

**Limits on the Scope of Judicial Review of Administrative Determinations:
Lessons from *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] SGCA 37**

I. EXECUTIVE SUMMARY

In *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] SGCA 37, Nagaenthran a/l K Dharmalingam (“**Nagaenthran**”) was charged under section 7 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (“**MDA**”) for importing not less than 42.72g of diamorphine (heroin). Upon conviction by the High Court (“**HC**”), which was later upheld on appeal, he was sentenced to the mandatory death penalty under the applicable sentencing regime at the time. However, the court also stayed execution of his sentence, pending Parliament’s review of the mandatory death penalty in relation to drug offences.

In 2012, Parliament passed an amendment to the MDA, which introduced section 33B. Section 33B modified the legal framework governing the sentencing of persons convicted of drug trafficking in two ways. *First*, it made it mandatory for the courts to sentence an offender to life imprisonment (instead of the death penalty) if the offender was merely a courier under section 33B(3)(a) and the offender was also suffering from an abnormality of mind under section 33B(3)(b). *Second*, it conferred on the courts the discretion to sentence an offender to life imprisonment (instead of the death penalty) if the offender was merely a courier under section 33B(2)(a), and the Public Prosecutor (“**PP**”) had issued a certificate of substantive assistance under section 33B(2)(b).

After the introduction of section 33B, Nagaenthran made two applications to be re-sentenced to life imprisonment rather than the death penalty. In the first application, he argued that he was suffering from an abnormality of the mind under section 33B(3). (It was undisputed that he was a mere courier.) In the second application, he applied for leave to commence judicial review proceedings¹ against the PP’s decision not to issue to him a certificate of substantive assistance under section 33B(2)(b). The HC dismissed both applications.

On appeal, the Court of Appeal (“**CA**”) upheld the HC’s decisions. On Nagaenthran’s *first* application, the CA held that the HC had correctly found that Nagaenthran did not suffer from an abnormality of mind. The CA also dismissed Nagaenthran’s *second* application. It held that Nagaenthran first had to establish that section 33B(4), which provided that the PP had the “sole discretion” to determine whether any person substantively assisted the Central Narcotics Bureau (“**CNB**”) in disrupting drug trafficking activities (unless such determination was done in bad faith or with malice), did not oust (or exclude) the courts from reviewing the PP’s non-certification decision. The CA did rule that section 33B(4) was *not* an ouster clause because it did not exclude the court’s supervisory jurisdiction, but instead only immunised the PP from legal proceedings. Nonetheless, the CA found that Nagaenthran had not adduced any evidence to establish his claims.

II. MATERIAL FACTS

In 2009, Nagaenthran was stopped at the Woodlands Checkpoint while entering Singapore. During a search conducted by officers from the CNB, a bundle was discovered strapped to his left thigh. At the time of his arrest, Nagaenthran admitted to CNB officers that the bundle contained heroin. He claimed that a friend called “King” had told him to strap the bundle to his thigh to conceal it.

¹ In judicial review proceedings, the courts review the lawfulness of decisions made by public authorities (including those of the PP).

However, at trial, Nagaenthran provided a different account. He denied knowing the contents of the bundle, and claimed that King had only informed him that the bundle contained “company spares” or “company product”. Nagaenthran also claimed that he had delivered the bundle under duress. According to him, King had allegedly slapped and punched him when he attempted to refuse to transport the drugs. Nagaenthran also alleged that King had threatened to kill his girlfriend if he did not transport the drugs.

At the conclusion of the trial in 2010, the trial judge found Nagaenthran guilty and sentenced him to death. First, he found that Nagaenthran’s contemporaneous statements to the CNB officers had been provided voluntarily and recorded accurately. Second, he found that Nagaenthran failed to establish the defence of duress, because he had fabricated the allegations that King had assaulted him and threatened to kill his girlfriend if he did not deliver the drugs. Third, he found that Nagaenthran had actual knowledge that the bundle contained diamorphine, based on Nagaenthran’s statements to the CNB officers.

