

**GOVERNMENT CHALLENGES
TO THE RULES ON STANDING IN JUDICIAL REVIEW
MEET STRONG AND EFFECTIVE OPPOSITION**

R (on the application of O) v Secretary of State for International Development
[2014] EWHC 2371 (QB)
(Mr Justice Warby)

INTRODUCTION

The issue of standing in judicial review proceedings has been the subject of significant attention over the last few years, both directly from government and the courts. Standing (“locus standi”) is concerned with whether or not the individual is entitled to invoke the court’s jurisdiction and, in judicial review proceedings, which involves consideration of matters of government policy and practice, the restrictiveness of such rules is a matter of great constitutional significance. Ever since Lord Diplock’s comments in *Inland Revenue Commissioners v National Federation for the Self Employed and Small Business Limited*¹ (“IRC”) that the restrictive approach to standing created a “grave lacuna” which risked undermining the rule of law, the court’s approach, with some notable exceptions, has been largely characterised as relaxed and had generally become viewed as a low threshold test.²

The test for standing is laid down in section 31(3) Senior Courts Act 1981³ and requires the applicant to have “sufficient interest” in the matter to which the application for permission to apply for judicial review relates. In the period since Lord Diplock’s comments in IRC, the appellate court’s judgments on standing, with a few notable exceptions, have gone in favour of applicants for judicial review. However, in the last five years, the fundamentally liberal approach characterised by such cases as *R v Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement* (“WDM”),⁴ has been the subject of scrutiny both in the court itself and in the wider political environment. A recent spate of cases⁵ and proposed reforms of the judicial review system⁶ have again brought the issue of standing to the foreground when it could well be argued that was one which rarely raised its head in judicial review proceedings since the decisions in the mid-1990s.

The current government, driven largely by the Lord Chancellor⁷, is clearly keen to reform the process of judicial review. The Lord Chancellor has expressed the concern that the expansion of judicial review since the 1980s has fuelled unmeritorious claims “which may be brought

¹ 1982 [AC] 617

² See, for example, Rose LJ at para 395 *R. v Secretary of State for Foreign and Commonwealth Affairs Ex p. World Development Movement Ltd* [1995] 1 WLR 386

³ 1981 c54

⁴ Supra note 2

⁵ See for example *R. (on the application of Chandler) v Secretary of State for Children, Schools and Families and others* [2009] EWHC 219 (Admin); *R. (on the application of UNISON) v NHS Wiltshire Primary Care Trust and others* [2012] EWHC 624 (Admin)

⁶ Judicial Review – Proposals for Reform 2012 Cmnd 8515; Judicial Review – Proposals for Further Reform Cmnd 8703

⁷ The honourable Christopher Stephen Grayling (1 April 1962), is a Conservative Party politician who has been the Lord Chancellor and Secretary of State for Justice since 2012. He is the first non-lawyer to hold the position in four hundred years.

simply to generate publicity or to delay implementation of a decision that was properly made”.⁸ These cost the country both:

...because a significant proportion of these weak applications are funded by the tax payer – through the expense incurred by the defendant public authority, by the court resource entailed, and in some cases by legal aid or by the public authority bearing the claimant’s legal costs...⁹

and because of the “impact these judicial reviews are having on the country as a whole”.¹⁰

Specifically, the proposed reforms of the judicial review process included proposals to reform the rules relating to standing. In their most recent consultation paper “Judicial Review - Proposals for Further Reform¹¹” (following quickly on from the paper in 2012 entitled “Judicial Review Proposals for Reform”¹²) the Ministry of Justice expressed the concern that:

...too wide an approach is taken to who may bring a claim, allowing judicial reviews to be brought by individuals or groups without a direct and tangible interest in the subject matter to which the claim relates, sometimes for reasons only of publicity or to cause delay.¹³

The proposals were roundly opposed by those who responded to the consultation, citing well-rehearsed arguments that restricting the test would move the focus of judicial review from challenging public wrong to protecting private rights and that many meritorious claims would not otherwise be brought if the liberal rules which allowed representative groups to bring claims were not retained.¹⁴ The powerful judgment of the Court of Appeal in the *WDM* case¹⁵ was much cited in replies to the consultation which stressed the importance of ensuring that abuses of power by government did not go unchecked because of the lack of someone able to bring a challenge. Notably, the senior judiciary in their response to the second consultation invoked the link, central to the *WDM* case judgment, that a liberal approach to standing was vital to uphold the rule of law and ensure that abuse of power did not go unchecked:

