Jeyaretnam Kenneth Andrew *v* Attorney-General
[2013] SGCA 56

Case Number	: Civil Appeal No 154 of 2012
Decision Date	: 31 October 2013
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; Quentin Loh J
Counsel Name(s)	: The appellant in person; Aedit Abdullah S.C., Aurill Kam, Jurena Chan, Jeremy Yeo Shenglong and Vanessa Yeo (Attorney-General's Chambers) for the respondent.
Parties	: Jeyaretnam Kenneth Andrew — Attorney-General

Administrative Law – Judicial Review

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2013] 1 SLR 619.]

31 October 2013 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of a High Court Judge ("the Judge") given in Originating Summons No 657 of 2012 ("the OS") where the Plaintiff, Mr Kenneth Andrew Jeyaretnam ("the Appellant"), applied for judicial review to challenge a decision of the Government of Singapore ("the Government") offering, through the instrumentality of the Monetary Authority of Singapore ("MAS"), to grant a contingent US$4 billion bilateral loan ("Loan") to the International Monetary Fund ("the IMF").

2 The Appellant is the Secretary-General of the Reform Party, one of the political parties in Singapore. In his affidavit he introduced himself as an economist by training and has had "almost 30 years of uninterrupted experience in the global finance industry in both Asia and the United Kingdom with an unblemished record of registration with the FSA". [note: 1]

Background to the dispute

3 On 20 April 2012, the MAS announced that Singapore would make the Loan to the IMF, as part of the broader international effort to provide the IMF with sufficient resources to tackle the then on-going Eurozone financial crisis and promote global economic and financial stability. It was to be a contingent loan to the IMF (not to the countries which would be borrowing from the IMF) and the sum would remain as part of Singapore's Official Foreign Reserves ("OFR").

4 The Appellant claimed that the offer of the Loan contravened Article 144 ("Art 144") of the Constitution of Singapore ("the Constitution"), as the Loan required both Parliamentary and Presidential approval, which approvals the Government had not obtained before agreeing to grant the Loan. This was the crux of his complaint, *viz*, that the Loan commitment was unconstitutional. As such, he sought leave to apply for the follow prerogative orders and declarations to be made against the Government:

1 that leave be granted for the [Appellant] to make:-

a an application for a **Prohibiting Order** prohibiting the Government and/or the Monetary Authority of Singapore ("MAS") from giving any loan and/or guarantee to the International Monetary Fund ("IMF") unless such loan was made in accordance with the provisions of Article 144 of the Constitution (1999 Rev Ed); and/or

b an application for a **Quashing Order** quashing the Government and/or the MAS' decision to make a US$ 4 billion loan commitment and/or guarantee to the IMF for contravening the provisions of Article 144 of the Constitution; and/or

2 that, further to leave being granted for either or both of the abovementioned applications in [1a] and [1b], leave be granted for the [Appellant] to make:-

a an application for a **Declaration** that a loan and/or guarantee may neither be raised nor given by the Government and/or the MAS save in accordance with the provisions of Article 144 of the Constitution; and/or

b an application for a **Declaration** that a loan commitment and/or guarantee may not be given by the Government and/or the MAS save in accordance with the provisions of Article 144 of the Constitution.

[emphasis in original]

The decision below

5 It was undisputed before the Judge that the following three requirements had to be satisfied before leave could be granted for the court to consider the issue of one or both of the aforesaid prerogative orders:

(a) the subject matter of the complaint was susceptible to judicial review;

(b) the material before the court disclosed an arguable case or a *prima facie* case of reasonable suspicion in favour of granting the remedies sought by the applicant; and

(c) the applicant has sufficient interest in the matter.

6 As the parties did not dispute that the first requirement was satisfied, the Judge only needed to consider the second and the third requirements which he found were both not satisfied.

7 On the second requirement, the Judge held that Art 144 had no application to the present case as the article only applied when a loan is *raised* by the Government, and not when the Government *gives* out a loan. He premised this construction on the following reasons:

(a) Art 144 was introduced by the Constitution of the Republic of Singapore (Amendment No 3) Bill 1990 (Bill No 23/1990). In the Bill this proposed Article read: "No debt, guarantee or loan shall be incurred, given or raised by the Government …" In the Explanatory Statement to the Bill this provision was explained "to provide that no loan, debt or guarantee may be raised, incurred or given by the Government except with the concurrence…" It is significant that while the sequence of the words "debt, guarantee or loan" was altered in the Explanatory Statement, the sequence of the verbs that followed also changed consequentially so that the word "debt", was

to be read with "incurred", "guarantee" with "given" and "loan" with "raised". When this provision was eventually enacted as Art 144 the words "debt" and "incurred" were left out and the provision only read "No guarantee or loan shall be given or raised". Thus Art 144 could only mean that it applied to the giving of a guarantee or the raising of a loan but not the giving of a loan.

(b) In 1998, when the Government was contemplating the giving of a loan to a neighbouring country, the then Attorney-General Chan Sek Keong ("A-G Chan") gave an opinion that the giving of the proposed loan by the Government would fall outside the ambit of Art 144. This opinion was later endorsed by Parliament (see *Parliamentary Reports* Vol 68 Cols 84-85). A-G Chan's views were also amply supported by both the 1988 White Paper Constitutional Amendments to Safeguard Financial Assets and the Integrity of the Public Services (Cmd 10 of 1988) ("the 1988 White Paper") and the 1990 White Paper Safeguarding Financial Assets and the Integrity of the Public Services (Cmd 11 of 1990) ("the 1990 White Paper"). Paragraph 42 of the 1990 White Paper, on which the Bill was based, did not refer to the giving of loans. In addition, Art 144(2) further reinforces the conclusion that Art 144(1) is not concerned with the giving of loans, as it refers only to the "giving of any guarantee" and the "raising of any loan".

(c) Both s 15 of the Financial Procedure Act (Cap 109, 2012 Rev Ed) and s 9 of the Bretton Woods Agreements Act (Cap 27, 2012 Rev Ed), the two statutes referred to in Art 144(3), did not refer to the *giving* of loans, only the *raising* of loans.

(d) The statutory interpretation maxim *reddendo singular singulis* states that where a complex sentence has more than one subject and more than one object, it may be the right construction to render each to each. Applied to Art 144, this puts loans given by the Government outside its ambit.

(e) The Auditor-General's comment that the Ministry of Finance did not comply with Art 144 when it issued a promissory note to the International Development Association ("the IDA") without the President's assent must be viewed in the context of s 5(1) of the International Development Association Act (Cap 144A, 2003 Rev Ed) which specifically gives the President a role in approving contributions by Singapore to the IDA. Moreover, whereas such a promissory note would create a liability, a loan given by the government remains an asset.

