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STANDING

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QUESTION

- How do you control - and overcome - difficulties with standing following the spate of recent cases?



ANSWER

- The basics - [What are the principles?](#)
- The high point – [a liberal approach to standing](#)
- The low point – [the recent cases \(e.g. JR: *Good Law Project* \[2022\] EWHC 298 \(Admin\), and HRA: *Reprive* \[2021\] EWCA Civ 972\)](#)
- How do you [control and overcome those difficulties?](#)

THE BASICS: 1

- Standing = jurisdictional rule; s. 31(3) of the Senior Courts Act 1981:

“No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless –

*(a) it considers that the applicant has a **sufficient interest** in the matter to which the application relates, ...”*

- Thus: standing cannot be conferred by the consent of the parties (*cf R v Secretary of State for Social Services ex parte CPAG* [1990] 2 QB 540 at 556 *per Woolf LJ*)
- Mixed question of fact and law (*IRC v National Federation of Self-Employed and Small Businesses* [1982] AC 617 “*Fleet Street Casuals*”)

THE BASICS: 2

- Broad approach, stemming from the early case law:
 - Sufficient interest cannot be looked at in isolation; but taken together with the legal and factual framework; not appropriate to treat as preliminary issue at the permission stage unless an obvious or simple case; more rigorous approach at substantive stage;
 - Low threshold = only as high as necessary to prevent abuse i.e. to exclude ‘meddlesome busybodies’ and ‘troublemakers’; a person or body with a bona fide concern will not be treated as such

(Fleet Street Casuals)

(ex p Argyll Group plc [1986] 1 WLR 763); and ex parte Dixon v Somerset CC [1997] EWHC Admin 393)

THE BASICS: 3

- When?
 - CPR 54: should be raised at permission stage but few cases knocked out on that basis alone at permission;
 - may still be addressed at the substantive hearing (jurisdictional) (and few examples of claim succeeding on merits but C lacking standing); also can be relevant to discretion as to remedy ...
- **Summary of 7 factors for assessing ‘sufficient interest’:**
 - Legislative framework for decision
 - Strength and importance of the grounds of challenge
 - Nature of individual or body’s interest or expertise
 - Impact (whether direct or indirect) on individual or body
 - Public interest
 - Presence or absence of other challengers
 - Alternative remedies

AXA & WALTON

- Breadth of standing rules = intrinsically linked to the preservation of the rule of law (see Lord Reed in *Axa v HM Advocate* [2012] 1 AC 868 at [169]):

*“170. For the reasons I have explained, such an approach cannot be based upon the **concept of rights and must instead be based on the concept of interests**. A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts.*

*In some contexts, it is appropriate to require an applicant for [JR] to demonstrate that he has a particular interest in the matter complained of...In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn **might** disable the court from performing its function to protect the rule of law...”*

BUT THERE ARE LIMITS

- 170 cont...*“I say might because the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court....**What is to be regarded as sufficient interest to justify a particular applicant’s bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review.**”*
- See also *Walton v Scottish Ministers* [2012] UKSC 44: distinction between a ‘busybody’ / person with ‘a reasonable concern in the matter to which the application relates (Lord Reed at [92])
“94.... Not every member of the public can complain of every breach of duty by a public body. But there may also be cases in which an individual simply as a citizen, will have sufficient interest to bring a [violation of the law] to the attention of the court, without having to demonstrate any greater impact upon himself than upon any other member of the public. The rule of law would not be maintained if, because everyone was equally affected....no one was able to bring proceedings to challenge it.”

THE HIGH POINT (1)

- Examples of the liberal trend:



- *ex p Smedley* [1985] QB 657: individual taxpayer had standing to challenge budget payments made by UK to EEC without Par'ly authority
- *ex p World Development Movement* [1995] 1 WLR 386: UK-based pressure group had standing to challenge Gov's decision to allocate development aid to Pergau Dam in Malaysia; no need for group or individuals to be personally affected
- *ex parte Rees-Mogg* [1994] QB 552: Member of HoL had standing to challenge decision to ratify Maastricht Treaty because of "*sincere concern for constitutional issues*"

HIGH POINT (2)



- *R (Plantagenet Alliance Ltd) v SS for Justice* [2013] Inquest LR 204 (entity formed of Richard III’s descendants had standing to challenge decisions about the reburial of his remains)
- *R (McCourt) v Parole Board* [2020] EWHC 2320 (Admin): victim of crime’s mother had standing to challenge decision to release her murderer (following *DSD v Parole Board* [2019] QB 285 and distinguishing *Bulger* [2001] EWHC Admin 119)

LOW POINT?



