

**THE PRESUMPTION OF CONSTITUTIONALITY  
AND THE RIGHT TO EQUALITY IN THE GRANTING  
OF CERTIFICATES OF SUBSTANTIVE ASSISTANCE  
UNDER SECTION 33B OF THE *MISUSE OF DRUGS ACT***

*Muhammad Ridzuan bin Mohd Ali v Attorney-General*<sup>1</sup>

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In *Ridzuan*, two co-accused were charged with and convicted of drug trafficking, yet only one received a certificate of substantive assistance under s 33B of the *Misuse of Drugs Act*.<sup>2</sup> This commentary examines the novel questions on the right to equality with respect to the granting of certificates of substantive assistance as raised in the Court of Appeal's decision. This commentary also addresses the broader question of how the presumption of constitutionality should apply in various contexts. Finally, it proposes a legislative mechanism to improve the institutional safeguards in place for the granting of these certificates.

I. FACTS AND PROCEDURAL HISTORY

The Appellant and his co-accused<sup>3</sup> faced identical charges of trafficking in diamorphine under s 5(1)(a) of the *MDA* read with s 34 of the *Penal Code*.<sup>4</sup>

By way of background, the Appellant and Abdul Haleem had been working as bouncers at the same night club when they both agreed to purchase one “ball” of heroin to repack and sell.<sup>5</sup> The arrangement was that the Appellant would deal with the supplier and provide the capital to purchase the heroin. Both of them would repack the drugs and source for customers.<sup>6</sup>

On 5 May 2010, the Appellant received a call from the supplier to collect the first-half of the “ball” of heroin from a courier. Abdul Haleem then collected the bundle of heroin from the courier later that same day.<sup>7</sup>

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<sup>1</sup> [2015] 5 SLR 1222 (CA) [*Ridzuan*].

<sup>2</sup> Cap 185, 2008 Rev Ed Sing [*MDA*].

<sup>3</sup> Abdul Haleem bin Abdul Karim [Abdul Haleem].

<sup>4</sup> Cap 224, 2008 Rev Ed Sing.

<sup>5</sup> *Ridzuan*, *supra* note 1 at paras 7, 9.

<sup>6</sup> *Ibid* at para 9.

<sup>7</sup> *Ibid* at para 13. The Court of Appeal did not specify how the collection was made.

The next day, on 6 May 2010, the Appellant received another call from the supplier to collect the second-half of the “ball” of heroin, and several additional bundles for other customers.<sup>8</sup> Abdul Haleem was tasked to make the second collection, which was from the same courier driving the same car. This time, however, the courier asked Abdul Haleem to get into the car because of the large amount of heroin involved. They drove to Novena Square and parted ways after the heroin changed hands there. Abdul Haleem took a taxi back to the Appellant’s flat, where he and the Appellant were arrested.<sup>9</sup>

Following his arrest, Abdul Haleem provided the police with information on the ethnicity of the courier and the car that the courier had driven. The Appellant also provided some information to this effect, but his knowledge was based on what Abdul Haleem had told him.<sup>10</sup>

The Public Prosecutor preferred two separate charges against each of the accused. The first charge, involving not less than 72.05g of diamorphine, was a capital charge under s 33 of the *MDA* (“Capital Charge”). The second charge, involving not more than 14.99g of diamorphine, was a non-capital charge.<sup>11</sup> The Appellant and Abdul Haleem were convicted of both charges after trial.<sup>12</sup>

Given that they were tried after the commencement of the new s 33B of the *MDA*, they were eligible to be punished under the alternative sentencing regime prescribed in that section.<sup>13</sup>

Under s 33B(1)(a) of the *MDA*, the court has the discretion to sentence a person convicted of an offence under s 5(1) of the *MDA*, being an offence punishable with death under s 33 of the same Act, to life imprisonment and 15 strokes of the cane instead of death if two requirements are met. First, the accused must prove on a balance of probabilities that his involvement in the trafficking offence was limited to the acts prescribed in s 33B(2)(a) of the *MDA*. Second, the Public Prosecutor must certify under s 33B(2)(b) of the *MDA* that the accused has “substantively assisted” the Central Narcotics Bureau in disrupting drug trafficking activities within or outside of Singapore.