8 On the third factor, the Judge held that the Appellant did not have *locus standi*. He reiterated that the *locus standi* threshold criteria remained a stringent one, according to this court's recent pronouncement in *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 ("*Tan Eng Hong*"). Unlike a *private* right, when an applicant seeks to enforce a *public* right, he has to show that he has been personally affected by the decision being challenged. The Judge held that in this case where the Appellant was trying to enforce a public right, he failed to show that he had suffered any special damage resulting from the public act which was being challenged and also that he had a genuine private interest to protect.

Issues in the appeal

9 The Appellant raised the following issues in this appeal:

(a) Is there a *prima facie* case of reasonable suspicion in favour of granting the prerogative orders sought?

(b) Did the Appellant have the *locus standi* to bring this application?

The decision of this court

Issue 1: Is there a prima facie case of reasonable suspicion?

10 On the first issue, in the Appellant's Case, the Appellant had raised the argument that the Loan was, in effect, an "implied guarantee" which would come within the ambit of Art 144. However, during the oral hearing before us, where he appeared in person, he effectively abandoned that argument, and alleged that he did not have sufficient time to instruct his then counsel, Mr M Ravi, who was preparing the Appellant's Case, due to the Appellant's preoccupation then with the by-election in Punggol East. Instead, he raised a new argument which largely centred upon the fact that the Loan to the IMF was a "contingent liability". This being a new point, it was not addressed in the Respondent's Case. Despite the change in the Appellant's argument, the Respondent declined to take up the Appellant's suggestion of having the hearing of the present appeal adjourned if the Respondent needed time to consider the new point. In this judgment, we will address the points raised in the Appellant's Case as well as his new arguments made during the oral hearing before us.

Arrangement of words

11 On the issue of the interpretation of Art 144, we are of the opinion that based on the materials put before us it is abundantly clear that Parliament intended the Article to refer only to the *giving* of guarantees and *raising* of loans, and not the *giving* of loans. Indeed, the Judge's careful consideration of the relevant materials (see Judgment at [13]-[36]) unequivocally showed that Parliament did not intend that Art 144 should be read to encompass the giving of loans as contrasted with the raising of loans. Hence we do not think it is necessary for us to traverse those same materials as the Judge, whose conclusion we are in full agreement with.

12 At this juncture we will briefly address the Appellant's contention that the words "given" or "raised" in Art 144(1) can both appropriately apply to a guarantee. In other words, while it is right to talk about "giving a guarantee" it is not wrong or absurd to allude to the "*raising* of a *guarantee*". The Appellant cited the Karnataka High Court (India) decision of *Intertek India Private Ltd. v State of Karnataka* (2 August, 2012) ("*Intertek*") for the proposition that since it is possible to raise a *letter of credit*, which instrument is "equivalent to a *guarantee*", as the issuing bank of that instrument is required to pay the seller if the buyer defaults, it should not be "inconceivable" or wrong to refer to the giving of a guarantee as raising a guarantee. This argument is so contrived as to constitute an abuse of the language. Even if it were linguistically correct to talk about "raising a guarantee", its meaning would be quite different from "giving a guarantee".

13 We note that the term "letter of credit" was referred to twice in *Intertek* in the following instances: "raising a timely letter of credit" (at [16]) and "opening a letter of credit" (at [33]). What is flawed in the Appellant's argument is the assertion that a "letter of credit" is "equivalent" to a "guarantee" when they are clearly not. While they are both instruments of a financial nature, their essential characteristics are very different and they serve distinct purposes.

14 When pressed further on whether it was common financial parlance to speak of "raising" a guarantee, the Appellant conceded that while it was not as common as "obtaining" or "giving", it was still not "patently absurd". He concluded by emphasizing that this was nonetheless not the "main thrust" of his argument, and an overall purposive construction of Art 144 would point to a presumption of a tighter form of financial control.

Implied guarantee

15 We now turn to consider the Appellant's argument that the Government had also fallen afoul of

Art 144 because it had given an *implied* guarantee for the Loan. This contention rests on the premise that since the loan to the IMF was not extended directly by the Government but by the MAS, thus by virtue of s 38 of the Monetary Authority of Singapore Act (Cap 186, 1999 Rev Ed) ("the MAS Act") which states that the Government "shall be responsible for the payment of all moneys due by the [MAS]", there would effectively be a form of an implied guarantee given by the Government to the MAS should the IMF eventually draw on the loan. To advance this point, he argued that, on account of s 38, there exists a "*sui generis*" [note: 2] banker/ client relationship between the Government and the MAS that incorporates a suretyship arrangement between MAS as the principal debtor and the Government as the surety. Section 38 reads as follows:

> **Guarantee by Government**
>
> 38. – (1) *The Government shall be responsible for the payment of all moneys due by the Authority.*
>
> (2) Nothing in this section shall authorise a creditor or other person claiming against the Authority to sue the Government in respect of his claim.
>
> [emphasis added]

The Appellant argued that read purposively, Art 144 effectively seeks to "limit discretionary spending by the Government of past reserves, by subjecting such actions to parliamentary and executive president ("EP") oversight". However, this purpose would be violated if the Government were to step in whenever the MAS suffered liquidity problems, such as when a debtor like the IMF defaults on a loan repayment of a significant amount.

16 There is a fundamental flaw in the Appellant's contention that because of s 38 of the MAS Act there has arisen an implied guarantee by the Government to reimburse the MAS in respect of any loss which MAS might suffer due to the IMF's inability to repay the Loan. What the Appellant seems to have overlooked is that the guarantee referred to in s 38(1) is in relation to the payment of moneys due *from* the MAS to others and not the other way round of moneys due from others *to* the MAS (which is the case here with respect to the Loan). Moreover, as rightly pointed out by the Respondent, an "implied guarantee" is a legal impossibility – Art 144(2) merely sets out a list of statutes under some of which the Government could give a guarantee – none of which would encompass what the Appellant sought to say had happened in this case.

The MAS as a separate vehicle

17 The Appellant also made the argument that while the commitment to offer a loan to IMF was made by the MAS, it was "absurd" to treat the MAS as a separate vehicle from the Government, given that it is a statutory corporation listed under the Fifth Schedule of the Constitution and all its shares are owned by the Government.

18 On this point, we need say no more than to refer to s 3(1) of the MAS Act:

> There shall be established an Authority to be called the Monetary Authority of Singapore which shall be a *body corporate* and shall have perpetual succession and may *sue and be sued in its own name*.
>
> [emphasis added]

Contingent liability

Contingent liability

19 As earlier mentioned at [10], in his oral submission before us, the Appellant brought up a new argument that the Loan, when properly classified, should be considered a *liability* (specifically, a contingent liability), rather than an *asset*. We can see that this point was being raised in order to ride on the distinction drawn by the Judge when he explained why the Auditor-General had commented that the Government's promissory note to the IDA, being a liability, required Presidential assent whereas the Loan, being an asset, did not. [note: 3] The Appellant then elaborated that the present contingent Loan extended to the IMF was akin to there being an option, in the sense that one could have an option to buy a share, without having to exercise it. Similarly, the IMF, through the Loan, had been given the *right* to draw down on the monies committed, although the IMF was not required to draw down on the loan. Quoting Christine Lagarde's (the current Director-General of the IMF) alleged description of such capital as a "fire ball", [note: 4] the Appellant contends that the Loan offered by the MAS, as well as similar loans offered by other countries to the IMF, when eventually drawn down by the IMF, would effectively be "sacrificed" to prevent the fire from spreading, bearing in mind that such a loan commitment would only be drawn down when there is widespread breakdown in the world's financial system and when presumably no one would want to make loans to the IMF. Hence by the time such a draw-down on the Loan is effected by the IMF, Singapore's exposure in relation to the Loan would be a lot riskier than it currently stands.