- Growth of public interest & crowd-funded litigation brought by NGOs
- Three sets of challenges brought during the pandemic:
 - Procurement:
 - #1 *R (GLP) v SSHSC* [2021] PTSR 1251 (Chamberlain J);
 - #2 *GLP v Minister for Cabinet Office & Public First* (TCC) [2021] EWHC 1569 (TCC); CoA - [2022] EWCA Civ 21
 - #3 *R (GLP & Runnymede Trust) v Prime Minister & SSHSC* [2022] EWHC 298 - appointment of senior officials to NHS posts
- (Another restrictive example – *JS v SSHD* [2021] EWHC 234 (Admin))

GOOD LAW PROJECT #1

- Claimants: (1) GLP and 3 MPs (2)-(4)
- Challenge to SoS's compliance with procurement law/policy during pandemic
- **Specifically:** (i) reg 50 Public Contract Regulations 2015 (PCR) (duty to publish contract award notice within 30 days); (ii) policy which 'advised' publishing within 20 days; and (iii) deliberate policy of non compliance with transparency
- SSHSC conceded (i) by time of hearing (and argued academic), but defended (ii) and (iii)
- SSHSC took standing point; only economic operators had standing
- Chamberlain J held: **GLP = standing**, applying CA dicta in *Chandler* [2010] PTSR 749; **MPs = no standing**;
- **On merits:** SSHSC had acted unlawfully in failing to follow advisory policy; declaration granted on basis (i) and (ii); no alleged policy as per (iii)

GOOD LAW PROJECT #1

- Principles and reasoning on standing [99-104]:
 - (i) a failure to comply with PCR = an unlawful act; a “*paradigm situation in which a public body should be subject to [Court’s] review, even where no economic operator to bring private law proceedings*”;
 - (ii) C will have standing if is affected in some identifiable way OR the gravity of a departure from public law justifies the remedy (echoing *Axa / Walton*);
 - (iii) depends on gravity of breach – here serious & widespread; important public interest; GLP had sincere interest and some expertise in scrutinising government in this area;
 - (iv) other more appropriate ways for breach to be litigated – this broad challenge not realistic for an economic operator to bring
 - (v) whether C using procurement regime for a purpose for which it was not created, or had ulterior motive (i.e. challenging the underlying decision) (as in *Chandler* – parent opposed to academisation) – no evidence of such
 - (vi) Courts should not spend valuable time on standing unless obvious;
 - (vii) Position viz. MPs different – GLP best placed, danger of politicisation [106-7].

GOOD LAW PROJECT #2

- TCC applied Chamberlain J's approach to procurement challenge #2
- Challenge to Minister's decision to award a £564,394 contract for qualitative research to inform Gov's comms strategy during pandemic directly to Public First (linked to Dominic Cummings & PM), without a tender process
- Alleged breach of PCR and apparent bias
- **Held:** no breach of PCR (exceptional circs) but apparent bias made out; GLP had standing to bring challenge, applying principles from #1
- **CA (LCJ):** allowed appeal on apparent bias “...*an unprecedented outcome: a party with no potential interest in a contract has not hitherto obtained a declaration of unlawfulness on the basis of apparent bias in respect of a decision by a public body to grant a private law contract*” (at [8])
- No appeal on standing but **clear warning** (at [6]): “*The question of standing for complete strangers to the procurement process with no commercial interest both under the Regulations and on public law grounds is a question ripe for review when it next arises.*” Also noted different considerations may apply to each ground of challenge in standing terms.

GOOD LAW PROJECT #3

- Claimants: (1) GLP and (2) Runnymede Trust (race equality NGO)
- Challenge to four health appointments during pandemic without open competition (including heads of Test and Trace; Vaccines Task Force), as evidence of an unlawful policy or practice by Government
- Policy alleged to be: (i) indirectly discriminatory (Eq Act 2010) in terms of race / disability (ii) in breach of PSED, (iii) apparent bias in relation to one appt
- Div Ct (Singh LJ & Swift J):
- GLP = refused permission variously for delay & (importantly) amenability to JR on grounds (i) and (iii), but also lacked standing for all grounds;
- Runnymede Trust = standing to bring PSED challenge and succeeded in respect of two appointments on that basis

