ECO-SUD v THE MINISTER OF ENVIRONMENT, SOLID WASTE MANAGEMENT AND CLIMATE CHANGE

2023 SCJ 284

Record No. 122360

IN THE SUPREME COURT OF MAURITIUS

In the matter of:

ECO-SUD

Appellant

v

The Minister of Environment, Solid Waste Management and Climate Change

Respondent

In the presence of:-

1. **Pointe D'Esny Lakeside Company Ltd**
2. **The Ministry of Agro-Industry and Food Security**
3. **The Ministry of Environment, Solid Waste Management and Climate Change**

Co-Respondents

JUDGMENT

This is an appeal against a ruling of the Environment and Land Use Appeal Tribunal (hereinafter referred to as "Tribunal") dated 6th October, 2021 upholding a *plea in limine* and dismissing the appeal on the ground that the appellant did not have *locus standi*.

The appellant had initially appealed against this decision on four grounds but at the hearing, grounds 1 to 3 were dropped. At the second hearing, following an objection from the respondent and co-respondent No. 3 to the effect that grounds 4.1 to 4.3 were too vague and did not amount to a ground of appeal, the appellant further dropped grounds 4.1 and 4.2. The appeal proceeded on grounds 4.3 to 4.5 only which read:

"*4. <u>The Tribunal's erroneous findings on the Merits:</u>*

(…..)

4.3. The Tribunal erred in finding that 'nowhere in these pleadings does the Appellant disclose any averment that it is an aggrieved party, nor if or how it has suffered undue prejudice'.

4.4. The Tribunal erred in adopting a restrictive interpretation of the locus standi test, as provided for under section 54(2) of the Environmental Protection Act.

4.5. The Tribunal erred in failing to adopt a liberal interpretation of the locus standi test, as provided for under section 54(2) of the Environmental Protection Act, which interpretation would have led the Tribunal to find that the Appellant had, even ex facie the pleadings, locus standi. " (sic)

Learned Counsel for the respondent and the co-respondent No. 3 submitted that ground 4.3 has been drafted in vague and uncertain terms and that the appellant has failed to clearly indicate why the finding of the Tribunal that "*nowhere in these pleadings does the Appellant disclose any averment that it is an aggrieved party, nor if or how it has suffered undue prejudice*" is wrong.

We do not agree with the submissions of learned Counsel on this point. True it is that ground 4.3 could have been more felicitously drafted but it does, by inference, contain the reason as to why it believes that the Tribunal erred. Consequently, we will entertain this ground.

Learned Counsel for the appellant submitted that the task of this court, according to Section 5(8) of the Interpretation and General Clauses Act, is to construe Section 54(2) of the Environment Protection Act (hereinafter referred to as "EPA") in such a manner as to give effect to its 'true intent, meaning and spirit'. Relying on **Madelen Clothing Co. Ltd. vs Termination of Contracts of Service Board and ors.** **[1981 MR 284]** and on **Lamusse Sek Sum & Co v Waqf Bai Rehmatbai (Late) [2012] UKPC 14**, she contended that the court may, in so doing, refer to the parliamentary debates. She pointed out that the *locus standi* test was meant only to curtail busybodies, rather than to prevent genuine bodies, like the appellant, to challenge alleged unlawful decisions. It is her contention that the test under Section 54(2) of the EPA is purposively vague as the legislator preferred to leave it open to interpretation by the court at any given time based on the changing needs in environmental matter. She was also of the view that the Climate Change Act, enacted in 2020, further affirms the legislator's intention to move towards a green economy. As such, the enactment of

legislation would be pointless if it were to unduly restrict access to justice in environmental matters.

Learned Counsel for the appellant expatiated comprehensively on the tests applicable for *locus standi* under English law and Australian law and also referred to the recent decisions of the Tribunal in Mauritius. Relying on the leading authority of **Walton v The Scottish Ministers [2012] UKSC 44**, she stated that there no longer exists any material distinction between the 'sufficient interest' test applicable for judicial review cases and the 'aggrieved person' test for statutory appeals in the United Kingdom. The English courts have adopted such a liberal interpretation in order to put an end to an unduly restrictive approach which has very often obstructed the proper administration of justice. In deciding whether a party has the requisite standing, the English courts adopt a multi-factor approach allowing for wide discretion regarding the factors to be taken into account to prove sufficient interest. This may include, but is not restricted to, the appellant's knowledge and expertise, his/its track record of engagement in the subject matter, his/its genuine interests in the environmental aspects that he/it seeks to protect, the applicable legislation, the merits of the claim, the importance of the issues raised, any previous involvement in the matter or any representation prior to appealing against the decision.

