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The Public Law Project

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Litigation can address the needs of NGOs

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Introduction

Thank you very much for inviting me and I hope that I can make some contribution to the furthering of public interest law in Ireland. I have spent the last day or so immersing myself in the conference papers and in Mel Cousin's report, which make for extremely interesting and informative reading. There is a great deal to be said for stepping back from the fray and analysing exactly where you are and where you want to get to. We at PLP have recently started a similar process, albeit in a much more limited way, with a series of seminars involving key players within UK public law and will happily share our conclusions with you towards the end of the year.

The pursuit of justice is frequently said to be unending. It is also often unequal, and this inequality is frequently compounded by social or economic disadvantage; those with the greatest need for access to justice are often those who have the fewest resources with which to obtain it. Although the introduction of the legal aid scheme in England and Wales' and the development of the advice and law centre movement have both helped to improve access to justice, there is no doubt that the legal system could do more.

One major avenue is public law. The recent growth and development of public law in Britain has created both a clearly defined arena in which issues central to social justice can be tried, and an opportunity to strengthen the hand of justice. Public law offers the possibility of challenging unjust and arbitrary measures and decisions and of making those in authority more accountable, and this has been bolstered by the enactment of the Human Rights Act 1998.

However, wider access to justice through public law does not come about automatically or easily. The resources with which to develop the possibilities of public law largely lie in the hands of those bodies that it is designed to regulate, rather than in the hands of those whom it is designed to protect. The obstacles to obtaining a remedy in public law are daunting. Ordinary members of the public wishing to avail themselves of such remedies must range themselves against bodies which are much bigger and more powerful than themselves. They will frequently find that no independent mechanism of redress exists. If the matter gives rise to litigation, they must run the gauntlet of complex procedures, argue their case in terms of complicated legislation and case law, and run the risk of prohibitive costs. Even if litigation is not involved, individuals often lack the resources to pursue their case by, for example, carrying out necessary research. For those who are already disadvantaged by poverty or by their position in an unequal society, the venture is formidable.

It was in response to these problems that the Public Law Project was set up in 1990. The plan was to set up a new body, small in size but national in scope, having some resources of its own as well as the ability to work with others,

which would provide a resource for those for whom access to public law is most problematic and for organisations working with them and on their behalf. It would not only take up broad public law issues affecting disadvantaged groups, but would also provide research, information, education, monitoring, and co-ordination in order to enhance the effectiveness of the large number of organisations that deal with public law issues on behalf of clients but for whom public law is only part of their work.

PLP thus aims to cover a potentially very wide field, as the issues in public law are legion. We do however have two key areas of priority, the quality of public decision-making and that of access to public law. Before I explain our casework strategy, I would like to draw your attention to a few of our publications, which have been produced by our research arm:

1. A Matter of Public Interest
2. Third Party Interventions in Judicial Review
3. The Impact of the Human Rights Act on Judicial Review

These have featured in your conference deliberations and I thought it might be useful for you to see the actual publications. If you wish to order any, let me know. They are free and in fact will soon be available to download from our new website which is going live next month – www.publiclawproject.org.uk

I have also brought some copies of our brochure, which describes in more detail who we are and what we have done.

PLP Casework Strategy

With limited resources and defined aims and objectives it is important for the Project to identify as closely as possible the criteria by which cases are taken on. In each case we need to be clear as possible about what we wish to achieve through litigation. The cases that the Project will take on fall within two broad categories – test cases and training/development cases.

Test cases

The Project's definition of a test case includes cases which either establish a new point of law, (by changing or by clarifying the law), or cases which involve the application of established public law principles in areas where they have not been applied before. The reasons behind this broader definition of a test case follow.

Whereas the 'test case' has always been seen as being concerned with the identification of new points, the Project also runs cases which are designed to apply points of law that appear new or underused in a particular context or locality. Our current work on behalf of the service users of small voluntary organisations is an example of the latter, and I will return to this later.

