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## PUBLIC INTEREST LITIGATION IN SCOTLAND

Tom Mullen\*  
University of Glasgow

### **Introduction: what is public interest litigation?**

The 30th anniversary of the judicial review procedure seems an appropriate time to examine the current state and future prospects of public interest litigation in Scotland. Public interest litigation may be defined as any litigation in which the person raising the action or intervening in the action seeks to advance a widely shared interest rather than an interest which is specific to him/her, and includes both cases which seek to advance only interests which are widely shared and cases in which a litigant who does have a personal stake in the outcome also presents public interest arguments. Public interest litigation has become increasingly common in recent decades and has affected a variety of policy areas including environmental protection, land use planning, energy generation and distribution, social security and human rights protection.

Public interest litigation may be pursued using various causes of action in various fora and through various procedures, but the most likely forum for public interest litigation in Scotland is the Court of Session and the procedure most likely to be used is that of judicial review. The introduction of the specialised procedure for judicial review in 1985 did not change the prospects of litigation being brought in the public interest. In fact, calls to amend the law of standing – which might have facilitated public interest litigation - were rejected on the basis that it was not competent to change the substantive law by Act of Sederunt, the vehicle chosen for introducing the new procedure.<sup>1</sup> It is only in the last decade, and particularly since the decision of the Supreme Court in *AXA General Insurance v Lord Advocate*<sup>2</sup> that significant change has occurred in this area,

Historically, judicial review litigation in the United Kingdom's three jurisdictions followed a private law model under which it was assumed that the only appropriate litigants were those pursuing their own interests. The most obvious manifestation of this was the law of standing to seek judicial review which in practice excluded actions brought to advance the public interest where those raising the action did not have a greater interest in the outcome of the litigation than that of the public generally, or of a large section of it. In recent years, this has been replaced by a model of standing which recognises the value of public interest litigation, although this has occurred only within the last four years in Scotland. The expansion of standing has been accompanied by developments in the law on public interest intervention and protective expenses orders. This article reviews developments in these three areas and considers the future prospects for public interest litigation in Scotland.

But, before reviewing the recent case law and legislation on standing and on other relevant matters such as expenses, it is necessary to consider the rationale for public interest litigation.

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\* Professor of Law, University of Glasgow.

<sup>1</sup> Lord Dunpark, *Report to the Rt Hon Lord Emslie, Lord President of the Court of Session by the Working Party on Procedure for Judicial Review of Administrative Action* (1984), para. 9.

<sup>2</sup> [2011] UKSC 46, [2012] SC (UKSC) 122.

## The rationale for public interest litigation

### *The purposes of judicial review*

In a recent article, I discussed the rationale for public interest litigation at some length and so will provide only a brief summary here.<sup>3</sup> The argument begins with establishing the purpose(s) of judicial review. The traditional answer was that it was to keep public bodies within the limits of their powers, and it was achieved by having the ultra vires principle as the core of judicial review.<sup>4</sup> In recent decades, other candidates have emerged for recognition as purposes of judicial review each of which has slightly different implications for public interest judicial review. There is, however, a consensus that keeping public bodies within the limits of their powers is at least one of the purposes of judicial review. This rationale for judicial review can be seen as an expression of the constitutional principle of the rule of law. There are many interpretations of the concept of the rule of law but the most widely accepted view is that it means, at the very least,<sup>5</sup> that government must be able to show legal authority for its actions. For many, this is not a sufficient account of the rule of law, but few would deny that this is an essential part of it.<sup>6</sup>

The notion that the purpose of judicial review is to ensure that public bodies stay within the limits of their powers, resting as it does on the constitutional principle of the rule of law, is capable of providing a consensus rationale for public interest litigation. Other more expansive views of the purposes of judicial review also provide arguments for permitting or encouraging public interest litigation, but, as they are more contentious, they are less likely to provide a widely accepted basis for it, and it is the rule of law rationale which the UK courts have in fact adopted as the basis for accepting public interest litigation. This article will, therefore, proceed on the basis that the rule of law rationale provides an appropriate theoretical basis for determining the minimum extent to which the legal system should permit or encourage public interest litigation, whilst accepting that other rationales might suggest a wider scope for it.

