Jurnal Undang-Undang dan Masyarakat 8(2004) 59-77

Locus Standi Rule For Judicial Review: The Current Law in The UK and Malaysia

MD. ABDUL JALIL

ABSTRACT

In an application for judicial review the court first determines whether the applicant has locus standi to bring the case to the court. If the court finds that the applicant does not have locus standi, the court will dismiss the case as frivolous and vexatious. It is important to make locus standi rule flexible. If the locus standi rule is made strict then in some cases a person whose right or interest is not adversely affected may not apply for judicial review although the person is representing other people who are adversely affected. Strict interpretation of locus standi rule bars public interest litigation in judicial review. In this paper I have examined the current locus standi rule in the UK and Malaysia, and have suggested that the locus standi rule might be made flexible so that a public-spirited man or a representative body can have standing to apply for judicial review to protect down-trodden public interest in genuine cases.

ABSTRAK

Sebelum membenarkan permohonan untuk mendapatkan semakan kehakiman, Mahkamah akan terlebih dahulu menentukan sama ada pemohon mempunyai locus standi untuk membawa kes ke Mahkamah. Jika Mahkamah mendapati pemohon tidak mempunyai locus standi, Mahkamah akan menolak kes tersebut atas alasan 'frivolous and vexatious'. Adalah penting untuk menjadikan kaedah locus standi sebagai sesuatu yang anjal. Ini adalah kerana dalam sesetengah kes, kaedah locus standi yang terlalu ketat akan menghalang seseorang yang walaupun hak dan kepentingannya tidak terjejas daripada mendapatkan remedi untuk orang yang diwakilinya bagi memulihkan haknya yang terjejas itu. Pentafsiran kaedah locus standi yang ketat akan menghalang semakan kehakiman dalam pertikaian yang menyentuh kepentingan awam. Dalam kertas ini penulis akan mengkaji kaedah locus standi terkini di UK dan Malaysia, serta mencadangkan agar kaedah locus standi dijadikan lebih anjal supaya orang awam yang berkepentingan atau badan perwakilan mempunyai hak untuk memohon semakan kehakiman bagi melindungi kepentingan awam dalam kes-kes yang sah.

INTRODUCTION

Locus standi is a Latin phrase which means "a place of standing".[1] In legal terminology it means a right of appearance before any formal body, such as

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[1] Ivamy, E.R. Hardy (ed.), *Mozley and Whiteley's Law Dictionary*, Butterworth, London, 1988, pg. 276.

a court, in any given matter.[2] In administrative law *locus standi* denotes a right to challenge an *ultra vires* or unlawful administrative action or decision in a court which affects the right or interest of a citizen. If a person intends to apply for judicial review of any decision made by any administrative officer, he must prove at the leave stage that he has *locus standi*, that is he must have sufficient interest in the subject matter of the case and he is adversely affected by the administrative decision. This is basically required to strike out frivolous and vexatious cases. It is important that *locus standi* rule should be made flexible so that people who have some interest in the subject matter of dispute (an administrative decision) as a member of the society may go to the court for judicial review. In this paper I have discussed the current *locus standi* law in Malaysia and the UK with special reference to the recent amendment in the Order 53 of the Rules of High Court (RHC) (Malaysia) in 2000.

LOCUS STANDI RULE IN THE UK

Before 1978, in Britain different standards or tests were applied regarding standing for *mandamus*, *certiorari* and prohibition. In case of *mandamus*, the court used a stricter test than other two prerogative orders such as *certiorari* and prohibition.[3] For the equitable remedies of declaration and injunction, the applicant had to prove that he had a "specific legal right" or had suffered "special damage" over and above that suffered by the public in general.[4] In case of *mandamus*, the applicant also needed to have a "specific legal right" to require an administrative official to do his public duty in accordance with law.[5] If the applicant did not have "specific legal right" he could not apply for *mandamus*, declaration and injunction.

In 1978, the *locus standi* rule in Britain was reformulated to enact a liberal rule on *locus standi*. The new Order 53 of the Rules of Supreme Court, which came into force on 11 January 1978, provides that: "The court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates."[6] Same provision has also been enacted in section 31(3) of the Supreme Court Act 1981 (UK). This new rule

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2 Ibid. See also, *Latin Words & Phrases for Lawyers* (Complied under the direction of Editorial Advisory Board), Law and Business Ontario Publications, Canada Inc., 1980, pg. 143.

3 *R. v. Thames Magistrates' Court, ex p. Greenbaum* (1959) 55 LGR 129. See also, *R. v. Commissioner of Customs and Excise, ex p. Cooke and Stevension* [1970] 3 All ER 1068.

4 *Boyce v. Paddington Borough Council* [1903] 3 All ER 1068.

5 *R. v. Commissioner of Customs and Excise, ex p. Cooke and Stevenson* [1970] 3 All ER 1068.

6 Order 53 rule 3(5) of the Rules of Supreme Court.

of *locus standi* implies that to apply for judicial review, the applicant taxpayer must have "sufficient interest" in the subject matter as the requirement of *locus standi*. This new rule does not require the old judicially created requirement that the applicant must be an "aggrieved person", and must have "specific legal right" to the subject matter. Therefore, this rule may liberalize the principle of *locus standi* to allow the public spirited people such as a taxpayer or taxpayers' organisation to have access to the public interest litigation, where the applicant is not an aggrieved person.