PLP has found (as have previous test case litigators) that a successful test case strategy is not just about winning legal arguments in court. There have been too many examples of the government changing the law to reverse court victories to make this a sufficient basis on which to build a strategy. Publicity,

education, being the focus of a campaign, or to keep public bodies aware of their powers and duties can be as important reasons for bringing a case as a victory on a legal point.

It should also be remembered that predicting the outcome of cases is notoriously difficult and that we can never guarantee that a particular case will lead to the outcome we aim for or intend. The leading study on public interest cases by Harlow and Rawlings rather pessimistically states that the outcome of court cases are often so inconsistent as to deserve the term "lottery"¹.

Training/Development cases.

PLP also runs cases which are not considered to fall within the above definition. Although our resources are primarily targeted on test cases, the Project also has a training and development role, leading advisers from other agencies through the initial assessment of a case, through to trial or other conclusion. This shows advisers the way in which public law can be used by involving them in the process, sharing the documents and correspondence generated and allowing them to observe the proceedings. This also keeps PLP solicitors in touch with day to day matters of practice and procedure, as well as bringing in much needed income.

Prioritising casework areas

We prioritise social welfare casework areas where lawyers are not firmly established, and have therefore traditionally excluded immigration, housing and welfare benefits. It should also be noted here however, that our expertise of working closely with groups and acting for organisations has often led us away from any priority casework area list. For example, we have become involved in immigration law on behalf of the Refugee Legal Centre and mental health/community care law on behalf of Values Into Action. This is particularly so when these cases potentially increase access to public law remedies, for example:

- who is reviewable,
- standing,
- who can intervene,
- maximising the availability of legal aid in judicial review cases, minimising the costs risk where it was not, (protective costs orders).

Of course, it might be possible to concentrate a casework strategy around a public law issue (like, for example, the duty to give reasons) and to seek out cases which test the issue. The problem with this approach is the difficulty of finding groups and organizations to work with to identify cases: there are plenty of groups campaigning for increased health care rights, very few (if any) who campaign for a general duty to give reasons!

We have found it useful to narrow the focus even more and to concentrate resources on just one area at a time for a fixed period. We work in partnership with the groups small and large, that advocate for, or provide services to the

¹ Pressure through law (1992) p301.

individuals most affected by that area of law. This was done with community care law, where PLP has been responsible for many of the leading cases², and has developed this field of law to the extent that it is now a recognised specialism, with scores of firms now practicing within it. We are now attempting to apply this model to the decision making processes affecting the voluntary sector. This is where PLP is at its most effective - identifying an area where public law has a great potential but is underused, drawing together the main players involved in the area (especially the NGOs) and with them identifying the main public law points that need resolving. Helping these organisations provide information and education to their local branches and users provides us with the feedback which then provides us with our cases, and often important test cases where abuse of power and/or unlawfulness is widespread. This strategy is currently underway with a project where we are working in partnership with a voluntary sector umbrella organisation, the National Association of Councils for Voluntary Service, (NACVS).

Empowering the Voluntary Sector

PLP acted for service users challenging the withdrawal of funding from 8 small voluntary sector groups. Negotiations, lobbying and public protests had all failed in getting the decisions reversed, and PLP were asked by one of the local umbrella groups, (Voluntary Action Leicester) to consider the legal position and to advise. The public body had refused to back down and this was seen as a last resort by the groups, without any great expectation of a positive outcome.

PLP travelled to Leicester and addressed a large meeting of affected organisations and service users, explaining our role and that of public law. We discussed with them their options in the light of their contractual and public law rights, the option of litigation and how it could be funded.

A number of service users came forward and PLP wrote to the Council on their behalf detailing the legal position. The service users were anxious to try and preserve local services serving a diverse population, including two women's groups, two BME groups, and one church group.

PLP pointed out that the consultation exercise that the Council undertook was unfair and flawed and the subsequent decision unlawful. We asked that the decision be set aside and the consultation process rerun. The Council refused – its view was that public law principles had no application in this context, as this was a strictly contractual matter.