20 The Appellant further argued that a loan given to the IMF could not possibly be "any kind of [a] commercial asset", given that it would be given to support the world's financial system in times of "imminent crisis". Describing the terms of the IMF's borrowing as "not commercial" but "concessional", he argued that the IMF could not possibly borrow on an interest rate of 0.3% per annum, as it does, on its own terms without the support of governments. While he acknowledged that no one had ever lost money lending to the IMF, the IMF functioned with a "burden sharing mechanism" in that countries which had contributed to the IMF shared in their losses made on loans given to the IMF.

21 To further support his contention that the Loan was in fact a contingent liability, the Appellant referred to comments made by the UK Chancellor of the Exchequer George Osborne referring to the UK's pledge to the IMF as a "contingent liability". He then referred to the US' Federal Deposit Insurance Corporation's Risk Management Manual of Examination Policies ("FDIC Manual") and explained that contingent liabilities such as the Loan can be considered as "off balance sheet activities". He then quoted the following passage from Section 3.8 of the FDIC Manual as follows:

> In reviewing individual credit lines, all of a customer's borrowing arrangements with the bank (e.g., direct loans, letters of credit, and loan commitments) should be considered. Additionally, many of the factors analyzed in evaluating a direct loan (e.g., financial performance, ability and willingness to pay, collateral protection, future prospects) are also applicable to the review of such contingent liabilities as letters of credit and loan commitments. When analyzing these off-balance sheet lending activities, examiners should evaluate the probability of draws under the arrangements and whether an allowance adequately reflects the risks inherent in off-balance sheet lending activities.

22 The Appellant also referred to the Statement of Financial Accounting Standard No. (FAS) 133, Accounting for Derivative Instruments and Hedging Activities, and expressed the view that these accounting guidelines supported his classification of the Loan as a liability. While he conceded that the MAS was not a commercial entity, and the Loan was not intended to be securitized and sold, he proceeded to explain that loan commitments were characterised as derivatives if they were to be sold. The originator of the loan commitment would be required to record the value at a fair value, which would be the market value of the loan commitment – "what it would cost to replace it". If the

borrower were to "deteriorate" subsequently, the lender would have to reflect this expected loss through a profit and loss account. Accordingly, such treatment showed that the Loan should be characterised as a contingent liability.

23 Without the benefit of proper submissions from both parties on this point, other than what the Appellant orally argued before us, we feel ill-placed to comment on the financial validity of the Appellant's arguments on the point, and hence will confine ourselves to the following brief remarks. Firstly, we note that accounting standards vary across different countries; hence what may be considered normal practice in the US may not necessarily be so in Singapore. The Appellant has not shown any evidence on what the standards in our local context are. Secondly, by drawing on the "fireball" analogy, the Appellant appears to be making the argument that the sheer *risk* allegedly inherent in the Loan must make it a liability, rather than an asset. This cannot be right – the amount of *risk* involved in holding an asset does not change its *nature* from being an asset into a liability. The same objection would apply to the Appellant's argument on the IMF's concessional, as opposed to commercial, arrangements. Third, the Appellant seems to have relied on wholly irrelevant materials in making his point, ignoring the context of the materials. An instance is the reference to the FDIC Manual (at [21] above) where the first sentence of section 3.8 of the Manual reads: "In reviewing individual credit lines, all of a customer's borrowing arrangements with the bank (e.g., direct loans, letters of credit, and loan commitments) should be considered". Here the Manual is referring to the contingent liability of the customer. It makes absolute sense for a commercial financial institution which is reviewing the different lines of credit offered to a customer to consider all the lines to determine the customer's contingent liability and his credit risk. That customer's contingent liability would be the sum of the facilities offered to him, *ie*, the aggregate of all the credit he could draw on. Here, even assuming we regard the MAS and the Government as one single entity, the offer of the Loan by the MAS to the IMF is effectively a facility which the IMF could, when there is a need, resort to. When that happens, whatever draw-downs effected by the IMF would be a debt due from the IMF to the MAS, and rightly that would be reflected as an asset of MAS. We cannot see how that could be converted into a liability of the MAS when it is in substance and in form a liability of the IMF to the MAS.

"Like a guarantee"

24 In yet another wholly inappropriate comparison, the Appellant further likened a loan commitment like the one in the present case to that of a guarantee, stating that the two were "identical" in nature because they were both off balance sheet lending commitments. He cited the Bank of England's Yellow Folder for a reporting format which showed that guarantees and loan commitments were to be treated in the same manner. Reference was also made to the 2011 Annual Report of JP Morgan Chase & Co. as evidence of how accepted accounting practice would regard the risk impacts of both guarantees and loan commitments as identical.

25 In our observation it is quite telling that the Appellant was clutching at any argument in order to bring the matter within Art 144 - from calling the Loan an "implied guarantee" given by the Government to that of a "guarantee" given by the MAS itself. Quite clearly he is simply seeking to draw a connection - *any* connection, however tenuous - between the word "guarantee" and the loan commitment given by the MAS to IMF so as to show the engagement of Art 144. The distinct and separate nature of these two contractual arrangements is obvious.

26 Again, we are surprised at the Appellant's attempt, bearing in mind that he is an economist, to draw a comparison between the Loan and the giving of a *call option* to the IMF because the IMF could "call upon [the Loan] if they need to", The concept of a call option is founded on a contractual arrangement to buy a right, and when that right is exercised a further contract of sale will come into

being– a mechanism for a transaction which is entirely distinct from the workings of a loan commitment. In the circumstances, it is unclear to us what the Appellant's purpose is in seeking to draw a connection between a call option and the Loan which the MAS had offered to the IMF. Neither is there any similarity between a call option and a guarantee.

27 The Appellant also took issue with the fact that the Respondent had stated that Art 144 was not engaged as it did not "breach past reserves", as he averred that Art 144(1) made no mention of past reserves at all. We are surprised by this comment of the Appellant, given that it was *the Appellant* who had argued in his written submissions that "transactions funded out of the OFR could be a transaction funded out of past reserves" (at [11.6] of the Appellant's case), even citing Prime Minister Lee Hsien Loong's speech on 28 April 2011 as "further evidence" of the OFR's characterisation as "past reserves" (at [11.5] of the Appellant's case). In any event, we feel that it is not necessary to belabour the point once again that the legislative intention behind Art 144 is to safeguard Singapore's past reserves against "profligate public spending by an irresponsible government", as explained in A-G Chan's opinion (see above at [7(b)]).

