

'Judicial Review and Test Case Strategies' – Seminar 1: Minutes
(Minutes taken under Chatham House Rule)

The Public Law Project

*(in association with the Department of Law,
Queen Mary, University of London)*

Date: 17 July 2006

Location: IALS, Room L101

In Attendance:

1. Richard Drabble QC	Landmark Chambers
2. Professor Richard Rawlings	LSE
3. Conrad Haley	PLP
4. Colm O'Conneide	UCL
5. Adam Chapman	Treasury Solicitors Dept
6. Richard Clayton QC	39 Essex Street
7. Stephen Grosz	Bindmans
8. Michael Fordham	Blackstone Chambers
9. Andrea Loux	Westminster University
10. Jane Oldham	11 KBW
11. Gita Parihar	Friends of the Earth
12. Roger Smith	JUSTICE
13. James Welch	Liberty
14. Stewart Wright	CPAG
15. Anne Mihailovic	DWP
16. Clare Collier	PLP
17. Hannah Jones	PLP
18. Caroline Stone	PLP – Minutes

Apologies: Andrew Le Sueur, QMC; Kate Markus, Doughty Street Chambers

Introduction

Chair: Brief introduction to purpose and structure of seminars.

Two specific aims of first seminar:

1. To provide an opportunity to consider what a 'test case' is in the context of judicial review. Questions include who brings them and why?; What is the relationship between test cases and third party interventions?; How are they financed?
2. To set the agenda for the future seminars by identifying three public law issues which are calling out for discussion and analysis.

Speaker 1

As a starting point, Speaker 1 expressed scepticism that it was possible to identify test cases in advance, describing it as an 'inherently difficult task'.

What is a test case?

To some extent, Speaker 1 intended to duck the question, believing there to be no single definition. One can distinguish two types of case: (i) a *leading case* – i.e. a case that raises sharp issues of statutory construction with a stack of other cases backing up, awaiting determination of the issue. Lawyers working in specialist fields, such as social security, know which cases fall within this ambit as the cases identify themselves; and (ii) cases which raise a *point of practical, not legal, difficulty*. In this instance a test case is an attempt to secure a political answer; the response of a body to a practical problem. E.g. CPAG have tackled the problem of the 'disappearing claim' where benefit payments are not being processed in sufficient time.

Who brings test cases?

The obvious answer is lawyers! However, a good test case is the meeting of an agenda of a pressure group with lawyers who have the skills to know how to achieve the desired aim. Hence, how can one identify test cases in a vacuum without the backing agenda?

Who are the Clients?

- NGOs, who serve to fill a gap in the legal structure. For example, with disappearing claims, the moment C puts their head above the parapet by bringing their claim, the Government will pay out, negating the challenge. CPAG, however, are in a position to raise the broader question of a systemic failure. In *Pergau Dam*, the World Development Movement was the obvious body with expertise, and, therefore, the natural body to bring the matter before the Court. In this sense, the NGO test case can solve problems with locus.
- Individuals. A large number of test cases can be brought by individuals. In some cases such individuals may be the vehicle for the wider interests of a pressure group. In environmental cases, test cases involve a local issue on the ground which needs to be litigated, which may be of a broader public benefit if the developer is going to be challenged.

Why are test cases brought?

A combination of campaigning goals and a desire to win the individual case. NGOs are obviously involved because of the wider interest served by bringing the case.

A successful test case is about the combination of 'an agenda + a point of law which is litigable + a campaign to bring the case to the forefront i.e. using the publicity machinery to push the specific agenda'.

The value of a victory depends on the area of law involved. In social security, there may well be an immediate change to subordinate legislation. In contrast, with an HRA claim, the problem is entrenched because of Parliamentary Sovereignty and the supremacy of primary legislation. Therefore, an important test case consideration is 'what areas of the law can the Government reverse?'

Candidates for test case treatment?

