the prisoners' correspondence (Claims 1 and 2)*

Affirming the position in *Gobi*, the CA reiterated that it was unlawful for the SPS to pass copies of prisoners' correspondence to the AGC, and for the AGC to receive or ask for such correspondence. In general, there is an expectation of confidentiality in a letter or document shared between private parties. In the case of prisoners, prison officers are permitted to read all correspondence from or to prisoners and make copies of the same unless they are to or from the prisoner's legal advisor; however, this does not extend to permitting the SPS to make copies of letters to or from lawyers or to give copies of letters to anyone, including the AGC.

Nonetheless, the CA recognised that there might be situations where the SPS requires legal advice to ensure the safety and good order of the prison or the public. In such situations, disclosure of correspondence to the relevant authorities may be excused. If the SPS requires urgent advice and a court order is impracticable, the SPS would, at the least, have to make it clear to the AGC that the disclosure was solely to obtain particular, urgent advice and the SPS has to identify the issue necessitating the advice. The AGC, for its part, must have systems in place to maintain the confidentiality of any documents received, disclosing them only to officers tasked with providing the necessary advice to the SPS. The CA emphasised that this limited exemption did not permit the AGC to request for the disclosure of prisoners' correspondence of its own volition.

Having found that the AG acted unlawfully, the CA held that the conditions for declaratory relief were also satisfied. Such relief may be granted under Order 15 rule 16 of the Rules of Court (Cap 322, 2014 Rev Ed) provided certain conditions are met, including, amongst others, the conditions that: the declaration is justified by the circumstances of the case, and the claimant has standing to bring the suit and there is a real controversy for the court to resolve.

The CA held that a declaration pursuant to Claims 1 and 2 was justified based on the circumstances of the case. While noting that the AGC had taken steps to prevent future disclosure of correspondence, the CA found that a declaration would still be valuable to the parties and the public in affirming the importance of a prisoner's ownership of correspondence and his right to maintain confidentiality and privacy. The Practice disregarded a prisoner's general interest in written communications or their specific interest in communications with their legal advisor.

Furthermore, the CA held that notwithstanding the earlier decision in *Gobi*, there was a real controversy for the court to resolve as to the impropriety of the AGC's conduct. As a matter of law, a prior decision can form a basis for not granting a similar declaration if it effectively redetermines an issue previously decided. However, the *Gobi* declaration differed from the declaration requested in this case. The *Gobi* declaration was pronounced in the context of an isolated incident of disclosure. In contrast, here the disclosures were made pursuant to the Practice or policy contrary to the Prisons Regulations, and the legality of such policy had not been resolved or commented on.

Thus the CA granted two declarations:

- *Claim 1.* The AGC's requests for disclosure of correspondence belonging to the prisoners without their consent were unlawful; and
- *Claim 2.* The SPS acted unlawfully in disclosing the prisoners' correspondence to the AGC, whether pursuant to the Practice or otherwise, in the absence of any legal necessity or court order or the prisoners' consent to the disclosure.

B. The prisoners' claims for declaratory relief and damages for breach of confidence (Claims 3 and 4)

The CA first noted that for there to be a breach of confidence, the claimants must establish that: the information in question has the necessary quality of confidence and it has been imparted in circumstances importing an obligation of confidence. One such circumstance is when confidential information has been accessed or acquired without the claimants' knowledge or consent. If the claimants succeed in establishing both requirements, a breach of confidence is

presumed to exist. The legal burden of proof then shifts to the AG to prove that its conscience was unaffected by the breach.

(i) Claim 3: Declaratory relief for breach of confidence

The CA examined the documents disclosed, including documents relating to court proceedings, letters to the SPF, clemency petitions, letters to and from lawyers, correspondence with organisations, and personal letters between Mr Suhail and his uncle, and split them into two categories: a) disclosures which did not give rise to a breach of confidence; and b) disclosures which did give rise to a breach of confidence.

