

**'Judicial Review and Test Case Strategies' – Seminar 2: Minutes**  
**(Minutes taken under Chatham House Rule)**

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

Date: 14 September 2006

Location: IALS, Room L101

In Attendance:

1. Stephen Grosz	Bindmans
2. Phil Shiner	Public Interest Lawyers
3. Andrew Le Sueur	Queen Mary, University of London
4. Caroline Stone	PLP – Minutes
5. Nony Ardill	Age Concern
6. Sarah Hannett	4-5 Gray's Inn Square And KCL Law School
7. Michael Fordham	Blackstone Chambers
8. Kieran Laird	Public Interest Lawyers
9. Andrea Loux	Westminster University
10. Colm O'Conneide	UCL
11. Prof Richard Rawlings	LSE
12. James Welch	Liberty
13. David Wolfe	Matrix Chambers
14. Stewart Wright	CPAG
15. Hannah Jones	PLP
16. Louise Whitfield	PLP

## **Introduction**

Chair:

- Brief recap of aim of Seminars: to examine what the concept of a 'test case' means in current legal and political circumstances; centrally, what are they, how are they conducted and to what effect?
- Seminar Two addresses whether it is possible to **identify factors which point to a successful test case**. In that regard, we have two lawyers in the thick of it making the presentations.

## **Speaker 1**

In the first instance, it is necessary to consider what one means by 'public interest litigation'. Using the definition formulated by PLP, 'public interest litigation' involves:

*"Cases which raise issues, beyond any personal interests of the parties in the matter, affecting identifiable sectors of the public or vulnerable groups; seeking to clarify or challenge important questions of law; involving serious matters of public policy or general public concern; and/or concerning systematic default or abuse by a public body."*

Speaker 2 expressed his view that 'public interest litigation' is essentially the same concept as that encapsulated by the phrase 'test case'.

Reviewing how things have changed in his 23 years of practice –

*The identification/early identification of issues*

There are a number of ways in which public interest cases are set up:

- (i) The public interest issue is carefully set up in pre- pre-action correspondence. E.g. In the cases concerning conscientious objectors who withheld taxes on the grounds that their payments were being used to fund an illegal war in Iraq (Peace Tax 7 Group), we spent a long time setting up this challenge before litigation was even in issue.
- (ii) An NGO is working on a campaigning issue and something changes on the ground that makes it the right time to bring the case. For example, for a while we have wanted to challenge the fact that the UK has doubled its export of arms to Israel in recent years. When the conflict on the Israeli/Lebanon border commenced, it became clear that if there was ever going to be a successful challenge to this policy, it would be now. As such, a case raising questions of ethical foreign policy is now actively underway.
- (iii) As a lawyer or NGO, you instinctively know something is wrong, but you are not sure *what* until you get served with the AOS/Government's response. It is only at this stage that you realise the case raises a big, big point of public interest. E.g. in *Al-Jedda*, it was only when we saw the Government's response regarding indefinite detention, that we knew an unlawful policy/law was in play.
- (iv) Sometimes the substantial public interest point only develops once the case takes off, in the sense that the Court encourages the resolution of a fundamental, underlying question. For example, in *R (Gentle) v Prime Minister, MOD and A-G*, the case challenging the Government's refusal to hold a public inquiry into why the UK joined the war in Iraq, the

Master of the Rolls has indicated to the parties that when the case comes before the Court of Appeal he would “appreciate guidance on justiciability”. From this comment it became clear that now was the time to test whether some issues will always be beyond the remit of litigation simply because the Government can wave the economic/national security/defence card.

- (v) The point is there and the right case comes up which fits, i.e. particular factual circumstances need to arise before you can test the legal point.

*Key ingredients/way things have changed*

- It is essential to have lawyers in the right place, who look at the world in the right way. They must be lawyers who are able and prepared to think outside the box – the kind of people who make things happen, not simply litigate in a reactive fashion.
- Funding: used to be administered by the Law Society, now by the Special Cases Unit at the LSC.

Test cases often run into the High Cost Cases regime, with detailed oversight of cases by the LSC. This means that they are subject to a tougher costs regime than other cases. On a positive note, the Public Interest Advisory Panel (PIAP) can ensure that cases are funded if, despite having borderline merits, they raise a public interest and this signifies a welcome move away from an individualised approach to funding. By way of example, Speaker 1 cited his recent acquisition of a certificate to essentially seriously embarrass the Government regarding their war in Iraq. This says a lot - although it did take a year to secure, meaning the case had no funding until the CA.

