

PUBLIC LAW PROJECT CONFERENCE 2013

WHO GUARDS THE GUARDIANS?

It is a truth universally acknowledged that judicial review is, in the Ministry of Justice's own words, 'a critical check on the power of the state, providing an effective mechanism for challenging the decisions, acts or omissions of public bodies to ensure that they are lawful' (Ministry of Justice, *Judicial Review: Proposals for further reform*, 2013, Cm 8703, para 1). The same is true of other public law remedies, such as statutory appeals and actions under the Human Rights Act, whereby the decisions, acts or omissions of public authorities may be challenged in the courts. This is a necessary component of the rule of law and, as famously pointed out by Lord Bingham in the *Belmarsh* case, the role of the judges in enforcing it is an essential part of the democratic process (*A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68). Indeed, in our Westminster-model democracy, Parliament cannot be sovereign without the judiciary to ensure that the executive and other public bodies stay within the law.

That is all very well, but judicial review can also be a confounded nuisance. When we were preparing for the move from the House of Lords to the Supreme Court, planning permission and listed building consent had been obtained for the conversion of the Middlesex Guildhall to suit our purposes, and the builders were ready to move in, SAVE Britain's Heritage launched a judicial review of Westminster City Council's decision (*R (Save Britain's Heritage) v Westminster City Council* [2007] EWHC 807 (Admin)). Fortunately for our purposes, they did not succeed and most of our visitors

seem delighted with what we have done with the building. But should they have been able to do it at all?

The approach we adopt towards the standing required for people and organisations to bring claims for judicial review or other public law remedies is crucial to the constitutional purpose which they serve. The same is true of the approach we adopt to governmental and non-governmental bodies who want to intervene in the proceedings to draw to our attention arguments or material which for whatever reason the parties may not have put before us.

Allowing, even encouraging, people to take an active part in the enforcement of the law, so as to encourage a ‘judge over the shoulder’ attitude on the part of government, must be a good thing. On the other hand, allowing any old busybody to bring proceedings which will delay or even prevent perfectly lawful governmental actions and decisions must be a bad thing, as must allowing them to interfere in other people’s proceedings. Distinguishing between busybodies and champions is almost as difficult as distinguishing between terrorists and freedom fighters. But too close a concentration on the particular interest which the claimant may be pursuing risks losing sight of what this is all about – fundamentally, as Mark Elliott has said, the issue is not about individual rights but about public wrongs. There are better ways of nipping unmeritorious claims in the bud than too restrictive an approach to standing.

Standing

As you know, under section 31(3) of the Senior Courts Act 1981, the court shall not grant permission to bring a judicial review claim unless the claimant has ‘a sufficient

interest in the matter to which the application relates'. Human rights claims can only be brought by people whom Strasbourg would regard as a 'victim' of the breach alleged (Human Rights Act 1998, s 7). And in some statutory contexts there is a requirement that the claimant be a 'person aggrieved'. The 'sufficient interest' test was selected by the Rules Committee when it devised the new Order 53 unified judicial review procedure in 1977, precisely in order to get away from the technicalities of the old law of the prerogative writs (which people as old as I remember having to try to teach) and to offer sufficient flexibility to recognise a proper interest when one saw one (see Lord Roskill in *R v Inland Revenue Commissioners, ex parte National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617).

The vast majority of judicial review claims are brought by people with a very direct interest in the outcome, especially those bringing asylum and immigration claims, but also the not inconsiderable number of vulnerable elderly and disabled people who challenge community care decisions, because no statutory procedure for doing so along similar lines to the homelessness procedure has yet been devised. Only a small proportion of claims are brought by charities and NGOs and only a small proportion of those can properly be called campaigning organisations or pressure groups, rather than umbrella organisations for a group of people many of whom have a personal interest in the subject matter. I would not call Age UK a campaigning organisation: it provides services for and protects the interests of a section of the community some of whom are particularly vulnerable and disadvantaged. It made obvious sense for them to challenge the way in which the United Kingdom had implemented the EU Directive on Age Discrimination, rather than to find some individual involuntary

retiree to back to do so (see *R (Age UK) v Secretary of State for Business, Innovation and Skills (EHRC and another intervening)* [2009] EWHC 2336 (Admin) [2010] ICR 260).