Legal proceedings were started, the court set aside the decision and ordered the council to undertake a new consultation process³. As a result, all groups had their funding restored (to a greater or lesser extent) following a new consultation process and the Council has reacted by drafting new policies

² See for example *R v Manchester City Council Ex parte Stennett*, *R v Redcar and Cleveland Borough Council*, *Ex parte Armstrong & R v Harrow London Borough Council*, *Ex parte Cobham* [2002] 2 AC 1127

³ *Capenhurst & Others v Leicester City Council* [2004] EWHC 2124 (Admin)

and procedures so as to ensure that all future decision making processes would be proper, fair and transparent.

We were struck by the following factors:

1. The complete ignorance of public law principles on the part of the Council (the voluntary sector were similarly ignorant but this was unsurprising). They were firmly of the view that the Council's discretion was untrammelled and that though unfair, the process could only be challenged by lobbying and the political process.
2. The organisations felt powerless and marginalised.
3. Once the proceedings had begun, there was a palpable feeling of exhilaration on the part of the organisations participating in them. On many occasions we were told that at the end of the day, it did not even matter if the proceedings were unsuccessful, because the Council could no longer treat them 'as little', could no longer 'kick them' around, and would from now on treat them with more respect.
4. The organisations told us after the case had finished that litigation might have been avoided 'had they known then what they know now'. Early advice and intervention may well have led to a situation where legal proceedings would not have been necessary.

In a nutshell, what the Council had done was to consult with the sector over a new policy whereby applications for funding would be measured against criteria A to G. However, when implementing their new policy, they actually used criteria A to D, and new criteria, H to K, the latter not having been disclosed to any of the applicants beforehand so that they were unable to address them. That is a classic public law wrong. Most of the organisations did not think that this was in any way unusual, and the Council thought it was perfectly normal.

We worked closely with one of the local CVS projects on Leicester, (as the local umbrella group in the sector) and following a number of similar cases⁴ in other parts of the country, (word of our success had spread) we decided to prioritise this area of work.

We are now working in partnership with the NACVS, in a delivery model PLP has deployed on a number of previous occasions – advice, training and casework. We write the training materials and together with NACVS, adapt them in such a way as to be relevant and accessible to their sector. They will deliver the training using their own networks and contacts, (around 60 training courses over the next three years) and PLP lawyers will provide a telephone consultancy line to deal with general or specific issues, with the capacity to take on individual cases for litigation. We hope that the small groups in the voluntary sector that represent or provide services to disadvantaged groups will begin to apply public law principles not just in matters that concern their

⁴ For example, see *Keating v Cardiff Local Health Board* [2005] 3 All ER 1000

funding, but also in policy matters which concern their users. Thus, they will be able to raise such arguments if local authorities develop policies which directly concern their members, for example because they do not take their views into account, or the policies discriminate against them in some way. There is much in common here with the approach developed by Robert Garcia and described in his piece delivered at last year's FLAC conference⁵ – it is an approach which, using his words, we hope will lead to '*a broader vision for distributing the benefits and burdens of public resources in ways that are equitable, protect human health and the environment, promote economic vitality and engage informed public participation in the decision-making process*'.

A little too close to home ...

It was therefore somewhat ironic that little over two months after we resolved to prioritise this area of work, the Legal Services Commission, (the UK Legal Aid Board) announced the termination of the so-called Specialist Support Service, with PLP being one of the providers. PLP has played a major role in the development of the Commission's 'Specialist Support' Scheme, whereby solicitors and advisers working within the legal aid sector can access specialist advice on complex matters from experts in their field. We have been involved as a provider of specialist advice on public law matters since the service started as a pilot in 2000, and continue to do so as part of a group of some 16 other providers advising on 9 distinct areas of law. This has falls well within PLP's objectives, as it raises awareness of public law principles and remedies amongst solicitors and advisers, better equipping them to provide advice to their clients.

