

Mandates of the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the rights of persons with disabilities; the Special Rapporteur on the human rights of migrants and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

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29 October 2021

Excellency,

We have the honour to address you in our capacity as Special Rapporteur on extrajudicial, summary or arbitrary executions; Special Rapporteur on the rights of persons with disabilities; Special Rapporteur on the human rights of migrants and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolutions 44/5, 44/10, 43/6 and 43/20.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **alleged imminent execution of Nagaenthran a/l K Dharmalingam, a Malaysian national, who reportedly has intellectual disabilities, for drug related offences, which does not meet the threshold of "most serious crimes" and in relation to crimes which carry a mandatory death sentence.**

According to the information received:

On 22 April 2009, Mr. Nagaenthran a/l K Dharmalingam, also known as Naga, a Malaysian national, was arrested while entering Singapore at the Woodlands Train Checkpoint (also known as Woodlands CIQ). During a search conducted by officers from the Central Narcotics Board, a bundle of diamorphine was found strapped to his thigh. He was later charged with the importation of 42.72g of diamorphine. During interrogation, he indicated he had been given the bundle by a friend and that he knew it contained diamorphine. At the trial, he denied having any knowledge of the contents of the bundle and stated that he had been threatened to deliver the bundle by a friend. This defence was rejected by the judge.

A private psychiatrist reported that Mr. Nagaenthran a/l K Dharmalingam suffered from "an abnormality of mind at the time of his arrest, namely: Severe Alcohol Use Disorder, Severe Attention Deficit Hyperactivity Disorder (ADHD), Combined Type and Borderline Intellectual Functioning/Mild Intellectual Disability". His evidence was rejected by the trial judge.

Three state appointed experts concluded that Mr. Nagaenthran a/l K Dharmalingam does not suffer from an intellectual disability but agreed he has borderline intellectual functioning. They found that he has an IQ score of 69, mild ADHD of the inattentive type, and also that his executive functioning

skills (including verbal fluency, set-shifting, abstract reasoning, strategy formation, and problem solving) were impaired. The court accepted this evidence.

According to the Misuse of Drugs Act, a defendant for a drug offence should be given life imprisonment in lieu of the death penalty if they suffered from such abnormality of mind as to substantially impair mental responsibility for acts and omissions, and were merely couriers. The court found that Mr. Nagaenthran a/l K Dharmalingam's borderline intellectual functioning and impairments were insufficient to constitute abnormality of the mind for the purposes of the Misuse of Drugs Act.

In November 2010, Mr. Nagaenthran a/l K Dharmalingam was sentenced to death by the High Court and has been on death row since that date.

His conviction by the High Court, was upheld on appeal in 2011 and he was sentenced to the mandatory death penalty under the applicable sentencing practice at the time¹. However, the court also stayed execution of his sentence, pending Parliament's review of the mandatory death penalty in relation to drug offences.

On 14 November 2012, Parliament passed the Misuse of Drugs (Amendment) Act 2012 (No 30 of 2012) ("the Amendment Act"), which introduced s 33B of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). The amendment brought about two significant changes to the legal framework governing the sentencing of certain groups of those convicted of drug trafficking.

First, the Amendment Act conferred upon a court the discretion to sentence an offender convicted of a drug trafficking offence that would ordinarily attract the imposition of the mandatory death penalty, to life imprisonment instead if the offender's involvement in the offence was merely as a courier, as described in s 33B(2)(a), and the Public Prosecutor had issued a certificate of substantive assistance under s 33B(2)(b) in respect of the offender. This leaves life and death decisions in the hands of the Public Prosecutor who is neither a judge nor a neutral party. It also makes it less likely that such a certificate will be granted to low level couriers, who are less likely to be in a position to provide meaningful assistance and thus are more likely to face execution.

Second, the Amendment Act made it mandatory for the court to sentence an offender convicted of such an offence to life imprisonment if the offender's involvement in the offence was merely as a courier, as described in s 33B(3)(a), and the offender was suffering from an abnormality of mind within the meaning of s 33B(3)(b).