But a small proportion of claims are brought by organisations or people who might be called campaigners. My guess is that the great majority of these are in the environmental field. ClientEarth, for example, describe themselves as ‘activist lawyers committed to securing a healthy planet’. They brought judicial review proceedings in an attempt to challenge governmental inactivity over air quality in London and other centres of population and have at least succeeded in obtaining a declaration that the government is in breach of our obligations under article 13 of the Air Quality Directive and a reference to the CJEU over the consequences of this (*R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2013] UKSC 25, [2013] 3 CMLR 29).

Then there was Mr Walton, who claimed to be a ‘person aggrieved’ by the proposed scheme for a section of the Aberdeen bypass (*Walton v Scottish Ministers* [2012] UKSC 44, [2013] PTSR 51). The Inner House doubted whether he qualified either as a person aggrieved or as someone with standing to bring judicial review, as he did not live in the immediate vicinity of the proposed road and would not be directly affected by it. Scotland has traditionally taken a more restricted view of standing to invoke what they call the supervisory jurisdiction than we have of standing to bring judicial review. In *Axa General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868, both Lord Hope and Lord Reed adopted a test of ‘sufficient interest’ (paras 62 and 170), meaning an interest sufficient to justify his bringing the application before

the court. Lord Hope then said that the words ‘directly affected’ captured the essence of what was being looked for; but by saying this he did not mean only a personal interest; he included someone ‘acting in the public interest [who] can genuinely say that the issue directly affects the section of the public he seeks to represent’.

As Lord Reed explained in relation to Mr Walton, ‘a distinction must be drawn between the mere busybody and the person affected by or having a reasonable concern in the matter. . . . A busybody is someone who interferes in something in which he has no legitimate concern. The circumstances which will justify the conclusion that a person is affected by the matter . . . or has a reasonable concern in it or is on the other hand interfering in a matter with which he has no legitimate concern will plainly differ from one case to another depending upon the particular context and the grounds of the application’ (para 92). Indeed, he went further: ‘There may also be cases in which an individual, simply as a citizen, will have sufficient interest to bring a public authority’s violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no-one was able to bring proceedings to challenge it’ (para 94).

Lord Hope (who is a well known bird-lover) would extend the protection of the rule of law to wildlife as well as people: ‘Take, for example, the risk that a route used by an osprey as it moved to and from a favourite fishing loch will be impeded by the proposed erection across it of a cluster of wind turbines . . . The osprey has no means of [challenging the proposed development] on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak

up on its behalf' (para 152). He did say that normally one would look to bodies such as the Scottish Wildlife Trust and Scottish Natural Heritage if there were good reasons for an objection, but they could not do everything and so there had to be some room for individuals who were sufficiently concerned and sufficiently well-informed to do so too (para 153).

It is of course noteworthy that the bodies he mentioned were statutory bodies, as too are some of the claimants who are appealing to the Supreme Court in the matter of HS2 which we are due to hear tomorrow. There are indeed many public bodies with a specific statutory role of protecting certain interests, ranging from wildlife, natural resources, the environment, to children, or disabled people and others with the characteristics protected from discrimination by the Equality Act 2010. One might have thought that, if it is within their powers, they should be free to fulfil that role even if the body which is threatening those interests is another public authority.

Let's think about it: these claimants, ranging from Mr Walton to ClientEarth to the local authorities of different political persuasions along the route of HS2, have all made challenges to the legality of government action which have been found sufficiently meritorious and serious to reach the highest court in the land. Can it really be suggested that they should not be allowed to do so? If they do not, how else is government action to be kept within the law?