However, in January this year, we received formal six month notification from the LSC that our contract was being terminated under the no fault provision in the contract. The consequences of early termination were a significant loss of income for this financial year - in the region of £56,000.00. For an organisation with a turn over in the region of £280,000.00 p.a. this causes obvious difficulties. The decision itself had come at the end of a flawed and highly unsatisfactory consultation process undertaken by the LSC

PLP then took the lead in organising the response. We advocated a twin track strategy, involving campaign work and litigation. At a meeting of Specialist Support providers, it was agreed that the work would be split – that PLP would deal with the litigation and that a number of the others would deal with the campaign work – under the overall lead of PLP. In my view, what transpired was an object lesson in the effectiveness of a co-ordinated public interest law strategy – mixing litigation, lobbying and publicity to achieve one's objectives, with several NGOs working together.

The campaign strategy involved a great deal of parliamentary lobbying work, (with much of this undertaken by Shelter, Citizens Advice and CPAG). The House of Commons Constitutional Affairs Committee was persuaded that the

⁵ See 'Race, Poverty, Justice and Katrina: Reflections on Public Interest Law and Litigation in the US – Robert Garcia (Public Interest law in Ireland- The Reality & the Potential, FLAC 2006)

issue was of such importance that they held a separate hearing into it. In a report released on Tuesday 14 March 2006, the Committee strongly criticised the decision by the LSC to cut funding for the Specialist Support Services. The Committee's full report can be accessed on:

<http://www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/919/919.pdf>

The Rt Hon Alan Beith, Chairman of the Committee, said:

"The LSC must look at this decision again ... All the evidence we received pointed to the success of the Specialist Support Services. There is a worrying lack of support for the proposed replacement, and questions as to why the LSC would so abruptly and prematurely end its own pilots. We are very glad that in public oral evidence to the Committee, the Lord Chancellor has assured us that he will personally look at both the process and the decision itself."

Meanwhile, judicial review proceedings were issued⁶, and interim relief awarded, extending the period before termination until October 2006. The main issue was whether this was a contractual termination, (in which case it was a private law matter and therefore any dispute was automatically referred to arbitration under the contract), or it was a policy decision to end the Specialist Support Service as a distinct method of service delivery, (in which case it was a public law matter and could proceed by way of judicial review).

The LSC conceded shortly after the issue of proceedings and before the Permission stage. It has withdrawn all of the termination notices and promised a full and proper consultation process before any new decision is made.

A great deal of work took place to gather enough pledges of financial support in order to deal with any adverse costs order, should the matter proceed to trial and fail. It has to be said that I did consider withdrawing PLP on a few occasions, but I am glad to say that the Commission blinked first. This brings me to one of the subject of Protective Costs Orders.

PCOs

In the UK, public funding is not currently available to organisations who wish to apply for judicial review themselves on behalf of their client groups, even though, in doing so they are acting not in their self-interest, but in the public interest. This can mean that wrongs go unremedied, because there is no individual willing or able to bring the challenge, or because the respondent public authority settles each individual case in the hope of preserving its policy, which it will then apply to others in the same circumstances. Public interest challenges brought by organisations against the unlawful policy itself are vital in these circumstances.

The main obstacle to the development of this practice is the risk the organisation faces of being ordered to pay costs if they are unsuccessful. PLP

⁶ PLP & others v LSC CO/2040/2006

has sought to develop the practice and jurisprudence of the Protective Costs Order to try and counter this risk. Such an order limits or extinguishes the applicant's cost liability at the outset of the litigation. Thus in 1998, we acted for Amnesty International UK and The Redress Trust in an application for such an order. The application was heard jointly with one made independently by the Child Poverty Action Group. This established that the court had the power to make such orders, although it refused to do so in either of these cases.⁷ This issue has returned to the fore following litigation involving PLP both as solicitors and as an organisation.