In relation to the Capital Charge, the trial judge found that both the Appellant and Abdul Haleem had satisfied the first of the two requirements as their acts were limited to those falling within s 33B(2)(a)(ii) or s 33B(2)(a)(iii) of the *MDA*.<sup>14</sup>

However, the Public Prosecutor only issued a certificate of substantive assistance to Abdul Haleem and not the Appellant. Abdul Haleem was eventually sentenced to life imprisonment and 24 strokes of the cane, while the Appellant was given the mandatory death penalty.<sup>15</sup>

The Appellant appealed against his conviction on the Capital Charge, which was dismissed. The Appellant subsequently applied for leave to commence judicial review proceedings against the Public Prosecutor for its decision not to grant

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<sup>8</sup> *Ibid* at para 14.

<sup>9</sup> *Ibid* at para 15.

<sup>10</sup> *Ibid*.

<sup>11</sup> *Ibid* at para 3.

<sup>12</sup> *Ibid* at para 17.

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid* at para 18.

<sup>15</sup> *Ibid*.

him a certificate of substantive assistance. The High Court dismissed the application, bringing about the present appeal.

## II. PROCEEDINGS AT THE COURT OF APPEAL

### A. *The Appellant's Case on Appeal*

The Appellant made three main arguments on appeal:

1. First, the Public Prosecutor should have granted him a certificate of substantive assistance on the basis that he had provided “sufficient information” to the Central Narcotics Bureau. The Public Prosecutor’s failure to do so was sufficient to establish a *prima facie* case of reasonable suspicion that the non-certification decision was made in bad faith.<sup>16</sup>
2. Second, the Appellant and Abdul Haleem were in “apparently the same or similar circumstances”, and Abdul Haleem was granted the certificate of substantive assistance while the Appellant was not.<sup>17</sup> This was *prima facie* evidence suggesting that the non-certification decision was in breach of art 12 of the *Constitution of the Republic of Singapore*.<sup>18</sup> In addition, since the Appellant was not privy to the actual grounds on which the non-certification decision was made, he could not be expected to produce any evidence directly impugning the propriety of the Public Prosecutor’s decision-making process.<sup>19</sup>
3. Finally, the Appellant argued that “bad faith” within the meaning of s 33B(4) of the *MDA* would be made out if he showed that proper procedure was not followed leading to a miscarriage of justice. The Appellant claimed that the proper procedure was not followed.<sup>20</sup>

### B. *The Respondent's Case on Appeal*

The Respondent made the following arguments in response:

1. First, “sufficient information” was not enough; the Appellant had to show that the information he gave enhanced the operational effectiveness of the Central Narcotics Bureau.<sup>21</sup>
2. Second, the Appellant had not shown that the information he gave the Central Narcotics Bureau was identical to that given by Abdul Haleem. Abdul Haleem was also more forthcoming in disclosing all that he knew early on.<sup>22</sup>

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<sup>16</sup> *Ibid* at para 26.

<sup>17</sup> *Ibid* at para 27.

<sup>18</sup> 1999 Rev Ed [*Constitution*].

<sup>19</sup> *Ridzuan*, *supra* note 1 at para 28.

<sup>20</sup> *Ibid* at para 29.

<sup>21</sup> *Ibid* at para 30(a).

<sup>22</sup> *Ibid* at para 30(b).

3. Finally, “bad faith” in the context of s 33B(4) of the *MDA* referred to the use of a discretionary power for extraneous purposes.<sup>23</sup> The Appellant had not adduced any evidence to show this.<sup>24</sup> In addition, there was no procedural impropriety in the way that the non-certification decision was made.<sup>25</sup>

### C. The Court of Appeal’s Decision

The Court of Appeal dismissed the appeal.

First, it held that all executive acts must be constitutional, and the court is conferred the power to declare void any executive act that contravenes the provisions of the *Constitution*.<sup>26</sup> This included the Public Prosecutor’s exercise of the discretion conferred on him by s 33B(2)(b) of the *MDA*.<sup>27</sup>

Next, the presumptions of constitutionality and regularity applied as a matter of the separation of powers doctrine (in the context of constitutional office holders) and legal policy (in the context of other officials). Therefore, it fell upon the applicant to adduce *prima facie* evidence of a breach of the relevant standard in order to rebut the presumption.<sup>28</sup> Nonetheless, the Appellant did not have to produce evidence directly impugning the Public Prosecutor’s decision-making process; inferences could be drawn from the objective facts.<sup>29</sup>

On the question of whether the Public Prosecutor could grant an offender a certificate of substantive assistance on the basis that he had given the Central Narcotics Bureau “sufficient information”, the Court of Appeal answered this in the negative.