GOOD LAW PROJECT #3

- Standing -3 useful categories (cf. Prof Craig) for group claims:
 - 1) **Associational** – organisation suing on behalf of members (e.g. unions)
 - 2) **Surrogate** – pressure group representing interests of others, who are not well placed to bring individual cases (e.g. Child Poverty Action Group)
 - 3) **Public interest** – those claiming to represent the wider public interest, rather than any group with an identifiable membership
- In 3), decisions may affect public generally and no particular individual has more immediate interest than any other... cf *Axa & Walton*
- **Court emphasised** – cases which have proceeded as part of the ‘liberal trend’ tended to be NGOs with particular interest, expertise or representing a group affected, thus - often in category (1) and (2) above or specialists in (3). Not everyone will have standing (e.g. Mayor in *DSD*).
- Court applied Lord Reed’s approach to sufficient interest in *Axa* and *Walton*

GOOD LAW PROJECT #3

- (1) **Indirect discrimination: neither C had standing.**
 - (i) Not a case where all members of public equally affected. Individuals affected by appt process could have => ET (*Coker & Osamor* [2001] EWCA Civ 1756)
 - (ii) The statutory tort (s.19) involves ‘A’ putting ‘B’ at a particular disadvantage; obvious person to bring claim is therefore B (although not definitive: cf. *Unison* [2020] AC 869 ([131-134] and *3Million* [2021] EWHC 1159 (Admin) at [35]).
 - (iii) Practical considerations also weighed against; ET had expertise.
- (2) **PSED – amenable to JR but did GLP have standing?**
 - (i) Caution in relying on #1 for GLP’s standing in light of CA’s warning in #2
 - (ii) Very detailed analysis of GLP’s Articles of Association (wide objects: general rule of law and access to justice) – would in effect cover all types of JR. “...tantamount to saying that GLP has standing to bring [JR] in any public law case.”
 - (iii) A better placed challenger: RT as it existed to promote racial equality.
- (3) **Apparent bias** – points under (1) applied and not amenable to JR.

‘VICTIM’ STATUS – S.7 HRA 1998

- *R (Repreive and others) v Prime Minister* [2021] EWCA Civ 972
- Reprieve and two MPs – challenge to PM’s decision not to hold a public inquiry into allegations that UK intelligence services had been complicit in unlawful detention, mistreatment & rendition of individuals by other states.
- Claim = PM acted contrary to s.6 HRA - incompatible with Art 3 ECHR
- CA (LCJ):
 - A claimant could only bring a claim founded on ECHR, and would only have standing in a judicial review, if s/he would be a “victim” for the purposes of Art 34 ECHR if proceedings were brought in the ECtHR
 - The Claimants, as representatives, were not “victims” and thus s.7 HRA meant they could not bring their claims and did not have standing to bring JR on that ground.
- But compare e.g. *JCWI v SSHD* [2020] EWCA Civ 542 – point not taken

EXTENT OF THE DIFFICULTIES?

- Clear that the victim requirement will now be strictly enforced in HRA JRs.
- As to the fall-out of the GLP cases:
 - Procurement JR approach likely to be revisited shortly; seems unlikely that a non-economic operator = standing in an individual contract decision
 - But otherwise the difficulties should not be overstated.
 - Focus is on type (3) (general public interest) cases, where the absence of an individual or NGO with real specialism causes the Court to doubt that the claim is genuinely required to vindicate the rule of law (as opposed to other, potentially political motives).
 - Even then, the Court finds a way to ensure instances of unlawfulness are identified by the narrowest route (e.g. Runnymede Trust)
- Courts' approach in line with invitation of the Independent Review of Administrative Law on standing (see paras 4.97-4.100)?

HOW DO YOU OVERCOME THESE?



ANSWER:

- JR:
 - Choose your claimant carefully. Individual if possible and appropriate (and funding); NGO as intervener?
 - If NGO, make sure it is the right one; expert, and focusing on that point
 - Associational or surrogate - better, or as close to that as possible
 - Otherwise, emphasise the specialist interest or expertise of the NGO (reflecting its strategic objectives)
 - Focus on the gravity and wider importance of the point, and demonstrate that there is no other viable mechanism to challenge or other challenger
 - Beware overarching and broad challenges of principle (and weak grounds)
- HRA:
 - need an individual victim, or the EHRC can satisfy s.7 HRA (under s.30 Equality Act 2010)

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