*a) Disclosures which **did not** give rise to a breach of confidence*

Documents relating to court proceedings: Court proceedings are generally public and not confidential. As such, the CA held that letters written to the Supreme Court dealing with procedural points or updates for cases in which the AG was the counterparty were not considered confidential. Likewise, documents involving proceedings in the Supreme Court to which the AG was not a party were also not considered confidential.

Letters to the SPF: The prisoners claimed that they had previously written letters to the SPF to investigate allegations that the SPS used illegal execution techniques. The CA held that with a request for investigation, there must be a reasonable expectation that the SPF would use or disclose information in letters to decide whether to investigate and may require advice from other government departments. Therefore, there was no expectation of confidentiality in the letters.

Clemency petitions: Correspondence from the prisoners to the Supreme Court concerning clemency petitions also cannot be expected, from an objective viewpoint, to be kept away from the Public Prosecutor.

*b) Disclosures which **gave rise** to a breach of confidence*

Letters to and from lawyers: The letters the prisoners wrote to or received from their lawyers were subject to legal advice privilege and/or litigation privilege and must have been written and received with the expectation of confidentiality.

Correspondence with organisations: The prisoners' correspondence with organisations like the Law Society of Singapore regarding complaints against counsel and request for advice were covered by an expectation of confidentiality.

Personal letters between Mr Suhail and his uncle: The letters between Mr Suhail and his uncle were also confidential documents protected by litigation privilege as they were for the dominant purpose of litigation.

In respect of the disclosures of these documents, the CA held there was a breach of confidence. The CA also held that the conscience of the AGC and the SPS were affected, as objectively, they must have known that the documents were confidential. Thus, the CA granted a declaration (under Claim 3) that the AG committed a breach of confidence by disclosing and retaining confidential information belonging to the prisoners.

(ii) Claim 4: Damages for breach of confidence

Despite having found a breach of confidence under Claim 3, however, the CA declined to grant damages to the prisoners.

Remedies from criminal proceedings: The prisoners argued that the criminal proceedings were unfairly tainted by the disclosure of their correspondence, leading to a claim for damages. However, the CA held this was a matter for criminal review, not a civil appeal.

Punitive damages: The CA noted that punitive damages are claimable where there is oppressive, arbitrary, or unconstitutional action by government servants. However, such damages are not available for all wrongs. Further, no Singapore court decisions have awarded punitive damages for a breach of confidence. Even if they were available, the prisoners failed to seek them in their claim for a breach of confidence, which was fatal to their argument. The prisoners were essentially raising new arguments, and allowing late claims would prejudice the AG due to a lack of opportunity to respond.

Equitable damages: Equitable damages are awarded in addition to or in substitution for an injunction (a court order that requires a party to do or refrain from doing a specific act). The CA held there was no need for an injunction as the correspondence had already been destroyed by the AGC. Since there was no reason to award an injunction, there was no basis to award equitable damages instead of an injunction. The CA also held the prisoners were not entitled to equitable compensation for mental distress: the general principle at common law is that emotional or mental distress is not actionable.

C. The prisoners' claims for a declaration and damages in respect of a breach of copyright (Claims 5 and 6)

The CA declined to grant declaratory relief for these claims. There was no justification for granting a declaration as the prisoners would not have secured any real relief from any liability, disadvantage, or difficulty. The HC's award of nominal damages made it obvious that there had been a technical infringement of copyright, making any declaration unnecessary.

The CA also agreed with the HC's decision to award nominal damages of \$10 to each prisoner for copyright infringement. The CA found that the amount was not arbitrary or unprincipled. The figure fell within the scope of "nominal damages" sought in Claim 6 and the quantum awarded was within the scope of the HC's discretion.

IV. Lessons Learnt

There are two key takeaways from this case. First, it is important for public authorities to routinely consider the implications of their processes. Second, prisoners' rights in written communications must be respected, especially when they possess a quality of confidence.

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