PUBLIC LAW PROJECT CONFERENCE 2011

JUDICIAL REVIEW TRENDS AND FORECASTS: THE RIGHT TO KNOW

PUBLIC LAW INTERVENTIONS AND ACCESS TO JUSTICE: CART AND BAHTA (AK)

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1. PLP has, of course, a proud history of involvement in litigation as an intervener in significant public law cases, and indeed has placed an important role in the development and the growth of such interventions over the years. I am not going to attempt to list its past achievements in this regard but notable interventions include *R (Corner House Research) v SSTI* [2005] 1 WLR 2600, the lead case on protective costs orders.

2. During the course of 2011, PLP acted as intervener in two very significant cases, one in the Supreme Court, and one in the Court of Appeal, respectively *R (Cart) v UT* [2011] UKSC 28, [2011] 3 WLR 107, and *R (Bahta) v SSHD* [2011] EWCA Civ 895[1]. In *Cart,* PLP had also intervened in the Court of Appeal [2011] QB 120, and the Divisional Court [2010] 2 WLR 1012. Both of these cases were in themselves important public law cases affecting access to justice for the disadvantaged. In *Cart,* the Supreme Court established the "second appeals" approach to judicial review of the Upper Tribunal, rejecting the very narrow exceptionality approach of the CA and Div Ct, and so widening access to justice in this area. In *Bahta,* the Court of Appeal significantly modified the long established *Boxall* principles governing awards of costs to claimants in judicial review following concessions by defendants, so improving the ability of conscientious claimant solicitors to obtain costs orders.

[1] *Bahta* involved four separate appellants, and was generally referred to during the course of the litigation by a different name, *AK,* so references to *AK,* including in the original title to this talk, should be understood accordingly.

3. It is also noteworthy that PLP was involved, in 2011, in another extremely important significant Supreme Court case, *R (Lumba) v SSHD* [2011] UKSC 12, [2011] 2 WLR 671, this time acting as solicitors for one of the parties, but in which, again, interveners played a significant part (namely, JUSTICE and Bail for Immigration Detainees). *Lumba* re-affirms, and somewhat liberalises, the *Hardial Singh* principles governing immigration detention, and establishes that public law errors in the decision making process leading to detention will render the detention unlawful.

THE TEST FOR INTERVENTION, AND HOW TO INTERVENE

4. There are now a number of papers from particularly eminent sources about the value of interventions to the court, why, and when, interventions should be permitted, and how to go about making an intervention: see for example "Interventions in the Court of Appeal", by Sir Henry Brooke[2], and most recently "Interventions and Possible Reforms", by Sir Mark Waller[3]. It is not my main purpose to discuss those subjects, which are better covered elsewhere, but I shall simply mention some central guidance on these issues.

5. As to why interventions should be permitted, and what test the court will apply, this is perhaps best covered by Lord Woolf's statement in *R (Northern Ireland Human Rights Commission) v Greater Belfast Coroner* [2002] UKHL 25, [2002] HRLR 35:

> *32 The practice of allowing third persons to intervene in proceedings brought by and against other persons which do not directly involve the person seeking to intervene has become more common in recent years but it is still a relatively a rare event. The intervention is always subject to the control of the court and whether the third person is allowed by the court to intervene is usually dependent upon the court's judgment as to whether the interests of justice will be promoted by allowing the intervention. Frequently the answer will depend upon whether the intervention will assist the court itself to perform the role upon which it is engaged. The court has always to balance the benefits which are to be derived from the intervention as against the inconvenience, delay and expense which an intervention by a third person can cause to the existing parties.*

6. It is not clear that what Lord Woolf had to say about interventions being rare remains true today, some 9 years later: by my reckoning, there were interveners in

[2] Delivered on 23 November 2006 at an earlier seminar organised by the Public Law Project, "Judicial Review and Test Case Strategies", 23 November 2006.
[3] Delivered at a JSB Seminar on Third Party Interventions on 1 December 2009.

22 of the 46 cases decided by the Supreme Court since 1 January 2011, and the court lamented the *lack* of an intervener in at least one other case[4]. This perhaps illustrates the high value that the higher courts, at least, now place on interventions.

7. As to how to go about it, for the Supreme Court there is a clear procedure proscribed by rule 26 of the Supreme Court Rules 2009, and supplemented by the Practice Directions. It remains the case that no equivalent guidance is to be found for the Court of Appeal, where the practice continues to be *ad hoc,* as described in Sir Henry Brooke's 2006 paper, nor in other courts save only the Administrative Court (where CPR 54.17 explicitly recognises the possibility of interventions but says almost nothing about how they should be conducted). The need for some reforms and somewhat clearer guidance has been stated on a number of occasions, although it is fair to say that it does not appear to cause any great practical difficulties or major deterrence (and, as Sir Henry explains, the consequence of reform, and formal rules, may be to make interventions more expensive for the intervener).

WHY INTERVENE?

8. The question I would like to focus on in slightly greater detail is as to what may be in it for the intervener, as opposed to the court.

9. In one sense the answer is obvious: the intervener wants to affect the outcome. But how is this to be done? What, specifically, is gained by a formal intervention, the instruction of counsel, the incurring of expense and so forth, which could not be gained by an organisation putting its resources at the disposal of the main party that it wishes to support, helping it with evidential points, etc?