After the amendments to the MDA came into effect on 1 January 2013, Nagaenthran made a voluntary statement to the PP to allow the PP to make a determination, under section 33B(2)(b), as to whether Nagaenthran had substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore.

In July 2013, Attorney-General Steven Chong Horng Siong (“**AG Chong**”), who was the PP at the time,² considered the information provided by Nagaenthran, together with additional information relating to operational matters and the CNB’s views. He determined that Nagaenthran had not substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore. Accordingly, he decided not to issue a certificate of substantive assistance under section 33B(2)(b).

III. ISSUES ON APPEAL

The two main legal issues were: (A) whether Nagaenthran suffered from an abnormality of mind under section 33B(3)(b); and (B) whether Nagaenthran should be granted leave to pursue judicial review proceedings against the PP’s non-certification decision.

A. Whether Nagaenthran suffered from an abnormality of mind under section 33B(3)(b)

Under section 33B(3)(b), if a court found that Nagaenthran suffered from an abnormality of mind which substantially impaired his mental responsibility for his acts, it would have to sentence him to life imprisonment instead of the death penalty.

The CA held that an offender could be re-sentenced to life imprisonment if he established the following requirements on a balance of probabilities:³

- (i) he was suffering from an abnormality of mind (*first limb*);
- (ii) the abnormality arose from a condition of arrested or retarded development of mind, any inherent causes, or was induced by disease or injury (*second limb*); and
- (iii) the abnormality substantially impaired his mental responsibility for his acts in relation to the offence in question (*third limb*).

This test was similar to the test for the defence of diminished responsibility for the offence of murder.

² In Singapore, the AG holds a dual appointment as the PP.

³ This means that the court must be satisfied that it was *more likely than not* that the requirements are fulfilled.

Regarding the *first* limb, the CA observed that the inquiry was fact-sensitive, and would depend on what the reasonable man would consider abnormal. This was analysed in terms of the offender's capacity to do three things: understand events, judge the rightness or wrongness of one's actions, and exercise self-control. However, these indicia were not exhaustive; an offender could, in principle, still succeed in proving an abnormality of mind even if he were unable to pigeonhole such abnormality of mind within one of those three indicia. The CA also stated that the legal inquiry as to whether an offender was suffering from an abnormality of mind must be founded on all of the evidence (including, among other things, the offender's conduct before, during, and after the offence). While medical expert opinion might often be useful, it was not necessarily dispositive of the *legal* inquiry as to whether an abnormality of mind was established under this first limb.

On the *second* limb, the CA held that it should be interpreted restrictively rather than extensively, as Parliament did not intend for section 33B(3)(b) to apply to offenders who did not suffer from a recognised and proven psychiatric condition. Therefore, the offender must show that the abnormality had a firm basis in an established psychiatric condition, which arose from: an arrested or retarded development of mind, any inherent causes, or was induced by disease or injury. This would largely be a matter to be established through expert evidence.

On the *third* limb, the CA held that the offender's abnormality of mind had to have substantially impaired his mental responsibility for his acts and omissions. Such impairment need not be total, but must be real and material. Further, while the abnormality of mind need not be the cause of the offender's actions, it must at least have had an influence on the offender's actions.

Applying this three-limb test here, the CA agreed with the HC that, even assuming Nagaenthran could succeed in establishing the *first* and *second* limbs, he had not established the *third* limb, i.e. that his mental responsibility was substantially impaired. He had clearly understood the nature of his acts and had not lost his sense of judgment of the rightness or wrongness of what he was doing. He had known that the bundle contained drugs and that it was unlawful to transport drugs; that was why he had attempted to conceal the bundle. The CA also dismissed Nagaenthran's subsequent account of having acted out of a misguided sense of gang loyalty as being a mere afterthought, since it had only emerged in late 2016 and contradicted his original account.

Finally, Nagaenthran had also alleged that his borderline sub-normal intelligence, cognitive defects, severe alcohol use disorder, and severe attention deficit hyperactivity disorder had substantially impaired his internal rationality and his ability to assess risks. The CA also rejected this argument. Even if his ability to assess risks had been impaired, making him more prone to engage in risky behaviour, this did not amount to an impairment of his mental responsibility for his actions. Nagaenthran had made a deliberate, purposeful and calculated decision to transport drugs in exchange for money, which ultimately did not pay off.