The test of standing in judicial review must be such as to vindicate the rule of law. Unlawful use of executive power should not persist because of the absence of an available challenger with a sufficient interest. The existing test of standing meets that requirement and we do not consider there to be a problem with it.¹⁶

The vigour with which the judicial review reform agenda is being pursued elsewhere, for example in the recent debates during the passage of the Criminal Justice and Courts Act¹⁷, may also be reflected in government lawyers’ approach to standing in cases. It could be that

⁸ Judicial Review – Proposals for Further Reform Cmnd 8703 page 3

⁹ Ibid page 3

¹⁰ Ibid page 3

¹¹ Judicial Review – Proposals for Further Reform Cmnd 8703

¹² Judicial Review – Proposals for Reform 2012 Cmnd 8515

¹³ Supra note 11 page 24

¹⁴ <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf> , accessed 23.12.2014

¹⁵ See note 2 supra

¹⁶ Supra note 10 at para 15.

¹⁷ 2015 c 2

recent successes emboldened the government to seek to challenge the approach to standing more generally.

The issue of standing has been complicated by the introduction of differing legal tests (“victim”, “person aggrieved”, “direct and individual concern”) depending on the area of law (respectively, human rights¹⁸, environmental challenges¹⁹, European Union law challenge²⁰). Notably, within the context of public procurement and privatisation of government services, applicants in recent cases have found themselves successfully thwarted by arguments on standing. In *R (on the application of Gillian Chandler) v Secretary of State for Children, Schools & Families and others*²¹, for example, the court held that a parent of a child in a local authority area had no standing to challenge a decision to grant a local school academy status. Similarly, in *R (on the application of Unison) v NHS Wiltshire Primary Care Trust and others*²², the trade union Unison had its standing successfully challenged when it attempted to challenge an NHS Primary Care Trust’s decision to outsource NHS services to private providers. Both judgments were referred to in the case discussed here.

The case of *R (on the application of O) v Secretary of State for International Development* may have seemed to the government’s lawyers like a case in which standing could easily be challenged, especially as it was brought by a non-UK national from outside of the jurisdiction. However, the argument that O, as a non-national should not be granted standing to challenge a decision of the UK government was one which Mr Justice Warby was reluctant to accept.

THE FACTS

O is Ethiopian. He claimed he was subject to human rights abuses in the course of the Ethiopian government’s programme of resettlement of villagers under the “Commune Development Programme”, described in court as a process of “villagisation”. Because of the brutal way in which this policy was applied, the claimant fled to Kenya. The claimant alleged that the Ethiopian government’s programme was in fact funded by the Department for International Development’s “Promotion of Basic Service” programme, a fund of some £510 million which is to be spent by 2018. The grant of development funding (under section 1 of the International Development Act 2002) has to take place in accordance with departmental policy as set out in “Partnerships for Poverty Reduction: Rethinking Conditionality”. That required, amongst other things, that the UK government reconsiders finance where donee governments are found to be in significant violation of human rights.

THE ISSUES ARISING

The claimant’s application to challenge the funding was based on two grounds. The first was that the Secretary of State had failed to put in place any process by which Ethiopia’s compliance could be assessed. The second was that the Secretary of State had refused to

¹⁸ Section 7 (1) Human Rights Act 1998 c 42

¹⁹ UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (‘Aarhus Convention’)

²⁰ TFEU Article 263

²¹ Note 5 supra

²² Ibid

make any assessment public. The claimant sought permission for judicial review and the Secretary of State raised the issue of standing at the application for permission.

It is interesting to pause at this point and reflect on the landmark decision in *WDM*; again, the central issue was standing and the subject matter the issue of statutory overseas aid. In that case, a pressure group, the World Development Movement, successfully challenged the then government's decision to grant aid to Malaysia to construct the Pergau Dam. Though the issue of standing was central, what was very different in *WDM* was the status of the applicant. In *WDM*, the entity challenging had no direct connection with the country in which the aid was being spent. It gained its standing, according to the court, as a body with a legitimate concern in the issues given its expertise in overseas development issues. It was not directly affected, in the normal sense of the words, but the matter was one of legitimate public concern and it was not that most reviled of judicial review participants, the notorious "busybody".

The argument on standing put forward by the government was that O had to show either that he had himself been "affected in some identifiable way" by the decisions challenged, or that the claim involved issues of real and significant public interest which would not otherwise be raised, such that the rule of law required the challenge to proceed.

The first of these tests derived from dicta of Arden LJ in *Chandler* (cited and applied by Eady J in *Unison*)²³. The second derived from the judgment of Lord Reed in *Walton v The Scottish Ministers*²⁴ which, quoting Lord Hope in *AXA General Insurance v Lord Advocate*²⁵, states that a personal interest need not be shown if the individual is acting in the public interest and can genuinely say that the issue directly affects the section of the public that he seeks to represent.