She further submitted that we should not be guided by the Australian law as it is not compatible with the purpose of our law and the mischief it intended to remedy. In Australia, the 'special interest' test, which depends on the nature and subject matter of the litigation, requires the party to show an interest which must go beyond that of ordinary members of the public in upholding the law and this interest must involve genuine convictions rather than mere emotional or intellectual concerns (*vide* **North Coast Environment Council Incorporated v Minister for Resources [1994] 55 FCR 492**). The court in **North Coast Environment Council (supra)**, laid down several criteria to be considered when exercising their discretion. The fact that an appellant has commented on the environmental aspects of a proposal does not, *per se*, confer standing upon this appellant. Similarly, an organisation does not demonstrate a special interest simply by formulating objects that denote an interest in and commitment to the preservation of the environment. The court held that the proximity between the activity of the party and that complained of, the credibility of the organisation and its recognition, its participation in official decision-making processes and representations made on the subject matter, were all relevant factors.

She added that the Tribunal has in recent decisions, particularly, **Agir pour l'Environnement v The Minister of Environment, Solid Waste Management and Climate Change & Ors [ELAT 1909/19]** and **J. D. Sauvage & Ors v The Minister of Social Security, National Solidarity and Environment and Sustainable Development & Ors [ELAT 1746/19]**, adopted a restrictive interpretation of Section 54(2) of the EPA. The Tribunal required that the proposed development impacts the appellant, irrespective of whether or not it may affect other people. She pointed out that the court in **Baumann M. L. I. v The District Council of Riviere du Rempart** [2019 SCJ 311] and in **Peerthy J v The Municipal Council of Vacoas-Phoenix & Anor, Beeharry I v. The Municipal City Council of Port Louis** [2022 SCJ 166], has adopted a restrictive approach in respect of the notion of *locus standi* under the Local Government Act only because a Building and Land Use Permit (BLUP) is a pure planning instrument. She conceded that we may consider the recent amendment brought to Section 54(2) of the EPA, which now requires that the appellant sends a statement of concern to the relevant authority in response to a notice published under Section 20 of the EPA, before legally challenging the decision. However, she maintained that this amendment in no way impacts on the 'aggrieved person' test, given that under both English and Australian law, this requirement is not *per se* conclusive and sufficient.

Learned Counsel for the appellant submitted that in deciding which approach would be relevant in interpreting Section 54(2) of the EPA, we should bear in mind that restricting standing in environmental matters only to parties who can show that they are directly affected by the decision, would be incompatible with the purpose of environmental laws in Mauritius and the international trend. In her opinion, Section 54(2) of the EPA must be interpreted in such a manner as to give effect to the real purpose of the law, which is to better protect the environment, including the preservation of biodiversity which is crucial for a small island like Mauritius. She submitted that, for this reason, the Australian test for standing is not well-suited, being too restrictive. Conversely, the 'sufficient interest' test under English law, as established in **Walton (supra)**, would be more compatible with the laws in Mauritius.

Learned Counsel for the appellant urged that in order to have the required *locus standi* under Section 54(2) of the EPA, an appellant must necessarily show that he is personally affected or substantially prejudiced in his right or interest. In fact, an appellant who can show sufficient interest in the matter at hand must also be able to bring proceedings. She submitted that it is also not necessary to demonstrate any greater impact upon himself than upon the public because if everyone was equally affected by an unlawful act, then nobody would be able to bring proceedings; thus, transgressing the rule of law (*vide* **Walton (supra)**). According to her, it is sufficient for an appellant to show genuine and particular interest in as

well as sufficient knowledge of the subject matter and in the environmental aspects that he/it seeks to protect. As such, proving a personal interest is unnecessary if an appellant is acting in the public interest and can prove that the issue directly affects the section of the public that he/it seeks to represent. Learned Counsel for the appellant maintained that these criteria should not be seen as an invitation to busybodies to question the validity of a scheme. She added that, in practice, the requirement of 'undue prejudice' under Section 54(2)(b) of the EPA is not materially different from the 'aggrieved party' requirement and is certainly not meant to further restrict the 'aggrieved party' test.