B. Whether Nagaenthran should be granted leave to pursue judicial review proceedings against the PP's non-certification decision

Nagaenthran had applied for leave to commence judicial review proceedings against the PP's decision not to issue a certificate of substantive assistance under section 33B(2)(b), on the grounds that the PP had failed to take into account relevant considerations in arriving at his non-certification decision, and that the PP's non-certification decision was made in the

absence of a precedent fact (*i.e.* a fact which must be established before an executive (or governmental) power can be exercised).

In Singapore, the courts ordinarily have the power to adjudicate all disputes. This includes the power of judicial review, where (as stated above) the courts may review the lawfulness of government actions, including the actions of the PP. However, section 33B(4) states that the PP has the “sole discretion” to determine whether any person substantively assisted the CNB in disrupting drug trafficking activities, and no action or proceeding shall lie against the PP in relation to such determination unless it was proven that the determination was done in bad faith or with malice. And it remained (till this case) an open question as to whether section 33B(4) ousted, or excluded, the courts from reviewing the lawfulness of government actions in this regard (*i.e.* whether it was an “ouster clause”).

Thus, the CA *first* had to decide whether section 33B(2)(b), read with section 33B(4), ousted the court’s power to review the PP’s certification decision, if the PP’s decision was not made in bad faith or malice. If the answer was negative, *then* the CA had to decide whether Nagaenthran had established a *prima facie* (or arguable) case of reasonable suspicion that the PP had failed to take into account relevant considerations or had acted in the absence of a necessary precedent fact.

(i) Section 33B(4) and the court’s power to review the non-certification decision

The CA first differentiated between ouster clauses and clauses that had the effect of immunising parties from suit or liability (“**immunity clauses**”). The key difference was that immunity clauses do not exclude the court’s jurisdiction, but only protect an identified class of persons from being sued under certain conditions. The CA held that such immunity clauses are valid and justified to the extent that they protect persons properly carrying out public functions from being unduly hindered by fear of liability.

The CA further held that section 33B(4) was *not* an ouster clause. Nothing in the wording of section 33B(4) excluded judicial review of the PP’s non-certification determination under section 33B(2)(b). Rather, section 33B(4) was an *immunity clause* which immunised the PP from suit (subject to the exceptions of bad faith, malice and unconstitutionality) regarding his determination under section 33B(2)(b) of whether an offender had substantively assisted the CNB.

Further, the CA drew an important distinction between the *inquiries* and *conditions* that must be fulfilled under section 33B(2). It found that section 33B(4) was directed to the *inquiry* (meaning the process by which the PP arrives at his certification decision), as opposed to the *condition* (the existence of the certificate of substantive assistance). The CA held that it was not appropriate for a court of law to undertake the inquiry of deciding whether an offender had substantively assisted the CNB in disrupting drug trafficking activities, because it would involve wider considerations and trade-offs beyond the court’s institutional competence, which the court was ill-equipped and ill-placed to determine. Thus, it was also entirely logical for Parliament to have intended for the inquiry under section 33B(2)(b) to be determined solely by the PP, in order to prevent the court from having to determine an issue that it was inherently not capable of determining.

As such, the CA did not need to decide whether ouster clauses would have the effect of excluding the court’s power of judicial review. Nonetheless, the CA observed that the court’s power of judicial review would not ordinarily be capable of being excluded by ordinary

legislation such as the MDA. Since the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) (“**Constitution**”), as the supreme law of the land, provided for the principle of the separation of powers,⁴ the legislature could not enact a law which purported to oust the judicial power vested in the courts, as embodied in Article 93 of the Constitution. Further, such legislation would be contrary to the rule of law, which demands that the courts be able to examine the exercise of discretionary power. Thus, the CA observed that if section 33B(4) was an ouster clause, it would be constitutionally suspect for being in violation of Article 93 and the principle of the separation of powers.