The significance of this new rule is that it requires a single uniform test of standing for all types of remedies in judicial review proceeding.[7] This was the majority view of the House of Lords in *R. v. Inland Revenue Commissioner, ex p. National Federation of Self-employed and Small Businesses Ltd.*[8] However, Lord Wilberforce suggested that a stricter test for *mandamus* may prevail. My humble opinion in this matter is that it would be better if the court follows one single test for all the remedies.

The above view of single uniform test for standing will accord with the objectives of the new Order 53 and will be highly acceptable by the applicants as well as the practising lawyers in the field of judicial review. Whether an applicant has standing to seek judicial review will depend solely on the legal and factual context of a case. Lord Wilberforce observed in this regard that:

To determine the *locus standi* of the applicant it will be necessary to consider the powers or duties in law of those against whom the relief is sought, the position of the applicant in relation to those powers or duties and to the breach of those said to have been committed.[9]

Order 53 rule 3(5) of the Rules of Supreme Court (UK) and section 31(3) of the Supreme Court Act 1981 (UK) require that *locus standi* should be assessed at the leave stage. Referring to the provisions, the House of Lords have observed that the question of standing involves two-stages test.[10] At the leave stage the court will form a provisional view as to whether an applicant has a sufficient interest, and at the full hearing, the sufficiency of the applicant's interest will be assessed against the full legal and factual back-ground to the application.

WHO CAN CLAIM "SUFFICIENT INTEREST"

It is very pertinent to determine who has "sufficient interest" and who does not have. The UK courts do not set any rigid formula to determine who has "sufficient interest" and who does not have in an application for judicial

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7 Lewis, C., *Judicial Remedies in Public Law*, Sweet & Maxwell, London, 1992, pg. 268.

8 [1982] AC 617.

9 Ibid., pg. 630.

10 Ibid.

review. The court determines "sufficient interest" (*locus standi*) looking at various factors such as, the nature of the power and duty of a public authority to be performed, the nature of the breach of the duty, the objective and content of the provisions of a statute which has not been complied with, whether the public authority has acted unlawfully, the nature of the right or interest of the applicant which has been affected by public authority decision etc.

In *R. v. IRC, ex parte National Federation of Self-Employed and Small Businesses Ltd*,[11] the House of Lords held that the Federation did not have sufficient interest in the case because it could not prove that the Revenue had failed to do their statutory duty. Lord Diplock in this case observed that he could held that the Federation had "sufficient interest" if the Federation could prove that the conduct of the Revenue was *ultra vires* or unlawful in the circumstances.[12]

Lim Beng Choon J., (in Malaysia) in *George John*'s case[13] stated his opinion on how to determine whether the applicant has "sufficient interest". He observed:

The extent of sufficient interest depends on diverse variable factors such as the content and intent of the statute of which contravention is alleged, the nature of the breaches of statutory power, the specific circumstances of the case, the nature and extent of the applicant's interest or grievance and the nature and extent of the prejudice or injury suffered by him.[14]

THE NEW RULES OF PROCEDURE FOR JUDICIAL REVIEW IN THE UK

It is to be noted that the procedure and rules of an application for judicial review under new Order 53 of the Rules of the Supreme Court (UK) have recently been amended in the UK in 1998. Order 53 of the Rules of Supreme Court (UK) has been abolished and replaced by the new Part 54 of the Civil Procedure Rules 1998 (CPR).[15] The new rules have brought judicial review of administrative actions fully within the framework of the CPR. The new rules in Part 54 of CPR have made some changes with respect to the permission stage (leave stage) and third party intervention. However, the *locus standi* rule has not been changed.[16] It still requires "sufficient interest" to the subject matter to have *locus standi*.

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[11] [1982] AC 617.

[12] Facts of this case has been stated at p 15.

[13] *George John v. Goh Eng Wah Bros Filem Sdn Bhd.* [1987] LSN (Legal Network Services) 111.

[14] The above observation of Lim Beng Choon J., is also stated in *YAM Tuanku Dato' Seri Nadzaruddin v. Datuk Bandar Kuala Lumpur and Anor* [2003] 1 CLJ 210 pg 216.

[15] Cornford, T., 'The new rules of procedure for judicial review' *Web Journal of Current Legal Issues* (2000). Web site: <http://webjcli.ncl.ac.uk/2000/issue5/cornford5.html> (20 Nov 2003).

[16] Ibid.

PERMISSION STAGE

The new rules of procedure for judicial review under Part 54 of CPR 1998 provides new rules to be followed at the permission stage. The claimant at the permission stage must fill up the claim form which will include or be accompanied by a detailed statement of the claimant's grounds for bringing the claim for judicial review, a statement of facts relied on, any written evidence in support of the claim, copies of any document on which the claimant proposes to rely and a list of essential documents for advance reading by the court.[17] The claimant must serve the claim form on the defendant and on any person the claimant considers to be an interested party. If the defendant or any other person on whom the claim form is served wishes to take part in the judicial review and wishes to contest the claim must file an acknowledgement of service to the court and set the summary of his grounds for contest in the acknowledgement.