Until the 1970s, it seemed to be assumed that the private law model of litigation was adequate to ensure both observance of the particular laws governing executive action and, more generally, respect for the rule of law by executive government. In fact, it was not because, if standing is only granted to those with a particular interest, there is a real risk that unlawful decisions and acts of government will not be challenged, either because no-one is entitled to sue (no person having a greater interest than any other) or because those who do have the necessary standing choose not to sue (there being several reasons why persons who have legal rights may not wish to enforce them). Ensuring that government does comply with the law, therefore, requires that it be possible for persons who do not have a personal stake in the outcome to litigate in the public interest.

The need for public interest litigation has arguably increased as a result of the major constitutional reforms of the last forty or so years: membership of the EU, devolution and the

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<sup>3</sup> See T. Mullen, "Protective expenses orders and public interest litigation" 19 *Edinburgh Law Review* 36 (2015).

<sup>4</sup> See, e.g. *Moss' Empires Ltd v Assessor for Glasgow* 1917 SC (HL) 1, Lord Shaw of Dunfermline, at p. 11.

<sup>5</sup> See, e.g. K. D. Ewing & A. Bradley, *Constitutional and Administrative Law* (15<sup>th</sup> edn) (London: Pearson Longman, 2011) ch. 6.

<sup>6</sup> There is a large literature. See, e.g. J. Raz, "The Rule of Law and its Virtue" (1977) 93 LQR 195 and P. Craig, "Formal and substantive conceptions of the rule of law: an analytical framework" [1997] *Public Law* 467.

Human Rights Act 1998. These have constitutionalised the government of the UK to a considerable degree, creating legal constraints on government action (particularly as to the permissible content of legislation) where before there were only political constraints. Whilst, some are opposed to, or sceptical about some of these developments,<sup>7</sup> there is no doubt that they have expanded the role of the courts; both the substantive grounds of judicial review and its intensity have increased. Whilst to some extent we can rely on individuals who are directly affected by specific decisions, to challenge governmental illegality, we cannot do so entirely. The constitutionalisation of the legal order has, therefore, increased the need for public interest litigation. Perhaps, most significantly, these constitutional changes have increased the possibilities for challenging legislative as opposed to executive decisions. This in turn means that the range of public interest considerations that may be relevant to a court's decision on legality has been broadened compared to challenges based on the traditional grounds of review. This in turn creates a need for a wider range of persons to be able to participate in litigation to ensure that the full range of public interest considerations is brought to bear.

### *Arguments against public interest litigation*

A number of arguments have been made - mainly in the context of standing - against permitting public interest litigation, but these are now largely discredited as convincing reasons for restricting access to the courts.<sup>8</sup> Thus, for example, fears of the courts being overwhelmed by a flood of cases are exaggerated. The English experience suggests that the expansion of public interest litigation has not added dramatically to the judicial review case-load; in fact, the enormous growth in the volume of judicial reviews is mainly attributable to immigration cases in which the applicant undoubtedly has a personal stake in the outcome.<sup>9</sup> There is no reason to suppose that public interest litigants are more likely to mount ill-founded cases than those with a personal stake in litigation. In any event, the new requirement to seek permission for judicial review imposed by s. 27B of the Court of Session Act 1988<sup>10</sup> should, if it works as intended, weed out ill-founded cases at an early stage thus limiting any possible waste of court time. The concern over politicisation can be met provided the courts ensure that they only adjudicate justiciable questions, and it is not likely that they will change their approach to deciding what is or is not justiciable merely because they hear more cases brought by public interest litigants. Similarly, we can reasonably expect courts to continue to reject cases asking abstract or hypothetical questions as being unsuitable for adjudication, as they have done in the past.

