DEFAMATION IN SINGAPORE
REPORT
TO
TO LAWYERS' RIGHT WATCH CANADA

IN THE MATTER OF JOSHUA BENJAMIN JEYARETNAM
AND
TWO APPEALS IN THE COURT OF APPEAL
OF THE REPUBLIC OF SINGAPORE [1]

1. Introduction

Joshua Benjamin Jeyaretnam's 20 year career as Member of Parliament in Singapore and his 42 year career as a lawyer ended on July 23, 2001, when the Singapore Court of Appeal unanimously dismissed his bankruptcy appeal. The following day, Tan Soo Khoon, Speaker of Parliament, announced, "I have to inform honourable members the seat of Mr. J.B. Jeyaretnam, as a non-constituency Member of Parliament, has become vacant." This observer attended two appeals as discussed below which represent the final chapter in the legal and parliamentary career of Mr. J.B. Jeyaretnam.
The two appeals involving J.B. Jeyaretnam were heard by the Singapore Court of Appeal on July 23rd and July 25th, 2001:

1. The *Lee Kuan Yew* case civil appeal number 600023 of 2001 between Joshua Benjamin Jeyaretnam, the appellant, and Lee Kuan Yew, the respondent and former prime minister, presently senior minister of the Government of Singapore, heard July 25, 2001, judgement reserved and given on August 22, 2001.
2. The *Krishnan* case (the bankruptcy appeal) civil appeal number 600011 of 2001 between Joshua Benjamin Jeyaretnam, the appellant, and Indra Krishnan, heard July 23, 2001 and dismissed, and reasons for judgement given August 7, 2001.

These two appeals were the culmination of 26 years of defamation litigation against Mr. Jeyaretnam begun in 1976 by Lee Kuan Yew, Senior Minister and former Prime Minister of Singapore, and ending with the proceeding before the Court of Appeal on July 25 2001, in which Lee Kuan Yew was also the plaintiff. To date, Mr. Jeyaretnam has paid in excess of 1 million Singapore dollars to satisfy defamation awards against him and the defamation judgement debts outstanding exceeds a further $1/2 million. There is a concern that defamation proceedings against Mr. Jeyaretnam and other government critics have impaired the right of Singaporeans to fully engage in professions that carry with them the duty or responsibility to, when necessary, be critical of government. This affects lawyers, parliamentarians, journalists, human rights defenders and all who depend on their services. There is also concern with effective violation of international standards governing freedom of expression and the right and duty of parliamentarians, lawyers, journalists and others to report on and advocate against human rights violations by the state. These standards are embodied in numerous instruments, including the

1 Prepared by Howard Rubin and Gail Davidson of Lawyers Rights Watch Canada. Mr. Rubin and Ms Davidson are members of the Law Society of British Columbia, Canada.

Universal Declaration of Human Rights, the Declaration on Human Rights Defenders, the Harare Commonwealth Declaration and Basic Principles on the Role of Lawyers.

While the appeals are merely the culmination of a long process, the appeal process adds to the concerns. The Court of Appeal failed to adequately consider the issue of abuse of process in the *Krishnan* appeal. The dominant purpose of the *Krishnan* case appeared to be to prevent Mr. Jeyaretnam from further criticising the government of Singapore and to remove him from public office by disqualifying him from continuing to sit as a Member of Parliament and by barring him from membership in the Law Society of Singapore. This collateral purpose arguably should have lead to a dismissal of the petition in bankruptcy. The Court of Appeal was asked to consider this error, but nowhere in the reasons for judgement do they address this issue of collateral purpose and abuse of process.

The *Krishnan* appeal ended the parliamentary career of Mr. Jeyaretnam, because he was now a bankrupt. It also ended his legal career. The finding of the Court of Appeal was that Mr. Jeyaretnam had to be judged bankrupt as he did not have the resources or assets to pay the judgement. Two days later the Court of Appeal heard Mr. Jeyaretnam's appeal involving a defamation suit brought by Lee Kuan Yew. This defamation lawsuit went back to the 1997 election and the details are set out more fully in this report. Prime Minister Goh Chok Tong, senior minister, Lee Kuan Yew (formerly Prime Minister of Singapore) and other government members had filed lawsuits against Jeyaretnam alleging that he had defamed them at an election rally. The words complained of were the same in each lawsuit and they were all intended to have been heard in 1998. For the reason set out later in this report, the lawsuit of Prime Minister Goh Chok Tong proceeded, but the lawsuit of Lee Kuan Yew did not proceed. It is the duty of the plaintiff Lee Kuan Yew to take his case to trial. It was intended that it would have gone to trial in 1997, however it did not. The issue in this appeal was whether on application of Jeyaretnam, the appeal should have been dismissed for want of prosecution. The reasoning of the Court of Appeal in dismissing Jeyaretnam's appeal in respect of Lee Kuan Yew is further discussed in this report.

These two Jeyaretnam appeals have highlighted a number of legal and human rights concerns in Singapore, namely:

- The apparent influence of PAP members on the excessive damage awards against government critics;
- The questions that the size of damage and cost awards against government critics raise about the independence of the Singapore judiciary;
- The palpably repressive effect of the awards on all aspects of freedom of expression in relation to criticism of government; and
- The absence of a right-to-jury trial in Singapore.