The new rules for judicial review in CPR provide *inter parties* procedure at the permission stage for determining *locus standi* which was not found in Order 53 of the Rules of Supreme Court. The court will take decision whether to give permission for judicial review based on papers submitted by the claimant and the defendant. However, the new rules do not state anything about the criteria for the grant of permission at the permission stage, although the Bowman Committee proposed that permission for judicial review will be given if there is an "arguable case" in favour of the claimant.[18]

THIRD PARTY INTERVENTION AT THE POST-PERMISSION HEARING

New rule 54.17 of Civil Procedure Rules 1998 (UK) gives the court power to permit any person interested to file evidence or make representations at the hearing of judicial review. This rule together with the "sufficient interest" requirement provide opportunity for the public interest litigation. Therefore, under the new rule of CPR a public-spirited man or a representative organization may take part at the hearing of an application for judicial review.

ANALYSIS ON COURT'S OBSERVATION ON LOCUS STANDI RULE IN THE UK.

The varied speeches of the law Lords except Lord Diplock *in R. v. IRC, ex parte National Federation of Self-Employed and Small Businesses Ltd.*,[19] imply the view that the applicant in judicial review proceedings has to show some personal injury and a public-spirited man or organization may not challenge an action taken by an administrative department merely because he

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[17] See, Rule 54.6(2) and Practice Direction (PD) 54 paras 5.6 and 5.7.

[18] Cornford, T., 'The new rules of procedure for judicial review' pg. 5

[19] [1982] AC 617; [1981] 2 All ER 93.

does not have any interest in the subject matter or has not suffered any loss.[20] This view will bar a public-spirited man or a representative organisation to have access in public interest litigation, where his or its personal interest is not affected.

An applicant (a taxpayer) may have standing to challenge the decision of the Revenue department for making assessment on other taxpayers differently from him. Here the taxpayer has sufficient interest to challenge the decision of the Revenue because, a taxpayer is entitled to challenge the decision of Inland Revenue if the decision affects his legal rights, interests or legitimate expectation. In *National Federation of Self-Employed and Small Businesses Ltd.*,[21] Lord Wilberforce observed differently. In this case he stated that:

> As a matter of general principle a taxpayer has no sufficient interest in asking the court to investigate the tax arrears of another taxpayer; indeed there is a strong public interest that he should not.

With respect, this statement may not always be correct in all tax cases. If two or more competitive taxpayer companies are conducting business and one of them may complain against the tax department for applying two methods of taxation to assess them differently; or if one taxpayer is given some tax exemption or tax incentive but another is not given who is in the same legal position. In these cases a taxpayer may complain against the taxation decision made in relation to another taxpayer on the ground of discrimination or unlawfulness.

In *R. v. Attorney-General, ex. p. P. ICI plc*,[22] the court allowed a rival taxpayer company to challenge the method of valuation of profits by the Revenue on another rival company which gave the other rival company some advantage over the other because, the applicant taxpayer's interest was affected by the decision of the Revenue. Hence, a taxpayer may probe into the tax affairs of another taxpayer if his business interest is affected.

In the past the court accorded *locus standi* to the ratepayers to challenge local authority decisions. Ratepayers have been allowed to challenge their own rating assessment and the rating assessment of others. In *R. v. Paddington Valuation Officer, ex. p. Peachy Property Corp. (NO. 2)*,[23] a rate-paying company was allowed to challenge the valuation lists made by the rating authority, although it was alleged that the applicant company's own financial interest in the valuation list was minimal. In this case the court held that

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[20] Jain, M.P., *Administrative Law of Malaysia and Singapore*, Kuala Lumpur, 1997, pg. 751.
[21] [1981] 2 All ER 93.
[22] [1987] 1 CMLR 72.
[23] [1966] 1 QB 380.

certiorari would be issued on the application of anyone whose interest was affected by what had been done, though the court would not listen to a mere busybody who was interfering in things which did not concern him.[24]

If one of the ratepayers is under-assessed in the valuation list in relation to his hereditament, the other ratepayer in the same local area may have *locus standi* to challenge the valuation list. In *Arsenal Football Club v. Ende*,[25] the appellant, Arsenal Football Club owned a stadium which was under-assessed in the valuation list as the rateable value of the stadium. The respondent was a ratepayer and was living within the same local area, Islington. Being aggrieved by the under-valuation of a stadium by the valuation officer, the respondent made a proposal for the alteration in the valuation list as regards Arsenals hereditament. The question of *locus standi* was raised. Under section 69(1) of the General Rate Act 1967 (UK), the respondent must be a person who is aggrieved by any value ascribed in the list to a hereditament.

