Public Interest Law in Ireland: the reality and the potential

Dublin, Ireland on 6th October 2005

Public Interest Law and Litigation in other Jurisdictions

The UK experience of test cases and the Human Rights Act 1998

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This paper covers four issues:

1. The context of test case litigation in England and Wales;
2. The effect on test case litigation of the Human Rights Act 1998 (which came into force on 2 October 2000).
3. The types of litigation that have been taken.
4. Possible lessons for Ireland.

1. The context

Test cases have a long history in England and Wales. Slavery was successfully challenged by cases taken as part of the anti-slavery movement[1] and two key Scottish test cases on the lawfulness of slavery in the British Isles were effectively third party interventions, 'memorials' that displayed 'a copiousness and variety of curious learning, ingenious reasoning and acute argumentation'.[2]

Overall, however, the UK's unwritten constitution has been taken as making it clear that Parliament was sovereign. As the nineteenth century constitutional apologist, Professor Dicey put it:

> Parliament has, under the English constitution, the right to make any law whatever, and further, no person or body is recognised by the law of England as having the right to override or set aside the legislation of Parliament.[3]

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[1] See C Harlow and R Rawlings *Pressure through Law* Routledge 1992.
[2] *Sheddan v Knowles* and *Knight v Wedderburn*, quoted in *Somerset v Stewart* Kings Bench 1772, http://medicolegal.tipod.com/somersetvstewart.htm
[3] A C Dicey *Introduction to the Study of the Law of the Constitution* Macmillan, 1959, p70.

My personal record was 48 hours: a potential landmark decision of the Social Security Commissioners was overturned by further secondary legislation within that period and before I had time to read the judgement. There has been no equivalent of the unilateral declaration by the United States Supreme Court that it was the ultimate authority.[4] As late as the early 1980s, a study of the Child Poverty Action Group's test case strategy concluded:

> The most important conclusion … is that not only are the indirect effects of test cases more important than the direct effects, but the role of the courts is overall marginal.[5]

A number of different trends emerged well before the Human Rights Act (HRA) was passed that changed the general relationship between the judiciary and the executive, challenging too complacent an acceptance of Dicey's proposition. To these, the HRA has added momentum. They will be relevant to the success or failure of any public interest litigation strategy in Ireland. They included:

- The development of judicial review. As the 1970s and 1980s advanced, the courts adjusted to playing a more active role in the monitoring of government. This has been particularly so in relation to their insistence on fair procedures. It is, thus, no surprise that judges have been very willing to intervene uphold the quality of decision-making, for example in to an adequate tribunal system for mental health cases.[6] What is more, there has been a simmering debate about the constitutional limits of Parliament – to what extent can the courts be excluded or 'ousted' from their supervisory jurisdiction. This recently came to a head in relation to review of asylum cases. It led to a somewhat unresolved debate to which one senior retired judge testily contributed:

  > Had they [the government] successfully pursued the ouster clause then we certainly would have been in a very interesting constitutional crisis. If they really did that … we would have to say "We [the judges] are an independent

[4] Marbury v Madison (1803)
[5] T Prosser *Test Cases for the Poor: legal techniques and the politics or social welfare* 1982, CPAG.

> estate of the realm and it's not open to the legislature to put us out of business. And so we shall simply ignore the ouster clause".[7]

I would imagine that things are better regulated in Ireland where you do have a written constitution. I do not know, however, how much you have developed judicial review – with its concepts of rationality and illegality that have provided an increasingly solid platform for challenge of public authorities in England and Wales.