Speaker 1 expressed some difficulty with the suggested shopping list given the theoretical nature of a challenge without individual facts. The objective is not a nice point of public law, but the campaigning aims of the group involved. So, C presents an injustice and lawyers then develop the case. The grievance comes first, the law second. It is only where there is a grievance that the matter will be driven on in Court. Further, primary legislation will only be struck down if there is a burning reason, namely, an individual suffering untenable circumstances.

Speaker 2

Speaker 2 made two initial points:

- It is important to keep in mind a major new feature on the public law landscape, the Commission for Equality and Human Rights. There is much discussion to be had about their input in test cases;
- Whilst a test case questioning the existence of proportionality as a free-standing ground might be a bit academic, Speaker 2 expressed the view that he could see how one might set up a case to challenge the limits of s6 HRA 1998.

Historical Context for Use of Test Cases

Set by reference to the book 'Pressure Through Law' 1992 (ed. Harlow and Rawlings), which examines the use of law as a technique for developing society's broader interests. The book serves a benchmark for where we have reached and may be going in the future. In summary:

- The phrase 'test case' is a loose description for cases where similar facts arise and one is chosen to air the point. There is also the 'class/lead action' which seeks to establish a legal principle. The name may imply a degree of intention absent in fact. In other words, cases sometimes take on significance after the event.
- Both civil court and criminal courts were examined. I.e. it is necessary to think of JR as one of a number of routes. Civil Courts involved a number of litigants, from the usual test case suspects through to one-interest/single-challenge groups. It is not possible to capture the broader range of test cases unless all of these parties are taken into account.

Golden Threads

(a) Test cases are a long-standing tradition. Literature seems to assume they began with the Human Rights Act. The HRA is a step-change, but that's all. It is not the origin e.g. *Somerset v Stuart* (1772). A certain humility is important when considering what we are doing at the seminars.

- (b) Speaker 2 wanted to demolish the idea that test cases are an American import. That is not to down-play what we can learn from the Civil Liberties Movement.
- (c) The international dimension of test cases is important. It is hard to imagine to insularity of the English Courts 20-30 years ago, e.g. *Factortame*, cf. Lord Bingham in *A v Home Sec.*

Questions to be answered

- Legal procedure: how generous/accommodating is procedure for bringing wider interest cases? Speaker 2 described different theories (e.g. the funnel theory) and expressed his view that Courts are becoming more accessible to such cases - JR is opening up at the access stage, which, in turn, is putting pressure on the development of grounds.
- How do we measure success? One wants to win a case, but so what? Presumably the aim is a ripple effect within the Administration. Both positive and negative effects must be considered.
- Predictors of success? There is a lot in the American experience, for example: the longevity of the group, the 'sharp-issue' focus, the ability to generate well-timed publicity, the ability to persuade intervention. Speaker 2 would add 'good fit', i.e. are there suitable pegs on which to hang the legal action?
- Legal consequences. What does a test case do to the separate identity of the Court? How do you square test case outcomes with the constitutional idea of courts?

Continuity of issues

- Parliamentary Sovereignty (just!): test cases still somewhat stunted when challenging a legal framework.
- The centralisation of JR procedure places an unnatural restraint on test cases, particularly for those wanting to promote a culture of respect for human rights throughout the UK.
- Costs rules: e.g. in the area of environmental justice.

Other observations

- One cannot predict some things, e.g. 9/11 and the new authoritarian view. This adds support to the view that trying to pinpoint test cases in advance is 'pie in the sky'.
- The rise of judicial discretion (in terms of the diversion of cases by case management, ADR, statutory review in asylum/immigration) is one of the most prominent developments in public law.
- Speaker 2 would like to suggest that JR has become an elite procedure populated by repeat players i.e. there is more space for test cases than currently being brought.

Interventions

It is early days in terms of interventions. Some cases involve competing interventions, e.g. *Burke*, yet in certain areas some pressure groups, such as Justice/Liberty, have a monopoly. Joint interventions also feature, for example in *A v Home Sec. (No 2)* (one group of 3 interveners, another of 14). It does not devalue the quality of the legal argument to say this is the closest we have in UK to *judicial lobbying*, blurring the divide between the legal and political spheres. There is room for discussion of tactics between groups in common areas.