Interventions

Once a matter is in court, the more important the subject, the more difficult the issues, the more help we need to try and get the right answer. Interventions have been

provided for in the lower courts since the introduction of the Civil Procedure Rules. Our own rules provide that ‘any person and in particular (a) any official body or non-governmental organisation seeking to make submissions in the public interest or (b) any person with an interest in proceedings by way of judicial review’ may make written submissions in support of an application for permission to appeal (Supreme Court Rules 2009, rule 15(1); and see Practice Direction 3, para 3.3.17 - 18). No particular formality is required and the invitation is a very open one, but not I think abused. I know of one case in which three different organisations wrote in support of the application, although it was ultimately unsuccessful (*R (Rudewicz) v Secretary of State for Justice* [2012] EWCA Civ 499, [2013] QB 410). It is an open question whether we should allow people to write in *against* the application: usually we can rely on the respondent, in judicial review proceedings more often the government department or public authority involved than the claimant, to put in a notice of objection.

Once we have granted permission to appeal, or an appellant who already has or does not need permission has filed a notice of appeal, ‘any person’, and in particular those same persons plus anyone who was an intervener in the court below or whose written submissions were taken into account at our permission stage, may apply for permission to intervene (rule 26). Formal applications are required at this stage (see Practice Direction 7) and, of course, a fee, although this can be waived for non-profit organisations acting in the public interest. We do expect applicants to consult the parties and their attitude is an important factor in whether we will give permission. Mostly they are quite relaxed about this, unless they perceive that their time estimates for the hearing will be put at risk by oral interventions.

Interveners like to be able to make oral as well as written submissions. No doubt they fear that written submissions will not be given the same weight as oral ones. But the main benefit is that they can see what is interesting or troubling the court and can react to that. The benefit for the court is that we can put our questions direct to the intervener rather than through the parties. There is an intermediate possibility, where interveners are given permission to make written submissions, but told that they are free to attend the hearing if they wish and in case the court has any questions for them. Views differ about the wisdom of this, and indeed about its fairness to the interveners, if they feel compelled to attend just in case. But I can think of at least two cases in which interveners who had made written submissions in fact turned up at the hearing. In one case they filed helpful additional written submissions as a result of listening to the debate: this was the Coram Children's Legal Centre in *H(H) v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2013] 1 AC 338 (the case about the interests of children whose parents face extradition). In another they made brief additional oral submissions: this was only last week in *Preddy v Bull* (the case about Christian hotel keepers who refused to let double-bedded rooms to unmarried couples). Unfortunately, they don't get the credit they deserve in the law reports if they only make written submissions.

Whether they make only written or both written and oral submissions, the intervener's role was made crystal clear by Lord Hoffmann in *E (A Child) v Chief Constable of the Royal Ulster Constabulary* [2008] UKHL 66, [2009] 1 AC 536. He began by saying that permission is given 'in the expectation that their fund of knowledge or particular point of view will enable them to provide the House with a more rounded picture than

it would otherwise obtain' (para 1). I think that sums up the point perfectly. But he went on to say that:

'An intervention is however of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything. It is not the role of an intervener to be an additional counsel for one of the parties. This is particularly important in the case of an oral intervention. (para 2)'

In that case he was directing his fire against the Northern Ireland Human Rights Commission, which did indeed repeat the points that had been made on behalf of the claimant – one of those little girls who had been subject to a barrage of intimidation and violence, met by almost equally scary police and army precautions, as they walked to school with their parents. Frankly, the claimant's counsel had been subjected to such a barrage of hostile questioning from the chair that I am not surprised that counsel for the Commission felt that she needed his help. Not for the first time, I felt it unfortunate that the child had not been separately represented, as so often 'there is a tendency to see confrontations such as this through adult eyes and forget that these are not the eyes of children who are simply the innocent victims of other people's quarrels' So I was glad that we had had some very helpful written submissions from the Children's Law Centre and Northern Ireland Commissioner for Children and Young People and quoted some of the useful points they, and no-one else, had made about the special vulnerability of children in such circumstances.

Some public bodies, such as the Equality and Human Rights Commission, have an express power to institute or to intervene in legal proceedings which are relevant to a matter in which they have a function, but they may also act for an individual litigant. They tend to do the latter in private law discrimination claims which they regard as test cases and one can well see why. But from the point of view of the court it can sometimes be difficult to disentangle the private interests of the client from the broader public interests of the Commission. Intervention in some-one else's claim makes that distinction much clearer. We also had an interesting complaint from the appellants last week that a public body such as the Commission ought to be neutral as between the different kinds of protected characteristic and should not so openly side with sexual orientation against religion and belief. NGOs such as Liberty may also either act for a party or seek to intervene and it must be an interesting question for them which strategy is likely to prove more effective.