The House of Lords held that the respondent as a ratepayer in the same local area was a person aggrieved in light of the section 69(1) of the Act. The court also ruled that fairness and uniformity had always been standards by which to judge the validity of rates. The valuation of the stadium was not fair in this case. Therefore, although the respondent could not demonstrate any financial or other loss as a ratepayer, he was in the circumstances a "person aggrieved" within the meaning of section 69(1) of the Act. In this case certainly the House of Lords adopted liberal meaning of *locus standi*. Such a decision will allow the ratepayers or taxpayers to have easy access to the court of law against the decision made by the rating authority or tax authority.[26]

LOCUS STANDI IN MALAYSIA

At present the judiciaries in the common law countries are liberalising the rule of *locus standi*. This is to facilitate the people to challenge unlawful action taken by the administrative bodies including tax departments. In this regard Professor M.P. Jain has said:

> The present-day tendency all over the common law world is towards liberalisation of the rule of *locus standi* to seek judicial redress against complaints of maladministration. It is to be appreciated that if the rule of standing is strict, there may

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[24] See also, *R. v. Waltham Forest London Borough Council, ex p. Baxter* [1988] QB 419; *R. v.Commissioner of Customs and Excise, ex. p. Cooke and Stevenson* [1970] 3 All ER 1068; *R. v. Hereford Corporation, ex p. Harrower* [1970] 3 All ER 460.

[25] [1979] AC 1. See also *Boyce v. Paddington Borough Council* [1903] 1 Ch 109.

[26] See also, *Bromley London Borough Council v. Greater London Council* [1983] 1 AC 768; *Prescott v. Birmingham Corp* [1955] Ch 210; *R. v. Secretary of State for Transport, ex p. Gwent County Council* [1988] QB 429.

arise a situation when there is no one qualified to bring an action in the court and consequently, the administrative order then go unreviewed. This will amount to a negation of rule of law.[27]

AMENDMENT OF ORDER 53 OF THE RULES OF HIGH COURT (MALAYSIA)

Order 53 of the Rules of High Court 1980 (Malaysia) did not provide any provision for *locus standi* rule. However, the Malaysian court used "an aggrieved person" as the requirement for *locus standi* rule before amendment of Order 53 of the Rules of High Court in 2000. At that time Malaysian court only granted leave for an application of judicial review if the applicant could prove that he is "an aggrieved person". The meaning of "aggrieved person" was that the applicant's legal right has been affected by the decision of the administrative authority.

Order 53 of the Rules of High Court (Malaysia) was amended in 2000 and new rule 2(4) was inserted in Order 53. Rule 2(4) of new Order 53 provides the requirement of *locus standi*. This rule provides that if a person is "adversely affected" by the decision of an administrative authority, he is entitled to apply to the High Court for judicial review of the decision taken. The wording of the new rule 2(4) is as follows:

> Any person who is adversely affected by the decision of any public authority shall be entitled to make the application (for judicial review).

The new Order 53 requires an applicant for judicial review to be "adversely affected" by the decision of public authority to be entitled to apply for judicial review. What does "adversely affected" mean? Does it mean that the taxpayer must be "an aggrieved person" by the decision? Malaysian courts have to analyse the actual meaning of the phrase "adversely affected".

If the new Order 53 requires that the applicant's property, right or interest must be adversely affected to be entitled to apply for judicial review, then the new Order 53 may exclude public interest litigations where a public-spirited man or a representative body may not be entitled to challenge a public authority's decision, because he is not adversely affected by the decision. Hence, we can say that the new Order 53 basically restates the already applied *locus standi* rule in Malaysia before amendment in 2000. Only difference is that before amendment in 2000, the applicant had to prove that he was an "aggrieved person" and now under new Order 53 the applicant for judicial review must prove that he is "adversely affected" by the administrative decision.

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[27] Professor Jain, M.P., *Administrative Law of Malaysia and Singapore*, Malayan Law Journal, Malaysia 1997, pg. 749.

Now if we compare between the new Order 53 (Malaysia) and Part 54 of CPR (UK), we will find that the *locus standi rule* in these two countries are different. In the UK the *locus standi* rule has been liberalised to enable more and more people to have access to the judicial review proceedings while in Malaysia the *locus standi* rule has been made strict so that if a person is not "adversely affected", he will not be entitled to apply for judicial review.

CASE ANALYSIS ON POINT OF LOCUS STANDI RULE IN MALAYSIA

The new order 53 in the UK which came into force in 1978, had influenced Malaysian courts to some extent. In some cases the courts have applied the rule of "sufficient interest" instead of the old rule "an aggrieved person" applied by the Malaysian courts before amendment in Order 53 of RHC in 2000. However, in majority of the cases, Malaysian courts have insisted that the applicant must be "a person aggrieved" by the decision. In *Lim Cho Hock v. Government of the State of Perak,*[28] the plaintiff sought several declarations revolving around the main question of the validity and legality of the appointment, by the state Authority of Perak, of the Mentri Besar of Perak as the president of the Ipoh Municipal Council. The plaintiff was a member of parliament for Ipoh, a member of the Perak State Legislative Assembly as well as a ratepayer within the council area. After referring to British, Canadian and New Zealand cases, Abdoolcader J. noted that in recent times there seemed to have been signs of a change in judicial attitudes directed to a more liberal rather than the restricted scope of individual standing hitherto adopted and that these cases in effect made the *locus standi* question discretionary where the interest of compelling public bodies to observe and obey the law could be served. The court held that the plaintiff as a ratepayer had standing to institute the proceedings and seek declarations.[29]

In deciding the question of standing, the nature of the applicant's interest in the subject matter is of great importance. A representative body or a pressure group may have standing to apply for judicial review of an administrative decision that affects the people generally.