28 In conclusion, on the question of whether the Appellant's application had passed the threshold of raising a *prima facie* question of reasonable suspicion, we have no doubt that the Judge's decision was correct, and the answer is clearly no. The construction sought to be placed by the Appellant on Art 144 is inconsistent with the literal sense of the provision and also flies in the face of what was the clear intention of the Legislature in enacting that Article as evinced by the 1988 White Paper and the 1990 White Paper.

Issue 2: Did the Appellant have locus standi?

29 As acknowledged during the hearing by counsel for the Respondent, Ms Aurill Kam, the position on *locus standi* in our law was very much an "open point": no clear stance had been laid down by our courts on what the standing requirements should be for cases involving *public*, as opposed to *private*, rights. However, since the hearing of this case in April, this court has released its judgment in *Vellama v Attorney General* [2013] SGCA 39 ("*Vellama*"), where it elucidated on the requirement on standing where public rights were concerned. Its implications will be discussed below.

30 Additionally, we note that since the Appellant's application for leave in this case already fails at the first stage (in that there is no *prima facie* case of reasonable suspicion), it will not be necessary for us to scrutinise the question whether the Appellant has the *locus standi* to seek the relief he prayed for in the originating summons. However, like the Judge below, in view of the fact that both parties have made extensive submissions on this question, and the sheer importance of the issue itself, we would take this opportunity to also make some comments on the Appellant's *locus standi* in this case.

31 On this point, the Appellant argued that this court's decision in *Tan Eng Hong*, where it held that it would be necessary for an applicant to prove that he had a personal right in order to establish standing to seek a declaration from the courts, was wrong, and that *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 ("*Lim Kit Siang*"), the Malaysian authority cited in *Tan Eng Hong*, had been "superseded by developments in the rest of the world" such as Canada and the UK. Alternatively, even if *Tan Eng Hong* was correctly decided, this court still had broad discretion to find standing for an applicant to apply for declarations in a public law case, or at least the court should apply a lower standard in relation to prerogative orders such as prohibiting and quashing orders.

32 The Respondent, in turn, argued that the test in the English House of Lords case of *Gouriet and others v H.M. Attorney-General* [1978] AC 435 ("*Gouriet*") had been consistently applied in local

cases such as *Tan Eng Hong* and *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 ("*Karaha Bodas*"), and should not be departed from. In addition, the Respondent gave reasons for not adopting the approach taken in Canada and drew a clear distinction between Singapore's standing rules as set out in O 53 of the Rules of Court (Cap 322, R 5, Rev Ed 2006) and those that currently prevail in England.

What is standing?

33 Before we begin our discussion on the issue of *locus standi*, it is crucial to note that the law on standing (which will be used interchangeably with *locus standi*) is not statute-based, but is a judge-made doctrine based on the common law which has, over the centuries, undergone enormous changes, not just in Singapore, but in many other common law jurisdictions. Admittedly, this is not an easy area of law to define or explain; neither are the past decisions wholly consistent. Hence, we will briefly sketch the origin and general purpose of the law on standing in order to guide our discourse on what it should consist of.

34 In public law, rules on standing act as a *procedural* barrier which an applicant must satisfy as a preliminary point before the court would embark on an examination of the merits of the claim and grant any relief prayed for; in other words, this issue relates to the applicant's right to apply for the remedy. This requirement differentiates a claim in public law from that in private law, where the right to apply for a remedy and the very entitlement to a remedy are tied up in the same inquiry. In contrast, in public law, such rules are put in place in order to prevent the wastage of the court's time and public money by the multiplicity of litigation brought by busybodies that could amount to an abuse of the legal process. Hence even though judicial review occurs in the realm of *public* law, this does not translate into *every member of the public* having the right to bring judicial review proceedings – this is unlike the *actio popularis* in Roman law, under which any citizen could maintain an action for the breach of a *public* wrong. As this court stated in *Vellama* at [29], the appropriate test for determining standing turns on the *nature* of the rights at stake altogether. In particular, the distinction between private and public rights is a crucial one.

Law of standing in relation to public rights

35 The overall basis for judicial review is very much tied up with democratic theory (see below at [48]-[50]), and especially the idea of the Government being often perceived as the guardian of "public interests". This can be seen in the way standing rules in relation to actions for injunctions to enforce public rights were developed by the English Court of Chancery. These principles arose in England during the 19th century from the need to restrain *ultra vires* activities, particularly the misuse of charitable funds. Where charitable trusts were concerned, the ground for equitable intervention was not the protection of any proprietary rights of a plaintiff, since these trusts were for *public* purposes, making their due administration a matter of *public* concern. The Attorney-General, acting as *parens patriae*, would restrain misapplication of charitable funds by way of an injunction either (1) in his own right (*ex officio*) or (2) at the relation of another (*ex relatione*), *viz*, a "relator" action. In the latter proceedings, the relator (member of the public) did not have to show a personal interest in the controversy beyond being a member of the public. Subsequently the Attorney-General's role expanded beyond the context of charitable trusts to protecting the *public* interest generally whenever a public authority exceeded its statutory powers by some act that tended to interfere with public rights and so injure the public. However without the Attorney-General's fiat, a private individual still could not enforce a public trust by a private suit alone, as the Attorney-General was the proper plaintiff in an action seeking to protect public rights in the courts of equity. This narrow approach meant that suits were often dismissed "for want of an equity", causing the courts to lament the fact that it lacked authority to give remedies where defendant bodies were clearly exceeding their statutory powers

(*Pudsey Coal Gas Co v Bradford Corporation* (1873) LR 15 Eq 167 at 172).

36 The two exceptions to this strict rule that would allow a plaintiff to sue for declaratory or injunctive relief without the interposition of the Attorney-General were set out by Buckley J in *Boyce v Paddington BC* [1903] 1 Ch 109 ("*Boyce*") at 114:

> A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with (e.g., where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and, *secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.*
>
> [emphasis added]

37 There were two limbs to this exception in *Boyce*: the first was where the applicant *had* a private right, and the second was where the applicant *did not* (as emphasised above). In the latter case, an applicant would have to show that he had suffered "special damage peculiar to himself". The Judge rightly identified the present case as one concerning the second limb of *Boyce* as Art 144 was "not concerned with a private right", [note: 5] and accordingly found that the Appellant failed to fulfil it for want of showing "special damage". [note: 6] Here, we would pause to highlight the fact that the test in *Boyce* was subsequently approved of and adopted in the House of Lords' decision in *Gouriet* where it was held that the applicant had no *locus standi* because he had no private rights at stake and had not suffered any loss or damage particular to himself from the threatened interruption of postal services.