2. The Political Context of the Defamation Case

It is impossible to consider the fairness of the results; the nature of the hearing accorded to Mr.

Jeyaretnam; and the implications of these proceedings, without considering the long history of the multiple defamation actions brought against Mr. Jeyaretnam in the context of being a candidate for public office. All of the different lawsuits leading up to these last two lawsuits against Mr. Jeyaretnam, and inclusive of them, involve public discussions by Mr. Jeyaretnam as a candidate for Parliament. The defamation damage awards against Mr. Jeyaretnam have been excessive and punitive. They resulted ultimately in the bankruptcy proceedings in the *Krishnan* case, and lead to his disqualification, on the hearing of that appeal, from sitting in parliament and from practising as a lawyer, on the grounds of his having been declared a bankrupt. It is the view of this observer that there has to be some leeway granted in law to political candidates in elections. The trend in most common law jurisdictions is to allow a defence of qualified privilege so as to permit political candidates to raise issues of concern to the public. To raise such issues is a basic responsibility of candidates for public office and there seems to be no other way that opposition candidates can call to task members of the government.

In each and every common law country except for Singapore there is a defence of qualified privilege. The trend in common law jurisdictions of allowing some room for opposition candidates to call into question concerns in an election have received the strongest support in the United States. In other words, in a political debate context, an opposition member is entitled to say that he has some information that is of concern and there needs to be some response from the members of government. Under Singapore law there appears to be no such defence. The court will presume that the speaker intended to assert the truth of the matter being raised. This creates a chill and leads to, as set out below, a concern with respect to freedom of expression.

3. International Freedom of Expression Rights and Standards

Freedom of expression is a universal human right and is one of the primary freedoms, an essential precondition to the exercise of other freedoms. It is the foundation upon which other rights and freedoms arise.[2] Freedom of expression is an essential component of a democratic society.[3]

The right to freedom of expression is found in numerous international documents, including: Article 19 of the Universal Declaration of Human Rights (UDHR); Article 19, paragraph 2 of the International Covenant on Civil and Political Rights (ICCPR);[4] and Article 10, paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

2 [A Draft] Statement on Freedom of Expression Annexed to The Latimer House Guidelines for the Commonwealth adopted 19 June 1998 by A Joint Colloquium on "Parliamentary Supremacy and Judicial Independence…towards a Commonwealth Model" held at Latimer House in the United Kingdom 15-19 June 1998. Over 60 participants attended representing 20 Commonwealth countries and 3 overseas territories.

3 Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression (London, under the auspices of Article 19, 26 November 1999).

4 "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

(The European Convention on Human Rights).[5] Article 19 of the UDHR reads as follows:

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

The African Charter contains two relevant provisions on freedom of expression and freedom to participate in government.[6] The American Convention article 13.1 guarantees that, "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through other medium of one's choice."

Freedom to engage in political debate and criticism of government is an aspect of freedom of expression without which there is no democracy. In modern democracies it is not only a citizen's privilege to criticize his/her government it is a citizen's duty.[7] Criticizing the official conduct of those who wield governmental power is an integral part of a free and democratic society. (Political expression)

> "History as repeatedly demonstrated that the first step taken by totalitarian regimes is to muzzle the media of views and opinions that may be contrary to those of the government. The vital importance of freedom of expression cannot be overemphasized."[8]

For this reasons, courts have consistently held that restrictions on freedom of expressions must not hamper the right to participate non-violently in political discourse and to advocate for unpopular causes. The European Court of Human Rights in the *Handyside* case affirmed the principle of proportionality:

> The Court's supervisory function obliges it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man…This means amongst other things, that every

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5 "Everyone shall have the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

6 African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CSB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) entered into force Oct. 21, 1986. Article 9.2 "Every individual shall have the right to express and disseminate his opinions within the law. Article 13.1 "Every citizen shall have the right to participate in the government of his country, either directly or through freely chosen representatives in accordance with the provision of the law."

7 Callum Kelly *Let the Chilling Winds Blow: The Canadian Position on Defamation and Criminal Libel in Relation to Public Figures*, at p. 5.

8 Cory J.A. of the Ontario Court of Appeal *R. v. Koptyo* (1988) 47 D.L.R. (4^{th}) 213 at 227 as quoted in Callum Kelly, *Let the Chilling Winds Blow: The Canadian Position on Defamation and Criminal Libel in Relation to Public Figures* at p.1.

> 'formality', condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued. 9

In balancing the right to freedom of expression with the right to protect reputation, freedom of expression (in the absence of proven malice) must always prevail where the right to criticise and question government is being exercised. Where the impugned expression is broadly within the context of matters of public interest, including the reputation of a person holding or seeking public office, freedom of expression is protected.

With respect to the broad interpretation of freedom of expression to criticise government or those holding public office, The European Court of Human Rights in *Castels v. Spain* made the following comments:

> "…the limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system, the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities, but also of the press and public opinion."10

Further, it is a common principle of international law that restrictions or limitations to "a human right [freedom of expression] based upon the reputation of others shall not be used to protect the state and its officials from public opinion or criticism."

9 *Handyside v. United Kingdom* (1979-80) 1I.H.R.R. 737 (Eur. Ct. H.R.) December 7, 1976, SeriesA No. 24, At para 49.
10 *Castells v. Spain,* April 23, 1992, Series A, No. 236 (Eur. Ct. H.R.).