Conclusion: "Pressure without reason is irresponsible. Reason without pressure is ineffective."

DISCUSSION

Response to definition of a test case/TC strategy

Speaker 3:

- Have a document called 'test case strategy', but there is not much science to it. For LSC purposes, where there is less than a 50-50 chance that case will be successful, the testing point is whether the case will be of impact beyond the individual's facts, i.e. of wider application. This is easier to say than apply.
- As an organisation, do attempt to pinpoint areas where can anticipate what the test case will be, e.g. HRA challenges in social security, but in reality, test cases are usually reactive.

Speaker 4:

- A test case is whatever you call it.
- What NGOs are really doing is developing the idea of legal accountability alongside political accountability. It is important to pull the camera back and set test cases in context, namely, the current constitutional shift which embodies the notion that the judges are the guardians of the HRA. This means they are using the law to reinforce democratic values, which is not only ok, but also a highly desirable movement.
- Tony Prosser (Bristol School of Law) said the indirect effect of test cases was greater than the direct. This is wrong and underestimates the value of such challenges.

Speaker 5:

- There are stronger short-term political drivers that determine the outcome of cases, rather than whether they are 'test cases' or raise a big point of precedent.
- Surprised at how rarely they face test cases. More often a central government legal department will meet the 'lead case', which is sensible use of resources. Test cases are not a huge point in public authorities.

Speaker 6:

- Sometimes cases do not progress where the defendant can see they raise a broader issue in need of challenge.

Settlement: fighting 'bad cases'

Speaker 7: Would a central government legal department ever think there is an important point of law which must be litigated, but the facts are not strong, so D settles and waits for a better case?

Speaker 5:

- Does not think Government ever wants litigation. It is difficult for them to choose which cases would rather fight – for example, regarding Article 2 obligations in cases of deaths in custody, how do you persuade C to compromise where there are bad facts, given the severity of their loss?

Speaker 8:

- There is an imbalance here. The Government can surrender where a case is bad, as this simply means paying over the benefit. Whereas for C, your duty is to take the case *if you can* and it is

difficult for claimant lawyers to wait for a case on better facts. The Government do not have this headache when considering settlement.

Speaker 3:

- Do not really have a problem with bad cases, as have no costs pressure to meet a certain caseload. Bad cases do lead us to intervene to supplement information in CA/HL cases (i.e. self-identified cases of public importance).
- There should be better communication between NGOs to identify better cases, as sometimes individual organisations are not aware that a pressing issue has arisen.

Intervening

Speaker 9:

- Sometimes at a loss regarding the decision as to when to intervene. Sometimes it is to make clear that there is a huge point of principle, other times it is to raise additional information.

Speaker 2:

- Can foresee different type of intervention e.g. middle of the road interventions which offer the Court a choice of outcomes, loss leaders etc. Believes that the more experienced groups do engage with each other and think where on this spectrum they are.

Speaker 10:

- Intervening raises interesting issues about who does what. Much initial thinking to be done, but would be a shame if human rights and public law were only joined to Commission's agenda after it was up and running.
- *Johnson* provides an interesting example of the DCA intervening. Most of the 40 paragraphs are about the DRC/DCAs' submissions.
- There is a reservoir of experience in comparative Equality Commissions which must be drawn on.
- Disability Groups have an interesting litigation strategy for intervening:
 - (i) They pick on a high profile case e.g. Ryan Air;
 - (ii) They have pushed the boundaries of disability discrimination (East Sussex lifting case); and
 - (iii) They have gone into broader human rights claims (e.g. *Burke*) to make the point that disability is about more than disability discrimination.

Speaker 3:

- Do individual judges know an issue is kicking off when they first see the case?

Speaker 1:

- Brooke LJ called up Liability Insurance in the recent *CFA* case. This was a positive call for intervention, otherwise the Court was not going to be able to use its judgment to proffer any guidance.