But from our – or at least my - point of view, provided they stick to the rules, interventions are enormously helpful. They come in many shapes and sizes. The most frequent are NGOs such as Liberty and Justice, whose commitment is usually to a principle rather than a person. They usually supply arguments and authorities, rather than factual information, which the parties may not have supplied. I believe, for example, that it was Liberty who supplied the killer argument in the Belmarsh case (*A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68). And Justice intervened helpfully, for example, in the habeas corpus case of the man detained at Bagram air base since 2004: *Rahmatullah v Secretary of State for Defence* [2012] UKSC 48, [2013] 1 AC 614.

One thing that such interveners can do, which the parties may find it more difficult and more costly to do, is to draw our attention to international jurisprudence which may be relevant to the issue. By international jurisprudence, I mean two rather different things. First are the international human rights instruments and their interpretation by the bodies charged with monitoring compliance with them by states parties. Second is the jurisprudence of other states when dealing with similar problems. Unlike the Supreme Court of the United States, we have not – at least so far – encountered political objections to our looking outside the United Kingdom for help with the difficult problems we have to resolve. It stands to reason that we are going to look at how other countries interpret and apply international instruments to which we are also party. It also makes sense to look at how countries with similar legal and constitutional traditions resolve common problems. None of this is binding, in the way that the jurisprudence of the CJEU is binding, or even influential, in the way that the jurisprudence of the European Court of Human Rights is influential, but it is still helpful. We would be foolish not to look at it.

The problem for us is finding out what it is, in a reliable way. In our adversarial system, we cannot always rely upon the parties to do this. They may not have the resources and, even if they do, they may tend to concentrate on the material which helps their case. Nor do we have the resources to do the necessary research ourselves. I recently listened with awe to a Judge on the German Constitutional Court who told us that each Judge has four clerks who are themselves trained judges. They write a comprehensive treatise on each case. These treatises now commonly have a comparative chapter (according, as she delicately put it to the Judge's preference and cast of mind). A Constitutional Court Judge from Colombia added that they had

developed some implicit rules for looking at such material – in particular that they must not look at only one country but at contrasting ways in which the problem is understood in different countries and alternative solutions. We do not have that luxury and in our adversarial system there are sensitivities about judges relying too much upon their own researches. The obvious solution is for an intervener to do this and share the products of their labours with us and the other parties.

The most frequent example of this is the United Nations High Commissioner for Refugees, who has a special mandate to supervise the implementation of the Geneva Convention on the Status of Refugees. There is, some think unfortunately, no international court or committee with the power authoritatively to interpret the Convention and to ensure compliance. But the guidance given by the UNHCR carries great weight, as does any information he is able to give about the implementation of the Convention in other countries. A recent example is *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54, [2013] 1 AC 745, about the exclusion of a person from refugee status, even if he has a well-founded fear of persecution in his home country, if there are serious reasons for considering him guilty of acts contrary to the purposes and principles of the United Nations. It was, I think, much better that we heard from the UNHCR directly as an intervener than indirectly through the different prisms of each party's case.

Another intervener which comes into this category is a much smaller NGO, the AIRE Centre, Advice on Individual Rights in Europe. As specialists, they know more about European Union and Human Rights law than many litigants, and I fear that we may ignore their interventions at our peril. In *Patmalniece v Secretary of State for Work*

and Pensions [2011] UKSC 11, [2011] 1 WLR 783, we decided that it was justifiable to deny state pension credit to EU citizens who did not have the right to reside in the UK. The European Commission is now taking action against the UK.