The UDHR also contains a provision regarding protection of reputation.[11] It is, however, a common principle of international law that restrictions or limitations to "a human right based upon the reputation of others shall not be used to protect the state and its officials from public opinion or criticism."[12]

This principle is implicit in most declarations and covenants enshrining freedom of speech. Article 8.2 of the Declaration on Human Rights Defenders imposes upon states the duty to provide legal guarantees for,

> "the right, individually and in association with others, to submit to governmental bodies and agencies and organisations concerned with public affairs, criticism and proposals for improving their functioning and to draw attention to any aspect of their work which may hinder or impede the promotion, protection and realisation of human rights and fundamental freedoms."[13](Underlining added)

4. Qualified Privilege

In most common law democracies qualified privilege protects criticism of government political debate from libel actions. The degree of protection provided to political expression varies.

In the United States following the decisions of the U.S. Supreme Court in *New York Time v. Sullivan*[14] and *Garrison v. Louisiana*[15], a political plaintiff can only establish liability for such statements if the plaintiff can prove that the words complained of were untrue and the defendant either knew the words were false or was reckless as to their falsity.[16]
Therefore in the United States, a government official or public figure cannot succeed in a defamation suit based on a statement regarding an issue of public interest even though that statement damages the plaintiff's reputation unless malice can be proven. Even if the defendant's assertion is proven to be untrue and defamatory the plaintiff, to succeed, has to prove that the defendant knew the impugned statement was untrue or showed reckless

11 Article 12. "No one shall be subjected to…attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."
12 The Siracusa Principles on the Limitations and Derogation Provisions in the International Covenant on Civil and Political rights Principle 37. (1984)" (1985), 7 H.R.Q. 3. The Siracusa Principles were adopted in May 1984 by a group of international human rights experts convened by the International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human Rights, and the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy to consider the limitation and restriction provisions of the ICCPR.
13 Declaration on the right and responsibility of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms. (Declaration on Human Rights Defenders) adopted unanimously by the UN General Assembly December 1998.
14 376 U. S.254, 11L ed. 2nd 686 (1964) [all subsequent cites to L ed}
15 379 US 64, 13L. ed 2d 125 (1964)
16 *Supra* note 7 at page 7.

disregard.[17]

In New Zealand and Australia courts have recognised a more limited defence of qualified privilege in defamation arising from political discussions. England has recognised a more general qualified privilege for discussions of matters of public concern. [18]

Australian courts have extended the defence of qualified privilege to "disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia" provided that the publication is 'reasonable'.
The New Zealand Court in *Lange v. Atkinson*[19] found that the public has an interest in information about the government and concluded that a defence of qualified privilege is available for words published to the public. Justice Elias of the New Zealand Supreme Court has explained that it is an essential to the democratic political process that issues can be put forward for political debate without the risk of defamation suits. Elias J. held:

> "Comment on the official conduct and suitability for office of those exercising the powers of government is essential to the proper operation of a representative democracy. Political discussion in a democracy will inevitably on occasion entail the making of statements that are likely to injure the reputation of others. Qualified privilege in my view attaches to statements made to the general public about matters of government. It is necessary for the public to be informed about these matters for a representative government to function."[20]

The New Zealand Law Commission issued a preliminary paper criticising the decision and recommending that the defence of qualified privilege for discussion of political matters published to the general public should be available to a defendant only if the publication of the defamatory material was reasonable, i.e. if the defendant had reasonable grounds for believing the defamatory words were true and gave the plaintiff a chance to respond.[21]

The Latimer House Guidelines for the Commonwealth while affirming that freedom is expression is the foundation upon which other freedoms depend, specifically rejects the American approach and recommends that defamation law "continue to strike an appropriate balance between the protection of reputation and freedom of expression."[22] The Guidelines explicitly provide for restrictions that are required to "respect other social interest which are

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17. New York Times Co. v. Sullivan 376 U.S.254 (1954)
18. Raymond E. Brown, The Law of Defamation in Canada, 2 Ed. Vol. 2, p. 13-183 to 13-191 (Carswell)

19 Lange v. Atkinson [1998] 3 NZLR 424 (C.A.)
20 Lange v. Atkinson [1997] 2 N.Z.L.R. 22 at 46.
21 *Supra* note 7 at p. 15.
22 Article 7.a Private Rights/Civil Defamation from [A Draft] Statement on Freedom of Expression Annexed to The Latimer House Guidelines for the Commonwealth adopted 19 June 1998 by A Joint Colloquium on "Parliamentary Supremacy and Judicial Independence…towards a Commonwealth Model" held at Latimer House in the United Kingdom 15-19 June 1998. Over 60 participants attended representing 20 Commonwealth countries and 3 overseas territories.

of pressing and substantial significance".

Clearly the pressing and substantial need is to protect the citizen's right to participate in political debate during elections and not the protection of reputation.
Singapore's Constitution provides for a freedom of expression subject to restrictions, including the restriction of defamation:

> Article 14
> (1) Subject to clauses (2) and (3)
> (a) every citizen of Singapore has the right to freedom of speech and expression;
> (2) Parliament may by law impose
> (a) on the rights conferred by clause (1)(a), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence:

The *Defamation Act of Singapore*, Section 14 is clearly designed to severely restrict the freedom of to discuss 'questions in issue' in an election (by or on behalf of a candidate) by precluding qualified privilege as a defence. Singapore's *Defamation Act* is designed to preclude candidates from using this defense.