After an analysis of the parliamentary debates, the Court of Appeal held that the offender’s cooperation in good faith was neither a necessary nor sufficient basis for the Public Prosecutor to grant him a certificate of substantive assistance.<sup>30</sup> In fact, the Public Prosecutor would be acting *ultra vires* if he were to grant an offender a certificate of substantive assistance simply on the basis that the latter was forthcoming in disclosing all that he knew to the Central Narcotics Bureau. The information provided must have led to the actual disruption of drug trafficking activities within or outside Singapore.<sup>31</sup>

On whether the Appellant established a *prima facie* case of reasonable suspicion that the Public Prosecutor had acted in breach of art 12 of the *Constitution*, this was also answered in the negative. Citing *Public Prosecutor v Ang Soon Huat*<sup>32</sup> and *Eng Foong Ho v Attorney-General*,<sup>33</sup> the Court of Appeal held that in the context of executive acts, the equal protection clause in art 12 is breached if “there is deliberate and arbitrary discrimination against a particular person. . . [a]rbitrariness implies the lack of any rationality”.<sup>34</sup>

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<sup>23</sup> *Ibid* at para 30(c).

<sup>24</sup> *Ibid* at para 30(d).

<sup>25</sup> *Ibid* at para 30(e).

<sup>26</sup> *Ibid* at para 35.

<sup>27</sup> *Ibid*.

<sup>28</sup> *Ibid* at para 36.

<sup>29</sup> *Ibid* at para 43.

<sup>30</sup> *Ibid* at para 45.

<sup>31</sup> *Ibid* at para 48.

<sup>32</sup> [1990] 2 SLR (R) 246 at para 23 (HC) [*Ang Soon Huat*].

<sup>33</sup> [2009] 2 SLR (R) 542 at para 30 (CA) [*Eng Foong Ho*].

<sup>34</sup> *Ridzuan*, *supra* note 1 at para 49.

This evidential burden could be discharged if the Appellant had shown, first, that his level of involvement in the offence and the consequent knowledge he acquired of the drug syndicate he was dealing with was practically identical to his co-offender's level of involvement and the knowledge the co-offender could have acquired.<sup>35</sup> Second, he had to show that he and his co-offender provided practically the same information to the Central Narcotics Bureau.<sup>36</sup>

On the facts, it was found that the Appellant had failed to discharge this evidential burden.<sup>37</sup> In reaching this conclusion, the Court of Appeal accepted that a judge is not the appropriate person to determine the question of whether a convicted drug trafficker had rendered substantive assistance.<sup>38</sup> It held that the three affidavits filed on behalf of the Public Prosecutor were dispositive in showing that the Appellant and Abdul Haleem had not given practically identical information to the Central Narcotics Bureau.<sup>39</sup>

Next, it was held that "bad faith" within the meaning of s 33B(4) of the *MDA* is the knowing use of a discretionary power for extraneous purposes, *ie* for purposes other than those for which the decision maker was granted the power.<sup>40</sup> The Appellant had not adduced any evidence to show this.<sup>41</sup>

Finally, the Court of Appeal declined to express a view on whether s 33B(4) of the *MDA* has effectively limited the court's power of review to only the ground of bad faith and malice, apart from review on grounds of unconstitutionality.<sup>42</sup>

### III. COMMENTARY

This section examines the right to equality under art 12 of the *Constitution* and the presumption of constitutionality *vis-à-vis* the granting of certificates of substantive assistance. It addresses related questions such as whether the granting of these certificates entails the exercise of prosecutorial power, and, more broadly, how the presumption of constitutionality should apply in various contexts. Finally, it proposes a legislative mechanism that will introduce more institutional safeguards in the granting of the certificates without jeopardising the operational capability of the Central Narcotics Bureau.

#### A. *The Presumption of Constitutionality as the Starting Point*

It is trite that the presumptions of constitutionality and regularity apply as a matter of the separation of powers doctrine and legal policy.<sup>43</sup> It falls upon the applicant to adduce *prima facie* evidence of a breach of the relevant standard to rebut the

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<sup>35</sup> *Ibid* at para 51.

<sup>36</sup> *Ibid*.

<sup>37</sup> *Ibid* at para 68.

<sup>38</sup> *Ibid* at para 66.

<sup>39</sup> *Ibid*.

<sup>40</sup> *Ibid* at para 71.