The High court in *Mohammed bin Ismail v. Tan Sri Haji Othman Saat,*[30] held a liberal view of standing. Wan Yahya J. in the High court observed that:

Public interest demands that a wider and more liberal construction be given to the class of persons who could qualify as having a right or interest to such a remedy (in

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[28] [1980] 2 MLJ 148.

[29] See also, *George John v. Goh Eng Wah Bros, Filem Sdn. Bhd.* [1988] 1 MLJ 319; *Abdul Razak Ahmed v. Kerajaan Negeri Johor* [1994] 2 MLJ 297.

[30] [1982] 2 MLJ 133.

judicial review). In our courts the mendicant may in appropriate circumstances challenge the act of a Minister if the exercise of such act appears to be unlawful, or against public interest. I would hold that the English authorities on the subject of "sufficient interest" in a judicial review equally apply to our courts."

The above observation of Wan Yahya J. clearly recognised public interest litigation in judicial review proceedings and thereby liberalised the *locus standi* rule and held that the English *locus standi* rule "sufficient interest" is equally applicable in Malaysia. However, in this case Abdoolcader J. in the Federal Court of Malaysia observed:

The sensible approach in the matter of *locus standi* in injunctions and declarations would be that as a matter of jurisdiction, an assertion of an infringement of a contractual or a proprietary right, the commission of a tort, a statutory right or the breach of a statute which affects the plaintiff's interest substantially or where the plaintiff has some genuine interest in having his legal position declared, even though he could get no other relief, should suffice.[31]

In the above case the High Court propagated a broad principle regarding locus standi that a citizen has a right in a democratic country to challenge in a court an unlawful action of the state even when he may have no real grievance or injury at all if he has "sufficient interest" in the matter. However, the Federal court insisted on the infringement of an individual right or interest.

In *Government of Malaysia v. Lim Kit Siang*,[32] Abdul Hamid CJ (Malaya) and Hashim Yeop A. Sani SCJ stressed in the Supreme Court that where public and not private right was in issue, the applicant needs to show some special interest beyond that possessed by the public. The majority of the justices in the Supreme Court were of the opinion that, the English position was not directly relevant because of the post-1977 changes.

In the above case the court's statement was against the liberalisation of *locus standi* rule. Now it is high time to see how Malaysian courts decide on public interest issues under new Order 53 of the Rules of High Court (which was amended in 2000). In this regard the court may take into account of the observation made by Wan Yahyah J. at the High Court in the *Mohamed bin Ismail* case.

We can refer to a recently given decision on *locus standi* issue by the High Court of Malaya, Kuala Lumpur in *YAM Tuanku Dato' Seri Nadzaruddin v. Datuk Bandar Kuala Lumpur and Anor*,[33] In this case the applicant applied

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[31] Ibid., pg. 179.
[32] [1988] 2 MLJ 12.
[33] [2003] 1 CLJ 210.

for leave to apply for judicial review against the decision given by the first respondent. The first respondent approved the second respondent's plan to develop his land adjacent to the applicant's land. The development plan which was approved stated that the second respondent could build two blocks on the land with 107 units. The applicant opposed the approved development plan *inter alia* that the plan would raise the density from 30 persons to 285 persons per acre in the area which may cause so many social and traffic problems.

In this case the issue of *locus standi* rule was raised and the court referred to rule 2(4)[34] of the new Order 53 of the Rules of High Court (Malaysia) (amended in 2000) and found that the applicant had *locus standi* as he was adversely affected as the owner of the adjacent land of the respondent.[35] It is to be noted that in this case the High Court stated that if the applicant did not have a legal or equitable right he must have at least "sufficient interest" in the subject matter. The High Court observed as follows:

The court is in full agreement with Lim Beng Choon J. in *George John*'s case when he said: In order to have the *locus standi* to invoke the jurisdiction of judicial review, the applicant should claim, if not a legal or equitable right, at least a sufficient interest in respect of the matter to be litigated. The extent of sufficient interest depends on diverse variable factors such as the content and intent of the statute of which contravention is alleged, the nature of the breaches of statutory power the specific circumstances of the case, the nature and extent of the applicant's interest or grievance and the nature and extent of the prejudice or injury suffered by him.[36]

It is worth mentioning here that the judiciary in India has also liberalised the *locus standi* rule and has accepted public interest litigation where the applicant has no interest save only public interest. It is my humble opinion that all the common law countries should follow such a pragmatic and beneficial decision. The Supreme Court of India observed in the *Judges Appointment and Transfer* case[37] that:

Where a person or class of persons to whom legal injury is caused or legal wrong is done but by reason of poverty, disability or socially or economically disadvantaged position not able to approach a court for judicial redress, any member of the public acting *bona fide* and not out of any extraneous motivation may move the court for

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[34] Rule 2(4) of Order 53 of RHC 1980 (Malaysia) provides:
"Any person who is adversely affected by the decision of any public authority shall be entitled to make the application (for judicial review)."

[35] Ibid, pg. 216.

[36] Ibid.

[37] AIR 1982 SC 149.

judicial redress of the legal injury or wrong suffered by such person or class of persons and the judicial process may be set in motion by any public spirited individual or institution even by addressing a letter to the Court.[38]

COMPARISON OF LOCUS STANDI RULE BETWEEN THE UK AND MALAYSIA

In the UK the applicant in an application for judicial review must have "sufficient interest" in the subject matter to apply for judicial review.[39] He does not need to prove that he has "specific legal right" in the subject matter and his "specific legal right" has been affected by administrative decision. He also does not need to prove that he has been an "aggrieved person". Simply he needs to prove at the permission stage that he has "sufficient interest" in the subject matter of the case.