> **14.** A defamatory statement published by or on behalf of a candidate in any election of the President or other elected or partially elected body shall not be deemed to be published on a privileged occasion on the grounds that it is material to a question in issue in the election, whether or not the person by whom it is published qualified to vote at the election.

Given the definition of defamatory words as ones that "tend to lower the plaintiff in the estimation of right thinking members of society generally"[23] this section seeks to remove the protection of qualified privilege from the political discussion and debate upon which an election depends. Candidates or those campaigning for them engage in political expression at the risk of defamation suits against them.

There is no question that this restriction goes beyond a restriction that is appropriate in a democratic society. Section 14 of the Defamation Act is also inconsistent with the Declaration of Commonwealth Principles, 1971 (The Singapore Declaration) which affirms citizens' "inalienable right to participate by means of free and democratic political processes in framing the society in which they live."[24]

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23 *Duncan and Neill on Defamation*, 2nd ed. (London: Butterworths, 1983), at 21.
24 Issued by consensus at the Heads of Government Meeting at Singapore.

Singapore is in breach of its obligations as a member of the Commonwealth to guarantee a degree of freedom of expression appropriate to democracy.

All of the defamation judgements against Mr. Jeyaretnam, from the first suit launched in l976 by Lee Kuan Yew, appear to have been based on statements that would have been protected by qualified privilege in democratic common law jurisdictions.
Mr. Jeyaretnam is reported to have paid over $1,500,000.00 Singapore dollars in damages and costs awarded in these defamation cases.

5. Absence of Jury Trials

The absence of a jury system for defamation cases raises a concern. A jury system ensures the independence of the judicial system by standing between the executive and the courts in cases of political rhetoric. It is of concern to this observer that Mr. Jeyaretnam was precluded from having a civil jury trial in his defamation law suits, because in a politically charged defamation lawsuit there has to be a wall of separation between the executive and the courts. Juries have historically fulfilled that function.

In Canada a defendant in defamation case has an absolute right to a civil jury. In most other civil actions where the litigants are entitled to a jury, either party can apply to strike a jury notice on the basis that the case is too complicated to be heard by a jury, but the plaintiff cannot prevent a jury trial in defamation law suits.[25]

Juries have never been available for civil trials in Singapore. The original provision for jury trials in criminal cases in Singapore was restricted in 1960 to capital offences, and then, in 1970, over the objections of bar, the jury system was abolished altogether. Lee Kuan Yew was instrumental in the eventual abolition of juries. The bill to abolish juries was referred in 1969 to a select committee. Lee Kuan Yew sat on the committee and delivered the keynote speech in the political debate over the abolishment of jury trials.[26]

The University of Singapore Law Society and the Council of Singapore Advocates and Solicitors' Society both presented written submissions to the government that vigorously opposed the abolishment of the jury system based in part on submissions that abolition would lead to a lack of independence in the judiciary or minimally the appearance of lack of impartiality.
The University of Singapore Law Society submitted:

> "...the abolition of jury trials affects all capital offences; not only murder and

25 Under the British Columbia Rules of Court, Rule 39(27) a party who has been served with a jury notice can apply to set aside the jury notice in all causes of action except for defamation, false imprisonment and malicious prosecution.

26 Chan Wing Cheon and Andrew Phang, *The Development of Criminal Law and Criminal Justice in Singapore*, Singapore Journal of Legal Studies.

> kidnapping, but treason as well. As treason is inevitably a political act, it is not inconceivable that some government in the future would assert pressure on High Court judges to come to a `correct' decision. If, however, that fact finding function remains as it is with the jury, it is much less likely that such pressure can be applied to seven persons whose means of livelihood may not be so dependent on the pleasure of the government."[27]

Election speeches are equally political and Mr. Jeyaretnam should have been entitled to a jury. The Council of Singapore Advocates and Solicitors' Society raised the same concern:

> "The historical reason for the jury in criminal trials and its major attraction in democratic countries is that it interposes a group of anonymous persons between the government and the citizens in the administration of criminal justice. Because of its very anonymity, the jury sieves out personal whims and animosities of the government and provides the best system of impartial justice known. That is why no jury system survives in a totalitarian state."[28] (Underlining added)

In response to the Council of the Singapore Advocates and Solicitors' Society, Lee Kuan Yew is reported to have replied that the judicial system in any country is essentially a part of the administration of the country. Ominously, the failure of the Prime Minister to see the need for a separation between the courts and the administration of the country eroded confidence in his judicial appointments.
It is of concern that Mr. Jeyaretnam could not have a jury trial in what have been essentially political trials involving freedom of political expression.

6. Independence of the Judiciary

The sheer size of the awards and the repeated instances where the courts have rejected compelling defence arguments raise concerns about the extent to which the courts hearing these cases are independent from the executive.

Lee Kuan Yew has said that in appointing judges, he has sought to appoint the builders of Singapore. That may have been the motivation behind the appointment of the Chief Justice, Yong Pung How who, prior to being appointed to the bench, had not practised law for 20 years and whose qualifications to be Chief Justice appear largely to flow from his administering some of the largest Singapore companies, including Sing Tel and Singapore Airlines. Yong Pung How C.J. does not have a lifetime appointment. Being over the age of 65 he is subject to renewable appointments by the government. Lack of security of tenure is a concern in all common law countries with respect to the independence of the judiciary. A

[27] Report of the select committee on the criminal procedure code (Amendment Bill, A7.)