¹ Public Prosecutor v Nagaenthrana/l K Dharmalingam [2011] 2 SLR 830 ("Nagaenthran (Trial)"); Nagaenthran a/l K Dharmalingam v Public Prosecutor [2011] 4 SLR 1156 ("Nagaenthran (CA)"). This was before the introduction of s 33B.

In other cases the judge remains mandated to sentence the accused to death.

After the amendments to the MDA came into effect on 1 January 2013, Mr. Nagaenthran a/l K Dharmalingam provided information to the prosecution, on 26 February 2013, by way of a voluntary statement for the purposes of allowing the Public Prosecutor to make a determination, under section 33B(2)(b), as to whether he had substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore. In July 2013, the Public Prosecutor considered the information provided by Mr. Nagaenthran a/l K Dharmalingam, together with additional information relating to operational matters. In August 2013, the Public Prosecutor informed Mr. Nagaenthran a/l K Dharmalingam of the non-certification decision.

Alongside the introduction of s 33B, the Amendment Act also provided a transitional framework for persons who had been convicted and sentenced to death under the MDA as it stood prior to the amendment, and had their appeal dismissed, to be resentenced under s 33B. Mr. Nagaenthran a/l K Dharmalingam accordingly filed before the High Court, Criminal Motion No 16 of 2015 (“CM 16”) on 24 February 2015, seeking to be re-sentenced to life imprisonment under s 33B(1)(b) read with s 33B(3) of the MDA arguing that under s 33B(3)(a) he was a mere courier. The High Court dismissed the petition.

In the second application, he applied for leave to commence judicial review proceedings against the Public Prosecutor’s decision not to issue to him a certificate of substantive assistance under section 33B(2)(b)². The High Court dismissed both applications.

Mr. Nagaenthran a/l K Dharmalingam sought leave from the court to launch a judicial review against the Public Prosecutor’s non-certification decision in 2015. His request was refused in May 2018 and an appeal of the refusal dismissed in 2019. An appeal for re-sentencing was also dismissed in 2019.

On appeal, the Court of Appeal upheld the High Court’s decisions. On Nagaenthran a/l K Dharmalingam’s *first* application, the Court of Appeal held that the High Court had correctly found that Nagaenthran a/l K Dharmalingam did not suffer from an abnormality of mind.

On 26 October 2021, his family were informed that his execution has been scheduled for 10 November 2021. The Singaporean authorities have indicated that they will facilitate entry for a maximum of five members of his family. The family members have been given a long list of COVID-19 rules and regulations they are required to follow. They have been required to arrange PCR tests, accommodation for quarantine and transport whilst in Singapore as well as necessary entry procedures including applying for entry approval and making health declarations prior to travel. They will be permitted to leave their

² Nagaenthran a/l K Dharmalingam v Public Prosecutor [2017] SGHC 222 (“Nagaenthran (Criminal Motion)”). Criminal Appeal No 50 of 2017 (“CCA 50”) is the appellant’s appeal against the dismissal of CM 16

quarantine accommodation to visit Mr. Nagaenthran a/l K Dharmalingam in prison. However, they will not be permitted to take public transportation. Singapore is currently experiencing an “unusual surge” in COVID-19 infections and has recently reported the highest number of new daily cases.

We would like to express serious concern that the death penalty may be imminently carried out against Mr. Nagaenthran a/l K Dharmalingam, who provenly suffers from intellectual disabilities, for drug-related offences, which does not meet the threshold of “most serious crimes” established by international law for the imposition of capital punishment and for offences which carry a mandatory death penalty. We are further concerned by the decision to carry out an execution during the COVID-19 pandemic and the additional impact of the sentence on Mr. Nagaenthran a/l K Dharmalingam’s family members, which may amount to torture or other cruel, inhuman or degrading treatment or punishment.

Without making any judgment as to the accuracy of the information made available to us, the above allegations appear to be in contravention of the right of every individual to life, liberty and security as set out in article 3 of the Universal Declaration of Human Rights (UDHR) and the guarantee that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment in article 5 of the same. We remind that the right to life is a jus cogens, peremptory norm from which no derogation is permitted. We further refer the Convention on the Rights of persons with disabilities which Singapore ratified on 18 July 2013, in particular article 10 which requires state parties to take all necessary measures to ensure the right to life of persons with disabilities on an equal basis with others and article 13 regarding equal access to justice.