Even if permitting public interest litigation did have adverse effects of the type listed above, that would not be a conclusive argument against it. The essential point is that public interest litigation is necessary in order to guarantee respect for the rule of law by executive government. Relying solely on persons who litigate to advance their own interests will not achieve that aim. It would have to be shown that the potential disadvantages of permitting public interest litigation listed above outweighed the gains achieved in terms of better

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<sup>7</sup> See, e.g., J. A. G. Griffith, "The Political Constitution" (1979) 42 *Modern Law Review* 1, T. Campbell, K. D. Ewing, and A. Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001).

<sup>8</sup> For a more detailed discussion of the arguments, see P. Craig, *Administrative Law* (7<sup>th</sup> edn) (London: Sweet & Maxwell, 2012), ch 25; T. Mullen, "Standing to Seek Judicial Review" in A. McHarg & T. Mullen (eds), *Public Law in Scotland* (Edinburgh: Avizandum, 2006).

<sup>9</sup> See, e.g. Ministry of Justice, Civil Justice Statistics Quarterly, England and Wales and Appellate Court Statistics 2014 (June 2015).

<sup>10</sup> Inserted by s. 89 of the Courts Reform (Scotland) Act 2014 with effect from 22 September 2015.

securing the rule of law. I will, therefore, proceed on the assumption that there is a strong case for permitting and facilitating public interest litigation for the purpose of ensuring respect for the rule of law and will now consider to what extent Scots law does actually permit and facilitate it.

## Standing

Until recently, the approach to standing to sue in Scots law discouraged public interest litigation. As noted above, standing was based on a private rights model under which a person had to show that s/he had both title and interest to sue or defend an action.<sup>11</sup> In practice, the Court of Session would recognise standing only where a litigant was asserting his/her legal rights and where the outcome would materially affect the interests of one of the parties to the case. When applied to administrative law, this private rights model of judicial review, made extremely difficult to for those who did not have a personal stake in the outcome to seek judicial review in the public interest.<sup>12</sup> The negative effects on public interest litigation can be illustrated by two modern cases: *Scottish Old People's Welfare Council, Petitioners*<sup>13</sup> and *Rape Crisis Centre v Secretary of State for the Home Department*<sup>14</sup> In the former case, a charity claiming to represent the interests of old people challenged guidance on entitlement to cold weather heating payments issued by the Chief Adjudication Officer on the basis that it included errors of law and was *ultra vires*. The petition was refused as although Lord Clyde considered that they had title to sue, they did not have an interest to sue. In the latter case, an organisation campaigning against sexual violence sought to challenge the Home Secretary's decision to allow former World Heavyweight Champion, Mike Tyson, leave to enter the UK for a boxing match despite his having a conviction for rape; something which would normally have precluded granting of leave. Again the petition was refused, Lord Clarke considering that that they had interest to sue, but not title.

The position was in marked contrast to that in English law. There, too, a restrictive approach based on the private rights model had been taken, but in a series of cases from the early 1980s, beginning with *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd*,<sup>15</sup> the English courts abandoned the restrictive approach to standing, interpreting the statutory test of "sufficient interest"<sup>16</sup> broadly in order to allow persons and groups to represent the public interest. The Scottish courts, however, maintained the restrictive approach long after it was abandoned in England.

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<sup>11</sup> The key cases included *D & J Nicol v Dundee Harbour Trustees* 1915 SC (HL) 7 and *Swanson v Manson* 1907 SC 426.

<sup>12</sup> For a detailed account, see T. Mullen, "Standing to Seek Judicial Review", above.

<sup>13</sup> 1987 SLT 179.

<sup>14</sup> 2002 SLT 389.

<sup>15</sup> [1982] AC 617. See also, e.g. *R v Felixstowe Justices, ex parte Leigh* [1987] QB 582, *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg* [1994] QB 552, *R v Inspectorate of Pollution, ex parte Greenpeace (No2)* [1994] 4 All ER 329 and *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [1995] 1 All ER 611. For analysis, see P. Craig, *Administrative Law*, 25-011 to 25-23.

<sup>16</sup> Senior Courts Act 1981, s. 31.