<sup>41</sup> *Ibid* at para 74.

<sup>42</sup> *Ibid* at para 76.

<sup>43</sup> *Ramalingam Ravinthan v Attorney-General* [2012] 2 SLR 49 at paras 44, 47 (CA) [*Ramalingam*], affirmed in *Ridzuan*, *ibid* at para 36.

presumption of constitutionality. The decision-maker is not required to justify his decision until the applicant has crossed this threshold.

For art 12, the relevant standard in relation to executive acts is “deliberate and arbitrary discrimination against a particular person. . . [a]rbitrariness implies the lack of any rationality”.<sup>44</sup>

This test may find its roots in *Howe Yoon Chong v Chief Assessor*,<sup>45</sup> where Lord Keith of Kinkaid cited the US Supreme Court case of *Sunday Lake Iron Co v Township of Wakefield*<sup>46</sup> with approval. It was held in the latter that the equal protection clause of the US Fourteenth Amendment<sup>47</sup> was meant “to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination.”<sup>48</sup>

Nonetheless, the test was first applied in *Ang Soon Huat*,<sup>49</sup> and later in, *inter alia*, *Eng Foong Ho*,<sup>50</sup> *Cheong Chun Yin v Attorney-General*,<sup>51</sup> and the present case.

It is submitted that the status quo is unsatisfactory for two reasons. First, the strength of the presumption of constitutionality ostensibly applies with the same strength regardless of the nature of the power in question. Second, it is submitted that there is a lack of parity between this test for executive actions and the reasonable classification test applied to differentiating legislation.

#### B. *Whether the Granting of Certificates of Substantive Assistance Under the MDA Constitutes an Exercise of Prosecutorial Discretion*

The first step in the inquiry should be to determine the nature of the power sought to be reviewed. This should then guide the relevant standard to be applied.

##### 1. *Distinguishing the Exercise of Prosecutorial Discretion from Regular Executive Acts*

Prosecutorial discretion is a constitutional power vested in the Attorney-General pursuant to art 35(8) of the *Constitution*. In *Law Society of Singapore v Tan Guat Neo Phyllis*,<sup>52</sup> the Court of Three Judges, referring to judicial power in art 93 of the *Constitution* and prosecutorial power in art 35(8), held that:

... These two provisions expressly separate the prosecutorial function from the judicial function, and *give equal status to both functions*. Hence, both organs

<sup>44</sup> *Ang Soon Huat*, *supra* note 32 at para 23, applied in, *inter alia*, *Eng Foong Ho*, *supra* note 33 at para 30 and *Ramalingam*, *supra* note 43 at para 40.

<sup>45</sup> [1990] 1 SLR (R) 78 at para 13 (PC).

<sup>46</sup> 247 US 350 at 352 (1918) [*Sunday Lake Iron Co*].

<sup>47</sup> US Const, amend XIV.

<sup>48</sup> *Sunday Lake Iron Co*, *supra* note 46.

<sup>49</sup> *Ang Soon Huat*, *supra* note 32. This case concerned the Public Prosecutor’s methods applied in measuring and computing the weight of drugs for the purposes of prosecution.

<sup>50</sup> *Eng Foong Ho*, *supra* note 33. This case concerned the acquisition by the Collector of Land Revenue of land on which a temple was located and not the land of a nearby mission and church.

<sup>51</sup> [2014] 3 SLR (R) 1141 (HC) [*Cheong Chun Yin*]. This case, like the present case, concerned the Public Prosecutor’s discretion to grant a certificate of substantive assistance under s 33B of the *MDA*.

<sup>52</sup> [2008] 2 SLR (R) 239 (HC).

have an equal status under the Constitution, and *neither may interfere with each other's functions or intrude into the powers of the other*, subject only to the constitutional power of the court to prevent the prosecutorial power from being exercised unconstitutionally...<sup>53</sup>

The Court of Appeal in *Ramalingam*<sup>54</sup> reiterated the co-equal status of judicial and prosecutorial powers under the *Constitution*, and the general principle of non-interference.<sup>55</sup>

Therefore, while the exercise of prosecutorial discretion is itself an executive act,<sup>56</sup> it is distinguishable from regular executive acts that do not have a constitutional status or are co-equal with judicial power.

## 2. The Strength of the Presumption

In light of this, it is submitted that the strength of the presumption of constitutionality in relation to the exercise of prosecutorial power ought to differ from that of regular executive acts. A higher threshold should be in place where a power of constitutional status, and co-equal with judicial power, is concerned.