- The growth of importance of the European Union where the European Court of Justice can deliver interpretations binding on national government. This does provide an absolute source of authority on some areas of jurisdiction, for the UK as for Ireland. It provides hope of hitting the jackpot for public interest litigators. Camden Law Centre, for example, took major European employment litigation in relation to allegations of indirect discrimination against women in the procedures for unfair dismissal. Reference to the European Court of Justice – after the case had progressed through the Divisional Court and Court of Appeal – provided an ultimate source of authority.[8]
- A further internationalising influence has been the European Court of Human Rights where, even before the Human Rights Act, the UK government was accustomed – sometimes with reluctance - to compliance with its decisions. The Human Rights Act has increased the influence of the court, requiring that its decisions be 'taken into account' by domestic judges.[9]
- The development of an approach to legal standing that was liberally inclined to NGOs representing the interests of their membership. This approach was pioneered by the Child Poverty Action Group (CPAG)[10] but has since been used by a number of the

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[6] Insert ref
[7] *Guardian*, 26 April 2005, Lord Donaldson.
[8] For at least part of the story see R Allen and G Moon 'Strategic litigation in pursuit of pay +equity' in Gregory, Sales and Hegewisch *Women, Work and Inequality: the challenge of equal pay in a deregulated labour market* 1999, Macmillan Press
[9] s2 Human Rights Act 1998.
[10] R v Secretary of State for Social Services ex parte CPAG and GLC 1985 (*The Times)* 16 August

national organisations. These include the Joint Council for the Welfare of Immigrants[11], Shelter, Liberty and MIND.

- The development of 'third party interventions' where a third party, often an NGO, may apply to be heard either in writing or orally. The widely used definition of a 'public interest cases' as ones which 'raise issues, beyond the personal interests of the parties in the matter …' is, in fact, taken from a Public Law Project study of the use of third party interventions which points out their further potential.[12]
- The existence of a cadre of national organisations proclaiming a 'test case strategy' and armed with lawyers to carry it forward. Many single issue campaigning groups in England and Wales have added a test case legal strategy as an adjunct to their political work. An obvious example would be Liberty which has always undertaken considerable casework. Russell Campbell, formerly at Shelter which was a relatively late developer in the early 1990s of its legal arm, argued that there are three distinct strands to its test case strategy.

> First, are cases in which it is decided that Shelter should be the applicant. For example, in 1996, Shelter challenged the retrospective effect of the Immigration and Asylum Appeals Act. The second component is the conventional one of dealing with a new point. The local [Shelter] Centres are in everyday contact with housing authorities and what is going on in their area. They are a good base from which key emerging issues can be identified. We have take cases involving priority in homelessness and home loss payments. The target is to try to get important cases to the Court of Appeal where they can set a precedent. The third strand is to use our authority and knowledge to join in on cases run by others. Shelter has developed the use of a witness statement as an alternative to third party intervention. This avoids some of the problems with third party interventions in relation to partiality etc. It is also a

[11] *R. v. Secretary of State for Social Security ex parte Re B* and *Joint Council for the Welfare of Immigrants*

way around any potential liability for costs. [In addition] one of the functions of a national team can be to accelerate developments of law and practice in a particular locality where there is, for some reason, a problem. As an example, we have been involved in some areas where there are local courts which do not have much experience of dealing with homelessness appeals. In that type of case, we have intervened to help local agencies effectively to educate the court and local practitioners. Once that has been done, we withdraw.[13]

CPAG have the most succinct justification for taking test cases – which, though specific to its work in social security, have a wider resonance. They argue that test cases can do the following:

a. Deter unlawful administrative practice and lead to improvements in this area;
b. Lead to improvement in standards of adjudication;
c. Highlight the improved standards of adjudication;
d. Generate publicity for CPAG and promote the aims of the organisation;
e. Promote an interpretation of the law which maximises benefits to claimants;
f. Even if we do not actually win the case, it can still highlight injustices and help build pressure to remedy these.[14]

CPAG has been pretty good about generating publicity for its cases over many years and originally built its strategy quite explicitly on a US model.[15]

- The availability of civil legal aid. Although currently subject to cuts and re-branding as a Community Legal Service, the benefit formerly known as civil legal aid is still available for judicial review and challenges of the government. It provides both funding for representation and a degree of protection against an award of costs.