Finally, learned Counsel for the appellant urged that the appellant has the requisite standing, regardless of which test this court will apply. If the English test is adopted, the present appellant has demonstrated that it has a sufficient interest inasmuch as it has a particular interest in the environment *in lite* and has greatly participated in the consultation process. The appellant is a well-reputed environmental association advocating for the protection of the environment, in particular, Environmental Sensitive Areas (hereinafter referred to as "ESAs"). It is recognised by the authorities as well as by the United Nations Development Programme as a genuine and knowledgeable interlocutor. On the other hand, if the Australian test is applied, the appellant has established that it has a special interest because it is also affected in a manner distinguishable from the general members of the public inasmuch as it works extensively on the site to protect ESAs, especially, the one under challenge. She concluded that even if the rulings of the Tribunal are followed, the appellant still has *locus standi* given that it has demonstrated a genuine interest in and has shown a strong nexus to the said project, notwithstanding the fact that no civil wrong has been suffered.

Learned Counsel for the respondent and the co-respondent No. 3 submitted that to have *locus standi* before the Tribunal, the appellant has to imperatively show that it conjunctively satisfied the then two prerequisites under Section 54(2) of the EPA, that is, it is an aggrieved party and it is likely to suffer undue prejudice from the proposed development. He further highlighted that any person, wishing to appeal against the grant of an Environmental Impact Assessment licence (hereinafter referred to as "EIA licence"), should be able to establish that the issue of the EIA licence is likely to affect him personally in order to have the requisite standing. It is also the contention of learned Counsel that the appellant did not aver in its pleadings that it was an aggrieved party and that it was likely to suffer undue prejudice. He therefore submitted that the Tribunal was right in concluding that *ex facie* the appellant's statement of case, it had failed to establish that it is aggrieved by and is likely to incur undue prejudice from the issue of the EIA licence.

Learned Counsel further submitted that the language used in Section 54(2) of the EPA is clear, unambiguous and clearly conveys the legislator's intention to limit access to the Tribunal to a specific category of persons. The restrictive approach adopted by the Tribunal is, therefore, in accordance with the intention of the legislator, the moreso in light of the amendment to Section 54(2) of the EPA.

As regards the appellant's reference to Hansard parliamentary debates, learned Counsel submitted that in the present case, there is no such ambiguity in Section 54(2) of the EPA as to warrant the exceptional recourse to the "*travaux préparatoires*". He relied on the cases of **Peerthy (supra)** and on **Globe Prism Ltd v The Environment and Land Use Appeal Tribunal [2020 SCJ 99]** to buttress his arguments. He took the view that should the court decide to refer to the Hansard parliamentary debates, it should bear in mind that the legislator's intention was to weed out frivolous applications.

Learned Counsel also pointed out that when importing foreign principles, there is a risk that the intended purpose and essence of Section 54(2) of the EPA will get dissipated. Learned Counsel finally submitted that the powers of the Tribunal are clearly limited by law and that to assimilate the powers of the Supreme Court to that of the Tribunal, would be ludicrous. He invited us to adopt the approach adopted in **Baumann (supra)** and **Peerthy (supra)**.

Learned Senior Counsel for the co-respondent No. 1 submitted that the appellant has failed to establish its nexus with the project before the expiry of the timeframe to challenge the issue of an EIA licence as provided by Section 5(4) of The Environment and Land Use Appeal Tribunal Act (hereinafter referred to as "ELUAT Act"), that is, 21 days being given that the appellant did not aver in its statement of case how it is an aggrieved party to which undue prejudice is likely to be caused. It was only in its reply to the objections raised by the respondent and co-respondents that the appellant expatiated on its grounds of appeal to state how it was aggrieved by the decision of the respondent. Learned Senior Counsel, therefore, argued that the appellant was well outside the statutory timeframe to prove that it had the requisite standing to appeal to the Tribunal.