- Alternative funding: The availability of such funding is a route which the LSC expect to be pursued where possible. For example, we have been told to get funding from the Palestinian Authority for the challenge to the UK’s arms-export policy. This focus on alternative funding has dried up environmental judicial reviews, as local interest groups are expected to fund cases themselves which is not always possible. One perfectly acceptable and practical way of dealing with this funding issue is to set up an incorporated company, thereby limiting individuals’ costs liability. In parallel with this drive towards alternative funding, there has been a trend for NGOs to litigate themselves.
- The rules on standing have definitely improved, *cf* the 2-3 days spent arguing questions of standing in environmental challenges in 1990s. This provides another good example of judges sometimes creating test cases, e.g. in *ex p Dixon*, Sedley J decided to tackle the issue of standing, despite the fact that he was not cited certain key cases, such as *ex p WDM*. In this regard, Speaker 1 was conscious that ‘victim status’ under the Human Rights Act has created difficulties which have yet to be aired thoroughly in the UK Courts.
- It is imperative to have a tactical sense of what we’re doing – lawyers should do a risk assessment with other NGOs to get an overall sense of the issue/campaign at hand. Only in this way can one ensure that the potential benefits of bringing a case outweigh the risks of doing harm. E.g. Despite warnings/requests not to proceed, Mrs *Hutchinson* ran a hopeless case which relied on citation of the ICJ’s Opinion on the Legality of the Threat or Use of Nuclear Weapons before a domestic court. In so doing, she did the peace movement’s credibility much harm.

- If you want a case to succeed, it is vital to have civil society on board. Speaker 1 believed that the difference in outcome between the Court of Appeal and Lords in *A v Home Sec* (Belmarsh) may well have been a reflection of the intense media/PR work done in the meanwhile - a lot of effort was put into winning public opinion regarding the unlawfulness of indefinite detention. As an element of litigating in the Court of public opinion, one needs to adopt a wider view of what amounts to a successful case. To this end, Speaker 1 felt it proper to unashamedly use public and professional press to further his work.

### *Conclusion*

Whilst not wishing to get carried away, it is clear that human rights lawyers are a real opposition for the Government – a significant thorn in their side, as we should be. Bearing this out, Speaker 1 cited John Reid’s recent comment to judges that, with regard to the proposed flight returning failed asylum-seekers to Iraq, ‘they could do what they like, but the flight would be going ahead’. The fact that this comment came prior to any mention of litigation speaks volumes. Public funding changes are definitely empowering, but clearly potential difficulties arise if a litigant simply can’t secure legal aid.

### *Areas ripe for treatment*

1. There is no case defining what the ‘public interest’ is.
2. A case which put rationality in the dustbin, to be replaced by proportionality.
3. A reasoned and comprehensive judgement on justiciability, building on *Jones* (2006).

### **Speaker 2**

To the definition of ‘public interest litigation’, Speaker 2 would add that such cases should have a significant influence on public opinion. There may be instances where a case has reasonably good prospects of losing but it is nonetheless important to bring it because the public support achieved may itself serve to eventually change the offending policy. E.g. the campaign around the Herceptin case (*Rogers*). It was not the case directly ( - won by a slim legal margin - ) which led to NICE/Patricia Hewitt fast-tracking the drug’s licensing; rather, it was the pressure around this case causing public opinion to shift, which in turn pushed it higher up the political agenda.

Speaker 2’s wish list of ideal test case features (occasionally one or two arise, more often, none do!):

- Merits, both factual and substantive.
  - (i) A case which has factual merit from a campaigning point of view. This means facts which appeal both to civil society (the court of public opinion) and the Court. The former is particularly important where you have a case which the judge hates.
  - (ii) Preferably a substantive point of domestic law e.g. *Witham*. Domestic law is where the judges feel more comfortable. That having been said, in terms of making a test case stick, points of EU law are better because the Government cannot meddle with them. Were Richard Drabble here, he could give us countless examples of social security cases where the case has been won in court only for its outcome immediately to be overturned by statutory instrument. Human rights points have the potential to stick, but, if so inclined, the Government can find ways of wheedling their way out of them. E.g. in *Abdulaziz and Ors v UK* (case concerning immigration of spouses), there was always the possibility that the Government would level down the legislation so as to erase the discriminatory treatment.

We felt sure they would not take this course of action, but in response to the Court's decision, that is exactly what they did.