38 *Gouriet*, in turn, was adopted by this court in *Karaha Bodas*, albeit in a private law context, for the proposition that an applicant seeking a declaration had to show that it related to a right personally vested in him, and that he had a "real interest" in it (at [15] and [19]).

39 In S A de Smith, *Judicial Review of Administrative Action* (Sweet and Maxwell, 3rd Ed, 1973) ("*de Smith*") the learned author summarised the position then on standing in these terms (quoting only the relevant parts) at p 407:

> (i) As we have seen, in cases of public nuisance the plaintiff must show either that he has suffered (or is in imminent danger of suffering) an interference with his private rights or that he has suffered (or is in imminent danger of suffering) particular or special damage. It seems that essentially the same principles apply to other wrongful forms of interference with amenities enjoyed by the public as a whole.
>
> (ii) If specific criminal sanctions are attached to the doing of a wrongful act, a private plaintiff will generally be held to lack *locus standi* to sue without the Attorney-General for an injunction to restrain its commission or continuance. ...
>
> (iii) *Locus standi* to sue for injunctions in respect of other wrongful acts and omissions by public bodies is governed by broadly the same rules as those stated above, but there appear to be certain modifications which cannot, however, be stated with assurance. ...

We quote this edition of *de Smith* because significant changes to the law were effected by statute in 1977, which changes have not been replicated in Singapore. We also noted that notwithstanding the

statutory changes, this text was restated in the next edition of the same work (Sweet and Maxwell, 4th Ed, 1980) at p 458; perhaps it was still early days.

The evolution of standing rules in Singapore

40 In Singapore, the starting point for determining what the test for standing consists of is *Chan Hiang Leng Colin and others v Minister for Information and the Arts* [1995] 2 SLR(R) 627 ("*Colin Chan (HC)*") where Judith Prakash J observed (at [10]) that "sufficient interest" as it was used in the UK after 1977 was "not found anywhere else in our O 53" and hence the law as it stood in Singapore was that of pre-1977 English law. However "sufficient interest" still remained the standard which applicants had to meet, albeit not in the same liberal sense in which it was being used in the UK, as evinced by the use of that phrase by this court in *Chan Hiang Leng Colin and others v Minister for Information and the Arts* [1996] 1 SLR(R) 294 ("*Colin Chan (CA)*") at [14]:

> There is thus no need for the appellants to show that they are office holders in IBSA or members thereof. Their right to challenge Order 405/1994 arises not from membership of any society. Their right arises from every citizen's right to profess, practise and propagate his religious beliefs. If there was a breach of Art 15, such a breach would affect the citizen *qua* citizen. *If a citizen does not have* ***sufficient interest*** *to see that his constitutional rights are not violated, then it is hard to see who has*.
>
> [emphasis added in italics and bold italics]

41 We should add that in *Colin Chan (CA)* this court found that the appellants (who were Jehovah Witnesses) had the *locus standi* to pursue the matter because what was complained of was an alleged violation of their citizen's constitutional right under Art 15 of the Constitution to profess, practise and propagate their religion.

42 Unfortunately, the English body of law on standing that we inherited as at the cut-off point of 1977 (prior to legislative amendments made to their O 53) was widely acknowledged as "one of the most confusing areas of the law" (G. Aldous, J. Alder, *Applications for Judicial Review, Law and Practice of the Crown Office* (2nd Ed, Butterworths, 1993) at p 98). Not only did different standards of standing requirements exist for the various remedies, even within each remedy there were conflicting lines of authority. In general, however, it could be said that the prerogative remedies (*viz*, certiorari, prohibition orders and mandamus) had lower requirements than the remedies which had been developed from private law (*viz*, declaration and injunction). Initially, the prerogative orders had a long history of being used for the control of governmental duties and powers, and were granted only at the suit of the Crown. However, they soon became readily available to ordinary litigants by the end of the 16th century. Having such a strong public flavour, the standing requirements for such prerogative orders were very liberal, to the extent that even a "stranger" could apply for prohibition orders (*De Haber v Queen of Portugal* (1851) 17 QB 171 at 214). In fact, as a matter of the court's discretion, any member of the public could have standing to apply for certiorari and prohibition orders, which was also a matter of right for those whose "interests" (not necessarily legal, but also economic, loss of amenity, or convenience) were particularly affected. Mandamus, on the other hand, had a slightly more discriminating test of requiring an applicant to have a specific legal right to enforce, although this was also not applied consistently. In contrast, declarations and injunctions, originating as private law remedies applied in the public law context, required applicants to have either legal rights in issue, or have suffered special damage (as discussed in *Boyce* and *Gouriet*, see above at [36]-[37]).

43 In *Eng Foong Ho v Attorney-General* [2009] 2 SLR(R) 542 ("*Eng Foong Ho*") it was established that the *locus standi* requirements were to be the same across the different remedies sought, regardless of their historical roots. There the Attorney-General's submission, that a declaration sought under O 15 r 16 had stricter standing requirements than that for prerogative reliefs under O 53, was rejected by this court which favoured a uniformed approach (at [18]):

> The argument seems to be that a higher standard of *locus standi* is required for an application under O 15 r 16 than that under O 53 r 1. This argument has no merit whatsoever. *Karaha Bodas* was not concerned with the pursuit of constitutional rights. In our view, it does not matter what procedure the appellants have used. The substantive elements of *locus standi* cannot change in the context of the constitutional protection of fundamental rights.

44 Prior to 1 May 2011, an applicant could not have sought a declaratory relief in proceedings commenced under O 53. However, the Rules of Court were amended with effect from 1 May 2011 to allow declarations to be obtainable under O 53 as an additional "relevant relief", in addition to an application for a prerogative order (referred to as the "principal application"). Hence, prior to 1 May 2011, while a declaration could only be sought under O 15 r 16, it may also now be applied for under O 53, as the Appellant does here.

45 The English procedural unification (effected in 1977 through the legislative reform of their O 53) was based on the singular concept of "sufficient interest" as the test of standing for all claims. The test of "sufficient interest" in the UK has since been developed liberally with more resemblance towards the earlier flexible standards of prerogative writs rather than the private law remedies. In contrast, Singapore has taken the opposite approach of endorsing the standard applied in the context of the latter instead. Specifically, the two-limbed test as set out in *Boyce*, and affirmed in *Gouriet* (which arose in relation to injunctions in a private law context), was applied recently by this court in both *Tan Eng Hong* and *Vellama*. Since the pronouncement in *Eng Foong Ho* that the standard of *locus standi* is the same throughout for all the different remedies, it is clear from these two cases (*Tan Eng Hong* and *Vellama*) that the standard has been pitched at what used to be the requirements for the reliefs of declaration or injunction under the old English law of judicial review.