(ii) Whether leave for judicial review should be granted

Nagaenthran sought leave for judicial review of the PP’s non-certification decision on two grounds; the CA rejected both grounds.

(a) Whether the PP had failed to take into account relevant considerations.

Nagaenthran submitted that the information which he had provided to the CNB at the time of his arrest in 2009 was time-sensitive in nature, and thus had become stale by the time the PP considered it in 2013 (in arriving at his non-certification decision). Thus, he argued, he was prejudiced because he could not conceivably have been in a position to render substantive assistance to the CNB in 2013. Instead, AG Chong should have, but failed to, consider the effect of his information in relation to the disruption of drug trafficking activities as of 2009.

The CA rejected this argument. It began by observing that section 33B did not impose on the PP an obligation to consider, retrospectively, the effect of information provided by offenders on the disruption of drug trafficking activities. In any event, the CA found that Nagaenthran had been unable to provide any evidence to show a *prima facie* case of reasonable suspicion that the PP had in fact failed to consider the effect of this information on the disruption of drug trafficking activities as of 2009. Nagaenthran had not provided any evidence to contradict an affidavit filed on behalf of the PP, stating that AG Chong had made the non-certification decision only after having considered the information provided by Nagaenthran at the time of his arrest in 2009.

(b) Whether the PP’s non-certification decision had been made in the absence of a precedent fact.

The CA found that the PP’s non-certification decision under section 33B(2)(b) could not be challenged on this ground because it did not involve the exercise of an executive discretion that required the establishment of an objective precedent fact to begin with.

This ground would apply where an authority had the discretion to make a decision which was triggered only after a particular fact had been established, and had exercised the discretion even though that fact was absent. The CA held that the ground could not apply to a decision under section 33B(2)(b) because the PP did not have discretion in deciding whether to issue the certificate, but was *bound* to issue the certificate once he had determined that an offender had provided substantive assistance in disrupting drug trafficking activities. The PP only had discretion with regard to the underlying *inquiry*, such as the type of information he should consider in arriving at his certification decision. Therefore, the PP’s determination under section 33B(2)(b) could not be challenged on the ground that it was made in the absence of

⁴ The principle of separation of powers is a doctrine of constitutional law under which the three branches of government (executive, legislative, and judicial) are kept separate. It is embodied in the Constitution: Article 23 vests executive authority in the President and Cabinet, Article 38 vests legislative power in the President and Parliament, and Article 93 vests judicial power in the courts.

an objective precedent fact.

IV. LEGAL IMPLICATIONS

This decision has clarified section 33B of the MDA by establishing that the reasoning relating to abnormalities of mind in the context of murder applies as well to section 33B of the MDA, and that an impairment of an offender's ability to assess risks is insufficient to satisfy the third limb of the test.

More broadly, this decision carries three important implications for constitutional and administrative law. *First*, it is crucial to differentiate between clauses that *immunise* parties from suit and clauses that purport to *oust* the court's jurisdiction. In the former case, immunity is unlikely to be granted where the beneficiary misuses or abuses the public function in question, or where the beneficiary has exceeded the proper ambit of his office's public function. Of course, this would ultimately depend on the specific wording of the immunity clause. Particularly, if the immunity clause is worded like section 33B(4), the claimant must show bad faith or malice. However, if the claimant is seeking to apply for judicial review of a decision, an immunity clause will not prevent the claimant from bringing an application for judicial review on the usual grounds such as illegality, irrationality and procedural impropriety.

Second, in interpreting statutes which vest discretionary decision-making power in a public authority, it is equally important to differentiate between conditions the satisfaction of which the court is to determine, and queries to be undertaken by an authority which results in determinations by that authority which the courts are then to act on. In the latter case, the court is likely to be confined to reviewing the legality of the authority's determination, as opposed to its merits.

Lastly, the CA's observation that ouster clauses contained in ordinary legislation are probably liable to be struck down as unconstitutional was interesting, even though it was ultimately *obiter* in the light of the court's analysis.

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