Learned Senior Counsel urged that the Tribunal was correct in finding that it can only intervene if all the requirements under Section 54(2) of the EPA are satisfied and that *ex facie* the appeal before it, the appellant had failed to establish its standing. He added that the mere fact that the appellant is engaged in the protection of the environment in Mauritius, does not automatically entail that it satisfies the requirements laid down in Section 54(2) of the EPA.

He concluded that the appellant's objects are general in nature and they apply to Mauritius as a whole without any particular focus on the region of Pointe D'Esny.

Learned Senior Counsel also argued that planning laws enacted in Mauritius are mostly based on the Australian principles and therefore, we should refer to Australian case law in the present matter, namely, regarding the 'special interest' test. Relying on **Australian Conservation Foundation v. The Commonwealth (1980) 146 CLR 493**, he submitted that a special interest does not equate to a mere intellectual or emotional concern; rather, one must clearly establish that it is likely to gain some advantage. Citing the relevant principles from the case of **North Coast Environment Council (supra)**, learned Senior Counsel submitted that the appellant has failed to establish the impact that the proposed development is likely to have on it to make it a party aggrieved by the respondent's decision. He was of the view that the concerns of the appellant amount to mere emotional or intellectual concerns. Its public comments on the EIA application and its involvement in the EIA process and meetings, do not confer upon it standing *per se.*

As regards the requirement of undue prejudice in the second limb of Section 54(2) of the EPA, learned Senior Counsel submitted that the appellant's contention that its mission in environmental restoration and conservation programs in the vicinity would be jeopardised by the granting of the EIA licence, is merely speculative. He maintained that the appellant has failed to show that it has been specially affected as compared to the public at large.

Learned Senior Counsel was of the opinion that the appellant is seeking to pursue a form of public interest litigation, which is strictly prohibited in Mauritius (*vide* **Tengur S v The Ministry of Education & Scientific Research & Anor [2002 SCJ 48]; Ministry of Education and Human Resources & Ors v La Société de L'Histoire de L'Ile Maurice & Ors [2016 SCJ 445]**). According to him, the intention of Parliament, in amending Section 54(2) of the EPA, is to keep the right to challenge an EIA licence within clearly defined parameters. As such, although the appellant's legitimate interest in environmental issues is not disputed, the Tribunal correctly held that the appellant did not have the required *locus standi* under Section 54(2) of the EPA.

In reply to learned Senior Counsel for the co-respondent No. 1's argument that the appellant had failed to establish its *locus standi* in its statement of case, learned Counsel for the appellant submitted that this is not fatal to the case and it would be unduly harsh on the appellant to be denied *locus standi* simply because it had only expatiated on the issue in its reply to the statements of defence rather than in its initial statement of case.

We shall deal with the three remaining grounds of appeal in the order they were argued before us. However, before doing so, we shall address the arguments concerning this appeal being a form of public interest litigation. Learned Counsel for the respondent and co-respondent No. 3 as well as learned Senior Counsel for the co-respondent No. 1 urged that the appeal before the Tribunal falls within the realm of public interest litigation. Bearing in mind that "*public interest litigation is alien to our jurisdiction*" (*vide* **Tengur (supra)**), we cannot help finding that the contention of both learned Counsel is incorrect, inasmuch as appeals to the Tribunal are far from being akin to actions seeking constitutional redress or judicial review remedies. Here, we are in presence of a statutory appeal before the ELUAT against the decision of the Minister to grant an EIA licence. Hence, the issue of public interest litigation does not arise.

We are of the view that to deprive an appellant from appealing to the Tribunal, as duly provided by the relevant provisions of the EPA, on the basis that such an appeal would fall under the realm of public interest litigation, would be prejudicial, given that public interest litigation arises when a plaintiff brings "*an action in Court to litigate a matter of general public interest.*" (sic) (*vide* **Tengur (supra)**), which is clearly not the case here.

We will now consider the grounds of appeal.