In 2004, the Refugee Legal Centre (RLC) instructed PLP to act for it in proceedings against the Secretary of State for the Home Department. The claim for judicial review was dismissed at first instance, with the defendant having already given RLC an undertaking not to pursue his costs in such circumstances. However, following the grant of leave to appeal by the Court of Appeal, this undertaking was not renewed, jeopardising the whole appeal. No undertaking was even offered in respect of the costs incurred in relation to the seeking of a protective costs order. RLC was then forced to seek protection from any costs risk associated in the seeking of a protective costs order! The Court of Appeal directed that there should be an oral hearing and was highly critical of the defendant's position. It indicated that the case was one where it would look favourably in granting a protective costs order for the substantive appeal itself, not simply for any application for costs protection. The defendant subsequently consented to a protective order in favour of RLC, removing all potential liability for costs⁸. The case was also notable for the fact that the Court of Appeal expressed its desire to explore fully the whole issue of protective costs, but had been prevented from doing so following the defendant's concession. However, it did not have to wait long for its opportunity.

In the matter of *R (Corner House Research) v Secretary of State for Trade & Industry*⁹, PLP intervened as an interested party to make submissions in support of the claimants application for a protective costs order, making oral submissions before the Court of Appeal, (the application having been dismissed at first instance). The application was granted, but the court's reasoning and the conditions it laid down were not overtly helpful, though overall the rules were probably relaxed. The problem was that the case was heard in a rush just before the Christmas break and very little discussion took place in court as to what the conditions should be.

Nevertheless, it did ensure that the issue of protective costs orders was well and truly back on the legal agenda. PLP is now part of a working party chaired by Lord Justice Maurice Kay, examining the whole issue with a view to recommending changes to the Civil Procedure Rules.

⁷ *R v Lord Chancellor ex p CPAG* [1998] 2 All ER 755

⁸ *Refugee Legal Centre v Secretary of State for the Home Department* [2004] EWCA Civ 1239 and [2004] EWCA Civ 1296).

⁹ [2005] EWCA Civ 192

The Working Party report is now in draft form and I sincerely hope it will encourage our judiciary to be more liberal in its treatment of PCO applications. One of the current problems is the insistence of the courts on the 'no private interest' requirement. Thus applications made on behalf of social security claimants have been refused because their case, albeit a test case, involves some element of financial benefit to them¹⁰, as has a case brought by a grieving family member seeking an inquest where the Court of Appeal held that the claimant had a private interest in the outcome of her claim in that she was motivated to obtain a further inquest into her father's death. The court took the view that the requirement in *Corner House* that an applicant for a PCO have no private interest was expressed in unqualified terms and concluded that "a personal litigant who has sufficient standing to apply for judicial review will normally have a private interest in the outcome of the case..."¹¹ The Working Group has been unanimous in recommending that the 'private interest' criterion should not be a precondition to obtaining such an order.

Interventions

As was demonstrated in the *Corner House* case, non-governmental organisations such as PLP may also intervene in public interest cases brought by others. Third Party Intervention is a process by which such organisations can represent the interests of groups who will be affected by the outcome of the proceedings, but who are unrepresented in them. Until recently, third party interventions were extremely rare in this country, although well established in other jurisdictions such as Canada. PLP has taken a leading role in developing this. In 1995, jointly with JUSTICE, PLP convened a working party chaired by (the then) Mr Justice Laws. Their report, *A Matter of Public Interest*, made recommendations for reforms to assist its development. PLP was subsequently awarded a grant by the Nuffield Foundation to undertake an action research project to investigate and develop the practice. Interventions are much more common now, and the court have generally agreed to insulate the interveners from any risk of costs, as they are perceived to be intervening in the public interest in an effort to assist the court.

I hope that gives you a flavour of the work that we do, and perhaps provides you with some ideas as to the way in which the work of NGOs can be supported through the legal system. Your conference papers have certainly given me some food for thought.

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¹⁰ *Campbell v Secretary of State for Work and Pensions* [2005] EWCA Civ 1400

¹¹ *R (Goodson) v Bedfordshire and Luton Coroner* [2005] EWCA Civ 1172, [2006] C.P.Rep. 6