Other interveners are more concerned to protect the interests of a particular group of people who are affected by the litigation. So, for example, Freedom from Torture and MIND intervened in *SL v Westminster City Council* [2013] UKSC 27, [2013] 1 WLR 1445, on the scope of local authorities' duties to accommodate failed asylum seekers with mental health needs; Age UK, having failed to defeat the regulations implementing the age discrimination directive, intervened in *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16, [2012] ICR 716 to argue about how the regulations ought to be interpreted and applied, in a claim brought by a retired solicitor against his former partners; Reunite, the London Metropolitan University's Centre for Family Law and Practice and Families across Frontiers intervened in *A v A* [2013] UKSC 60, [2013] 3 WLR 761, on whether a baby who had never been here could nevertheless be held habitually resident here for jurisdiction purposes; and the Council of Immigration Judges intervened in *Ministry of Justice v O'Brien* [2013] UKSC 5, [2013] 1 WLR 522, on whether fee-paid part time judges are entitled to pensions pro rata with the salaried part time and full time judges. In the last, of course, the interveners had a direct personal interest in the outcome, but the other interveners mentioned did not. They just wanted us to get things right as they saw it.

But an important class of interveners are the government departments themselves. They intervene principally in order to protect the legislation and policy for which they are responsible. A good example is again *Seldon v Clarkson, Wright and Jakes*:

having successfully defended its age discrimination regulations in Luxembourg, the Secretary of State for Business, Innovation and Skills intervened in a private discrimination dispute in order to promote the department's view of how the legislation ought to work. A similar example is *X v Mid-Sussex Citizen's Advice Bureau* [2012] UKSC 59, [2013] ICR 249, where the Secretary of State for Culture, Media and Sport intervened to safeguard the government's view that 'occupation' in anti-discrimination law did not include volunteering; the Christian Institute intervened to the same effect, and other third sector organisations wrote to support the CAB's case; while the Commission for Equality and Human Rights supported the claimant.

It should not be thought that the government's interventions go all one way. Sometimes they can surprise us. The best example is *Yemshaw v Hounslow London Borough Council* [2011] UKSC 3, [2011] 1 WLR 433, on the meaning of 'violence' and 'domestic violence' in the homelessness legislation. The Court of Appeal had held that this was limited to direct physical contact, but the Secretary of State for Communities and Local Government intervened in support of a much wider definition. This intervention was backed up by a large amount of helpful national and international material and dovetailed quite neatly with the material on victims of domestic violence presented by the Women's Aid Federation of England. We could begin to feel quite sorry for Richard Drabble QC, for the local authority, confronted by the combined forces of Nathalie Lieven QC for the claimant, James Maurici for the government, and Stephen Knafler for the federation.

I think it does sometimes trouble us when it looks as if one side, usually the government, is having to fight on more than one front at once. But that is not usually

the situation. The interveners are, or should be, there to provide us with evidence and arguments with which, for whatever reason, the parties are unlikely or unable to provide us, so that, as Lord Hoffmann said, we can get a more rounded picture of the problem. If we were the German Constitutional Court, with the resources fully to research that information for ourselves, things might be different. But even then, there are sometimes insights which we might never think of: we needed, for example, to hear from the clinicians who actually work in critical care units and struggle every day with the issues of withdrawing life sustaining treatment in the current *Aintree Hospitals* case.

Costs

Of course all this costs money. But it seems to me that the courts, and through them the law and the constitution, get a great deal of help from the people and organisations who bring proceedings or intervene in the public interest. Many of their lawyers are acting pro bono or for very limited fees. There are circumstances in which organisations which bring proceedings should have the benefit of protective costs orders with a correlative cost-capping order (*R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600). As a general rule, organisations which intervene in the public interest should neither have to pay the other parties' costs or be paid their own, unless they have effectively been operating as a principal party (rule 46): if they behave properly, the principle that costs follow the event should not apply to them. But of course there will be some additional costs caused by the parties having at least to read and think about what the interveners have to say, so responsible moderation is called for.

Dare I say it: if there is a problem, could it be that it is not the NGOs and public bodies who bring or intervene in public law proceedings in the public interest who are to blame, so much as private bodies and individuals who do either in vigorous pursuit, not of the public interest, but of their own private profit? If, of course, there is a problem at all!