The government, as well as arguing that O had not shown a personal interest, (which itself seems a difficult line of argument in the circumstances) submitted that the requirement of a significant public interest was not met and that the rule of law did not require this challenge to proceed.

For O, it was argued that the test of standing derived from *Chandler* was specific to its context, and narrower than the general test. Standing, it was argued, had to be treated "in the overall legal and factual context of the case". As the claim raised serious public interest issues arising from the acknowledged need to ensure that development aid does not go to governments involved in grave human rights breaches, O could not be categorised as a mere busybody. He had a credible basis for arguing that UK aid had contributed to the human rights violations of which he complained.

THE JUDGMENT

Mr Justice Warby granted permission for the claimant's application to proceed to a full hearing, accepting that there were arguable grounds that the Secretary of State had failed to put into place a process by which Ethiopia's compliance could be assessed while rejecting the second ground of challenge. He accepted that the applicant, clearly, had standing to bring the

²³R. (on the application of *Chandler*) v Secretary of State for Children, Schools and Families and others [2009] EWHC 219 (Admin)

²⁴[2012] UKSC 44

²⁵[2011] UKSC 46

claim and accepted that neither *Chandler* nor *Unison* should be treated as providing authoritative guidance on the right approach to standing in O's case. Echoing both Lord Reed in *Walton* and Lord Justice Rose in *WDM*, he stressed the significance of and sensitivity to context in a decision on standing. Rejecting the government's two pronged approach outlined in submissions he stated:

1. the court should avoid an unduly restrictive approach, which treats judicial review exclusively as a means of redressing individual grievances;
2. the concept of a "sufficient interest" is not one that lends itself to exhaustive definition, but is inherently elastic depending on the particular context and circumstances;
3. a person will not have standing if they are a mere busybody in the sense that they are interfering in a matter in which they have no personal interest and no reasonable or legitimate concern;
4. it is not necessary to demonstrate a personal interest if the individual is acting in the public interest and can genuinely say that the issue directly affects the section of the public that he seeks to represent.

COMMENT

To some extent, the decision clarifies rather than develops the law on standing, stressing the importance of context, reiterating that judicial review is not simply a means of dealing with specific individual grievances and emphasising the vital role it plays in holding government to account through the rule of law.

It also, though, acts as a very clear indication that holding government to account through the courts is not something of peculiar concern to those who can argue a direct and tangible interest (ironically, perhaps, in a case where the applicant, albeit not a citizen, had a very direct tangible concern as to the impact of a government policy). The cases of *Chandler* and *Unison* both involve specifically the process of public procurement and outsourcing; as such, they should be viewed as judgments largely limited to cases involving such issues. The expansive approach to standing envisaged by Lord Diplock and asserted over the last 30 years or so seems likely to remain, despite restrictions in particular areas of policy.

CONCLUDING REMARKS

By allowing standing in this case, the Court is recognising both the crucial importance of a liberal approach to standing to ensure that abuses of power do not go unchecked and that such challenges need not come from citizens but are an available method for anyone affected by UK government policy to challenge government action.

Despite the politicians' rhetoric and their obvious and perhaps inevitable dislike of a judicial process which is open to both pressure groups and foreigners, the judiciary seems implacably opposed, both within the courts and through responses to consultation to see judicial review significantly limited. The government, however, as evidenced by the recent attempts to reform judicial review,²⁶ seems intent on trying to curb its use.

²⁶ See Criminal Justice and Courts Act 2015, 2015 c 2

The collision between elected politicians and former judges has been played out most recently in the House of Lords in recent debates over proposed reforms in the Criminal Justice and Courts Act²⁷ which, amongst other things, attempts to make financial contributors to a judicial review action and interveners potentially liable for costs. The forcefulness with which the Coalition government has pursued its objective to restrain judicial review is also evident in the approach taken by the government's lawyers over the issue of standing, though in this case, those attempts were unsuccessful. Now the Criminal Justice and Courts Act has received Royal Assent, it is likely that the conflict over the use of judicial review will continue in the courts. Indeed, it will be interesting to see if the scenario envisaged by Lord Steyn in *Jackson*,²⁸ in which access to the courts is significantly restricted, may well see the court being asked to consider whether or not the principle of Parliamentary Sovereignty should be revisited in the name of upholding the Rule of Law.

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²⁷ Note 26 supra

²⁸ UKHL [2005] 56 at para 102