In Malaysia, the applicant in an application for judicial review has to prove that he has been "adversely affected" by the administrative decision. The meaning of "adversely affected" is not very clear. Does it mean that the applicant's legal right should be adversely affected; or any right (including equitable right) or interest should be affected? Malaysian court has not yet clearly expressed its opinion on this matter. However, from recent judicial decisions it seems that Malaysian courts impliedly approve "equitable right or interest" as requirement for standing in the court for judicial review.[40]

The *locus standi* law in the UK is flexible but the law in Malaysia is stricter than the UK. The "sufficient interest" rule in the UK allows more and more applicants to apply for judicial review of administrative decisions. This flexible standing rule in the UK also allows public interest litigation in the sense that a public-spirited man or a representative body may apply for judicial review to vindicate the rule of law. For example, if a government development policy unfairly affects the people in an area, any public-spirited man or a representative organisation may apply for judicial review of the policy decision as they have "sufficient interest" in the subject matter.

In Malaysia locus standi rule is that the applicant in an application for judicial review must be "adversely affected" by the public authority decision. This rule means that the right or interest of the applicant must be "adversely affected" to have standing to apply for judicial review. If his rights are not adversely affected by the public authority's decision the applicant may not have *locus standi*. So, Malaysia propagates a stricter *locus standi* rule which

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[38] See also, the observation of Bhagwati J, in *Peoples Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473.

[39] Part 54 of Civil Procedure Rule (UK).

[40] *YAM Tuanku Dato' Seri Nadzaruddin v. Datuk Bandar Kuala Lumpur and Anor* [2003] 1 CLJ 210 pg. 216.

may bar public interest litigations in the sense that a public-spirited man cannot apply for judicial review because his personal right or interest has not been affected by public authority decision; or the court may ask him to prove that he has suffered "special damage" over and above that suffered by the public in general which is to negate his *locus standi*. This strict rule will certainly bar certain applicants to have *locus standi* in an application for judicial review where not his personal right but public right or interest is affected.

PUBLIC INTEREST LITIGATION

Earlier in this paper I have said that the *locus standi* rule should be made flexible to recognise the public interest litigations. If the *locus standi* rule is made strict then in some cases it will happen that nobody has standing to sue an administrative authority for its unlawful decisions.

In *R. v. Inland Revenue Commissioner, ex p. National Federation of Self-employed and Small Businesses Ltd*,[41] about 6,000 "fleet Street Casuals" were working for newspaper companies. They did not write their true names in the pay dockets to evade employment tax. Thus the Revenue lost around £1m tax per year. These "Fleet Street Casual" workers were backed by their trade unions. Therefore, they were very powerful. The Revenue discovered this tax fraud and wanted to collect the past years' unpaid taxes from them but the casuals threatened industrial action against the employers. Hence, the Revenue made an arrangement with the casuals, their employers, and their trade unions that they will disclose their true names of the casual workers and pay future taxes regularly. Thereby, the casuals were given amnesty for the past years' taxes.

The respondent Federation which was representing a group of taxpayers sought a declaration under Order 53 of the Rules of Supreme Court (UK) that the Revenue had acted unlawfully in making the arrangement and also sought an order of *mandamus* directing the Revenue to assess and collect tax from the casuals as required by law. The question was whether the Federation had sufficient interest to challenge the action of the Revenue. In the Court of Appeal it was held that the Federation had *locus standi* as it had sufficient interest in the matter. Lord Denning in the Court of Appeal observed that the Self-employed and Small Shopkeepers "have a genuine grievance because, as they see it, the Fleet Street casuals are getting out of paying their back taxes because of their industrial muscle."[42] However the House of Lords

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[41] [1981] 2 All ER 93; [1982] AC 617.

[42] [1980] 2 All ER 378.

unanimously reversed the decision of the Court of Appeal. The House of Lords held that the Federation did not have sufficient interest in the matter.

In the House of Lords, Lord Scarman stated that the Federation had not shown sufficient interest as it could not show that the Revenue had failed to do their statutory duty. If the Federation could show reasonable grounds for believing that the failure to collect tax from the casuals was an abuse of the Revenue's managerial discretion, then he would hold that the Federation had sufficient interest to challenge the decision of the Revenue.

Lord Wilberforce stated that as a matter of general principle a taxpayer had no sufficient interest in asking the court to investigate the tax arrears of another taxpayers, indeed there was strong public interest that he should not. Lord Diplock on the other hand took the liberal approach for granting *locus standi*. He said that the expression "sufficient interest" leaves the matter of standing to the unfettered discretion of the courts. He denied *locus standi* on the ground that the Federation had failed to show that the conduct of the Revenue was *ultra vires* or unlawful. If the Federation could prove that the conduct of the Revenue was *ultra vires* or unlawful, he could held that the Federation had shown sufficient interest to bring the case to the court. Lord Diplock, while delivering his judgment in the House of Lords observed that:

It would be a grave lacuna in our system of public law if a pressure group, like the Federation or even a single public-spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."