[28] *Ibid* at A 30.

Chief Justice in Singapore is paid 100,000 Singapore dollars a month, and bonuses and the other benefits that go with being the Chief Justice. The lack of security of tenure, financial security for the future and institutional independence create the potential for an appearance of lacking independence and being subject to improper influence.

Members of the bar interviewed by this observer have expressed a serious concern about the independence of judicial system in Singapore. When it comes to politically charged cases, the bar does not see the court as independent of the government. But, when it comes to ordinary commercial or other civil litigation, the bar views the court as eminently qualified, fair and impartial.

7. Background of Mr. Jeyaretnam

Mr. Jeyaretnam was a thorn in the side of the government. He was educated as a barrister in London and was admitted to practise law in 1951, shortly returning to Singapore and entering immediately into the public service. He served briefly as a prosecutor and then in the administrative courts at the lower level, rising by the mid-1960's to be a Senior District Judge. About that time, the government of Singapore had split from Malaysia, and sought to create a favourable entrepreneurial business climate by passing new labour legislation. As the Senior District Judge, Mr. Jeyaretnam came to learn that the police were taking prosecutions of labour leaders, under the new labour legislation, directly to particular judges. Mr. Jeyaretnam issued a memorandum requiring all such cases to be funnelled through his office, and then sat on a labour prosecution where he acquitted the accused on the basis that their picketing was merely an exercise in freedom of expression and had no criminal intent. Subsequently, Mr. Jeyaretnam resigned from the judicial system, having concerns at the direction the court system was heading and returned to private practice.

8. The Start of the Defamation Law Suits

In 1971, Mr. Jeyaretnam was elected as Secretary General of the Workers' Party. In 1981, he won a by-election becoming the first opposition member in over fifteen years to sit in parliament with PAP parliamentarians.

In 1976 Mr. Jeyaretnam made a political speech, in which he said,

> "I am not very good in the management of my own personal fortune, but Mr. Lee Kuan Yew has managed his personal fortune very well. He is the Prime Minister of Singapore. His wife is the senior partner of Lee and Lee, and his brother is the director of several companies, including Tat Lee Bank in Market Street; the bank which was given a permit with alacrity, banking permit license when other banks were having difficulties getting their license.... if I became Prime Minister there will be no firm of Jeyaretnam and Company in Singapore because I wouldn't know how to manage my own fortune."

The then Prime Minister successfully sued Mr. Jeyaretnam for defamation based on these

statements, submitting that these words were understood to mean that he had procured preferential treatment for his brother and wife and an advantage to them and, thus, abused the office of the prime minister, and was awarded 130,000 Singapore dollars in damages.

Statements like those made by Mr. Jeyaretnam seem a necessary part of the political debate which occurs frequently and openly in Canada, such as when politicians call on the Prime Minister of Canada for an explanation of his personal investments.

The issue raised is whether the public is entitled to know of these types of investments, and whether an opposition candidate is entitled to call on the Prime Minister for an explanation, no more or less than that.

In the United States this type of political rhetoric could not be the subject of a defamation action, absent proof of malice, because when a politician chooses to become a candidate, he submits for public evaluation his honesty, integrity and fitness for the office. In the other common law countries this question put by Mr. Jeyaretnam would be subject to a defence of qualified privilege.

Again in 1988, Prime Minister Lee Kuan Yew sued Mr. Jeyaretnam for defamation arising from a political speech and was awarded damages of $260,000.00 Singapore dollars. The defamation suit filed in l997 will now go forward, because the Court of Appeal dismissed Mr. Jeyaretnam's appeal.

9. The Criminal Charges

The government of Singapore attempted to rid itself of Mr. Jeyaretnam by having him charged with offences, which the Privy Counsel ultimately deemed to be an injustice. The Privy Council cleared Mr. Jeyaretnam's reputation, and restored him to the rolls in order to be able to practice law. The government refused to acknowledge the deep disquiet expressed by the privy counsel and subsequently changed the law so that there would no longer be appeals to the Privy Counsel.

Following his re-election in 1984, Mr. Jeyaretnam was charged with alleged financial impropriety related to the collection of party funds. In 1986, he was acquitted by a District Court of all charges save one. The prosecution appealed the acquittal and the then Chief Justice allowed the appeal, with the direction that a re-trial be heard by a District Court. At re-trial, Mr. Jeyaretnam was found guilty and sentenced to three months in jail, which was reduced by the High Court but with the addition of a S$5,000 fine. The imposition of a fine of over S$2,000 resulted in the automatic disqualification of Mr. Jeyaretnam as a Member of Parliament and the conviction also triggered a Law Society hearing that resulted in him being disbarred.

Mr. Jeyaretnam's earlier application for the re-trial to be heard before the High Court rather than a District Court, which would have allowed any subsequent appeal to be pursued up to

Singapore's then highest court, the Privy Council located in London, had been refused.

Although his appeal to the Privy Council was limited to the issue of his disbarment the Privy Council Lords examined the fairness of the criminal trial and concluded that Jeyaretnam and co-accused Wong were not guilty of the offences for which they had been convicted, imprisoned and punished. The Lordships concluded that Jeyaretnam and Wong were innocent.