Ground 4.3

In so far as ground 4.3 is concerned, the court holds that the Tribunal's finding that nowhere in its 'pleadings' did the appellant disclose any averment as to how it is an aggrieved party or how it suffered undue prejudice following the respondent's decision, is flawed, inasmuch as this court construes the term 'pleadings' as including the statement of case of an appellant as well as the replies to the statements of defence of the opposing parties. Suffice it to set out Section 5(4) (ab) of the ELUAT Act which states as follows:-

> "***5.*** ***Proceedings of Tribunal***
>
> *(…)*
>
> *(4)*
>
> *(…..)*
>
> *(ab)* *A statement of case shall contain precisely and concisely –*
>
> *(i)* *the facts of the case;*
> *(ii)* *the grounds of appeal and the arguments relating thereto;*
> *(iii)* *submissions on any point of law; and*
> (iv) *any other submissions relevant to the appeal."*
>
> (Underlining is ours)

This section coupled with Section 54(2) of the EPA clearly reveals that it is not incumbent upon the appellant, at the very outset of the appeal itself, to expatiate lengthily on the issue of *locus standi*, the moreso the statement of case, as per the legal framework in place, should be precise and concise.

According to Sections 5(4)(a) and 5(4) (aa) of the ELUAT Act, it is unquestionable that an appellant should, in his notice of appeal, set out the grounds of appeal concisely and precisely within 21 days from the date of the decision against which he intends to appeal and that the notice of appeal shall be accompanied by a statement of case and any witness statement, where necessary. However, the mere fact that, in the present case, the appellant expatiated further on its *locus standi* only in its reply to the respondents' statements of defence, does not, in any manner whatsoever, cast the appeal before the Tribunal outside the statutory timeframe. Rather, it can be gleaned from the appellant's statement of case before the Tribunal that it did explain its involvement in the subject matter *in lite* as well as its concerns raised during the whole process.

In the same vein, there is no obligation upon the appellant to argue his whole case at such a premature stage of filing his statement of case; if the appellant feels that he is aggrieved by a decision and that undue prejudice is caused to him, as per Section 54(2) of the EPA, he can appeal to the Tribunal. Whether he has the requisite *locus standi*, is another question which begs arguments to be heard on both sides, rather than deciding upon such a pertinent issue based merely on statements of case and statements of defence. The court finds it apt, at this stage, to quote the following passage from **Nada Fadil Al-Medenni v Mars UK Ltd [2005] EWCA Civ 1041**:-

> "*It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way.*" (Underlining is ours)

It is of the view that the co-respondent No. 1 knew well which case it had to meet *ex facie* the appellant's statement of case before the Tribunal. In the present case, the court finds that the appellant did lengthily aver in its reply to the statements of defence of the respondent and the co-respondents, how it was aggrieved by the decision of the respondent and how it is likely to incur undue prejudice. Therefore, we hold that ground 4.3 is well taken.

Grounds 4.4 and 4.5

Given that grounds 4.4 and 4.5 essentially relate to the issue of *locus standi* and the interpretation of Section 54(2) of the EPA, they will be dealt with together.

In essence, the contention of learned Counsel for the appellant is that the Tribunal adopted a restrictive approach when interpreting Section 54(2) of the EPA while a more liberal interpretation should have been adopted. On the other hand, learned Counsel for the respondent and the co-respondent No. 3 as well as learned Senior Counsel for the co-respondent No. 1, argued that the intention of the legislator, when enacting Section 54(2) of the EPA, was to restrict access to the Tribunal to a specific category of persons and therefore, the Tribunal was correct in adopting such a restrictive approach.

It is apposite, at this juncture, to set out the applicable law, as it then was, at the time of the appeal before the Tribunal. The then Section 54(2) of the EPA enunciated –

> "***54. Jurisdiction of Tribunal***
>
> ***(…)***
>
> *(2) Where the Minister has decided to issue an EIA licence, any person who –*
>
> *(a) is aggrieved by the decision; and*
>
> *(b) is able to show that the decision is likely to cause him undue prejudice,*
>
> *may appeal against the decision of the Tribunal.*"
>
> (Underlining is ours)

This section was then amended in 2020 to insert an additional criterion which reads as follows:

> "*(c) had submitted a statement of concern in response to a notice published under section 20,…*"

A plain reading of Section 54(2) of the EPA, as further amended in 2020, indicates the legislator's intention to weed out frivolous applications before the Tribunal. However, the court bears in mind that the concept of "person aggrieved' should be considered and interpreted in line with the purpose intended for the EPA. Generally, in other fields of law, for instance in applications for constitutional redress or for judicial review, the concept of '*locus standi*' or 'standing' or 'aggrieved person' is normally given a restrictive interpretation to extend a right

to a person whose direct or relevant personal interest or rights have been affected by a law or decision. Now, the question is whether we should follow the same principles in relation to 'standing' for an appeal before the ELUAT. It is worth noting that in **Mirbel M J N & Ors v State of Mauritius & Ors** [2008 SCJ 300], the court considered an attempt to rely on judicial review proceedings in an application for constitutional redress as "*misguided*".