The above statement of Lord Diplock was a brave and historic statement to liberalise the rule of *locus standi*. The view expressed by Lord Diplock was very significant as it liberalised the rule of standing and opened the gate for public interest litigation. It was a very interesting case to decide whether the Federation had *locus standi* and whether it could get the order of *mandamus*. My humble opinion is that at the preliminary stage of hearing the court could grant *locus standi* to the Federation and could held that the Federation had sufficient interest to challenge the decision of the Revenue on the ground of public interest. However, due to the complicated situations in that case I have doubt that the court could issue an order of *mandamus* requiring the Revenue to assess and collect the past years' taxes from the Fleet Street Casuals at the final hearing.

The court in the above case said that the Revenue acted on good managerial reasons, that was to collect future taxes regularly without having any difficulty. Nonetheless, the decision seemed to be slightly unfair for other taxpayers, who were paying their taxes sincerely.

In the above case the law Lords were influenced by the fact that the Revenue had a duty of confidence to all taxpayers and therefore a taxpayer

might not ask the court to investigate the tax affairs of another taxpayer. But this duty of confidence must go with the duty to act fairly. If the Revenue discriminates between the individual taxpayers or groups of taxpayers, whereby one group is under-assessed than the other, then the affected group of taxpayers or their representative body may ask the court to review the conduct of the Revenue. Since the decision in the above case, the courts are adopting liberal views on the question of *locus standi* in the UK. Courts are now granting standing to an individual or a group of people to challenge an administrative action which affects the public interest on the ground of public interest litigation.[43]

A federation or representative body of taxpayers may apply to the court for judicial review of decisions made affecting the rights or interests of some taxpayers or even a single taxpayer in the association. Here the representative body or association may not have sufficient interest to challenge the decision made by the Revenue against one of the member taxpayers, but certainly the representative body has sufficient interest to challenge the decision on public interest ground. Public interest demands that if a taxpayer or a group of taxpayers are unable to sue the tax department due to poverty or lack of taxation knowledge, a public-spirited good man or a representative body should be given an opportunity to sue the tax department on behalf of the affected taxpayer(s).

In *R v. Manchester City Council, ex p. King*,[44] the court allowed a representative of a street traders' association to challenge a decision of the City Council to charge fees for street traders' licences.

Clive Lewis also recognised the public interest litigation that a public-spirited taxpayer or taxpayers' representative body may have sufficient interest to bring action against the Revenue for the public interest. He said that:

> A representative body of taxpayers may challenge the decision of the Revenue, on behalf of the taxpayers, to protect their rights. The representative body will have standing if the decision of the taxing authority affects the general interest of the member-taxpayers or even an individual taxpayer.[45]

If the rule of *locus standi* is made stricter then many wrongful decisions of the public authorities will go unchallenged. As a result, the public officers may embark upon arbitrary decisions in some situations.

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[43] See also, *R. v. HM Treasury, ex. P. Smeldy* [1985] QB 657, [1985] 1 All ER 589; *R. v. Greater London Council, ex p. Blackburn* [1976] 1 WLR 550.

[44] [1991] COD 422.

[45] Lewis, C., *Judicial remedies in Public Law*, pg. 274.

When public interest is a issue, the applicants or a representative body of the applicants or a member of the public may request the Attorney-General to apply to the court for judicial review of the actions taken by defendant(s) which adversely affects a class of people in a particular area. This is known as relator action. Such a relator action has been provided in the Environmental Quality Act 1974. Section 34A(8) of the Act creates an offence and provides criminal penalty for a person who contravenes any provisions of the Act.

Gopal Sri Ram JCA expressed his opinion in *Ketua Pengarah Jabatan Alam Sekitar v. Kajing Tubek*,[46] that no private individual could bring an action under section 34A(8) of the Environmental Quality Act 1974 as it provides a criminal penalty. In such a matter Attorney-General as the public Prosecutor may decide on his own motion or at the instance of a member of the public to bring an action to remedy the injury caused to the people.

Similarly Abdul Hamid CJ (Malaya) (as he then was) expressed his opinion in *Government of Malaysia v. Lim Kit Siang*,[47] as follows:

> With due respect to the learned judge, my view is clear in that fundamentally where a statute creates a criminal offence by prescribing a penalty for the breach of it but not providing a civil remedy – the general rule is that no private individual can bring an action to enforce the criminal law, either by way of an injunction or by a declaration or by damages. I am inclined to the view that it should be left to the Attorney-General to bring an action, either of this own motion or at the instance of a member of the public who 'relates' the facts to him: see *Gouriet's* case (*Gouriet v. Union of Post Office Workers & Ors.* [1978] AC 435).

In the *Kajing Tubek* case Gopal Sri Ram JCA recognised that in some countries the courts adopt a fairly lenient stance, while others insist on a stricter approach to decide on locus standi for example USA and India.[48] In the US, the courts sometimes adopt fairly lenient approach and sometimes stricter approach to determine locus standi depending on the current judicial impression.[49]

Locus standi in public interest issue depends on economic, political and social circumstances. When government adopts a giant public project, for the benefit of people in a country, courts have to take into account economic development of the country and the benefit which will result from the project to the people. If the injury suffered by the applicants is not significant

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[46] [1997] 4 CLJ 253, at pg. 279.