Tan Eng Hong

46 In *Tan Eng Hong* it was affirmed that the intent behind *Eng Foong Ho* was to "unify the threshold of *locus standi* for cases brought under O 15 r 16 and cases brought under O 53 r 1" (at [76]) and that the test for *locus standi* in constitutional challenges (*ie*, where one has a *private* right) remained the test as set out in *Karaha Bodas* (at [115]), which embodied the approach of *Gouriet*. It was not enough for an applicant to show that he *possessed* a personal right (which all constitutional rights are by default); he also had to show a *violation* of that personal right. This was essentially an elaboration of the first limb of *Boyce*, which addressed cases where an applicant had *private* rights that were infringed by a certain public act. However, little was said about the situation where an applicant was without such a private right, and the right was purely *public* (*ie*, the second limb of *Boyce*), though the Malaysian Supreme Court's decision in *Lim Kit Siang* was briefly cited at [69]:

> In *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 at 27, the majority of the Malaysian Supreme Court ruled that to possess *locus standi*, an applicant must show that he had a private right which had been infringed. ***If a public right was involved, the applicant must show that he had suffered special damage as a result of the public act being challenged and that he had a genuine private interest to protect or further*** **.** It is not disputed that in the present appeal, the rights concerned are not public rights. To clarify the terminology used here, ***a public right is one which is held and vindicated by public authorities, whereas a private right is***

one which is held and vindicated by a private individual .

[emphasis added in bold italics]

Vellama

47 As *Tan Eng Hong* was not a case concerning a *public* right, there was no further elaboration on what "special damage" and "genuine private interest" meant. This was until our recent decision in *Vellama*, where this court elaborated on the meaning of "special damage" as follows (at [33]-[34]):

> Where the applicant asserts no more than a public right which is *shared in common* with other citizens, however, standing accrues only if a nexus between the applicant and the desired remedy is established by demonstrating 'special damage'. Public rights are shared in common because they arise from public duties which are owed to the general class of affected persons as a whole. It is in this sense that public rights are "held and vindicated by public authorities" (see [28] above). As public rights are shared with the public in common, an applicant cannot have standing unless he has suffered some 'special damage' which distinguishes his claim from those of other potential litigants in the same class. Furthermore, if 'special damage' were not to be required, it is likely that the courts will be inundated by a multiplicity of actions, some raised by mere busybodies and social gadflies, to the detriment of good public administration. The burden of having to bear costs may not be a sufficient deterrence.
>
> Taken collectively, these rules on standing espouse an ethos of judicial review focused on vindicating personal rights and interests through adjudication rather than determining public policy through exposition. *Matters of public policy are the proper remit of the Executive, and decoupling judicial review from the fundamental precepts of adversarial litigation would leave the courts vulnerable to being misused as a platform for political point-scoring.*
>
> [emphasis added]

48 The last sentence, in particular, stands for a particular view on the role of judicial review in Singapore. Three years before *Vellama*, the former Chief Justice Mr Chan Sek Keong ("CJ Chan") had made similar remarks when speaking extra-judicially at the Singapore Management University in 2010 (Chan Sek Keong, "*Judicial Review – From Angst to Empathy*" (2010) 22 SAcLJ 469). There CJ Chan expressed plainly his opinion that judicial review is a "function of socio-political attitude in the particular community" (at 479), and espoused a certain "green-light" approach towards administrative law for Singapore's context. On this view, public administration is not principally about stopping bad administrative practices but encouraging good ones: "in other words, seek good government through the political process and public avenues rather than redress bad government through the courts" (at 480).

49 This was juxtaposed against the "red-light" approach taken in the UK where the courts exist in a combative relationship with the Executive, functioning as a check on the latter's administrative powers. In the words of *Beatson, Matthews, and Elliott's* Administrative Law, Text and Materials, (4th Ed) at 2-3 "it is the *courts* which are centrally charged with securing good administration, while the emphasis is on administrative law as a *control* upon government". CJ Chan noted that the difference in both approaches has manifested in the different doctrines of *locus standi* developed in each jurisdiction: whilst the English courts have applied the "sufficient interest" test liberally, CJ Chan opined that "[it] is not, in my view, also to say that our courts will apply the test with the same rigour as the UK courts" and raised caution about "seriously curtail[ing] the efficiency of the Executive in practising good governance" (at 481). Rather, in terming judicial review as a

"comparatively blunt tool" in solving symptoms of systemic bureaucratic problems, CJ Chan instead advocated the following approach for the courts in Singapore to take (at 481):

> Under a green-light approach, the courts can play their role in promoting the public interest by applying *a more discriminating test of locus standi* to balance the rights of the individual and the rights of the state in the implementation of sound policies in a lawful manner.
>
> [emphasis added]

50 In our view, the red/ green-light theory of administrative law not only provides a useful classification of administrative law but also highlights the integral role that the political and economic contexts of a jurisdiction play in determining which approach would be more suitable for a given jurisdiction. Professors Harlow and Rawlings' statement that "behind every theory of administrative law, there lies a theory of the state" (C Harlow and R Rawlings, *Law and Administration* (Cambridge University Press, 3rd Ed, 2009) at p 1) finds resonance with Paul Craig who also states that in order to understand the rules, principles and goals of judicial review, one must first come to terms with the social, political and economic contexts of that jurisdiction (P Craig, *Administrative Law* (7th ed, Sweet & Maxwell, London, UK, 2012) at [1-001]). It is in this light that we must approach the law on standing which we have inherited from England, albeit up till 1977, and evaluate its suitability in the Singaporean context today, especially in the context of this appeal.

Distinguishing the current appeal from Tan Eng Hong and Vellama

51 At this point, it would be pertinent to set out the exact nature of the Appellant's claim, vis-à-vis the two earlier decisions of *Tan Eng Hong* and *Vellama*, in order to appreciate the significance of the issue of *locus standi* in this particular appeal. In both of the earlier cases, it was clear that the applicants had some form of *right* in relation to the claim: for *Tan Eng Hong*, it was his private constitutional rights under Articles 9, 12 and 14 of the Constitution, for *Vellama*, it was her public right, as a voter of a constituency which was then without a Member of Parliament, to seek a declaration on the proper construction of Article 49 of the Constitution. In contrast, here the Appellant alleges a wrongdoing on the part of the Government (leaving aside the merits of his case for the moment which, as discussed above, are bare), in that the Government and/or the MAS had somehow breached their public duties by acting in contravention of Art 144. Yet he is unable to assert any rights – private or public – to the alleged breach of duty, because there is none to be had: his claim is brought in the *public interest*. Simply put, the present case falls outside the categories of the *Boyce* exceptions altogether. It is here that we pick up from the discussion in *Vellama* where this court declined to comment further on "applications founded purely on the breach of *public duties* which do not generate correlative public or private rights" [emphasis added] (at [36]), which squarely is the case here.