Speaker 2:

- In *Burke* the Court of Appeal was expressly hostile to intervening because they felt the interventions were taking considerations far from the facts of the case. In the Lords, they seem more relaxed about interventions and comparative materials are used a lot. What are our

obligations in this regard – do we need to supply all the information (e.g. unfavourable case law etc.)?

Exploring procedure of intervening

Chair:

- There are skeletal references to the procedure e.g. to intervene in the Admin Court one writes to ask the Court's permission, the process is free. By contrast, in the Court of Appeal intervention involves a formal application + fee. This is an odd state of affairs.

Speaker 8:

Practical issues –

- How find out about cases? It is difficult to mobilise at the last minute. Why aren't UNHCR automatically told about immigration/asylum appeals?
- Oral v written? The Court seems to put them in the same category, but it makes a big difference. The Government does not usually object to an intervention, as they want to be seen to be fair, by then they insist that interventions are written only.
- Sequence. Does one intervene before the Government has put in their case, only to find that the written intervention is then ignored at the oral hearing?
- How do different NGOs get involved/communicate? Is one examining case law, another policy etc.? A better system of co-operation would stop navel-gazing.

Speaker 11:

- Useful to have non-lawyers involved in this discussion.
- Can learn from Canada where there is an infrastructure for intervening (e.g. notification), part of which is Government-funded. Courts will contact interveners, though they do not like it when interveners disagree, so they encourage better communication.
- The Commission might be a good focal point for bringing in all the groups.

Suggestions for future seminars

1. Live issues in public law – which might or might not be attacked by JR. Areas ripe for consideration, where legal intervention warranted.
2. Cases which one thinks were decidedly incorrectly, but lawyers/NGOs are looking for a chance to overturn if they get the chance. (This would give something concrete to work from)
3. Relationship between legal challenges and the political constituencies being represented. How the lawyers who bring test cases interrelate with the people on whose behalf the cases are being brought.
4. Looking further at the predictors of success/what is a good test case i.e. why cases fail/succeed?

Speaker 7 would add to list of predictors:

- How close is the challenge to core values of dignity etc.?
- Parliamentary Sovereignty – is a declaration of incompatibility the only remedy?
- Real people with real problems – looking good for the cameras
- Resources

Speaker 12 – test cases must be driven by what parties, not lawyers, want.

5. Examination of the impact of test cases: from (i) legal, (ii) political and (ii) bureaucratic (inside LAs) points of view. Query what general principles could be disseminated from this?
6. What is the role of JR where Ombudsmen exist? This springs from a concern that there is a plethora of Ombudsmen now and this is being seen as the way of providing citizens with redress. It was pointed out that this might be premature given the Law Commission project on 'voluntary remedies', in the course of which the Ombudsman will express a concrete view.
7. The scope for legal aid in test cases? The LSC grants permission on a random basis, there appearing to be no procedure for determining how they choose the lead case. This often ends up with 'unexpected' cases becoming lead cases. Public funding generates so many of these cases. By contrast, in *Austin v Saxby*, it was actually the lawyers who decided which would be the lead legal case.
8. 'Victim' status. According to Strasbourg this status continues unless the respondent Govt acknowledges a breach of human rights i.e. compensation is not enough. What happens if someone pursues this point in the UK Courts? In theory a challenge in Strasbourg is possible, but what about 'bringing rights home'?

General:

Request to bring in more of the other side for future seminars.

Consensus that a session on interventions would be helpful.

Agreement reached on the following three topics as the subject matter for the next 3 seminars:

1. Test cases: Is it possible to identify the factors (e.g. legal/political/academic etc) that point to a successful test case? (14th September 2006)
2. Infrastructure: Learning from other jurisdictions about how the legal sector organises itself to communicate amongst its disparate parts and to cooperate in test cases and other strategic work (19th October 2006)
3. Third Party Interventions: discussing and developing practice and procedure. (23rd November 2006)