After considering English and Australian decisions, we fully agree that adopting the same restrictive approach to "person aggrieved" in an appeal under the EPA may, in some cases, yield an undesirable result although public interest litigation has been considered up to now as being "*alien to our jurisdiction*" (*vide* **Tengur (supra), Quedou K. v State of Mauritius [2004 SCJ 40] and Mirbel (supra)**)

The English case of **Walton (supra)** concerned the final chapter in the long-standing legal argument concerning the building of the Aberdeen City Bypass and of a specific trunk road known as Fastlink. Mr Walton's house was close to the western peripheral route (WPR) but some distance from the Fastlink and in the opinion of the Extra Division, he was no different from someone who lived many hundreds of miles from the proposed route and therefore, he did not possess sufficient interest to clothe him with rights under the relevant law and to claim that he was "*a person aggrieved"* (paragraph 2 of Schedule 2 to **The Roads (Scotland) Act 1984**).

On appeal, Lord Reed considered the concept of "*person aggrieved".* He referred to the judgment of Lord Denning in **Attorney-General of the Gambia v N'Jie [1961] AC 617, 634** in which Lord Denning said that the definition given by James LJ in **Ex parte Sidebotham (1880) 14 Ch.D.458, 465** to the phrase "person aggrieved" as being "*a person with a legal grievance*" was not to be regarded as exhaustive. Lord Denning went on to say:

> *"The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him: but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests."*

Lord Reed was of the view that:

> "*a wider interpretation than that adopted in Ex parte Sidebotham is appropriate, in particular, in the context of statutory appeals under the Town and Country Planning Acts: a context which, like the present, is concerned with the granting of consent for proposed developments,…*"

Lord Reed also referred to the case of **AXA General Insurance Ltd and others v HM Advocate and others [2011] UKSC 46** to confirm the approach to be adopted on the issue of 'standing'. It should not be given an "*unduly restrictive approach*" which could result in the obstruction of the proper administration of justice. He quoted Lord Hope in the above-named case:

> "*One must, of course, distinguish between the mere busybody, to whom Lord Fraser of Tullybelton referred in R v Inland Revenue Comrs, Ex p National Federation of Self-Employed and Small Businesses Ltd [1982 AC 617, 646, and the interest of the person affected by or having a reasonable concern in the matter to which the application related. (….) A personal interest need not be shown if the individual is acting in the public interest and can genuinely say that the issue directly affects the section of the public that he seeks to represent.*"

Lord Reed concluded that Mr Walton, apart from living in the vicinity of the western leg of the WPR, was an active member of local organisations concerned with environment; he was the Chairman of the local organisation set up to oppose the WPR on environmental grounds; he made representations as stipulated in the 1984 Act and he took part in the local inquiry. He could not, therefore, be assimilated to a busybody as he has shown a reasonable and legitimate concern in the grant of consent for the development which is bound to have a significant impact on the natural environment.

In **Walton (supra)**, Lord Hope was of the opinion that in holding that Mr Walton was not a '*person aggrieved*' within the meaning of the 1984 Act, the Judges of the Extra Division took a too narrow view of the "*situations in which it is permissible for an individual to challenge a scheme or order on grounds relating to the protection of the environment*." He said that there are circumstances where personal interests of any particular individual may not be directly affected by an environmental issue and yet, such issue needs to be protected and raised before an appropriate forum. He took the example of ospreys being unable to fly to a lake due to the building of wind turbines. He observed that just because one individual person cannot say that his property rights or interests are directly affected, it does not mean that a decision cannot be challenged as that "*would seem to be contrary to the purpose of environmental law, which proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone.*" Lord Hope went on to add that the "*osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf*". Evidently, ospreys and any other animal or part of nature that can be harmed by humans are unable to bring a case to court themselves. In such a case, strictly, there is no need for the rights of an individual to

be affected for proceedings to be brought to challenge the unlawful or incorrect decision before the Tribunal.