Indeed, the Court of Appeal in *Ramalingam* recognised this:

We might add that as a matter of legal policy, it is not only officials with a constitutional standing who enjoy a presumption of legality for their acts (*although the presumption will certainly be stronger in relation to the acts of an official who holds a constitutional office*).<sup>57</sup>

In addition, the Court of Appeal in *Lim Meng Suang v Attorney-General*<sup>58</sup> noted that the strength of the presumption is not monolithic, but may vary according to the circumstances of each case. The presumption does not, for instance, apply as strongly to laws pre-dating the commencement of the independent *Constitution* on 9 August 1965 because many of such laws were formulated in the absence of a constitutional bill of rights.<sup>59</sup> On the other hand, the presumption is said to apply with full force to post-independence laws as these were “promulgated in the context of, *inter alia*, an elected legislature which, it can be assumed, would have fully considered all views before enacting the (post-Independence) laws concerned”.<sup>60</sup>

It is submitted that effect can be given to the varying strengths of the presumption of constitutionality in its application.

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<sup>53</sup> *Ibid* at para 144 [emphasis added].

<sup>54</sup> *Ramalingam*, *supra* note 43 at para 44.

<sup>55</sup> The court in *Ramalingam*, *ibid*, emphasised that the separation of powers doctrine “requires the courts not to interfere with the exercise of prosecutorial discretion unless it has been exercised unlawfully.”

<sup>56</sup> *Supra* note 54.

<sup>57</sup> *Ramalingam*, *supra* note 43 at para 47 [emphasis added].

<sup>58</sup> [2015] 1 SLR 26 at paras 107, 108 (CA) [*Lim Meng Suang*].

<sup>59</sup> *Ibid* at paras 105, 107.

<sup>60</sup> *Ibid* at para 107.

3. *The Public Prosecutor's Discretion to Grant Certificates of Substantive Assistance—An Exercise of Prosecutorial Discretion or Regular Executive Act?*

The next question is whether the Public Prosecutor's discretion to grant certificates of substantive assistance under s 33B of the *MDA* constitutes an exercise of prosecutorial power, or whether it is merely a regular executive act performed by the Public Prosecutor.

The Court of Appeal in *Ridzuan* did not appear to make a conclusive determination on this. Nevertheless, it is submitted that the latter position is the better one for two reasons:

1. First, the nature and scope of prosecutorial power differs greatly from the discretion conferred under s 33B of the *MDA*. When exercising prosecutorial discretion, the Public Prosecutor is obliged to consider, in addition to the legal guilt of the offender, his moral blameworthiness, the gravity of the harm caused to public welfare by his criminal activity and a myriad of other factors, including whether there is sufficient evidence against the particular offender.<sup>61</sup> This is in contrast to the narrow discretion under s 33B of the *MDA*, which requires the Public Prosecutor to consider the specific question of whether the information provided by the offender actually enhanced the operational effectiveness of the Central Narcotics Bureau.<sup>62</sup> In fact, the Court of Appeal in *Ridzuan* noted that the Public Prosecutor would be acting *ultra vires* if it took other factors, such as the offender's willingness to disclose information, into account.<sup>63</sup>
2. Second, from a separation of powers point of view, the *raison d'être* for the wide latitude afforded to the Public Prosecutor in exercising prosecutorial discretion is that the process is ultimately subject to judicial control. When an accused is prosecuted and brought before a court, he would still have to be convicted and sentenced by the judge before any punishment can be meted out. This is in contrast to certificates of substantive assistance, which are granted after the offender is convicted, and the scope for subsequent judicial control is minimal.<sup>64</sup>

For these reasons, it is submitted that the better view is that the granting of certificates of substantive assistance is no more than a regular executive act performed by the Public Prosecutor. This power does not have constitutional status, and therefore should not be conflated with the exercise of prosecutorial power under art 35(8) of the *Constitution*.

As an aside, it may be contended that because the Public Prosecutor holds a "high constitutional office",<sup>65</sup> the presumption of constitutionality should apply with the same strength to all acts performed by the Public Prosecutor regardless of the nature of the act.

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<sup>61</sup> *Ramalingam*, *supra* note 43 at para 63.

<sup>62</sup> *Ridzuan*, *supra* note 1 at para 45.

<sup>63</sup> *Ibid* at para 48.