That restrictive approach was subject to academic criticism<sup>17</sup> and the Scottish Civil Courts Review recommended that the separate tests of title and interest to sue should be replaced with a single test (analogous to that applied in English law) of whether the petitioner had sufficient interest in the subject matter of the proceedings which would facilitate proceedings being brought in the public interest in appropriate cases.<sup>18</sup> Before the Scottish Government could act on this recommendation by introducing a Bill, the Supreme Court changed the Scots law of standing to seek judicial review in *AXA General Insurance v Lord Advocate*.<sup>19</sup> In that case, a group of insurance companies sought judicial review to challenge the validity of the Damages (Asbestos-related Conditions) (Scotland) Act 2009, legislation which extended the liability of employers for conditions caused by exposure to asbestos. The respondents were individuals who had been diagnosed with pleural plaques caused by exposure to asbestos<sup>20</sup>, and who might have rights of action against their former employers under the legislation. The petitioners questioned the standing of some of the respondents.

The Supreme Court confirmed that the respondents had standing, as had the courts below, but Lords Reed and Hope also seized the opportunity to rewrite the Scots law of standing to seek judicial review. Both said that whilst the requirement of showing title and interest to sue remained generally appropriate in private law cases it was not suitable for public law cases. Lord Hope declared:

“As for the substantive law, I think that the time has come to recognise that the private law rule that title and interest has to be shown has no place in applications to the court’s supervisory jurisdiction that lie in the field of public law. The word ‘standing’ provides a more appropriate indication of the approach that should be adopted. I agree with Lord Reed (see para 170, below) that it cannot be based on the concept of rights, but must be based on the concept of interests.”<sup>21</sup>

Lord Reed expressed the rationale of this more liberal approach to standing as being respect for the rule of law:

“The essential function of the courts is however the preservation of the rule of law, which extends beyond the protection of individuals’ legal rights. ... There is thus a public interest involved in judicial review proceedings, whether or not private rights may also be affected. A public authority can violate the rule of law without infringing the rights of any individual: ... A rights-based approach to standing is therefore incompatible with the performance of the courts’ function of preserving the rule of law, so far as that function requires the court to go beyond the protection of private rights: in particular, so far as it requires the courts to exercise a supervisory jurisdiction. The exercise of that jurisdiction necessarily requires a different approach to standing.”<sup>22</sup>

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<sup>17</sup> See, e.g. C. Munro, “Standing in judicial review” 1995 SLT (News) 30 and T. Mullen, “Standing to Seek Judicial Review”.

<sup>18</sup> See *Report of the Scottish Civil Courts Review* (2009), ch 12, paras 13-25, available at: [http://www.scotcourts.gov.uk/docs/aboutscs/vol1chap1\\_9.pdf?sfvrsn=10](http://www.scotcourts.gov.uk/docs/aboutscs/vol1chap1_9.pdf?sfvrsn=10)

<sup>19</sup> [2011] UKSC 46, [2012] SC (UKSC) 122.

<sup>20</sup> The legislation provided that the presence of such plaques could be considered a personal injury for purposes of the law of reparation.

<sup>21</sup> [2011] UKSC 46, para [62].

<sup>22</sup> [2011] UKSC 46, para [169].

That seemed a clear enough signal that the Court of Session should adopt a more liberal approach to public interest standing in future, but that court initially seemed reluctant to embrace the new approach. In *Walton v Scottish Ministers*,<sup>23</sup> the court had to consider a challenge under the Roads (Scotland) Act 1984 to a proposal to build a new road near Aberdeen by a person who had long campaigned against the proposal. The court had to decide whether Mr Walton was “a person aggrieved” in terms of paragraph 2 of Schedule 2 to the 1984 Act and, therefore, entitled to challenge the road proposal. The Inner House<sup>24</sup> decided that Walton was not such a person aggrieved, commenting that a person cannot claim to be a person aggrieved under the 1984 Act simply because he was strongly opposed to the decision and had campaigned against it. He was no more than an opponent of the road scheme and in that respect was “no different from, say, someone who lives many hundreds of miles from the proposed route but has, on occasions, to travel to Aberdeen.”<sup>25</sup> The court noted that the Supreme Court had recently broadened the law of standing in *Axa* but distinguished *Axa* on the basis that it concerned standing to invoke the supervisory jurisdiction whereas in *Walton* the court was not exercising its supervisory jurisdiction but considering an appeal under statute and so *Axa* did not assist in determining who was entitled to bring a case to court under the 1984 Act.