> 'Their Lordships have to record their deep disquiet that by a series of misjudgements the appellant and his co-accused Wong have suffered a grievous injustice. They have been fined, imprisoned and publicly disgraced for offences of which they were not guilty. The appellant, in addition, has been deprived of his seat in Parliament and disqualified for a year from practising his profession. Their Lordships order restores him to the roll of advocates and solicitors of the Supreme Court of Singapore, but, because of the course taken by the criminal proceedings, their Lordships have no power to right the other wrongs which the appellant and Wong have suffered. Their only prospect of redress, their Lordships understand, will be by way of petition for pardon to the President of the Republic of Singapore."

The government refused to heed the Privy Council's advice to facilitate a pardon for Mr. Jeyaretnam on the grounds that the criminal convictions had not been the subject of the Privy Council appeal. Mr. Jeyaretnam was subsequently re-instated as a lawyer, but prevented from standing again for election until 1997, when he ran and was returned as a non-constituency member of parliament.

10. <u>The Current Appeals</u>

These appeals appear to be the culmination of a long effort to restrict Mr. Jeyaretnam as a political opponent. The concerns of this observer as to the matters overlooked by the Court of Appeal in these two appeals standing by themselves would be meaningless. It is important to view the decision of the Court of Appeal in the larger context of what appears to be a campaign by the government, using the courts, to rid itself of a parliamentarian and a lawyer who represented difficult political and other cases of concern to the government.

1) The Lee Kuan Yew Case

Shortly after the 1997 election Senior Minister Lee Kuan Yew, Prime Minister Goh Chok Tong and other senior PAP members filed suits against J.B. Jeyaretnam alleging that he had defamed them at an election rally by saying the words, "And finally, Mr. Tang Liang Hong has just placed before me two reports he has made to the police against, you know, Mr. Goh Chok Tong and his people".

Tang Liang Hong, a Workers' Party parliamentary candidate, had filed a police report alleging that the PAP leadership had defamed him during the campaign by publicly labelling

him an "anti-Christian, Chinese chauvinist". The PAP leaders listed in the police reports alleged that they had been defamed by Tang Liang Hong through the reports, sued and were awarded damages of S$8.08 million (US$5.6 million) reduced on appeal to S$4.53 million (US$ 2.3 million). Tang Liang Hong was subsequently declared bankrupt.

In his suit against Mr. Jeyaretnam, Prime Minister Goh Chok Tong was awarded S$20,000 increased on his appeal to S$100,000 plus full costs. Amnesty International representatives observed both trial and appeal and expressed concerns that the suits against Mr. Jeyaretnam were politically motivated. In 1998, Goh Chok Tong began bankruptcy proceedings against Mr. Jeyaretnam but later agreed to accept payment of the damages awarded to him in instalments. Bankruptcy proceedings resumed when Mr. Jeyaretnam failed to meet an instalment, but the Prime Minister discontinued them with S$31,000 remaining unpaid. In December 2000, Goh Chok Tong's co-plaintiffs, including Lee Kuan Yew and other PAP members, took steps to revive their 1997 suits, which had not yet come before the courts. It is the dismissal of Mr. Jeyaretnam's application to dismiss these libel actions for failure to proceed for a period of over three years that was the subject of one of the appeals before the Court of Appeal in July 2001.

2) The Krishnan Case

A 1995 article in the Workers' Party newspaper alleged that an event called the "Tamil Language Week"' was an ineffective means of advancing the Tamil language and that a number of those involved were political opportunists beholden to the government. The article resulted in two parallel libel suits against the author of the article, J.B. Jeyaretnam as editor and members of the Workers' Party's central committee. The article was in Tamil, Mr. Jeyaretnam's native tongue from childhood, but by 1995 he was no longer fluent in that language.

In the first suit, involving Minister of Foreign Affairs S. Jayakumar and four other PAP parliamentarians, the defendants agreed to apologise publicly and to pay S$200,000 in damages. In February 1998, after paying S$100,000 in three instalments, the defendants were unable to make further payments and the plaintiffs did not pursue the matter at that time.
The second suit was lodged by Indra Krishnan and nine other members of the 'Tamil Language Week' organising committee, one of whom is now a PAP Member of Parliament. Although the author admitted that he was wholly responsible for the article, the High Court awarded the ten plaintiffs S$265,000 damages and S$250,000 costs jointly against all the defendants. Two of the plaintiffs subsequently began bankruptcy proceedings against Mr. Jeyaretnam alone, but were paid off in instalments. Subsequently, the other eight plaintiffs also began bankruptcy proceedings against Mr. Jeyaretnam, and one day after Mr. Jeyaretnam failed to pay an agreed instalment in January 2001, he was declared bankrupt. On 16 July 2001, Mr. Jeyaretnam offered to pay off the remaining damages in three further instalments. Mr. Jeyaretnam's final appeal against this bankruptcy order was heard before the Court of Appeal July 23, 2001. Because Mr. Jeyaretnam was confirmed bankrupt, he was automatically removed from parliament.