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[12] *Third Party Interventions in Judicial Review: an action research study* Public Law Project, 2001, p4.
[13] Statement to author.
[14] As above

Indeed, public interest litigation is privileged and a Lord Chancellor's direction authorises:

> the [Legal Services} Commission to fund excluded services in Legal Representation in proceedings which have a significant wider public interest, other than proceedings arising out of the carrying on of the client's business.[16]

A special public interest advisory panel, largely composed of lawyers from non-governmental organisations (including JUSTICE), gives advice on appropriate cases.

Human Rights Act and litigation

Implementation of the Human Rights Act was delayed for two years while a major training operation was conducted for the judiciary, barristers and solicitors. Public authorities, from the police to regulatory bodies, reviewed their procedures with care to ensure compliance. It was anticipated that there would be an avalanche of litigation. In fact, the number of cases has been relatively low. However, the government expressly intended that some key issues in the Act would be decided in litigation. Thus, for example, the Act deliberately gives no definition of the 'public authorities' on which it places duties to be compliant with the European Convention on Human Rights. As a result, there has been a line of cases on this issue with, currently, a not entirely satisfactory result.[17] Some of these have been 'accidental' cases ie raising a major point of public law only, in a sense, unexpectedly in litigation that set

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[15] See eg R Smith 'How Good are Test Cases' in J Cooper and R Dhavan *Public Interest Law* Blackwell, 1986.

[16] Lord Chancellor's Direction Scope Of The Community Legal Service Fund Exceptions to the Exclusions 2 April 2001

[17] eg Poplar Housing and Regeneration Community Assn v Donoghue [2001] EWCA Civ 595; Callin and others v Leonard Cheshire Foundation [2002] EWCA Civ 366; Anston Cantlow and Wilmcote and Billesley Parochial Church Council v Wallbank [2004] 1 AC 546; R v Hampshire Farmers Market ex parte Beer [2003] EWCA Civ 1056. The Parliamentary Joint Committee on Human Rights has called the result 'highly problematic' (*Meaning of Public Authority under the Human Rights Act* HL Paper 39)

out on some other point. However, even in these, interested bodies, such as JUSTICE, have made third party interventions to raise the public law issue.[18]

Slowly, the HRA is making its full influence felt. After a slow and uncertain start, the judiciary have now revealed themselves as willing to take up its challenge. At the core of the act are sections 3, 4 and 6. Section 3 requires that:

> So far as is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.'

Section 4 allows the court to make a 'declaration of incompatibility' if it determines that a provision in primary legislation is incompatible with Convention rights.

A series of cases illustrate the extent of these provisions. In Ghaidan v Godin-Mendoza[19] the House of Lords indicated that section 3 created a 'strong, rebuttable presumption' in favour of a compatible reading. This has famously involved some creativity. In an early case, by implication now recognised as setting the way, the House of Lords placed article 6 fair trial rights above the express words of a statute limiting admissible evidence in a trial for rape.[20] What is more, European jurisprudence on 'proportionality' has been seized upon to extend the grounds of judicial review beyond illegality and rationality.[21] As explained by Lord Steyn, discussion of proportionality takes the judge much further into the merits of the decision than was previously possible:

> First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened

[18] eg in the Leonard Cheshire case.
[19] [2004] 2 AC 557.
[20] R v A (no 2) [2002] 1 AC 45.

> scrutiny test … is not necessarily appropriate to the protection of human rights … the intensity of the review … is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question of whether the interference was really proportionate to the legitimate aim being pursued.[22]

There have been spectacular decisions as judges have absorbed their new role. The Human Rights Act has been decided, for example, to apply to those in the prisons of the UK army out of the jurisdiction, in Iraq.[23] Celebratedly, the House of Lords ruled Part 4 of the Anti-Terrorism, Crime and Security Act 2001 to be incompatible.[24] This is a good time to be an English public interest lawyer and to have some source of funding, very heaven.