This was a peculiarly narrow approach to adopt. In the first place, it was simply out of step with the wide interpretation that had been given to the term “person aggrieved” in statutory appeal provisions in a series of cases, particularly those under planning legislation. Persons who had made objections or representations as part of the procedure preceding the decisions challenged had generally been regarded as persons aggrieved.<sup>26</sup>

Secondly, it was in effect a restatement of the private rights model of standing that had been rejected in *Axa*. There are very close similarities between appeals to the court under the 1984 Act, and under certain other statutes e.g. planning legislation which also use the term “person aggrieved” formula, and applications to the supervisory jurisdiction. The grounds of challenge to administrative decisions are essentially the same under these statutes as they are under the supervisory jurisdiction, as was explained in *Wordie Property Co Ltd v Secretary of State for Scotland*.<sup>27</sup> Indeed, the *Wordie* case, which was a statutory appeal under the planning legislation, has been frequently cited as an authoritative statement of the grounds of judicial review in applications to the supervisory jurisdictions.<sup>28</sup> Also, the considerations of legal policy favouring public interest standing apply just as much to these statutory schemes as they do to judicial review. Yet these legal policy considerations are not even mentioned in the court’s opinion.

It is not, therefore, surprising that when *Walton* came to it on appeal the Supreme Court reiterated the need to take the new and broader approach to standing that it had stated in

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<sup>23</sup> *Walton v Scottish Ministers* [2012] UKSC 44; 2013 S.C. (UKSC) 67.

<sup>24</sup> [2012] CSIH 19.

<sup>25</sup> *Ibid.*, para 37.

<sup>26</sup> See *North East Fife District Council v Secretary of State for Scotland* 1992 SLT 373; *Cumming v Secretary of State for Scotland* 1992 SC 463; *Mackenzie’s Trustees v Highland Regional Council* 1994 SC 693; *Lardner v Renfrewshire District Council* 1997 SC 104; *Cook v Southend-on-Sea Borough Council* [1990] 2 QB 1; *Turner v Secretary of State for the Environment* (1974) 28 P. & C.R. 123; *Times Investment Ltd v Secretary of State for the Environment* (1991) 61 P. & C.R. 98 (all cited by Lord Reed in the Supreme Court).

<sup>27</sup> 1984 SLT 345.

<sup>28</sup> Lord Clyde and D. Edwards, *Judicial Review* (Edinburgh: W Green, 2000) 14.08, and e.g., *Strathclyde Passenger Executive v McGill Bus Service Ltd*. 1984 SLT 377.

*Axa*.<sup>29</sup> The Supreme Court rejected Walton’s challenge to the legality of the scheme, but confirmed that he was a “person aggrieved” for purposes of the Act. The factors which entitled him to bring the case were that Mr Walton made representations to the Scottish Ministers in accordance with the procedures laid down in the 1984 Act, and taken part in the local inquiry held under the Act. He was entitled as a participant in the procedure to be concerned about any unlawful failure to consult the public by Ministers or unfair procedure. He was not a mere busybody interfering in things which did not concern him. He resided in the vicinity of the new road. He was an active member of local environmental organisations and chairman of the local organisation formed specifically to oppose the scheme on environmental grounds. He was “indubitably a person aggrieved within the meaning of the legislation.”<sup>30</sup>

Although strictly speaking, the case was concerned with the meaning of the statutory formula, “person aggrieved”, Lord Reed said that it might be helpful to discuss standing at common law “in view of the Extra Division’s observation that Mr Walton would lack standing, even if the test were the same as would apply to an application to the supervisory jurisdiction under the common law ...”.<sup>31</sup> He said that in *Axa* the Supreme Court had:

“... clarified the approach which should be adopted to the question of standing to bring an application to the supervisory jurisdiction. In doing so, it intended to put an end to an unduly restrictive approach which had too often obstructed the proper administration of justice: an approach which presupposed that the only function of the court’s supervisory jurisdiction was to redress individual grievances, and ignored its constitutional function of maintaining the rule of law.”<sup>32</sup>

He went on to say that the factors which had supported Mr Walton’s entitlement to bring the present application as a “person aggrieved” would: “Mutatis mutandis, ... also have given him standing to bring an application for judicial review ....” confirming that the broad approaches to common law standing applied equally to standing under this statutory formula.

Lord Hope of Craighead also reiterated the reasons for taking a broad approach to standing that permitted public interest litigation and the comments of both were supported by the other judges. So, if the Supreme Courts’ message had not been understood the first time, there was now surely no doubt about the need to accept that the law of standing in judicial review had changed and was now far more receptive to public interest litigants.

### **Developing the new approach to standing**

The test for standing for judicial review has now been put on a statutory footing; section 27B (2) of the Court of Session Act 1988; the court may not grant permission for judicial review unless the applicant can demonstrate “a sufficient interest in the subject matter of the application”. In effect this endorses the new approach to standing set out by the Supreme Court and, as the term “sufficient interest” is not defined, there is a need to elaborate the new approach which the Supreme Court and the legislation have introduced. Two uncertainties

<sup>29</sup> [2012] UKSC 44; 2013 SC (UKSC) 67.

<sup>30</sup> *Ibid.*, para 88.

<sup>31</sup> *Ibid.*, para 89. Whilst this is a possible interpretation, it is not clear that the Extra Division intended to say that Mr Walton would have lacked standing to invoke the supervisory jurisdiction at common law.

<sup>32</sup> *Ibid.*, para 90.

remain. One is whether the Court of Session will apply the new approach based on the rule of law rationale in the spirit which the Supreme Court intended. The other is what more detailed guidance the courts should create on the application of the sufficient interest test for standing. The judgments of Lords Reed and Hope in *Axa* and *Walton* provide only a general statement of the new approach to standing and the rationale for it. They do not resolve all of the issues that might arise when litigants assert that they have standing to sue in the public interest, in particular the factors which the court should take into account in deciding whether to recognise the standing of a public interest litigant. I will deal with the second issue first.

Given that the new approach in Scots law was inspired by the approach taken in English law, it is worth looking at the factors which the English courts have referred to in recognising the standing of public interest litigants. The English cases suggest that where a person seeks to litigate to enforce the public interest rather than a personal interest, the court should take into account:<sup>33</sup>

- the legislative framework within which the decision challenged was taken;
- the strength and importance of the grounds of challenge;
- whether any other person would be likely to raise the legal issues in question if standing were denied;
- whether that person has relevant expertise either in the relevant law or in the subject matter that might assist the court;
- the track record of the person in campaigning about or otherwise working on the issues raised by the case;
- whether that person has participated in any consultation process that preceded the decision, and
- the extent to which that person represents the interests of persons affected by the decision.

Applying these factors, they have created a generous regime for public interest litigation. Interest groups and campaigning groups regularly appear in the courts to challenge pressure groups. Prominent examples include *R. v Inspectorate of Pollution Ex parte Greenpeace Ltd (No.2)*,<sup>34</sup> *R v Secretary of State for Foreign and Commonwealth Affairs, Ex parte Rees-Mogg*<sup>35</sup> and *R v Secretary of State for Foreign and Commonwealth Affairs, Ex parte World Development Movement Ltd.*<sup>36</sup> In *Greenpeace Ltd (No 2)*, an environmental pressure group were recognised as having standing to seek judicial review of a decision to allow British Nuclear Fuels Plc to discharge radioactive waste from their plant at Sellafield, Cumbria in order to test their new thermal oxide reprocessing plant (THORP). In *Rees-Mogg*, the claimant, who was described as a member of the House of Lords with an interest in constitutional issues, had standing to seek judicial review of the decision of the Foreign Secretary to ratify the Maastricht Treaty on European Union. In *World Development Movement*, a pressure group had standing to challenge the decision of the Foreign Secretary to approve financial assistance for construction of the Pergau River Dam in Malaysia under the 'aid and trade' provisions of the Overseas Development and Co-operation Act 1980.