The English case law emphasises that this interpretation should "*not be seen as an invitation to the busybody to question the validity of a scheme or order under the statute just because he objects to the scheme of the development.*" (*vide* **Walton (supra)**). It is clear, therefore, that while the English courts do not adhere to a restrictive interpretation of who can bring an action under environmental law, they also do not warrant any kind of action by any busybody who just does not agree with the proposed development.

The Supreme Court judgment in **Walton (supra)** shows that there is a requirement for applicants to "*demonstrate that they have a genuine interest in the aspects of the environment that they seek to protect, and that they have sufficient knowledge of the subject to qualify them to act in the public interest in what is, in essence, a representative capacity.*"

In Australia, under the common law, the court established the principle that a litigant must have a special interest in the subject matter of the proceedings or be specially affected to be granted standing. In effect, this test puts forward that each case will be decided on its own facts as to who can bring a case.

In Australia, there is also a statutory provision in Section 3(4) of the Administrative Decisions (Judicial Review) Act 1977 (hereinafter referred to as the "ADJRA") which defines 'standing' as including a person whose interests are or would be adversely affected by the decision or conduct sought to be reviewed. The case law under the ADJRA suggests a growing tendency for the courts to apply the principles arising from the special interest test to determine whether an applicant is a person aggrieved in accordance with the ADJRA. At this point, a perusal of recent Australian cases reveals that the Australian courts seem to be more inclined to grant environmental organisations standing either on the basis of the special interest test under the common law or the aggrieved person test under the statute, provided that such groups satisfy the conditions mentioned in the statute.

The inescapable conclusion from both the English and Australian perspectives is that the courts are gradually moving towards a more expansive and liberal approach to the concept of 'standing' especially with regard to public interest groups in the field of environment and climate justice. It can be gathered from the case law that a restrictive interpretation of the concept of 'standing' ('person aggrieved' in the EPA) can actually deny access to justice to a

person or body genuinely concerned with environment protection and whose qualms need to be considered. This awareness has given rise to the concept of 'representative standing'.

We have considered the different legal approaches to the issue of standing in the light of the provisions of Section 54(2) of the EPA, its historical background as well as its recent amendment and we are of the opinion that Section 54(2) of the EPA should be given, as far as possible, a non-restrictive interpretation in very appropriate cases. We are comforted in our decision when we read Lord Carnwath in **Walton (supra)**:

> "*The courts may properly accept as "aggrieved", or as having a "sufficient interest" those who, though not themselves directly affected, are legitimately concerned about damage to wider public interests, such as the protection of the environment*."

The prerequisites for 'standing' under Section 54(2) of the EPA should, therefore, not be given a narrow interpretation that would render it ineffective. 'Standing' to bring an appeal under Section 54(2) of the EPA will exist where an appellant can show that he/it has a sufficient interest in the act or decision that he/it wishes to challenge or where he/it can establish that he/it is personally affected or substantially and unduly prejudiced in his/its right or interest, in addition to Section 54(2)(c) of the EPA. This implies that an appellant organisation, in seeking to establish that it is an aggrieved party to whom undue prejudice is likely to be caused, will have to show genuine concern and interest in the environmental aspects that it seeks to protect and sufficient knowledge of the subject matter at hand so as to qualify it as genuinely acting in the general interest albeit no individual property right or interest has been affected. Other factors will then be relevant and considered in the light of the factual context of the application. Indeed, in such matters, the appellant's expertise and knowledge of the subject matter, its track record of engagement on the subject matter, any previous involvement in the matter at hand, the merits of the claim and the importance of the issue raised and its consequences may be considered. It must be, however, understood that each case will depend on its own facts.

This in no way means that busybodies will have a free hand in such matters as the present one. It is up to the Tribunal, which is a specialised Tribunal specifically "*set up by the legislator because of the technicality of the matters in issue*" (*vide* **Ah Yan G C v The District Council of Grand Port** [2018 SCJ 227]), to objectively, in appropriate cases, find the fundamental balance between those parties with a legitimate interest and those who simply have too much time on their hands, rather than dismissing appeals outright on the basis of

locus standi. The court again stresses that each case will have to be determined based on its own set of factual and legal circumstances and the grounds of the application.