10. There are, I think, two well-recognised ways in which an intervention may be able to do more than this. First, the intervener may, in its legal argument, be in a position to give a perspective on the issues which the main parties are unable, or perhaps for tactical reasons, unwilling, to give. In *Cart* in the CA, Sedley LJ observed as follows in relation to the PLP intervention:

[4] Lord Brown in *Ambrose v Harris* [2011] UKSC 43.

> *12 ... Mr Drabble* [for the Claimant, Mr Cart], *perfectly properly, has confined his argument to the proposition that, whatever the law may be in relation to other chambers of the UT, a jurisdiction which has historically been open, with beneficial results, to judicial review ought not to lose that characteristic simply because it has been transposed into a new structure. If the claimant can establish this, he is not concerned about other jurisdictions within the FTT and UT structure. But, with respect, we are, because any such decision will have indeterminate effects on a considerable range of tribunal functions. For this reason we are as much, if not more, concerned with Mr Eadie's argument* [for the government] *that judicial review of the UT as a whole can run no wider than the Divisional Court held it to do, and with Mr Fordham's counter-argument that, once reviewability is established, there is no principled basis for restricting its ambit.*

11. Secondly, the intervener may be in a position to put persuasive evidential material before the court, in particular material which, by its very nature, it might be difficult for an individual, or even institutional claimant, to obtain.

12. I want to highlight what I think is a third, less well recognised, way in which an intervention may achieve its aims, which is that the very fact of the intervention may, in some cases, affect the way an argument will go. The point is illustrated by the two PLP interventions that I have mentioned, *Cart* and *Bahta*. The presence of the intervener may in itself influence what the court is willing to make decisions about.

13. The point I think emerges most clearly from *Bahta.* No doubt different views can be expressed about the impact of PLP's submissions on the substantive outcome. But what was clear to me, at least, was that PLP's presence had a big influence on the court's willingness to address wider issues. Whilst there was here no fundamental conflict of interest between the Appellants, and PLP, there was inevitably some difference as to what they wanted to achieve. The Appellants wanted, principally, to win their individual appeals by whatever route would be most effective. Their solicitors, as legal aid solicitors, undoubtedly had an interest in a wider outcome on the approach to costs in judicial review, but rightly and properly could not put that above their client's interests in winning the case. On the facts, their case was very strong, and was likely to have won whatever approach the court took to the wider issues. Thus, and understandably, they did not need to press the wider issue as to the best approach to costs. PLP, by contrast, was all about the wider issue, namely whether the *Boxall* guidance, and the way it was being applied in practice in the Administrative Court, was appropriate, and

needed to be altered in light of the introduction of the pre-action process and the recommendations in the Jackson Costs Review. It was PLP that took that argument forward, and which, as much as anything, secured that the court did in fact give a ruling upon the wider issue:

> *29 Mr Wilson submitted that following the Jackson Report there needs to be a change of landscape and of culture. Boxall was decided before the implications of the CPR and of PAPs had emerged. The judicial review protocol took effect in March 2002, that is after Boxall . Those submissions were developed by Miss Lieven QC, for the Public Law Project ("PLP"), the intervener.*

14. Faced with the detailed submissions which then followed from PLP (summarised at §§30-37 of the judgment), and the government's inevitable response, it became all but impossible for the court to avoid addressing the issue of whether the *Boxall* principles remained appropriate, as it presumably might have chosen to do if the arguments had not been pressed by PLP.

15. None of this is to gainsay what the Court of Appeal said in *R (Burke) v GMC* [2006] QB 273, in which the court observed as follows in relation to a number of the interventions in that case:

> *82 We have referred to matters put before us by three interveners: the Disability Rights Commission; the Medical Ethics Alliance and the Intensive Care Society. We mean no discourtesy to the other interveners when we observe that a great deal of their thoughtful and well-presented contributions falls victim to our general view that this litigation expanded inappropriately to deal with issues which, whilst important, were not appropriately justiciable on the facts of the case. In so far as the interveners directly addressed the issues which we have addressed in this judgment, we hope that our conclusions are clear.*

16. There is a real difference between seeking to influence the court to address justiciable issues which potentially arise, and affect the outcome of the case, where the court might otherwise take another route to its conclusions, and putting before the court matters truly outside the scope of the litigation. The former may well be a legitimate aim of an intervention, whereas the latter is likely to let the intervener in for heavy criticism.

TIPS FOR INTERVENERS

17. A few thoughts on what interveners might do to secure permission to intervene and a successful intervention:

(i) Liaise with the main parties. In particular, ensure if at all possible that your intervention is welcomed by the party whose side of the argument you support.

(ii) Consider carefully what value your intervention can add. What can you say that the main party cannot say on its own behalf?

(iii) Be focussed on the specific points you wish to make. Long-winded advocacy is rarely effective, but the constraints on interveners are particularly stringent. Can the sorts of points you wish to get across really be conveyed in the ½ hour, or at best 1 hour, slot, your advocate is likely to be allocated. If you propose to submit evidence, you may be able to range somewhat more widely since it need not affect the time estimate so directly, but the court will not welcome wide-ranging material (see *Burke*, above).

(iv) Interveners run a costs risk, but it is often possible to secure, by agreement or court order, some protection against costs risks if this is addressed early on. On the other hand it is unlikely that an intervener will ever be able to obtian its own costs from another party.

(v) Think about the intervention, and make the application to intervene, as early as possible in the proceedings.

(vi) Work with the main party you support in relation to evidence to put before the court.

(vii) Avoid in all but the most extreme cases making arguments which undercut your ally in the litigation. The gold standard is to make argument which adds to, but does not depart from or undermine, the arguments made by the main party.

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