A contributory factor in Mr. Jeyaretnam's failure to pay the agreed instalment to Indra Krishnan and her fellow plaintiffs by one day in January 2001 was the unexpected petition by Minister of Foreign Affairs S. Jayakumar and the four other PAP plaintiffs. After making no demands since receiving a third instalment towards their S$200,000 award in 1998, these plaintiffs applied successfully to the courts in December 2000 to seize a sum of S$66,600 awarded to J.B. Jeyaretnam that month against a lawyer who owed him costs. Mr. Jeyaretnam intended to use that money to meet his agreed January repayment. The Minister of Foreign Affairs and his fellow plaintiffs pursued the balance of payments of their damage award against Mr. Jeyaretnam alone and not against the other Workers' Party defendants.

11. The Court of Appeal Judgements

1) The Krishnan Case

The court dismissed Mr. Jeyaretnam's appeal from the bench and reasons for judgment were delivered August 7, 2001. These reasons are unsatisfactory, in that they do not address the most important argument advanced by Mr. Jeyaretnam, that of abuse of process.

Mr. Jeyaretnam, in his submission to the Court of Appeal, argued that to put him into bankruptcy would only ensure no further payments, and that the only purpose of the Krishnan bankruptcy proceedings was to remove him from public office by disqualifying him from continuing as a Member of Parliament. The point being made was that so long as Mr. Jeyaretnam was allowed to make payments on these defamation awards, he could continue to raise funds and make payments. He argued that the bankruptcy order would serve no useful purpose, because he did not have sufficient assets to pay off the judgements. It was not as if there were any assets that could be called in by a receiver, in order to pay off this judgement. English and Canadian courts have the discretion to dismiss a petition if it is brought for some collateral or improper purpose. Canadian courts will not permit bankruptcy legislation to be used for an improper collateral purpose. An improper collateral purpose is one that is contrary or collateral to the purpose for which the legislation was enacted by Parliament. Where a party is found to be using the bankruptcy legislation for an improper collateral purpose the bankruptcy petition will be dismissed as an abuse of process. Mr. Jeyaretnam had argued that the only purpose of the bankruptcy petition had to be the political objective of removing him from Parliament.

The issue of collateral purpose or abuse of process was considered in Canada by the Nova Scotia Court of Appeal in *Re Laser Works Computer Services Inc.*, (1998) 37 B.L.R. (2d) 226. The Registrar who first heard the matter made this finding of fact:

> "I can only conclude that the purpose of Datarite was to effect the bankruptcy of LaserWorks. It is a reasonable supposition that the purpose was to remove a competitor from the marketplace. I find that it was the intention of Datarite to put

> LaserWorks in bankruptcy. I further find that the motive was to lessen competition."[29]

The Nova Scotia Court of Appeal agreed with the result on the basis that the purpose of the competitor's actions was to eliminate the bankrupt as a business competitor.
In *Re Shepard* (1996), 40 C.B.R. (3d) 145 (Man. Q.B.) Registrar Harrison dismissed a petition making the following findings:

> "The dominant purpose of this litigation is not to accomplish the aims and purposes of the Bankruptcy and Insolvency Act, but rather to obtain a very important business advantage. It is not appropriate or indeed, correct in law, to have the courts facilitate such an objective."

To initiate bankruptcy proceedings for the purpose of removing a political opponent from public office is clearly more egregious.

The same principle of law would apply to Mr. Jeyaretnam, because if the real purpose of the bankruptcy application was to remove Mr. Jeyaretnam from Parliament, then the motivation of seeking the bankruptcy would not be the collection of debt. It would be a collateral purpose. The Court of Appeal didn't consider the importance of this collateral purpose.

In Canada, proceeding with a bankruptcy for the collateral purpose of having a person removed from a political office would be an abuse of process. The Court of Appeal ought to have considered that legal argument advanced by Mr. Jeyaretnam.

2) The Lee Kuan Yew Case

The Court of Appeal found that the delay in proceeding with the defamation suit of two years and four months was both unexplained and inordinate. The Court of Appeal then had to decide if the delay had caused prejudice that would prevent Mr. Jeyaretnam from having a fair trial. Aside from the many causes of prejudice that flow from lengthy delay, such as, memory problems, availability of witnesses and the prejudice of having the suit hang over his head, there was the additional problem of having brought lawyers from England for the first trial. Mr. Jeyaretnam had been represented in that first trial in 1998 by two of the most distinguished lawyers in the field, George Carman, Q.C. and Charles Gray. Mr. Jeyaretnam argued in the Court of Appeal that Mr. Carman had died and Mr. Gray had been appointed to the bench in England and, in the result, neither was available to assist him in defending the case brought by Lee Kuan Yew, which would now be heard some four years later.

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29 *Re Laserworks Computer Services Inc.* (1998) 37 B.L.R. (2d) 226 at 241.

The Court of Appeal dismissed this argument of prejudice on the basis that there was no evidence that Mr. Jeyaretnam could not simply get another lawyer brought from England to assist him. This aspect of the judgment ignored the fact that two days before the Lee Kuan Yew appeal was argued, the Court of Appeal has declared Mr. Jeyaretnam to be bankrupt. To suggest that he could now bring two lawyers from London ignored the fact that as a result of all that went on in the past four years, and of the bankruptcy petitions brought against him, he would no longer be able to fund bringing lawyers from England. Having been declared a bankrupt, Mr. Jeyaretnam would have no income from being a Member of Parliament and he would no longer be able to practice law as a bankrupt, so he would have no income from that.
The argument accepted in the Court of Appeal earlier that week in the bankruptcy appeal was that Mr. Jeyaretnam had no assets with which to satisfy these judgements. How then could he bring any lawyers from London at this late date? In oral argument, Mr. Davinder Singh, counsel for Lee Kuan Yew, had tried to justify the delay by asserting, "Mr. Jeyaretnam already had judgements against him [in 1998] which he could not pay. Why bring on the action [in 1998] and increase the costs." But, by the time of this appeal Mr. Jeyaretnam not only had judgements, but was declared a bankrupt, and the only reason for Lee Kuan Yew's renewed interest in old litigation seemed to be the impending election in 2002.