There has been a political reaction against the breadth of this approach and, indeed, we may yet have serious political discussion of the merits of the Human Rights Act. The Prime Minister has announced that he would consider amending the Human Rights Act to require judges to accept agreements with third countries not to torture those returned to their custody.[25] This has set off a continuing row about how the doctrine of proportionality should practically be applied.[26] The former language of 'judicial deference' has been replaced by the concept of the 'discretionary area of judgement' to be given ministers.[27] A further dynamic has been given the European Convention by its anti-discriminatory provision, article 14. In particular, the European Court has been very clear that:

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[21] See R v Secretary of State for Home Dept, ex parte Daly [2001] UKHL 26; A and others v Secretary of State for Home Department [2004] UKHL 56.
[22] In Daly above.
[23] R v Secretary of State for Defence ex parte al Skeini [2004] EWHC 2911.
[24] A case above.
[25] Press statement, 5 August 2005.
[26] See also *Changing the Rules: the judiciary, human rights and the constitution* JUSTICE, 2005, available at www.justice.org.uk.
[27] See, in particular, Lord Steyn *BIICL lecture*, 10 June 2005.

> Very weighty reasons would have to be put forward before the court could regard treatment based exclusively on the ground of nationality as compatible with the Convention.[28]

The House of Lords found the anti-terrorism provisions both disproportionate and discriminatory in its landmark judgement.

Thus, as its use has evolved, the Human Rights Act has provided a happy hunting ground for public interest lawyers. It has sparked a number of key issues, the balance of which is still being resolved. These include:

- Extra-territorial effect (Court of Appeal to hear appeal in October);
- The balance of sections 3 and 4 of the Act;
- Meaning of 'public authority';
- The general effect of national security considerations;
- The meaning and effect of proportionality;
- The relative powers of judges and ministers.

In addition, there is the indirect effect of the Act. How much do its provisions influence the common law even where they do not directly apply? In jargon, what is its 'indirect horizontal effect'? This is an absolutely fascinating area. Judges have indicated that:

> The time has come to recognise that the values enshrined in articles 8 and 10 are now part of the cause of action for breach of confidence.[29]

A judge, albeit in a minority court of appeal judgement, has also indicated that the prohibition against torture (article 3) should be incorporated into the common law so that no court should allow evidence which might have been obtained by torture even

[28] Gaygusuz v Austria (1996) 23 EHRR 364 at para 42.
[29] Lord Nicholls, Campell v MGN Ltd [2004] 2 AC 457.

though the common law has previously been clear that all evidence may be submitted in civil cases and its provenance goes only to credibility.[30]

Thus, the Human Rights Act effectively changes the UK's famously unwritten constitution. It opens up the possibilities of test cases significantly beyond what they have been. In a way that was completely unanticipated, the Iraq war and the arrival of international terrorism within England and Wales has made the Human Rights Act particularly relevant to key political issues of the day.

The use of test cases on the Human Rights Act in the UK

From the point of view of public interest law, cases under the HRA may be divided into a number of key categories:

First, a small group of civil liberties lawyers, largely in private practice but often with an earlier history of working in the not-for-profit sector, have taken a series of key civil liberties cases. Thus, Louise Christian and Gareth Peirce have taken high profile challenges precipitated by the response of the government to the threat of terrorism, in particular the imprisonment of their clients without trial under anti-terrorism legislation. They have used the Human Rights Act to challenge provisions which would, otherwise, have been largely unchallengeable, at least in the domestic courts. In so doing, they have acted primarily under the stimulus of the interests of their individual clients. Among such lawyers, Phil Shiner of Public Interest Lawyers has been, in public interest law terms, the most interesting because he appears actively to have sought cases that might not, otherwise, have naturally come to him. For example, he was the solicitor behind the testing of the Act's extra-territorial effect in Iraq. He is also explicitly linking his firm with the concept of public interest law.