We also would like to draw the attention of your Excellency’s Government attention to article 1 of the the Safeguards guaranteeing protection of the rights of those facing the death penalty, which state that the sentence of death may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences. This has consistently been interpreted to mean that the **death sentence may only be imposed in respect of intentional killing**. While we fully acknowledge the need for States to tackle drug-related offences, however, we would like to point to the absence of proof that the death penalty services as a deterrent for such crimes (A/HRC/15/19).

The International Narcotics Control Board (INCB), which is responsible for monitoring State compliance with the international drug control treaties, also considers that the use of the death penalty for drug crimes is incompatible with international law. The most effective manner of addressing drug-related offences is through strengthening the rule of law, ensuring an effective justice system and reducing drug use by adopting a strong public health approach to prevention, harm reduction and other forms of health care and treatment in accordance with international standards.

Furthermore, we would like to highlight that according to international human rights standards **the death sentence may not be carried out on persons with serious psycho-social and intellectual disabilities**, as appears to be the case according to first

medical expert who examined Mr. Nagaenthran a/l K Dharmalingam and which subsequent examinations did not fully contradict.

Additionally, we would like to highlight that the experience of numerous judicial and quasi-judicial bodies has demonstrated that **mandatory death sentences are inherently over-inclusive and unavoidably violate human rights law**. The categorical distinctions that may be drawn between offences in the criminal law are not sufficient to reflect the full range of factors relevant to determining whether a death sentence would be permissible in a capital case. In such cases, individualized sentencing by the judiciary is required in order to prevent cruel, inhuman or degrading punishment and the arbitrary deprivation of life (A/HRC/4/20).

We note that the **circumstances surrounding the imposition or execution of the death penalty can also constitute cruel, inhuman or degrading treatment or punishment or even torture**. Physical or mental torture or other cruel, inhuman or degrading treatment or punishment, particularly the so-called death row syndrome, may inflict pain and suffering on convicts and their relatives which may well amount to torture or other cruel, inhuman or degrading treatment or punishment (see A/67/279, para. 75).

Lastly, we recall that Singapore accepted a recommendation in the first cycle of its Universal Periodic Review to make available statistics and other factual information on the use of the death penalty (A/HRC/18/11, para 95.15).

The full texts of the human rights instruments and standards recalled above are available on www.ohchr.org or can be provided upon request.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, in view of the urgency of the matter, and of the irreversibility of the punishment of the death penalty, **we respectfully call upon your Excellency's Government as a matter of urgency to halt the planned execution, which, on the facts available to us, may constitute a violation of applicable international human rights law, and thus an arbitrary execution**. We further respectfully urge your Excellency's Government to ensure that the death sentence against the aforementioned individual is annulled and that he is re-tried in compliance with international standards. We also urge the President to consider granting clemency in this case.

Additionally, as we seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned allegations.
2. Please provide information on the death sentence against Mr. Nagaenthran a/l K Dharmalingam and how it is compatible with Singapore's human rights obligations.

3. Please provide information on the scope for suspending the execution and commuting the death sentence against Mr. Nagaenthran a/l K Dharmalingam in consideration of the facts outlined in this communication.
4. Please provide detailed statistics on the use and execution of the death penalty in Singapore.
5. Please provide information on any efforts envisaged to remove the mandatory death penalty in Singapore and/or to reduce the scope of application of the death penalty.

In view of the urgency of the matter, we would appreciate a response on the initial steps taken by your Excellency's Government to safeguard the rights of the above-mentioned persons in compliance with international instruments.

We are considering to publicly expressing our concerns in the near future as we are of the view that the information at hand is sufficiently reliable to indicate a matter warranting immediate attention. Any public expression of concern on our part will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

This communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

We would like to inform your Excellency's Government that a copy of this letter has been sent to the Government of Malaysia.

Please accept, Excellency, the assurances of our highest consideration.

Morris Tidball-Binz
Special Rapporteur on extrajudicial, summary or arbitrary executions

Gerard Quinn
Special Rapporteur on the rights of persons with disabilities

Felipe González Morales
Special Rapporteur on the human rights of migrants

Nils Melzer
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment