(2016) 28 SAcLJ 527
(Published on e-First 1 September 2016)

RAISING THE BAR

Amending the Threshold for Leave in Judicial Review Proceedings*

Following *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294, the appropriate threshold for granting leave applications in judicial review proceedings is that of the "*prima facie* case of reasonable suspicion" or "what might on further consideration turn out to be an arguable case". This article argues for a higher threshold to be imposed, where leave will only be granted where it is clear to the judge that the case is arguable based on the information and evidence available before the judge. It is argued that a higher default threshold would accord better with the purpose of the leave requirement, which is to act as an effective filter against unmeritorious claims. It is also in accord with international practice. Further, this article explores the possibility that in certain circumstances, it may be appropriate to apply an enhanced arguability test so that leave in judicial review proceedings is only granted when the case has a real prospect of success.

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I. Introduction

1 The administrative law landscape in Singapore is fast maturing, with a significant number of judicial review cases having been heard by the courts in the last five years. This trend is to be welcomed, for it demonstrates an increase in the public consciousness *vis-à-vis* the reviewability of decisions made by public authorities and the checking function played by the courts against executive excess.

* The views expressed in this article are those of the authors and are not representative of the views of the Attorney-General's Chambers.

2 At the same time, an unfettered ability to challenge the decisions of public authorities is to be eschewed as there is an equally strong public interest in ensuring that such bodies are protected against weak and vexatious claims. In order to operate effectively, public authorities must have the freedom to operate without having to divest finite time and resources to managing and responding to unmeritorious actions. As a matter of public accountability and operational transparency, an authority should, where appropriate, be expected to account for its decisions and actions. However, constraints on resources being an inevitable fact, appropriate filters must be put in place to ensure that the duty incumbent upon a public authority to rationalise its behaviour when queried is not so onerous that its ability to operate effectively is compromised.

3 It is in this context that the leave requirement in judicial review proceedings must be understood. The leave requirement provides an appropriate sieve in the public interest, filtering out weak and vexatious claims which would otherwise increasingly impinge upon limited public resources. The chilling effect of prospective litigation is also not to be underestimated. Governmental action would inevitably be stifled if officials had to constantly make policy plans and operational decisions against the backdrop of constant challenge. The leave requirement safeguards against this by reducing the uncertainty public authorities may face when deciding upon whether they can safely proceed with administrative actions while judicial review proceedings are pending.

4 On the part of the court, the leave requirement provides a mechanism for the efficient management of the judicial review caseload since many claims can be disposed of at this stage with minimum use of the court's resources. Leave hearings tend to pertain less to disputes of fact, turning instead on legal points or affidavit evidence. They require less getting up and are more easily disposed of as compared to a full hearing. The leave hearing is also a good opportunity for the court to filter out frivolous and unmeritorious claims, thereby preventing the court's time from being wasted by "busybodies with misguided or trivial complaints of administrative error".[1] Further, from the claimant's point of view, the leave requirement enables him to obtain the views of the court on the merits of his application expeditiously and cheaply.

5 In order for the leave mechanism to fulfil the purposes set out above, it must be properly calibrated to function in a meaningful and effective way. To this end, it is suggested that the current leave threshold set out in *Chan Hiang Leng Colin v Minister for Information*

1 *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 643.

and the Arts[2] ("*Colin Chan*") is outdated and ill-suited to serve the aforementioned purposes. In particular, the test of "what might on further consideration turn out to be an arguable case" is too low and fails to function as an effective filter against obviously weak and unsustainable as well as vexatious cases. It is posited instead that a higher threshold should be imposed by default in all judicial review proceedings. Using the proposed threshold, leave will only be granted where it is clear to the judge that the case is clearly arguable based on the information and evidence available before the judge (the "arguability test"). It is argued that a higher default threshold would accord better with the purpose of the leave requirement and achieve a better balance between two competing public interests – that of citizens having access to the courts, and ensuring that the work of public authorities is not needlessly hampered by unwarranted intrusion and scrutiny.

6 In addition to a higher default threshold, this article goes further to consider whether the High Court should be accorded the discretion to impose an enhanced standard above the default threshold in specific circumstances. The judge may consider a variety of factors in deciding what standard to apply. For instance, an enhanced standard may be warranted when there are little or no disputes of fact, or when the judge has already heard detailed and complete arguments at the leave stage. This comports with current trends in international practice and is also in accordance with the policy and principles undergirding the requirement of leave in judicial review proceedings.

II. Surveying the landscape – Current law in Singapore on the leave threshold in Order 53 proceedings

7 Order 53 r 1 of the Rules of Court[3] prescribes the requirement of leave as a prerequisite for an application for a mandatory order, prohibiting order or quashing order. The threshold test for leave to be granted in such proceedings is trite law and remains as stated in *Colin Chan*, namely whether the material before the court discloses what might on further consideration turn out to be an arguable case in favour of granting the specific relief sought (the "potential arguability test"). *Colin Chan* also posited a second, slightly different articulation of the relevant test, namely whether the material before the court discloses a *prima facie* case of reasonable suspicion that the applicant is entitled to the specific relief sought (the "reasonable suspicion test"). The court in *Colin Chan* took the view that both tests presented a low threshold and

2 [1996] 1 SLR(R) 294.
3 Cap 322, R 5, 2014 Rev Ed.

questioned whether there was any real difference in substance between the two interpretations.[4]

8 Both the potential arguability and the reasonable suspicion tests require the applicant to demonstrate the factual and legal tenability of the specific relief sought. It is not an illusory threshold. Mere assertions, or evidence and arguments that are skimpy and vague, are insufficient to surmount the leave threshold. It is also worth noting that in *Manjit Singh v Attorney-General*,[5] the High Court preferred the potential arguability test to the reasonable suspicion test because the latter formulation was made in the factual context of *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd*[6] ("*IRC*"). According to Vinodh Coomaraswamy JC (as he then was), it was appropriate for Lord Diplock to have applied the reasonable suspicion test in *IRC* because the applicant's only argument was that the respondent tax authority had acted *ultra vires* due to a hidden improper motive. In most judicial review proceedings, the reasonable suspicion test would be of questionable applicability because "the grounds for alleging an act was illegal, irrational or procedurally improper will ordinarily be manifest".[7]

9 Yet, whichever the preferred formulation, this requirement is undoubtedly low, as recognised by the court in *Colin Chan*. In particular, the potential arguability test requires that leave be granted where the judge finds that the case may "on further consideration" turn out to be arguable. The advantage of a low threshold test is that an applicant may often have enough material to surmount the threshold test even if he does not, at that stage, have material that would satisfy a balance of probabilities test during a substantive hearing. Once the applicant is able to satisfy the threshold test, there is a possibility of the respondent complying with his duty of candour or making an application for cross-examination, both of which would provide the applicant with more material to conduct his case.

10 Nevertheless, the purposes of the leave requirement as set out above, in particular the need to ensure that public authorities are not needlessly bogged down by constant challenge, must also be borne in mind. It is thus suggested that the potential arguability test sets an unacceptably low bar and is increasingly ill-suited to act as an effective filter against hopeless, frivolous and vexatious claims. The potential arguability test was formulated in an era where leave applications for

4 *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294 at [22].
5 [2013] 2 SLR 1108 at [93]–[94].
6 [1982] AC 617 at 644.
7 *Manjit Singh v Attorney-General* [2013] 2 SLR 1108 at [93].

judicial review were typically heard *ex parte*, without the respondent contesting or taking part in the proceedings. When *IRC* was decided, the procedure under the English Rules of the Supreme Court was that a leave application is initially made *ex parte* but may be adjourned for the person against whom relief is sought to be represented.[8] In *IRC*, however, the only material before the court came from the applicant because no adjournment had been sought for the respondent tax authority to make representations.[9] It may therefore have been practical in the context of *IRC* for the court to have had a quick perusal of the material and to have determined whether or not a full hearing should be allowed on that basis.

11 It is argued that the potential arguability test no longer accords with the realities of how leave hearings are conducted in Singapore, where the current practice has departed significantly from that in the UK. Order 53 r 1(3) of the Rules of Court requires an *ex parte* originating summons for leave to commence judicial review proceedings to be served together with a statement containing specified particulars and a supporting affidavit on the Attorney-General's Chambers not later than the day preceding the application. The Attorney-General is therefore a necessary party and putative respondent in all judicial review proceedings and tends to take a position in the majority of cases. Second, judicial review proceedings are becoming more varied and complex, with the issues that the court must deal with spanning the gamut of administrative action. Leave hearings have thus become important avenues for the parties to ventilate their arguments and points of law. Consequently, leave applications are seldom heard on an *ex parte* basis, but instead on either a contested *ex parte* or *inter partes* basis. In a contested *ex parte* hearing, the hearing is, strictly speaking, on an *ex parte* basis but the respondent is notified of and in attendance at the hearing. The respondent may also be asked by the court to give his opinion. In an *inter partes* hearing, the parties consent to having fully contested arguments at the leave hearing. In both cases, the court is presented with significantly more evidence and is able to take cognisance of a much wider range of views than in a traditional *ex parte* hearing. Accordingly, there is little justification to continue following the potential arguability standard, which was formulated in an era where *ex parte* hearings were the norm. It is posited instead that an arguability test is more appropriate, wherein a judge decides whether a case is arguable based on the comparatively robust facts and evidence that are placed before the judge.

8 Rules of the Supreme Court 1977 (UK) O 53 r 3.

9 *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 642.

12 The courts have made various *obiter* remarks that seem to indicate frustration with these circumstances. For example, in *Pang Chen Suan v Commissioner for Labour*,[10] issues that required more than a cursory examination of the merits were raised. The judge commented that it should have been heard as a substantive application, there being no reason why the application could not have been heard *inter partes* and disposed of on the merits as a substantive application. Similarly, in *Chai Chwan v Singapore Medical Council*[11] ("*Chai Chwan*"), which was heard *inter partes*, the court had the benefit of affidavits from both sides and also a statement from the applicant. In these circumstances, the court commented that it was difficult to see what else might on further consideration turn out to be an arguable case after the court had heard full arguments. The court in *Chai Chwan* seemed to suggest that it was able and ready to make a decision on the substantive merits of the case but felt bound by the traditional leave threshold set out in *Colin Chan*.

13 In *Yong Vui Kong v Attorney-General*,[12] there was no dispute of fact and the judge was of the view that the pure questions of law had been fully and ably argued. The court doubted the necessity of a bifurcated process under which the judge would "quickly peruse" the merits in order to decide whether to grant leave before leaving a more detailed consideration to be made by another judge. The court opined that everything could and should be decided at one hearing.

14 One of the procedural innovations relied upon by the courts to get around these difficulties is to conduct a "rolled-up hearing", whereby the court collapses the leave stage and the substantive application under O 53 r 2 of the Rules of Court into a single, combined hearing. While the rolled-up hearing has often been an efficient and effective means by which the court disposes of the entire application, it is submitted that more clarity on both the theoretical and practical aspects of the rolled-up hearing is needed for greater certainty and usability. Theoretically, there is ambiguity as to the limits and scope of the rolled-up hearing because the Rules of Court do not cater for it and is silent on when and how a rolled-up hearing should be used. While case law suggests that it can be ordered where parties consent, it is not as clear whether a similar order can be made if it is judge initiated or if parties have not expressly requested it. It is also not clear whether the judge has to decide whether to roll up as a jurisdictional issue before hearing arguments on the substantive issues in the case, or whether he can decide to do so after he has heard the parties on the substance of the application. If the latter scenario is indeed permissible, it is not clear whether any procedural

10 [2008] 3 SLR(R) 648 at [56].
11 [2009] SGHC 115 at [31].
12 [2011] 1 SLR 1 at [16].

safeguards should be put in place to give assurance of a fair hearing. These may include giving the parties further opportunity to make submissions on substantive issues or to tender further evidence.

15 Although the presence of ambiguities does not significantly diminish the utility of the rolled-up hearing, judicial clarification would reduce divergence in practice and allow it to be used in a more consistent manner. As it stands, the case law highlighted above shows that different judges have adopted different approaches to the rolled-up hearing. While the judge in *Chai Chwan* declined to roll up the hearing, for example, the judge in *Colin Chan* fully considered the points of law raised and disposed of them on the merits.

16 Other than the need for clarity, the concerns that UK courts have raised about the rolled-up hearing procedure are also worth considering. In *R (Milner) v South Central Strategic Health Authority*,[13] Holman J cautioned that it was:[14]

> … very important that a practice, on occasions, of ordering a so-called rolled up hearing does not blur the important step of the grant of permission, or the distinction between consideration of permission and substantive consideration of all, or any discrete, grounds at a rolled up hearing.

This principle is equally apposite in Singapore as the blurring of the leave stage and the substantive application stage would inevitably undermine the statutory scheme of having a two-stage test. This is particularly since O 53 r 2 of the Rules of Court makes clear that the grant of leave should precede the principal application. However, maintaining such a separation is nigh impossible in the context of a rolled-up hearing. In *R (B) v Secretary of State for the Department of Health*,[15] for example, the English High Court acknowledged that a rolled-up hearing "regularly leads, as it did here, to the case being argued in full and thus to a substantive hearing rather than a two stage hearing".[16] This results in the permission stage failing to act as "an effective practical filter to save unmeritorious claims being pursued, time and money".[17]

13 [2011] EWHC 218.
14 *R (Milner) v South Central Strategic Health Authority* [2011] EWHC 218 at [67].
15 [2005] EWHC 1936.
16 *R (B) v Secretary of State for the Department of Health* [2005] EWHC 1936 at [228].
17 *R (B) v Secretary of State for the Department of Health* [2005] EWHC 1936 at [228].

III. Comparative analysis

A. UK

(1) Higher standard for leave

17 The traditional formulation of the standard for leave in *IRC* was whether, "on a quick perusal of the material then available, the court thinks it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed".[18]

18 Since the decision in *IRC*, the prevailing view has shifted to the arguability test expressed in *R v Legal Aid Board, ex parte Hughes*[19] ("*Hughes*") where the English Court of Appeal held that leave should only be granted if "*prima facie* there is already an arguable case for granting the relief claimed".[20] This entails the judge deciding whether leave should be granted based only on material that is already before the court. The court's justification appears to be largely pragmatic – in most *ex parte* applications for leave, whether or not there is an arguable case is usually clear. Where the court needs more information to determine whether or not a case is arguable, the appropriate action should be to adjourn the application for an *inter partes* hearing and not to adopt a lower standard for leave.[21] Since then, the arguability test has been consistently applied by the appellate courts.[22] These include the English Court of Appeal in *R (Z) v Croydon London Borough Council*,[23] where the test was expressed as whether the applicant has a "realistic prospect or arguable case";[24] and the Privy Council in *Sharma v Brown-Antoine*,[25] where the court expressly rejected the potential arguability test on grounds that leave cannot be granted upon a speculative basis[26] but only when the applicant has an "arguable ground" for judicial review "having a realistic prospect of success".[27] The arguability test has also been accepted by a leading academic authority, who has opined that the test for leave "ought to be broadly similar to that for summary judgment

18 *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 644.
19 [1992] 24 HLR 698.
20 *R v Legal Aid Board, ex parte Hughes* [1992] 24 HLR 698 at 702.
21 *R v Legal Aid Board, ex parte Hughes* [1992] 24 HLR 698 at 702.
22 Although there was High Court endorsement of the potential arguability test in *R v Secretary of State for Trade and Industry, ex parte Greenpeace Ltd* [1998] Env LR 415 at 418.
23 [2011] PTSR 748.
24 *R (Z) v Croydon London Borough Council* [2011] PTSR 748 at [6].
25 [2007] 1 WLR 780.
26 *Sharma v Brown-Antoine* [2007] 1 WLR 780 at [14], citing *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712 at 733.
27 *Sharma v Brown-Antoine* [2007] 1 WLR 780 at [14].

applications in other types of claim[s], namely that there is 'no realistic prospect of succeeding on the claim or issue'".[28]

19 Although there was no detailed exposition in *Hughes* to justify the shift in approach from the potential arguability test to the arguability test, it would be argued that the correctness of the *IRC* standard is questionable because the requirement of "further consideration" was in fact unnecessary on the facts of *IRC*. First, the relevant issue in *IRC* was whether the Divisional Court had correctly granted leave *ex parte* for the applicant to bring a judicial review application against the Inland Revenue Commissioner. The court did not have to consider whether or not the only material available, an affidavit by the applicant's vice-president, had disclosed what may on further consideration have turned out to be an arguable case. This is because the affidavit had "made out a *prima facie* case, albeit a somewhat flimsy one",[29] that the Commissioner had acted unlawfully. Second, the court had held that the procedure under O 53 of the Rules of the Supreme Court 1977 had two stages: the first stage concerned the application for leave to apply for judicial review, whereas the second stage concerned the hearing of the substantive application. At the leave stage, the court should only form "a *prima facie* view … upon the material that is available".[30] This *prima facie* view, if favourable to the applicant, may then alter "on further consideration in light of further evidence that may be before the court"[31] at the substantive hearing. The court's holding recognises that further consideration can only be made when there is further evidence, which is only available after the court gives further directions to obtain it. It is therefore premature for the court to speculate, at the first stage, what materials might be available at the second stage in order to determine whether leave should be granted.

(2) Flexible standard for leave

20 The other significant development in the UK has been the adoption of a flexible standard for leave. The flexible standard originated in *Mass Energy Ltd v Birmingham City Council*[32] ("*Mass Energy*"), where an unsuccessful applicant for an incinerator plant tender put up by a city council applied to quash the city council's decision to award the tender

28 Lord Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 7th Ed, 2013) at para 16-050.

29 *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 643.

30 *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 642.

31 *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 642.

32 [1994] Env LR 298.

to another applicant. While affirming the arguability test, the English Court of Appeal considered that a higher threshold for granting leave was justified by the following circumstances:[33]

> (a) First, the court had all the relevant documents and the benefit of hearing detailed *inter partes* arguments. Accordingly, it was unlikely that the points could be canvassed in any greater depth or detail at the substantive hearing.
>
> (b) Second, the city council had a tight schedule to follow to achieve its plans of incinerating waste in its area. A full hearing and possible appeal by either party would cause not only extra expense but also considerable public disadvantage by delaying the date on which the incinerator plant could be provided.
>
> (c) Third, the court was in as good a position as a court at the substantive hearing stage to construe the relevant documents. This was because, unlike in most leave applications, the court had gone through the relevant documents in detail.

21 For these reasons, the court applied what Fordham calls the "enhanced arguability" test[34] of whether the applicant's case was "likely to succeed" if leave was granted.

22 After *Mass Energy*, the enhanced arguability test was further refined in subsequent decisions. In *R v London Docklands Development Corp, ex parte Frost*[35] ("*Frost*"), the English High Court suggested a two-stage approach to determine if the enhanced arguability standard applies. At the first stage, the court should consider whether the applicant has demonstrated an arguable case. If there is not even an arguable case, leave should be refused without a need to consider the enhanced arguability test. If there is an arguable case, the court should proceed to ask, at the second stage, if it had heard the leave application in as much detail and depth as was normally likely in a substantive hearing.

23 In *R v Derbyshire County Council, ex parte Woods*[36] ("*ex parte Woods*"), the English Court of Appeal further clarified that the threshold for granting leave "is essentially a discretionary matter".[37] It is therefore possible for intermediate standards between "arguable" and "likely to

33 *Mass Energy Ltd v Birmingham City Council* [1994] Env LR 298 at 307.
34 Michael Fordham, *Judicial Review Handbook* (Hart Publishing, 6th Ed, 2012) at para 21.1.9.
35 (1997) 73 P & CR 199 at 203–204.
36 [1998] Env LR 277.
37 *R v Derbyshire County Council, ex parte Woods* [1998] Env LR 277 at 281.

succeed" to exist. On the facts, the court adopted a standard that was between "likely to succeed" and "reasonable prospect of success".[38] Similarly, in *R (Federation of Technological Industries) v Commissioners of Customs and Excise*,[39] the English High Court held that the standard "may range from requiring likely success at the substantive hearing to merely establishing an arguable case".[40] On one hand, "likely success" may be the appropriate standard if there had been detailed presentation and development of argument expected at the substantive hearing. On the other hand, a standard in between "arguable" and "likely to succeed", namely "substantial prospect of success", may be appropriate if the presentation and development of argument were more extensive than that at usual leave hearings, but fell short of the level expected at a substantive hearing.[41] Other factors like the "nature of the issue" and the "urgency of resolution" should also be considered to determine if the enhanced arguability test applies.[42]

(3) Summary of UK position

24 From the case law surveyed above, the UK position on the standard for leave in judicial review applications can be summarised as follows:

(a) First, the ordinary test to be applied in leave applications is the arguability test. However, the court has discretion to raise the standard to an enhanced arguability test.

(b) Second, the standard of the enhanced arguability test is whether an applicant is "likely to succeed" if leave were granted. Intermediate standards like "substantial prospect of success" may also be applied depending on the circumstances of the case.

(c) Third, the primary factor in determining whether a higher standard should apply is the depth and detail of arguments canvassed at the leave stage. The touchstone is whether the court hearing leave is placed in as good a position to hear the merits of the case as the court that will handle the substantive hearing. Other relevant factors include whether delay caused by granting leave would result in public disadvantage, and the nature of the issue.

38 *R v Derbyshire County Council, ex parte Woods* [1998] Env LR 277 at 280–281.
39 [2004] EWHC 254.
40 *R (Federation of Technological Industries) v Commissioners of Customs and Excise* [2004] EWHC 254 at [9].
41 *R (Federation of Technological Industries) v Commissioners of Customs and Excise* [2004] EWHC 254 at [9].
42 *R (Federation of Technological Industries) v Commissioners of Customs and Excise* [2004] EWHC 254 at [8].

25 Finally, it bears mention that the enhanced arguability test has been accepted in several High Court decisions in Northern Ireland even though details of when the test applies have yet to be fully ventilated.[43]

B. Hong Kong

26 In Hong Kong, the requirement for leave is provided for by s 21(K)(3) of the High Court Ordinance[44] and O 53 r 3(1) of the Rules of the High Court.[45] For many years, the leading authority on the standard for leave in Hong Kong was the Court of Appeal decision in *R v Director of Immigration, ex parte Ho Ming-sai*[46] ("*Ho Ming-sai*"), which adopted the potential arguability test in *IRC*. *Ho Ming-sai* was challenged in *Wong Chung Ki v Chief Executive*,[47] where the Court of Appeal accepted that the decision in *Ho Ming-sai* may have been different if *Hughes* had been cited to the court. Nevertheless, the court did not find it necessary to re-examine what the correct test should be.

27 In 2007, *Ho Ming-sai* was finally reversed by the Court of Final Appeal in *Peter Po Fun Chan v Winnie CW Cheung*[48] ("*Peter Po*"), which preferred the arguability test set out in *Hughes*. In delivering the judgment of the court, Andrew Li CJ set out a number of reasons that may be divided into three categories – practicality, policy and principle. Practically, the court considered that the potential arguability test may be difficult to apply because "what further materials and arguments may be available subsequently may not be apparent at the leave application".[49] Moreover, the court's focus after leave is granted would not be on whether an arguable case has been shown but on whether the substantive relief claimed should be granted.[50] In practice, the issue of arguability is often left unaddressed because it would either have been bypassed or become irrelevant by the time of the substantive hearing.

28 Second, the court weighed the competing interests of citizens having access to the courts to challenge decisions made by public authorities, and the public interest in good administration. As a matter of policy, the court found that the balance lay in favour of not subjecting public authorities and third parties affected by public authorities' decisions to uncertainty as to the validity of decisions as a result of

43 See, *eg*, *Re Armstrong's Application* [2007] NIQB 20 at [9] and *Re Jordan's Application for Leave* [2013] NIQB 74 at [26].
44 Cap 4 (Hong Kong).
45 Cap 4A (Hong Kong).
46 [1993] HKCA 232 at [6].
47 [2000] HKCA 270.
48 [2007] HKCFA 77.
49 *Peter Po Fun Chan v Winnie CW Cheung* [2007] HKCFA 77 at [12].
50 *Peter Po Fun Chan v Winnie CW Cheung* [2007] HKCFA 77 at [12].

unarguable claims. Third, adopting the arguability test is sound as a matter of principle because it would better serve the purpose of the requirement for leave, which is to "prevent public authorities from being unduly vexed with unarguable challenges".[51]

29 The decision in *Peter Po* has been consistently endorsed in later cases[52] and most recently applied in *Leung Kwok Hung v President*.[53] In that case, the Court of Final Appeal declined to extend the "public interest litigation factor" to disapply normal costs rules to an unsuccessful applicant in a leave application "which does not even pass the reasonable arguability test".[54] The reason was because doing so "would necessitate abandoning the threshold test at the substantive judicial review stage and there is no justification for doing so".[55]

30 One noteworthy difference between the arguability test in Hong Kong and the UK is that the test in Hong Kong appears to be more stringent than that in the UK. This is because in *Peter Po*, Li CJ described a reasonably arguable case as one "which enjoys realistic prospects of success".[56] The phrase "realistic prospects of success" suggests that the arguability test in Hong Kong is similar to the enhanced arguability test in the UK, for which the standard is "likely to succeed". The difference is unlikely to be semantic considering the emphasis that judges in Hong Kong have placed on the "realistic prospect of success" limb. Notably, Li CJ (who was retired by then) stated in December 2015 in response to criticism against Hong Kong's judicial review process that the threshold for granting leave had been raised to whether "there was a reasonably arguable case which enjoyed a realistic prospect of success".[57] Hong Kong's current Chief Justice, Geoffrey Ma, similarly emphasised at the Opening of the Legal Year 2016 that the standard laid down in *Peter Po* "is a high one because potential applicants are supposed to show their arguments to be

51 *Peter Po Fun Chan v Winnie CW Cheung* [2007] HKCFA 77 at [14].

52 See, *eg*, *Secretary of Justice v Ho Chun Yan Albert* [2013] HKCFA 53 at [22] read with fn 47, where the court observed, citing *Peter Po Fun Chan v Winnie CW Cheung* [2007] HKCFA 77, that:

> … the threshold for obtaining leave is by no means an easy threshold to overcome since there has to be a reasonably arguable claim which enjoys a realistic prospect of success.

53 [2014] HKCFA 104.

54 *Leung Kwok Hung v President* [2014] HKCFA 104 at [11].

55 *Leung Kwok Hung v President* [2014] HKCFA 104 at [11].

56 *Leung Kwok Hung v President* [2014] HKCFA 104 at [15].

57 Gary Cheung, "Judicial Reviews Fundamental to Rule of Law in Hong Kong, Says Former Top Judge Andrew Li" (14 December 2015), available at <http://www.scmp.com/news/hong-kong/law-crime/article/1890943/judicial-reviews-fundamental-rule-law-hong-kong-says-former> (accessed 7 February 2016).

reasonably arguable with a realistic prospect of success".[58] The position in Hong Kong remains unsettled in this respect because no case has discussed the extent of the arguability test in Hong Kong and whether the need to show a realistic prospect of success brings that test close to the enhanced arguability test in the UK. Nevertheless, it is clear that the threshold test for leave in Hong Kong is more stringent than the potential arguability test in Singapore.

C. Canada

31 The threshold for leave to commence judicial review proceedings in Canada, where leave is required, is no less stringent than that in the UK and Hong Kong. Although judicial review is available as of right for most categories of cases,[59] s 72(1) of the Immigration and Refugee Protection Act[60] ("IRPA") requires leave before a judicial review application may be brought for any decision made under the Act. This leave requirement provides a useful point of comparison for two reasons. First, it was introduced not because of the unique nature of immigration and refugee proceedings but for the same reasons why leave is required in other Commonwealth jurisdictions – because the courts were facing a significant caseload problem for these proceedings.[61] Canadian jurisprudence on the leave requirement should therefore be considered to have general comparative value and not be limited to immigration and refugee proceedings only. Second, the standard for the leave requirement has been the subject of numerous Canadian decisions.

32 In the leading decision of *Bains v Canada*[62] ("*Bains*"), the Federal Court of Appeal established the test for leave as "whether a fairly arguable case has been disclosed".[63] The court pegged the test for leave to that in summary judgment proceedings because "the requirement for leave is in reality the other side of the coin of the traditional jurisdiction to summarily terminate proceedings that disclose no reasonably

58 Geoffrey Ma, "CJ's Speech at Ceremonial Opening of the Legal Year 2016" (11 January 2016), available at <http://www.info.gov.hk/gia/general/201601/11/P201601110428.htm> (accessed 7 February 2016).

59 The Canadian Federal Courts Act (RSC 1985, c F-7), which applies to judicial review applications against federal boards and tribunals, does not prescribe a requirement for leave. Neither does equivalent legislation that applies to judicial review applications against decisions by provincial boards and tribunals: see, *eg*, Judicial Review Procedure Act (RSO 1990, c J.1) (Ontario); Judicial Review Procedure Act (RSBC 1996, c 241) (British Columbia).

60 SC 2001, c 27 (Canada).

61 Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38 Queen's LJ 1 at 35.

62 (1990) CarswellNat 615.

63 *Bains v Canada* (1990) CarswellNat 615 at [3].

arguable case".[64] The "fairly arguable" test was followed by the Federal Court of Appeal in *Krishnapillai v Canada*[65] and many later decisions by the Federal Court. In fact, one Federal Court decision has stated the test as a "serious, arguable case with serious issues",[66] which appears to be a higher standard than "fairly arguable".

33 This brief survey shows that courts in the UK, Hong Kong and Canada have all adopted an arguable or higher standard for leave. The following part will argue why Singapore ought to follow this trend by raising the default threshold for leave. It goes on to consider whether a flexible approach that allows judges to impose an enhanced standard over and above the default threshold in specific circumstances should also be adopted.

IV. Reformulating the test for leave in Singapore

A. Raising the current threshold

34 There are three main reasons why the current threshold for leave should be raised in Singapore. First, doing so would be compatible with the green-light conception of administrative law, a recognised feature in Singapore administrative law. Second, it would better cohere with the conceptual underpinnings of the leave requirement and avoid problems caused by the low threshold. Third, as is clear from the foregoing section, it would bring Singapore's test for leave in line with those in other Commonwealth jurisdictions. As the second reason has been explained in an earlier section,[67] this section will elaborate on the first reason and consider possible counterarguments against raising the threshold.

(1) The green-light conception

35 Influenced by the utilitarian tradition, the main objective behind the green-light conception of administrative law is to achieve the greatest good for the greatest number. To this end, it encourages the establishment of organised institutions that are properly accountable and yet able to deliver public services effectively.[68] In this scheme, the role of administrative law is that of a regulator and facilitator to enable social policies to be implemented effectively and fairly. The courts are

64 *Bains v Canada* (1990) CarswellNat 615 at [3].
65 [2001] FCA 378.
66 *Mina v Canada* [2010] FC 1182 at [6].
67 See paras 7–16 above.
68 Peter Leyland & Gordon Anthony, *Textbook on Administrative Law* (Oxford: Oxford University Press, 7th Ed, 2013) at p 7.

not seen as the first line of defence against administrative abuses of power because the Judiciary is considered to lack legitimacy in two ways: it is unelected, and its judgments may undermine the legitimacy of decisions made by democratically elected politicians. As such, reliance is placed on the legislative and executive branches of government to uphold high standards of public administration and policy.[69]

36 In contrast, the red-light concept of administrative law begins from the assumption that the bureaucratic and executive power of the State, if left unchecked, would threaten individual liberty. The primary role of administrative law is therefore to keep the powers of the Government within their legal bounds and compel public authorities to perform their duties if they fail to do so.[70] The Judiciary, which is regarded as autonomous and impartial, is centrally charged with securing good administration.[71] In short, the green-light conception prioritises democratic or political forms of accountability, whereas the red-light conception prefers courts.[72]

37 In Singapore, the Court of Appeal has implicitly endorsed the green-light conception in *Jeyaretnam Kenneth Andrew v Attorney-General*[73] ("*Jeyaretnam*") which involves the standing requirements for judicial review. In holding that members of the public do not have the right *per se* to bring judicial review against every decision made by public bodies, the court stated that the red-light view must be approached with caution despite the "obvious intuitive appeal" of allowing a wide class of persons to draw the court's attention to any misuse of public power.[74] The court also emphasised the "obvious pragmatism of minimising disruptiveness caused by vexatious claims to the functioning of these bodies"[75] and opined that "extensive judicial intervention in the administrative process"[76] is not the only way to ensure good governance. These remarks resonate strongly with the green-light conception. Read together with the Court of Appeal's

69 Chan Sek Keong, "Judicial Review – From Angst to Empathy: A Lecture to Singapore Management University Second Year Law Students" (2010) 22 SAcLJ 469 at 480.

70 William Wade & Christopher Forsyth, *Administrative Law* (Oxford: Oxford University Press, 10th Ed, 2009) at pp 4–5.

71 Mark Elliott, Jack Beatson & Martin Matthews, *Beatson, Matthews and Elliott's Administrative Law Text and Materials* (Oxford: Oxford University Press, 4th Ed, 2011) at pp 2–3.

72 Carol Harlow & Richard Rawlings, *Law and Administration* (Cambridge: Cambridge University Press, 3rd Ed, 2009) at p 38.

73 [2014] 1 SLR 345.

74 *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 at [54].

75 *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 at [55].

76 *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 at [56].

pronouncement in *Vellama d/o Marie Muthu v Attorney-General*[77] that the "rules on standing espouse an ethos of judicial review focused on vindicating personal rights and interests through adjudication rather than determining public policy through exposition",[78] the general applicability of the green-light conception in Singapore administrative law is beyond doubt.

38 Applied to the test for leave, the green-light conception would favour a higher threshold to strike a better balance between an individual's right of access to the courts and the public interest in ensuring that policies can be implemented without being hindered by unmeritorious judicial review applications. The Court of Appeal's observations in *Jeyaretnam* further suggests that the balance should lie in favour of the latter concern.

39 Moreover, it bears mention that the test for leave and standing requirement work hand in glove to ensure that judicial review is not misused because they are both part of three requirements that must be satisfied before the court may grant leave.[79] The Singapore courts have repeatedly espoused a conservative attitude towards standing requirements, firstly by declining to adopt the English position in *IRC* that leave may be granted where there is public interest in a matter even though an applicant is not personally affected,[80] and secondly by cautioning against liberal standing rules that could encourage "the surge of public interest litigation that has been making its way into the courts of other jurisdictions where taxpayers' actions questioning all nature of administrative acts are commonplace".[81] Retaining an overly liberal test for leave may similarly encourage the multiplicity of unmeritorious litigation against administrative bodies. It may also reduce the effectiveness of conservative standing requirements in preventing unmeritorious judicial review applications from reaching the courts.

(2) Possible counter-arguments

40 The principal counter-argument against raising the standard for leave is that doing so would impede an applicant's access to the courts. With the increasing emphasis on access to justice, including access to the courts, in recent years,[82] greater emphasis should be placed on

77 [2013] 4 SLR 1.
78 *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at [34].
79 *Jeyaretnam Kenneth Andrew v Attorney-General* [2013] 1 SLR 619 at [5].
80 *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at [17].
81 *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 at [62].
82 See, *eg*, Keynote Address by the Honourable the Chief Justice Sundaresh Menon at the Subordinate Courts Workplan 2013 (1 March 2013), available at <http://www.supremecourt.gov.sg/docs/default-source/default-document-

(*cont'd on the next page*)

reducing procedural barriers like the leave requirement for an applicant to have his grievances heard by the court.

41 In response, it is suggested that a higher leave threshold (a) is not an impediment to access to justice; and (b) has not been so considered even in the UK and Hong Kong, where the right of access to the courts is more expansive than in Singapore.

42 First, the applicants had argued in *Bains* that the leave requirement under the IRPA contravened their fundamental rights to life, liberty and security, as well as their right to equality,[83] by denying them access to the courts. The court soundly rejected the argument, holding that "the right to apply for leave is itself a right of access to the Court".[84] Similarly, Lord Woolf opined as early as 1990, in response to an argument by the Justice All Souls Review[85] that the leave requirement subjects litigants seeking judicial review to "an impediment which is not put in the way of litigants generally",[86] that the leave requirement in fact facilitates access to justice. This is because it allows a litigant "expeditiously and cheaply to obtain the view of a High Court judge on the merits of his application".[87] The argument that a higher leave threshold impedes access to justice becomes even less convincing when a comparison is made with the requirement for permission to appeal in the UK.[88] Under the English Civil Procedure Rules,[89] permission to appeal against a lower court's decision will only be given where the court hearing the application for permission considers that the appeal "would have a real prospect of success", or where this is "some other compelling reason why the appeal should be heard".[90] The requirement for

library/sjc/keynote-address-by-the-honourable-the-chief-justice-sundaresh-menon-at-subordinate-courts-workplan-2013.pdf> (accessed 19 September 2015) and Speech of the Attorney-General V K Rajah SC as Delivered at the Opening of the Legal Year 2015 (5 January 2015) at para 16, available at <https://www.agc.gov.sg/Newsroom/Speeches.aspx> (accessed August 2016).

83 Canadian Charter of Rights and Freedoms 1982 (c 11) ss 7 and 15.

84 *Bains v Canada* (1990) CarswellNat 615 at [4].

85 *Administrative Justice: Some Necessary Reforms – Report of the Committee of the Justice-All Souls Review of Administrative Law in the United Kingdom* (1988) (Chairman: Patrick Neill).

86 *Administrative Justice: Some Necessary Reforms – Report of the Committee of the Justice-All Souls Review of Administrative Law in the United Kingdom* (1988) (Chairman: Patrick Neill) at p 153.

87 Harry Woolf, *Protection of the Public – A New Challenge* (London: Stevens & Sons, 1990) at p 21.

88 Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) Pt 52.3(1) (permission required to appeal a decision of a judge in the County Court or the High Court except in specified cases, such as where the appeal is against a committal order or a refusal to grant *habeas corpus*).

89 SI 1998 No 3132.

90 Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) Pt 52.3(6).

permission was introduced in 2000 following the recommendations of the Bowman Report,[91] which stated that the underlying principle behind the permission requirement is to enable appeals to be managed in ways that are proportionate to the grounds of the complaint and the subject matter of the dispute.[92] This balancing exercise between an appellant's interest in having any error, unfairness or wrong exercise of discretion corrected in an appeal, and the appellate courts' finite resources to hear appeals, is similar to the balancing exercise conducted in granting leave for judicial review applications. Accordingly, that the requirement of permission to appeal (with the real prospect of success standard) has not been considered an impediment to the access to justice in the UK is a strong reason against treating the higher threshold for leave in judicial review differently.

43 Second, the higher threshold for leave has not been considered an impediment to the access to justice even in the UK and Hong Kong, where the right of access to the courts is more expansive than in Singapore.

44 In the UK, an expansive right of access to the courts has developed partly because of the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters[93] ("Aarhus Convention"), which provides for, *inter alia*, the public's right to administrative or judicial review procedures to challenge decisions made in respect of the environment. Among other things, Art 9(2) creates a right of access to a review procedure before a court of law and Art 9(5) requires parties to the convention to "consider the establishment of appropriate assistance mechanisms to remove or reduce the financial and other barriers to access to justice". Largely because of obligations arising from the Aarhus Convention, the UK has developed novel mechanisms like protective costs orders to facilitate access to justice in environmental matters.[94] These mechanisms are not recognised in other Commonwealth jurisdictions. Yet, the test for leave in the UK remains more stringent than in Singapore.

45 In Hong Kong, both the right of access to the courts and "the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel" are enshrined in Art 35 of

91 *Report to the Lord Chancellor by the Review of Court of Appeal (Civil Division)* (6 November 1997) (Chairman: Sir Jeffery Bowman).

92 *Civil Procedure* vol 1 (UK: Sweet & Maxwell, 2012) at para 52.0.4.

93 2161 UNTS 447; 38 ILM 517 (25 June 1998; entry into force 30 October 2001).

94 Lord Justice Brooke, "Environmental Justice: The Cost Barrier" (2006) 18 J Environmental Law 341.

the Basic Law[95] and therefore enjoy constitutional status. In *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd*,[96] the Court of Final Appeal described Art 35 as having two dimensions. Of relevance here is the second dimension, which is "concerned with ensuring access to the courts" so that fundamental rights conferred by the Basic Law are enforceable by individuals and justiciable in court.[97] No equivalent right exists in Singapore's Constitution. Yet, the Hong Kong courts have endorsed a more stringent test for leave than in Singapore.

B. Whether a flexible standard should be considered

(1) Arguability test as a starting point

46 Under the present law, a single threshold is applied when the court considers whether to grant leave. There is no room for the court to apply a different threshold to suit the circumstances of the case. An argument may be made that this is becoming increasingly inappropriate because judicial proceedings have become more varied and complex. As the modern leave application may take place in a myriad of circumstances with multiple contesting parties, a single leave threshold may be too blunt a tool for the judge to effectively dispose of the issues that have been put before the court.

47 The main argument for adopting a flexible standard for leave is that it can serve as a useful case management tool that eliminates the need for a substantive hearing if the judge, having had the benefit of substantial material before him, finds that the application has low probability of success. This would benefit both the public authority and the applicant. For the public authority, disposal of the case at the leave stage would allow the implementation of its policy to resume with less delay. For the applicant, having the merits of its case assessed at an earlier stage would prevent the incurrence of unnecessary costs at the substantive hearing if the court goes on to dismiss the claim. Early resolution would be particularly beneficial for cases that involve matters of pure law with no factual disputes. Examples include the interpretation of statutory provisions, whether a claim for legitimate expectation is consistent with statutory law and whether natural justice requires a public authority to conduct an oral hearing.

95 The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (1990).

96 [2006] 9 HKCFAR 234.

97 *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd* [2006] 9 HKCFAR 234 at [50].

48 On the other hand, a flexible standard like the enhanced arguability test in the UK has several disadvantages that must be addressed before it should be considered for implementation in Singapore. First, a flexible standard may create uncertainty for the parties because the court is only able to decide which standard applies after the leave application when it has heard the parties' arguments and perused the documents provided. Before the leave application, neither party would know the extent of preparation it has to do to obtain or resist leave, as the case may be. Such uncertainty may be especially disadvantageous to the applicant, who bears the burden of persuading the court to grant leave. A possible solution is for the judge to indicate to parties the applicable standard before the leave hearing. This, however, is unsatisfactory because it assumes that the judge would be in the position to determine the applicable standard based on the materials before the judge, without the benefit of oral submissions. It would also be inconsistent with the approach in *Mass Energy*, which requires the court to have had the benefit of detailed *inter partes* argument. Nevertheless, the problem of uncertainty may not be as detrimental to an applicant as it first appears. This is because an applicant is likely to put forward his best case based on all available materials regardless of the standard that applies. He has little incentive to withhold material from the court just to ensure that the enhanced arguability test does not apply because doing so may result in him not even meeting the arguability standard. Accordingly, the extent of the applicant's preparation would arguably not be materially influenced by the adoption of a flexible standard.

49 A second disadvantage is that leaving the applicable standard entirely to the court's discretion without hearing the parties' arguments, as was the case in *Mass Energy*, may be contrary to the principle of natural justice that parties have the right to be heard.[98] In response, the simple solution is to allow parties to address the court on the applicable standard at the leave hearing. This has been done in many UK cases that have applied *Mass Energy*.[99] In *ex parte Woods*, for example, counsel for the applicant argued that an arguability standard should apply because further evidence would be required at a full *inter partes* hearing to establish what matters were and were not taken into account at a certain meeting. On the other hand, counsel for the respondent submitted, among other things, that there is unlikely to be a substantially greater

98 *Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 2 SLR 844 at [88].

99 See, *eg*, *R v Northampton Borough Council, ex parte Northampton Rapid Transit System* (10 July 2000) (unreported) at [5]–[7]; *R v Derbyshire County Council, ex parte Woods* [1998] Env LR 277; *R (Assisted Reproduction and Gynaecology Centre) v Human Fertilisation and Embryology Authority* [2013] EWHC 2236 at [10]; and *R (Menston Action Group) v Bradford Metropolitan District Council* [2015] EWHC 184 at [39].

number of points canvassed at the full *inter partes* hearing. After hearing both parties, the judge applied a standard that lay in between the arguability and enhanced arguability standards. Although having to hear parties on the applicable standard may make the leave hearing lengthier, this is an inevitable trade-off to ensure that parties are heard on all material issues.

50 If adopted, it is suggested that the flexible standard begin with the arguability test as the starting point. If the criteria for the enhanced arguability test to apply are met, the applicant must then show that he has a "real prospect of success" at the substantive hearing stage before the court may grant leave. The standard of "real prospect of success" encapsulates the different formulations that have been used in English cases, which include "not merely arguable but is strong; that is to say, is likely to succeed";[100] "a reasonably good chance of success";[101] and "strongly arguable".[102] In addition, the Court of Appeal has recognised that "real prospect of success" is a "higher and more rigorous standard" than that relating to an application for summary judgment[103] and to set aside a regular default judgment.[104] Adopting the "real prospect of success" standard is therefore unlikely to lead to confusion between the different standards used in the pretrial disposal of cases.

51 There are two possible objections to using the "real prospect of success" test as the enhanced standard. First, one may argue that it is unnecessary to introduce a test that is unfamiliar to Singapore jurisprudence, considering that there are well-established tests in the context of summary judgment proceedings and the setting aside of regular default judgments that may also be used. In response, this article suggests that these existing standards are indistinguishable from the arguability standard and are unable to achieve the purpose of the enhanced arguability test. In summary judgment proceedings, the standard for granting a defendant leave to defend is whether there exists "an issue or question in dispute which ought to be tried".[105] Although the Court of Appeal in *Habibullah Mohamed Yousuff v Indian Bank*[106] ("*Habibullah*") expressed the view that a defendant may obtain leave to

100 *Mass Energy Ltd v Birmingham City Council* [1994] Env LR 298 at 308; *R v Cotswold District Council, ex parte Barrington Parish Council* (1998) 75 P & CR 515 at 530; *R (Grierson) v Office of Communications* [2005] EMLR 37 at [27]; *R (Assisted Reproduction and Gynaecology Centre) v Human Fertilisation and Embryology Authority* [2013] EWHC 2236 at [10].

101 *R (Portland Port Ltd) v Weymouth and Portland Borough Council* [2001] EWHC Admin 1171 at [9].

102 *R (Mount Cook Land Ltd) v Westminster City Council* [2002] EWHC 2125 at [26].

103 *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 at [48].

104 *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 at [60].

105 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 14 r 3(1).

106 [1999] 2 SLR(R) 880.

defend if "he has a fair case for defence or reasonable grounds for setting up a defence, or even a fair probability that he has a *bona fide* defence",[107] the leading academic opinion is that this should not be read as requiring the defendant to show particular merits in his case.[108] Indeed, the court emphasised in *Habibullah* that the power to give summary judgment "is intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment".[109] Unlike in the enhanced arguability test, it is not intended to assess the merits of the case beyond whether the defendant has a triable issue. Similarly, the Court of Appeal in *Mercurine Pte Ltd v Canberra Development Pte Ltd*[110] ("*Mercurine*") has set the standard applicable to the setting aside of regular default judgments as "whether the defendant can establish a *prima facie* defence in the sense of showing that there are triable or arguable issues".[111] This test is not stricter than that for obtaining leave to defend in a summary judgment application even though the two tests are not identical.[112] Both tests would not achieve the objective of the enhanced arguability test, which is to assess the merits of the case and the likelihood of the claimant's case succeeding.

52 The second possible objection against introducing the "real prospect of success" test is that the Court of Appeal in *Mercurine* has considered and rejected the test in the context of the setting aside of regular default judgments. Among other things, the court criticised the "real prospect of success" test, which was set out by the English Court of Appeal in *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc*,[113] for requiring the court to "enter into an evaluation of the evidence to determine the likely outcome of the case". The court was also concerned that this evaluation process "may be compromised by the inconclusiveness of the affidavits, and allegations in the pleadings which have yet to be substantiated by evidence tested on oath".[114] These concerns, however, are addressed by the requirement in *Mass Energy* that the court must have had the benefit of detailed *inter partes* argument of sufficient depth and detail.[115] In practice, the English courts have maintained a high standard for the extent of material put before

107 *Habibullah Mohamed Yousuff v Indian Bank* [1999] 2 SLR(R) 880 at [21].
108 Jeffrey Pinsler, *Principles of Civil Procedure* (Singapore: Academy Publishing, 2013) at para 08.011.
109 *Habibullah Mohamed Yousuff v Indian Bank* [1999] 2 SLR(R) 880 at [21].
110 *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 at [60] and [95].
111 *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 at [60] and [95].
112 *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 at [60] and [95].
113 [1986] 2 Lloyd's Rep 221.
114 *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 at [58].
115 *Mass Energy Ltd v Birmingham City Council* [1994] Env LR 298.

the court and the depth of argument at the leave stage. In *R (Lichfield Securities) v Lichfield District Council*,[116] the English High Court declined to apply *Mass Energy* although there had been "quite a substantial hearing … on what is technically only an application for permission to proceed" because it considered that the full substantive hearing was "likely to take somewhat longer and to go into the merits of these arguments and into the authorities in greater detail". In *R (Assisted Reproduction and Gynaecology Centre) v Human Fertilisation and Embryology Authority*,[117] the English High Court applied the arguability test and not the enhanced arguability test because it considered that the hearing "has not been anything like a full hearing of the kind which would be necessary at the substantive hearing of the case" and was insufficient to inform the court on whether the claimant's claim was likely to succeed or had a substantial prospect of succeeding.[118] In *R (Menston Action Group) v Bradford Metropolitan District Council*,[119] the court declined to apply the enhanced arguability test because the defendant had intimated that "there may be further issues addressed if there was to be a substantive hearing", and also because further delay would not lead to very considerable public disadvantage, unlike in *Mass Energy*.[120]

53 If adopted, it is suggested that Singapore courts follow the standard applied by the UK courts in determining whether the enhanced arguability test should apply. However, Singapore courts should not insist that the criterion of considerable public disadvantage is met in every case. Even in the UK, this criterion "has been applied quite loosely", and the fact that a third party is effectively deprived of the benefit of a public authority's decision for the duration of the judicial review proceedings often suffices for the enhanced arguability test to apply.[121] In addition, Singapore courts should consider the suitability of adopting other peripheral criteria like the "nature of the issue" as and when suitable cases arise, and not view them as strict criteria. As the English High Court observed in *R v Cotswold District Council, ex parte Barrington Parish Council*,[122] the determining factor of the enhanced

116 (22 November 1999) (unreported).

117 *R (Assisted Reproduction and Gynaecology Centre) v Human Fertilisation and Embryology Authority* [2013] EWHC 2236 at [11].

118 *R (Assisted Reproduction and Gynaecology Centre) v Human Fertilisation and Embryology Authority* [2013] EWHC 2236 at [11].

119 [2015] EWHC 184.

120 *R (Menston Action Group) v Bradford Metropolitan District Council* [2015] EWHC 184 at [39].

121 James Maurici, "When Does the Heightened *Mass Energy* Permission Test Apply?" (2015) 20 *Judicial Review* 2 at 113.

122 (1998) 75 P & CR 515.

arguability test should be "the extent of the material put before the court and the depth of the argument at the leave stage".[123]

V. Conclusion

54 In the final analysis, the appropriate standard for the leave requirement in judicial review proceedings cannot be assessed without an appreciation of the leave requirement as a procedural safeguard "imposed primarily to protect public bodies against weak and vexatious claims."[124] This article has argued that the potential arguability test fails to discharge this function effectively because it sets an unacceptably low bar and creates uncertainty by allowing leave to be granted based on documents that have yet to be uncovered at the time a leave application is heard. Moreover, using the potential arguability test as a single standard in all judicial review applications fails to take into account the various permutations that can occur at the leave hearing.

55 This article has therefore argued for the introduction of two procedural innovations drawn from the UK, Hong Kong and Canada that can address the shortcomings of the potential arguability test – the more stringent arguability test, and the flexible standard for leave when certain prerequisites are met. It has explained how the arguability test is compatible with the green-light conception of administrative law in Singapore and would not impede an applicant's access to the courts. It has also explained how the flexible standard for leave, with the "real prospect of success" test as the enhanced standard, would benefit both applicants and public authorities as a useful case management tool provided that certain disadvantages are addressed.

56 Like other procedural safeguards, the leave requirement in judicial review is a means of achieving substantive justice between parties in a matter. While the natural tendency in judicial review proceedings may often be to focus on validating the rights of the applicant, the public interest in protecting the decisions of public authorities from excessive scrutiny and intrusion should not be overlooked either. It is thus hoped that the changes proposed in this article would promote a better balance between private and public interests in judicial review proceedings.

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123 *R v Cotswold District Council, ex parte Barrington Parish Council* (1998) 75 P & CR 515 at 531.

124 *R v Secretary of State for Trade and Industry, ex parte Eastaway* [2000] 1 WLR 2222 at 2227.