<sup>64</sup> This was noted by the Court of Appeal in *Ridzuan*, *ibid* at para 66.

<sup>65</sup> *Cheong Chun Yin*, *supra* note 51 at para 37.



This argument, however, goes against the grain of established principles of judicial review. It is trite that even constitutional office holders such as the Public Service Commission perform private functions that are not susceptible to judicial review.<sup>66</sup> The focus should undoubtedly be on the power and the act in question, rather than the actor.

### C. Achieving Parity Between the Approaches Towards Executive Acts and Legislative Classification

Another difficulty with the current approach is the apparent lack of parity between the art 12 tests for executive acts and legislative classification. As stated above, the art 12 test for executive acts requires “intentional and arbitrary discrimination”, with arbitrariness implying the lack of “any rationality”.<sup>67</sup>

In contrast, the reasonable classification test for legislation requires that the classification be based on an intelligible differentia which bears a rational nexus to the object of the law.<sup>68</sup>

The Court of Appeal in *Lim Meng Suang* noted that the absence of a rational nexus for the purposes of the reasonable classification test can take “many forms”.<sup>69</sup>

On the other hand, it is comparatively more difficult to prove the “lack of any rationality”<sup>70</sup> in order to successfully impugn an executive act under art 12. Thus, it is submitted that the need to prove the complete absence of rationality in relation to discriminatory executive acts is ostensibly more difficult than proving the unreasonableness of a legislative classification.

To achieve greater parity, it is submitted that the reasonable classification test should apply in relation to regular executive acts that differentiate between individuals or classes of persons. The first question would be whether there is an intelligible differentia between the individuals or classes of persons who were treated differently by the public authority. Second, whether there is a rational nexus between the differentiation and underlying policy objective behind the executive act in question.

Indeed, in *Mohamed Emran bin Mohamed Ali v Public Prosecutor*,<sup>71</sup> the High Court observed that:

The Court of Appeal in *Taw Cheng Kong* also stated that the prohibition of unequal protection is not absolute and that a differentiating law or *executive act* which

<sup>66</sup> In *Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR (R) 133, Ms Lai, a former senior officer at the Land Office, Ministry of Law, applied for leave to commence judicial review proceedings against, *inter alia*, the Public Service Commission, in relation to the termination of her employment. In declining to grant leave, the Court of Appeal held that the relationship between the Government and Ms Lai “was one of employer and employee”, and that Ms Lai’s employment was “not underpinned by any statute or any subsidiary legislation under a statute” (at para 40). Furthermore, the court noted that “when statutory bodies make certain decisions, it does not invariably follow that the statutory bodies are exercising a statutory power” (at para 44). As such, the decision was not susceptible to judicial review. See also *Tey Tsun Hang v National University of Singapore* [2015] 2 SLR 178 at paras 40-45 (HC).

<sup>67</sup> *Eng Foong Ho*, *supra* note 33 at para 30, citing *Ang Soon Huat* at para 23.

<sup>68</sup> *Lim Meng Suang*, *supra* note 58 at para 60.

<sup>69</sup> *Ibid* at para 68.

<sup>70</sup> Emphasis added.

<sup>71</sup> [2008] 4 SLR (R) 411 (HC).

satisfies the classification test would not be considered to be in contravention of Art 12.<sup>72</sup>

As explained above, the reasonable classification test is less stringent than the test for “intentional and arbitrary discrimination” as applied in *Eng Foong Ho*.

#### D. Scheme of Proposed Relevant Standards

To achieve the twin objectives of adequately accounting for the differences in executive acts and ensuring greater parity in the application of the presumption of constitutionality in relation to art 12 of the *Constitution*, first, in applying the presumption of constitutionality, executive acts with constitutional status should be distinguished from regular executive acts. Second, the reasonable classification test should apply to regular executive acts, as it currently does for legislation.