In any event, the court finds that the introduction of Section 54(2)(c) of the EPA further curtails the risks of the Tribunal being faced with busybodies who do not have genuine grievances. We are of the view that this new Section 54(2)(c) of the EPA, in effect, does not prevent an organisation having expertise and knowledge of the subject matter as well as a track record of engagement on the subject matter to submit a statement of concern in response to the notice.

The court seizes this opportunity to add that the interpretation of the term 'aggrieved person' in **Baumann (supra)** and **Peerthy (supra)** can be patently distinguished from the interpretation of the term 'person aggrieved' in Section 54(2) of the EPA. In the case of **Baumann (supra)**, the court, after a careful analysis of the different relevant provisions of the Local Government Act, concluded that the legislator did not intend for a neighbour to be an 'aggrieved person' having a standing to appeal against the granting of a BLUP. Indeed, in such matters, there is a genuine risk of abuse by malicious neighbours. The court also stated in **Baumann (supra)** that "*any other person, a neighbour… who feels aggrieved by the granting of a BLUP may have another recourse …*". The present matter is different. Therefore, if the test under Section 54(2) of the EPA is given an unduly narrow and restrictive interpretation, a party claiming to be aggrieved would have no effective alternative remedy as the latter will not be able to apply, for instance, for a judicial review of the impugned decision as our courts do not recognise the concept of public interest litigation.

In addition, we find it appropriate to reproduce the extract of the Hansard (page 140) regarding the debates on the Environment and Land Use Appeal Tribunal Bill filed before us which shows that Government was alive to the fact that the location of projects particularly in ESAs had given rise to much concern in the public. It was stated, in that respect, that:

> "…*with increased awareness through sensitisation campaigns and the media, there is also more interest as well as concerns raised nowadays on the part of aggrieved parties, stakeholders concerned, NGOs and the public at large regarding projects having significant environmental impacts*." We note that the preoccupation of Government was mainly that "*there are unscrupulous so-called consultants who take advantage of the legislation to object before the EAT and bring undue delays.*"

The aim of the Government, however, can be gauged from this extract at page 142 namely:

> "*With the growing pressure on our limited natural resources and the increased vulnerability of our island to threats such as climate change and sea level rise, it is more than imperative to steadily maintain the path of sustainable development. We need to make the right choices. We, therefore, need to scrupulously allow the implementation of projects that have the least environmental impacts to our country while ensuring, at the same time, that the implementation of the projects are not unduly delayed*." (sic)

Lastly, it is noteworthy that Section 5(8) of the Interpretation and General Clauses Act expressly stipulates -

> "***5. General rules of interpretation***
>
> *(….)*
>
> *(8) Effect shall be given to each enactment according to its true intent, meaning and spirit.*"

In the light of the above analysis, we are of the view that in interpreting the prerequisites of 'standing' under Section 54(2) of the EPA, we ought to adopt the same reasoning of the court in **Walton (supra)**. We do not believe that, in trying to restrict the right of challenge, the legislator intended to oust a body claiming to have representative standing. It would be an obstruction to good administration of justice if that were the case, namely, in important environmental issue cases. Rather we are of the view that the true intention of the legislator was to restrict frivolous challenges against projects which are highly desirable and beneficial for our economy; not to prevent challenges against unscrupulous projects with high environmental impacts on our already vulnerable island.

We, therefore, quash the ruling of the Tribunal and remit the matter back. We order the Tribunal to hear full arguments on the issue of 'standing' in the light of our above analysis.

We make no order as to costs.

S.B.A. Hamuth-Laulloo
Judge

M. Naidoo
Judge

18 July 2023

Judgment delivered by Hon. S.B.A. Hamuth-Laulloo, Judge.

For Appellant:	**Mr F. Hardy, Attorney at Law**
	Mr S. Buckhory, SC together with Mrs A. Jullienne, of Counsel
For Respondent and Co-respondent No. 3:	**Ms S. Angad, Principal State Attorney**
	Mr G. S. Coolen, Temporary State Counsel
For Co-respondent No. 1:	**Mr A. Robert, SA**
	Mr P. D. de Speville, SC together with Ms K. Teck Yong and Mrs E. de Speville, of Counsel
For Co-respondent No. 2:	**Not resisting**