Second, some NGOs have deliberately taken campaigning cases based entirely on the new possibilities opened up by the Act. The best example of this is probably the challenge by Liberty to the law relating to assisted suicide – the Diane

[30] A v Secretary of State for the Home Dept [2004] EWCA 1123 (awaiting appeal to the House of Lords)

Pretty case. This was a Human Rights Act case and undoubtedly the one that has attracted most mainstream attention. It related to an application to the Attorney General for an assurance that Diane's husband, Brian, would not be prosecuted under the Suicide Act if he helped her to take her own life. Diane was suffering from motor neurone disease. The application against the Attorney General's refusal was dismissed by the High Court in October 2001; the House of Lords in November and the European Court in the next year. However, media coverage was massive – generating a major public debate on the subject of suicide.[31] The Diane Pretty case is probably the best example of the possible compensatory value in political terms of a case that may have lost in the courts – and, indeed, in this particular case was lost before every single judge who heard it.

Third, lawyers both in private practice and in NGOs, in planned campaigning cases and more routine litigation, have used the Human Rights Act to buttress arguments that they would have made otherwise on other grounds.

Vada Bondy of the Public Law Project reported that:

> About half of all judicial reviews raise a human rights issue. Undoubtedly, many litigators use it as a fall back argument to bolster a case [rather than a primary cause of action].[32]

In the early days of the HRA, Ms Bondy's research found widespread use of the HRA in a whole range of cases – though she suggests it is secondary:

> At permission stage, the Human Right Act issues were raised in 53% of immigration/asylum cases; 31% of housing cases; 46% of cases excluding immigration/asylum and housing; and in 49% of all civil claims.[33]

Many litigators reported that an early value of the Human Rights Act (HRA) was the stimulus that it gave, through training and reflection, to look at potential test cases of

[31] See http://www.justice4diane.org.uk
[32] Interview with author
[33] *The Impact of the Human Rights Act on Judicial Review: an empirical research study* Public Law Project, 2003, p12.

a kind that might have been justified in any event but which had added force after the coming into force of the Act. Thus, Child Poverty Action Group's experience of the HRA, as reported by legal officer Stewart Wright, was that:

> The Human Rights Act did not create a big bang in test cases. Nor did we think that it would. There were, however, a number of changes. First, we got a large number of rights' queries from advisers who had a vague idea that human rights might be relevant but no precise understanding. Second, we put in a lot of time training. Thirdly, its introduction did make us think through different types of challenge in which we might be involved.[34]

We may now be moving to a situation where the Act is established and we can say that it has a more direct influence.

Lessons for Ireland

The important issue for Ireland is whether any lessons can be drawn from a common law jurisdiction with so much shared history but with major differences. I am in no position to judge but the following may be relevant observations.

First, the value of legal aid is apparent, underlining the value of any way in which its effect could be duplicated, as in the creation of a litigation fund.

Second, the English courts had to move a long way over 20 years to ease the possibilities for public interest litigation – loosening rules on standing, cost indemnity, third party interventions. I do not know how much of this groundwork remains to be done in Ireland.

Third, there has been a very real value in keeping litigation very close to organisations with wider political goals. In their practice, public interest law and public interest litigation need to be conceived as integrally linked to the substantive fields of law – social security, asylum etc – in which points arise.

[34] As above.

Fourth, there is much that both lawyers in private practice and NGOs can do to change legal and political culture. I would hope that there could be helpful co-operation between those engaged in public interest law within both our countries. Finally, as an extension of this, we have certainly benefited from an increasing engagement of private practitioners – both funded by legal aid and, particularly barristers, those acting on a pro bono basis - with NGO lawyers attracted by the intellectual challenge of this kind of work. This is a field that can attract – and should attract - the best legal minds who can work for progress from very different positions within the legal profession and the surrounding academic structure.

I wish you well.

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