With these proposed changes, the relevant standards for establishing a *prima facie* breach of the right to equality under art 12 of the *Constitution* are as follows:

- Executive acts with constitutional status: intentional and arbitrary discrimination test.
  - Whether there is deliberate and arbitrary discrimination against a particular person, with arbitrariness implying a lack of any rationality.
- Regular executive acts without constitutional status: reasonable classification test.
  - First, whether there is an intelligible differentia between the individuals or classes of persons who were treated differently by the public authority; and
  - Second, whether there is a rational nexus between the differentiation and underlying policy objective behind the executive act in question.
- Legislation: reasonable classification test.
  - First, whether there is an intelligible differentia between the classes of persons who are differentiated under the law; and
  - Second, whether that differentia bears a rational relation to the object sought to be achieved by the statute.<sup>73</sup>

#### E. Improving the Institutional Safeguards in the Granting of Certificates of Substantive Assistance

In *Ridzuan*, the Court of Appeal acknowledged, and rightly so, that “the Judge is not the appropriate person to determine the question of whether a convicted drug trafficker has rendered substantive assistance.”<sup>74</sup> To regard the issue as if it were a matter for the Public Prosecutor to justify and prove at trial would undermine the operational capability of the Central Narcotics Bureau and jeopardise our entire battle against drug trafficking.

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<sup>72</sup> *Ibid* at para 26 [emphasis in original].

<sup>73</sup> *Lim Meng Suang*, *supra* note 58 at para 60. See also *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at para 124 (CA).

<sup>74</sup> *Ridzuan*, *supra* note 1 at para 66.

However, as established above, unlike the exercise of prosecutorial discretion, the discretion to grant certificates of substantive assistance is not subject to subsequent judicial control through conviction and sentencing. There is also limited scope for judicial oversight through judicial review, as demonstrated above.

Hence, it is submitted that institutional safeguards in the form of a review mechanism in the following manner can be considered:

1. First, in determining whether a convicted drug trafficker should receive a certificate of substantive assistance, the Public Prosecutor and Minister for Home Affairs will review the facts and available evidence independently and make independent assessments;
2. If the Public Prosecutor and the Minister arrive at the same conclusion (*ie* they both decide that the certificate of substantive assistance should be granted, or they both decide that the certificate of substantive assistance should not be granted), the decision is final. The President's power to make a decision does not arise;
3. However, if the Minister and the Public Prosecutor arrive at different conclusions, the President shall, upon reviewing the facts and available evidence *de novo*, make a determination on whether the convicted drug trafficker had rendered substantive assistance to the Central Narcotics Bureau in disrupting drug trafficking activities. The President shall exercise his own discretion in so deciding, and his determination will be final.

This is modelled after the existing mechanisms in respect of the issuance of preventive detention orders under the *Internal Security Act*<sup>75</sup> and restraining orders under the *Maintenance of Religious Harmony Act*.<sup>76</sup> The President uses his own discretion in exercising these powers, and does not act on the advice of the Cabinet.

This achieves the objectives of, first, ensuring adequate institutional safeguards in the granting of certificates of substantive assistance. This may have life-or-death implications on the convicted. At the same time, this is done without compromising the operational capability of the Central Narcotics Bureau through the disclosure of sensitive information in open court.

In addition, the President's role at this stage would be to determine the specific question of whether the drug trafficker had indeed assisted the Central Narcotics Bureau substantively. This is distinct from the question of whether the convicted should be granted clemency subsequently, which power the President may exercise under art 22P(1) of the *Constitution* while acting in accordance with the advice of Cabinet.

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<sup>75</sup> Cap 143, 1985 Rev Ed Sing. Under art 151(4) of the *Constitution*, where the Advisory Board recommends the release of a detainee and the relevant minister rejects this, the detainee shall go free if the President concurs with the Advisory Board recommendations.

<sup>76</sup> Cap 167A, 2001 Rev Ed Sing. Under art 22I of the *Constitution*, where the recommendations of the Presidential Council for Religious Harmony are at variance with the Cabinet's decision to issue a restraining order under the *Maintenance of Religious Harmony Act*, the President has the discretion to confirm, vary or cancel the restraining order.

#### IV. CONCLUSION

In *Ridzuan*, the Court of Appeal considered the question of the right to equality under art 12 of the *Constitution vis-à-vis* the granting of certificates of substantive assistance under s 33B of the *MDA*.

It is submitted that the first step in the inquiry should be to determine the nature of the power sought to be reviewed. This should then guide the relevant standard to be applied. In this respect, the granting of certificates of substantive assistance by the Public Prosecutor under s 33B of the *MDA* should not be regarded as an exercise of prosecutorial power.

Also, the presumption of constitutionality should vary in strength depending on the nature of the power exercised, and there should be greater parity between the tests applied in the contexts of executive acts and legislation.

Finally, the institutional safeguards in the granting of certificates of substantive assistance can be made more robust by introducing a legislative mechanism with the Public Prosecutor and the Minister making independent assessments, and the President being the final arbiter should they reach different conclusions.