The Court of Appeal also ignored the fact that Mr. Carman and Mr. Gray had prepared the defence of this case. Even if Mr. Carman and Mr. Gray had been available four years after the fact to present the defence for Mr. Jeyaretnam, there would be start up costs in the lawyers having to get back into the case. It is unlikely that even two eminent lawyers such as Mr. Carman and Mr. Gray would remember every detail of the defence four years after the fact.
Had the case proceeded in 1998 as it was supposed to, and given that the words said to be defamatory are the same in both the action by Prime Minister Goh and in the action by Senior Minister Lee Kuan Yew, there would be savings involved in having Mr. Carman and Mr. Gray present the defence. Even if new lawyers could have been brought from London in order to present the defence, they would have lost any of the knowledge and work that Mr. Carman and Mr. Gray had undertaken in preparing in 1998. They would have to start from scratch and this would add to the cost. Returning to the bankruptcy, all of the evidence before the Court of Appeal pointed to the fact that Mr. Jeyaretnam would be financially unable to bring lawyers from London. He would be dependent on finding lawyers who would come *pro bono* and without payment of disbursements.

Had Lee Kuan Yew proceeded with his defamation case immediately following the defamation judgement in the case of Prime Minister Goh, Mr. Jeyaretnam would have been defended by Mr. Carman and Mr. Gray.

It is important to put all of this in a context of why Mr. Jeyaretnam brought Mr. Carman and Mr. Gray from London in order to defend the series of defamation proceedings that had been brought as a result of the Goh/Lee Kuan Yew law suits. There is fear in the bar in Singapore that makes it extremely difficult for Mr. Jeyaretnam to retain counsel in Singapore.

As a result of the long history of government members suing in defamation, and the government use of the *Internal Security Act* in the 1970's and 1980's to arrest amongst other citizens, various members of the bar who would speak out, it may not be possible for Mr. Jeyaretnam to find counsel in Singapore to properly defend him against the Senior Minister and former Prime Minister of the country. The case brought against Mr. Jeyaretnam is politically charged and that is why it was important for him to have Mr. Carman and Mr. Gray available to assist him in defence of the defamation action brought by the former prime minister of the country.

Perhaps one of the reasons Lee Kuan Yew did not proceed in 1998, is that Justice Ravrindra had only awarded Prime Minister Goh, S $20,000.00, a sum so low that it would possibly embarrass other plaintiffs. Perhaps the most serious prejudice to Mr. Jeyaretnam was the loss of Justice Ravrindra, as a trial judge.

12. Conclusions

There is an expression in law, *res ipsa loquitur*-the matter speaks for itself. A course of civil and criminal legal proceedings resulting in a member of the opposition being fined, jailed, forced into bankruptcy and disqualified from being a Member of Parliament and a lawyer for raising, in public, matters that are or should be of public concern demonstrates a failure of the rule of law and of democracy.

The decisions in these two appeals heightens concern that libel laws are being used in Singapore in a manner that amounts to a violation of the international fundamental rights to freely hold and peacefully express one's opinions. Such use of the libel laws and the awarding of damages, which are not clearly in proportion to the harm suffered by the victim, run the risk of having a serious chilling effect on freedom of expression in Singapore. To many Singaporeans the libel suits against Mr. Jeyaretnam and other government critics may act as a powerful deterrent to exercising their right to peaceful freedom of expression.

The use of defamation suits in Singapore to prevent political expression belies any notion that Singapore is a democracy. Democracy is the right to participate in one's governance and to receive, distribute and debate information regarding issues of public concern and the performance of public officials without the risk of civil or criminal penalties. Singapore has failed to protect these rights. Singapore has also failed to honour its obligation [30] to promote and protect the rule of law (a state of affairs in which there are legal barriers to government arbitrariness and legal safeguard for the protection of individuals). In Singapore there are insufficient legal safeguards to maintain the balance

30 The Harare Declaration pledged Commonwealth members countries, including Singapore to work with renewed vigour for: "the protection and promotion of the fundamental political values of the Commonwealth: democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government"

between the rights of the individual and the powers of the state creating a situation in which those in power are not accountable.

Section 14 of the *Defamation Act* creates a restriction that violates the rule of law and with the minimum freedom of expression upon which democracy depends.

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Lawyers Rights Watch Canada (LRWC) is a committee of lawyers who promote human rights and the rule of law internationally by protecting advocacy rights. LRWC campaigns for advocates in danger because of their human rights work, engages in research and education and works in cooperation with other human rights organizations.

N.B. This report is included as an Appendix to Frances Seow's *Beyond Suspicion? The Singapore Judiciary,* Yale Southeast Asia Area Studies, Yale Center for International and Area Studies (New Haven, December 2006).

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