[47] [1988] 2 MLJ 12, at pg. 32.

[48] [1997] 4 CLJ 253, at p. 276.

[49] Compare, for example, *Flast v. Cohen* [1968] 392 US 83 with *Valley Forge College v. Americans United* [1982] 454 US 464.

compared to the economic benefit to the people, courts may refuse to grant *locus standi* to the applicants. On this point Gopal Sri Ram JCA observed:

The choice appears to really depend upon the economic, political and cultural needs and background of individual societies within which the particular court functions. As these are not uniform in all countries, and fluctuate from time to time within the same country, views upon standing to sue in public law actions for declaratory or injunctive relief vary according to peculiar circumstances most suited to a particular national ethos.[50]

It is of particular importance to refer to the following passage from Zamir on "The Declaratory Judgment" as regards *locus standi* in public interest issue:

In public law proceedings this factor (meaning public interest) is likely to prove of particular importance in determining how discretion should be exercised because where the action challenged by the applicant is that of a public authority the action can affect a large number of individuals. To grant the applicant relief could therefore, while benefiting him, prejudice the public as a whole, and the court is entitled to have regard to the wider consequences when deciding whether or not to grant relief.[51]

Section 3(4) and 5 of Administrative Decisions (Judicial Review) Act 1977 (Australia) also provides similar provision with Rule 2(4) of Order 53 Rules of High Court 1980 (Malaysia) that is "a person aggrieved" rule. So, in Australia, the government also has not enacted flexible provision on *locus standi* like in the UK law that is "sufficient interest" rule.

Section 3(4) of the Australian Act provides:
(a) a reference to a person aggrieved by a decision includes a reference: (i) to a person whose interests are adversely affected by the decision; or (ii) in the case of a decision by way of the making of a report or recommendation – to a person whose interests would be adversely affected if a decision were, or were not, made in accordance with the report or recommendation."

As the locus standi rule in Australia and Malaysia is the same, it is pertinent to examine Australian cases as to how Australian courts interpret *locus standi* rule and apply it in public interest cases.

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[50] [1997] 4 CLJ 253 at pg. 276.

[51] This passage was quoted by Gopal Sri Ram JCA at p. 277 in the decision of *Ketua Pengarah Jabatan Alam Sekitar v. Kajing Tubek* [1997] 4 CLJ 253. See also similar decisions on locus standi issue in *R. v. Hillingdon London Borough Council, ex p. Pulhofer* [1986] AC 484; *R. v. Secretary of State for Environment, ex parte Nottinghamshire County Council* [1986] AC 240.

CONCLUSION

It is needed to make the *locus standi* rule flexible so that a public spirited man or a representative body may apply for judicial review of wrongful administrative decisions. To challenge an administrative action, the applicant must have sufficient interest in the subject matter. An applicant for judicial review may have sufficient interest if his personal right or interest or legitimate expectation is affected. However, where public right or interest is affected, any public-spirited man or a representative body or a pressure group may have sufficient interest to challenge the administrative action, provided that, such public spirited man or representative body or the pressure group must act *bona fide* and not with malicious or ulterior motives.

A mere busybody or a dilettante, who interferes in things which do not concern him and intends to make chaos, may not have *locus standi* to challenge the decision taken by administrative departments. Thus, the requirement of *locus standi* helps to dismiss the cases which are vexatious and frivolous at the leave stage to stop abuse of court process. It is very much needed that the standard of *locus standi* should be made flexible and liberal so as to allow public-spirited people or their association to file cases against the administrative department on public interest ground. However, the court may refuse to grant locus standi if public interest or national development outweighs the injury suffered by the applicant or the people in the locality.

Malaysia may provide liberal *locus standi* rule for judicial review of administrative decisions. The liberal law may require the applicant to have "sufficient interest" in the subject matter and he does not need to prove that his legal right or interest has been adversely affected nor he has been injured by the decision taken by administrative departments. The "sufficient interest" rule will not require the applicants in judicial review proceedings to prove injury in their personal right or interest. The "sufficient interest" rule may open the doors for public interest litigations.

It is important to mention at this point in the conclusion that, the liberal approach to *locus standi* rule is always subject to economic development, national security, political and social development. Hence, in certain circumstances the court may refuse to grant locus standi considering substantive aspect of locus standi rule as mentioned by Gopal Sri Ram JCA in *Ketua Pengarah Jabatan Alam Sekitar v. Kajing Tubek* at p. 277 as follows:

As regards subject matter, courts have, by the exercise of their interpretative jurisdiction, recognised that certain issues are, by their very nature, unsuitable for judicial examination. Matters of national security or of public interest, or the determination of relations between Malaysia and other countries as well as the exercise of the treaty making power are illustrations of subject matter which is ill-suited for scrutiny by the courts. Jurisdiction is declined, either because the supreme law has committed such matters solely

to either the Executive or the Legislative branch of Government, which is termed as 'the political question' by jurists in the United States, or because the court is entirely unsuited to deal with such maters. Substantive relief if denied in such cases on the ground that the matters complained of are non-justiciable.

Dr. Md. Abdul Jalil
Faculty of Management
Multimedia University
63100 CyberJaya
Selangor Darul Ehsan
Malaysia