- Individual claimants are helpful, particularly where they have an affecting set of circumstances, such as financial ruin, ill health etc. The media much prefer a bleeding stump to wheel out, than a lawyer. If not humans, animals will suffice. E.g. Speaker 2 litigated a case on behalf of a Buddhist group whose sacred cow was due to be put down owing to its lack of TB vaccination.
- The next key point is the campaign. One is not likely to win a political argument simply by bringing a legal case. The media is important because judges read the papers; equally important is filling the Court with your supporters.
  - (i) NGO support is incredibly helpful in this regard – they can supply information on the substantive issue and assist in identifying suitable claimants.
  - (ii) Take cases to Parliament. If politicians give damaging admissions, especially before Select Committees, this can be used as evidence in the case; so too, Select Committees' findings (e.g. the recent Ombudsman's Report on the Occupational Pensions Investigation). If you get nowhere with political pressure this weakens the Government's potential argument that the case raises a purely political/Parliamentary matter. The Court can clearly state that they are not trespassing on their margin of appreciation to Parliament, as the matter has already been aired there.
- Take a wide spread of cases covering all bases, to ensure you close down all the defendant's escape routes. In *Abdulaziz*, we identified enough husbands (through JCWI) and fiancées so that individuals could not be bought off. As a result, although the fiancées were then knocked out on admissibility (either because they had been let in by the time the litigation was brought, or because they could not prove their status), this did not wipe out the litigation.
- Don't bring cases which are too adventurous. It is better to bring a multiple of small points which will succeed, than something complex which fails and then impacts negatively on future cases. Part of this skill is having a sense of what will be acceptable, both legally and politically i.e. when to hang back and when to bring a case. Speaker 2 recalled the striking moment the Court of Appeal seriously addressed the rights of homosexuals serving in the armed forces in *ex p Smith*, his sentiment being that 10-15 years ago such a thing would not have happened.

In conclusion, you need to have a sense of a case's substantive justice and its acceptability.

## **DISCUSSION**

### *Meaning of 'success'*

Speaker 3:

- A different notion of 'success' is needed. With reference to Speaker 2's idea that success should be measured by more than whether a case wins or loses, the opposite is certainly true – in areas like environmental law, often a client wins the law, but loses the case. The reasons for this are, firstly, the courts hate quashing decisions against large commercial enterprises and thus refuse to award a discretionary remedy. Secondly, where cases involve a permit regime requiring permits to be renewed every four years in any event, the court holds that the public body only

need ensure future permits are correct i.e. no action is necessary with regard to the current, unlawful permit.

- The apocryphal Civil Service book 'Judge on Your Shoulders' reflects the underlying process at work in public law cases, namely, that cases shock the Environment Agency into realising they are under scrutiny. It is this scrutiny which changes their behaviour. Whilst it is possible to view a case as successful despite losing, such a loss does matter when the LSC still weighs up matters in terms of a traditional 'victory'. If they persist in this approach, we will lose the ability to *succeed in scrutinising*.
- We may have reached a Halcyon era in terms of standing and funding, however Speaker 3's view is that we are moving into a hard-line era again for different reasons.

*Settlement: fighting 'bad cases'*

Speaker 4:

(A) Is there ever a time when your instinctive legal genes say pull out of a case, but your 'campaigning brain' wants to push the case forward?

(B) Furthering campaigning aims is very much dependant on the whim of cases – how can one mitigate the effects of bad cases?

Speaker 2:

- Settlements are offered as the Government loves picking off good cases.
- As a solicitor in private practice, this does not cause me a dilemma because I represent (and act according to the wishes of) my instructing client. Of course one explains the impact of not litigating on the wider community, but if it is ultimately in their interests to compromise the case, they should settle, unless they instruct, or their original contract says, otherwise. For this reason, it is sometimes good to make it clear to clients that you have other potential claimants waiting in the wings.

Speaker 1:

- Sometimes it does cause a conflict of aims. In the CND case I really wanted to pursue the point, but I knew the case we had was not the right vehicle for the challenge.
- It is important to remember that if the LSC classify a claim as a 'test case', one cannot settle it without their permission.
- In response to the second question, the peace activists are a curmudgeonly lot who do as they please, but it is possible to use their network of communication in order to disseminate information explaining why a proposed challenge is a bad idea.

Speaker 5:

- Public authorities play this game of picking out good cases. E.g. Various policing tactics were being challenged in the *Fairford* and subsequent *May Day* cases. Despite only being an interested party in the first case, the Metropolitan Police managed to persuade the CA that it would be better to hear certain points in the second case (in which the Met were defendants).
- The courts are alive to this tactic, in addition to the broader impact of test cases. Therefore, if you cite an authority which may come their way in the near future, they will be careful to confine anything they say to the individual facts/law before them.

Speaker 1:

- The question is where we should be doing the same, perhaps by encouraging NGOs to bring earlier cases?

Speaker 5:

- Perhaps the best we can do might be to also make the Court aware of claimant cases which are waiting in the wings.

Speaker 2:

- The answer may be to try to expedite a better case to limit the damage caused by a bad one, as on the whole NGOs do not like putting in negative third party interventions. [Chair: Clearly co-ordination of cases is important – this is something to which we will return in Seminar 3.]

*Other factors: FOI*

Speaker 6:

- One crucial change is that public information is much freer now than 20 years ago. We are in a better place to penetrate further inside the Government machine, which is a positive factor.