Public duties and rights

52 The concept of public duties has been astutely described as an "important but elusive one" which has been "consistently ignored by jurists, avoided by public-law scholars, and rendered marginal for much of its history by the judges" (Harding, A. J., *Public Duties and Public Law* (Oxford OUP, 1989) at 1). The difficulty in understanding a public duty, as opposed to a private duty, lies in the breakdown that occurs in the realm of public law of the classical categorization by W. N. Hohfeld of rights and duties as correlative legal concepts. This notable correlation was stated in *Lake Shore & M. S. R. Co v Kurtz* (1894) 10 Ind. App. (at 60) (cited by Hohfeld in *Fundamental Legal Concepts As Applied in Judicial Reasoning*, 1913, Vol 23 Yale Legal Journal 16, at 31) as follows:

.. duty or a legal obligation is that which one ought or ought not to do. 'Duty' and 'right' are correlative terms. When a right is invaded, a duty is violated.

53 Generally in private law, the fact that X owes a duty to Y would normally mean that Y has a correlative right to sue X for a breach of that duty. This, however, does not translate to the same effect in relation to public law, as reflected in the observation by T. R. S. Allan that even though "every public authority has the duty of observing the law … it hardly follows that every official action or decision is appropriately subject to judicial review" (Allan, T. R. S., *Law, Liberty, and Justice: the legal foundations of British constitutionalism* (Oxford, Clarendon Press, 1993) at p 212, 223). The breakdown in this Hohfeldian duty-rights correlation that occurs in the realm of public law is reflected in Nicholas Bamforth's observation that judicial review "involves a much less direct and immediate linkage between the litigant's remedy and the public authority's wrongdoing: for judicial review protects the individuals' interests only *via* the intervening agency of the grounds of review which, as we have seen constitute general principles constraining public authorities, as well as being subject to the discretionary denial of remedies" (Kramer, M. H., *Rights, Wrongs and Responsibilities* (New York, Palgrave, 2001) at p 11).

54 Hence public law has long been perceived as constraining the exercise of public power where such exercise might encroach into an individual's liberties and or his rights (a "protection of the individual" view), as opposed to a means of ensuring that public bodies act properly in a legal sense, even in the absence of those rights (a "public interest" view). Yet the tension between the two has always existed. For instance, in *R v Somerset County Council, ex parte Dixon* [1998] Env LR 111, Sedley J clearly endorsed the latter (at 121):

> Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs—that is to say misuses of public power; and the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power. If an arguable case of such misuse can be made out on an application for leave, the court's only concern is to ensure that it is not being done for an ill motive. It is if, on a substantive hearing, the abuse of power is made out that everything relevant to the applicant's standing will be weighed up, whether with regard to the grant or simply to the form of relief.

55 While there is obvious intuitive appeal in such a view, we need to approach the "red-light" view of public law with caution. The recognition that members of the public do not have the right *per se* to call upon the courts to review every decision made by public bodies is not only undergirded by the obvious pragmatism of minimizing disruptiveness caused by vexatious claims to the functioning of those bodies, but also exists as a reflection of the very ethos of our adversarial system. This leads us to note the principal distinction between the classical Diceyan constitution (which accords more with Austinian jurisprudence) where decisions are made by a responsible government subject to parliamentary scrutiny, and a more communitarian, civic republican tradition where citizens achieve self-fulfilment through participation in politics and decision making, much like the *actio popularis* (see above at [34]), which essentially abolishes standing rules as we understand them to be. In the former, judicial review would be available to individuals for the purpose of protecting their own interests in dealings with the state, whereas the latter would necessarily have relaxed rules of standing in order to allow citizens to act in the public interest to contain perceived acts of governmental abuse (see further, David Feldman, *Public Interest Litigation and Constitutional Theory in Comparative Perspective* (1992) 55 Modern Law Review Rev 44.

56 The full range of theories behind this subject spans much broader than is necessary for us to

delve into here for the purposes of our discussion, but we raise this only to highlight the close nexus between the role of public law - and consequently, the law of standing – and the various political theories that underpin the approaches to the question of standing in different jurisdictions. Suffice it to say that we see much value in maintaining the Dworkinian policy/principle divide here; this finds expression in the courts being concerned only with the individual's rights and interests, and not matters of public policy, which rightfully remains in the remit of proper political process. In this vein, judicial review finds its place as an avenue for parties to bring claims of *legality* to the courts, and not for the purposes of challenging the very *merits* of a policy decision. Extensive judicial intervention in the administrative process is by no means the only avenue by which good governance can be ensured. Some regulatory functions can be better performed by other institutions or organs of state.

Not concerned with merits

57 In relation to what sorts of questions the courts should be considering at the *locus standi* stage, certain observations made by the English House of Lords in the seminal case of *R v Inland Revenue Commissioners, ex parte National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617 ("*R v IRC*") are pertinent, even though *Colin Chan (HC)* has held that for our courts the standard of "sufficient interest" as it was applied in the UK does not have the same application here. In that case, an association of small businesses and self-employed persons (the claimant) argued that the Inland Revenue had exceeded its powers in granting amnesty to a certain group of casual newspaper workers for previous years of falsifying information provided to the Inland Revenue in exchange for those casual newspaper workers registering for tax purposes. Lord Wilberforce, however, upon review of the Inland Revenue's powers, made the following remarks on the role of the courts (at 635):

> On the evidence as a whole, I fail to see how any court considering it as such and not confining its attention to an abstract question of *locus standi* could avoid reaching the conclusion that the Inland Revenue … were *acting in this matter genuinely in the care and management of the taxes, under the powers entrusted to them*. This has no resemblance to any kind of case where the court ought, at the instance of a taxpayer, to intervene. To do so would involve permitting a taxpayer or a group of taxpayers to call in question the *exercise of management powers* and involve the court itself in a *management exercise*. Judicial review under any of its headings does not extend into this area.
>
> [emphasis added]

58 This cautionary tenor was also present in Lord Roskill's observations, after he affirmed the importance of making judicial review available in appropriate cases, as follows (at 633):

> … On the other hand, it is equally important that the courts do not by use or misuse of the weapon of judicial review cross that clear boundary between what is administration, whether it be good or bad administration, and what is an unlawful performance of the statutory duty by a body charged with the performance of that duty …

59 Similarly, if neither of the two *Boyce* exceptions is applicable, this court should not engage in questions relating to the exercise of *management* powers by public bodies (such as the MAS, which derives it powers from the MAS Act). At this point, we refer once again to the facts of the present appeal. The Appellant's case, as explained above, fails for a sheer lack of merit (see [10]-[28] above). Notwithstanding these fundamental flaws in his case, the facts underlying these proceedings are still useful to illustrate our points made above (see [54]-[56]) on the function of judicial review. While the Appellant's case was based entirely on Art 144 in that the Government (which, as

mentioned above, is not the party that extended the Loan) failed to seek Presidential and Parliamentary assent on the transaction, essentially much of the Appellant's case *alluded* to the fact that such an act was not only risky, but also of dubious utility to Singapore. In so far as an applicant's intention in bringing judicial review proceedings against public bodies for certain acts or omissions is to ask the court to rule on the *merits* of these acts or omissions – such as the wisdom of granting the Loan to the IMF – this is not a role that the courts should, in any event, undertake.

Legality

60 On the other hand, the courts are concerned about the *legality* of their actions or omissions. As the guardian of the rule of law, it would be unthinkable that citizens would have no recourse for bringing claims against unlawful conduct by public bodies where there has been an obvious and flagrant disregard for the law. This category of cases may be described, in Lord Fraser's words (in *R v IRC* at 647), as instances of "some exceptionally grave or widespread illegality". In his speech, Lord Roskill also contemplated the strictly *theoretical* (as he emphasised) possibility where individuals whose rights are not directly affected and hence might otherwise be considered busybodies, would have *locus standi* to bring such proceedings where egregious breaches of the law are involved (in *R v IRC* at 662):

> It is clear that the respondents are seeking to intervene in the affairs of individual taxpayers, the Fleet Street casual workers, and to require the appellants to assess and collect tax from them which the appellants have clearly agreed not to do. Theoretically, but one trusts only theoretically, it is possible to envisage a case when because of *some grossly improper pressure or motive the appellants have failed to perform their statutory duty as respects a particular taxpayer or class of taxpayer*. In such a case, which emphatically is not the present, judicial review might be available to other taxpayers. But it would require to be *a most extreme case* for I am clearly of the view, having regard to the nature of the appellants' statutory duty and the degree of confidentiality enjoined by statute which attaches to their performance, that *in general it is not open to individual taxpayers or to a group of taxpayers to seek to interfere between the appellants and other taxpayers*, whether those other taxpayers are honest or dishonest men, and that the court should, by refusing relief by way of judicial review, firmly *discourage such attempted interference by other taxpayers*.
>
> [emphasis added]

61 We also note Lord Diplock's concerns where he lamented the emergence of a "grave lacuna" in the system of public law if applicants were to be denied *locus standi* by virtue of standing rules that would stop them from bringing matters "to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped" (at 644). While in general we acknowledge the force of this argument, it should not *ipso facto* extend to *all* forms of unlawful conduct without discrimination. It cannot be the case that a citizen is always entitled to come to court to ask for intervention by the court whenever it is alleged that a public body had acted beyond the powers conferred on it. The gravity of the breach would be a relevant consideration. The statutory scheme of things in relation to which the breach is alleged to have occurred is another. Now the essence of the complaint of the Appellant relates to the fact that (assuming the grant of a loan or the promise of a grant of a loan falls within Art 144) the Government had failed to obtain a Parliamentary resolution authorising the loan as well as the concurrence of the President to the same. Interestingly, we have been advised by the Appellant that he had in fact brought his concern up to the President. This question of whether the Loan should have been granted to the IMF was also a matter which was brought up in Parliament. However, neither Parliament nor the President had thought fit to question the propriety of the promised loan. If the President was indeed concerned and inclined to veto the commitment, he would

have done so. Alternatively, the President could have referred the question for an advisory opinion to a tribunal of three judges pursuant to Art 100 of the Constitution (see *Constitutional Reference No 1 of 1995* [1995] 1 SLR(R) 803 for an example). In the context of the scheme we do not think that Parliament intended by enacting Art 144 that persons such as the Appellant would have the standing to ask for judicial review of the action of the MAS (or of the Government, even assuming that the act of the MAS was that of the Government): see P. Cane, *Standing, Legality and the Limits of Public Law* [1981] PL 322 at 333 and *R v IRC* per Lord Wilberforce at 729-730 and Lord Fraser at 742. The nature of the issue is entirely political and should be resolved as such. In a parliamentary system of government, the government of the day would have commanded the majority vote of the House.

Public duties without correlative public rights

62 At this juncture, we need only make one further observation on the question of standing. It is clear that the law of standing is a judge-made doctrine of the common law (see Lord Diplock's speech at 639, and Lord Scarman's speech at 648 in *R v IRC*). We have already noted that, in so far as public rights are concerned, it was held in *Boyce* that "where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right" the plaintiff would have the standing to ask for judicial review in respect of that interference. In this regard, it seems to us that "special damage" might also possibly encompass those rare and exceptional situations where a public body has breached its public duties in such an egregious manner that the courts are satisfied that it would be in the public interest to hear it. However, we maintain that this is a very narrow avenue which concerns only extremely exceptional instances of very grave and serious breaches of legality. Judicial review is not the recourse for petty claims against breaches of just *any* public body or servant; a low-level government officer's failure to execute his duties fully would obviously not fall in the same category as a Cabinet Minister's abuse of his wide-ranging powers. As a note of caution, we would also pre-emptively clarify that what we have stated in these paragraphs should not in any way be taken as a spurring move towards the surge of public interest litigation that has been making its way into the courts of other jurisdictions where taxpayers' actions questioning all nature of administrative acts are commonplace with an established body of case law and jurisprudence on the topic. Indeed, as is all too apparent, the very notion of "public interest" has intrinsically the risk of it running amok, depending on the whims and fancies of anyone who happens to be a citizen of Singapore.

63 We also note that engaging in such a balancing act between considering both (1) the rights of the applicant and (2) the legality of public bodies' actions to determine *locus standi* has not escaped criticism (see P. Cane, *Standing, Legality and the Limits of Public Law* [1981] PL 322 at 336). However, we would emphasise that the principles in *Boyce*, which represent the view that individuals must have sufficient stakes in order to have standing, would still be the predominant test for most cases. This has been unequivocally applied by this court in both *Tan Eng Hong* and *Vellama*, and we do not propose to depart from that position.

Summary of the law on locus standi

64 To recapitulate, the law on *locus standi* in Singapore stands as follows: there must firstly be a public duty which has been breached; without such a breach, there can be no question of whether an applicant has standing or not. Where this public duty generates correlative private rights (as the case in *Tan Eng Hong*) or public rights (as the case in *Vellama*), the applicant would have *locus standi*. However, in the rare case where a non-correlative rights generating public duty is breached, and the breach is of sufficient gravity such that it would be in the public interest for the courts to hear the case, an applicant *sans* rights may be accorded *locus standi* as well, at the discretion of the courts.

65 We would only reiterate that none of these categories are made out in this case: not only does the Appellant lack any public or private rights in this matter such that he could establish *locus standi* to bring this application, he has also failed to show that the *Government* had in any way breached its duties under Art 144 (*ie*, there was no public duty that was infringed to begin with).

Conclusion

66 In sum, we dismiss the appeal with costs for the following reasons:

(a) the Appellant has failed to establish a *prima facie* case of reasonable suspicion; and

(b) the Appellant does not have the *locus standi* to challenge Art 144.

[note: 1] Appellant's Core Bundle Vol II p 17

[note: 2] AC para [9.6]

[note: 3] Judgment at [35]

[note: 4] It is not clear what is the source on which the Appellant relied to attribute this quote to Ms Lagarde, or if she had even made such a comment.

[note: 5] GD at [47]

[note: 6] GD at [48]