*Other factors: Resources*

Speaker 6: What are peoples' experiences of cases where you are trying to commit the Government to the provision of more expenditure/resources? Speaker 6's impression is that judges are reluctant to decide such cases in a favourable manner.

Speaker 1:

- Resource cases are difficult ones to win. The Ghurkha case is a good example of litigation which has gone a long way outside court, but which saw a pitiful performance before the judges. Despite the fact that the Government were paying them a pittance, the Court held that UK soldiers were not valid comparators as the cost of living in Nepal was so much lower than the UK. This ignored the evidence which suggested that most Ghurkhas remain in the UK once their tour of duty is finished. *Carson* is another example of a shoddy judgment in a case where the Government has a wide discretion regarding the allocation of resources.

Speaker 2:

- It is certainly more difficult to win a case which challenges a policy decision on the allocation of resources. In such cases, you have to appeal to the fundamental values underlying the cases i.e. access to justice, discrimination (preferably race and sex), the rule of law, human dignity/the way people are treated. Because the values at stake are so important and are ones which the Court understands, they may be prepared to override such wide policy discretion.

Speaker 5:

- The s55 asylum-seeker cases are a good example of this. Notwithstanding two losses in the CA, practitioners would not take 'no' for an answer and pushed ahead with further cases. This is also an example of a victory which was totally lawyer-driven.

Speaker 7:

- *Carson/Reynolds* is a paradigm of a poor test case. It was poorly argued and had bad facts. It begs the question 'which Court?', as the most that could be achieved in the Lords was a declaration of incompatibility, so perhaps it should have gone straight to Strasbourg. There was a sense in the Lords that this case was not sufficiently about human dignity – 24 year olds getting less money than 25 year olds and pensioners who had chosen to live in South Africa did not have the same resonance as asylum-seekers. This fits back into needing to know when to bring test cases. Sometimes when you discover a certain judge is hearing your case, you feel you may as well go straight to the Lords as you are bound to lose. Thus, bringing test cases is about being flexible and imaginative.

Speaker 1:

- *Carson* lacked merit, but her solicitor refused to allow the claim to be bolstered by other claimants who were in dire straights, namely UK pensioners based in Zimbabwe. Such claimants had something to contribute to the argument, so it was very frustrating that the law did not get a better airing. I can't quite remember why we did not intervene, but it was either because we did not have the agreement of the claimant/defendant or because the Court did not permit it.

*Other factors: jurisprudential development*

Speaker 6: Can jurisprudential development be of helping in bringing a successful test case, for example, the rise of judicial opinion against ouster clauses?

Speaker 1:

- The use of secondary legislation to knock out a successful test case does mark a change. However, in the second *Chagos Islanders* case the Court effectively told the Government to go down to Westminster and overrule the victory with primary legislation. One can imagine the response the Government would have got to this.

Speaker 2:

- There is no doubt that the Government's freedom of movement to respond has been cut down as the result of a fundamental constitutional shift. Whether it is the use of ouster clauses, or trying to make a derogating control order in the guise of a non-derogating order, the courts are more alive to the Government's attempts to duck out of enforcing test case victories/human rights.

*Dealing with the media*

Speaker 8: In terms of dealing with the 'court of public opinion', if the case is being brought by an NGO, you may, though not always, have a publicity arm. Otherwise, how do you advise your clients to handle the media?

Speaker 1:

- If the case is being brought by an NGO, I keep out altogether. With *Al-Skeini*, my clients were in Iraq, so I felt I had a duty to personally push the media campaign further, even though I came to despise the press. In other circumstances, my experience is that clients can learn very quickly.

Rose Gentle, for example, quickly became a very polished speaker, able to handle the media with ease.

- With the Iraq cases, I saw the media problem coming and got a day's training (from the public media consultancy who train the Bar Council/Law Society) in advance because I appreciated its importance.
- Prior to the *Mousa* court martial, I put out a press release stating that I would only give comment at the conclusion of proceedings. Come that time, I intend to state our case very frankly. This is an important part of the job to be done when *Al-Skeini* comes to the Lords.

Speaker 2:

- Ideally a client should deal with the press and they must be made aware of this at the outset. Some are amazing as they have a passionate story to tell.

*Relative importance of different factors*

Chair: From the presentations one is left with the strong impression that a range of factors are involved. What is the relative importance of these? Which are the key factors?

Speaker 1:

- Funding is the most important. If you can't crack this, it's the end of the case. Then merits, substantial and factual. Thirdly, the sustainability of outcome – in the 80s/90s the Government brought their draft legislation to court to wave at you. If there is no sustainability of outcome, is there some other redeeming social point? Fourthly, know your civil servants: the bluster from politicians regarding the small steps they can take does not always match up with civil servants' views on the matter. Lastly, there are the occasions where the success factor may simply be bringing the case in order to air the issue.

25 September 2006