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<sup>33</sup> See Lord Woolf, J Howell & A Le Sueur, *De Smith's Judicial Review*, 6<sup>th</sup> edn (London: Sweet & Maxwell, 2007), 2-024-41.

<sup>34</sup> [1994] 4 All ER 329.

<sup>35</sup> [1994] QB 552.

<sup>36</sup> [1995] 1 W.L.R. 386.

Each of the factors listed above are appropriate if standing is considered in terms of the rule of law rationale for public interest litigation. Consideration of the legislative framework must always be appropriate in the light of the doctrine of the sovereignty of Parliament and broader democratic considerations. The strength and importance of the grounds of challenge is also in general an appropriate consideration as court time is a scarce resource which does require to be rationed.

The likelihood that if the petitioner were denied standing, no-one else would make an equivalent challenge to the decision in question must be a powerful argument for recognising standing since this is exactly the problem with the private rights model that the rule of law rationale addresses. As Lord Reed said in *Walton*:

... there may also be cases in which any 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.<sup>37</sup>

The converse is not necessarily true. The fact that someone who has a personal interest is willing to bring the case should not automatically rule out recognition of the standing of any other public interest petitioner. Although the need to ensure that someone challenges an alleged illegality is the central aspect of the rule of law rationale, it does not exhaust it. It should be obvious that there may be more than two points of view as to how a disputed legal question should be resolved. In some cases, if the argument is left entirely to petitioner and respondent, certain relevant points may not be raised. If there is/are also one or more public interest petitioners in the case, then that lessens the risk that relevant points will not be aired. This is essentially the rationale for public interest intervention which has been permitted in many cases and is discussed below. So, in appropriate cases, the rule of law rationale should be interpreted as allow public interest petitioners to bring proceedings alongside petitioners with a personal interest where they have something of value to add to the argument.

The value of expertise hardly needs stating; the legal issues brought to court by public interest litigants often require consideration of complex factual questions for which the possession of specialised knowledge, for example, the environmental impact of development, (which the court does not possess) is valuable. However, as noted in *Greenpeace (No. 2)*, the expertise that might be useful includes expertise in the law itself, as opposed to technical expertise in the relevant area of policy. Public bodies will usually already have, or can readily procure, reasonably expert advice on the relevant law. The same is not true of the average citizen or the average private sector lawyer. Pressure groups are more likely to have some expertise in the relevant law or to know which lawyers to go to in order to get it.

However, the possession of expertise is not essential in all cases. There will always be cases which affect widely shared interests but which do not require technical expertise for their resolution. That is because social policy always depends ultimately upon values. So, whilst it is important to proceed on the basis of knowledge of the relevant facts, because all policy exists to advance certain values, the argument about what policy should be is always value laden. The contribution of interest groups lies in the analysis of the arguments for and against

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<sup>37</sup> *Walton*, para. 94.

policy proposals as well as the facts to which policy responds. Therefore, where what is disputed is, to a large extent, questions of value rather than technical matters, the court should not look too hard to find the petitioner's expertise.

Similarly, the fact that the litigant has a track record of campaigning about or otherwise working on the issues raised by the case should generally be treated as a factor in favour of granting standing, it too should not be treated as an absolute prerequisite, especially where it is unlikely that anyone else would be willing to bring the case.

It also makes sense to consider whether the litigant has participated in any consultation process that preceded the decision; it is reasonable to expect those who are particularly concerned about draft legislation or any impending policy decision to make use of the opportunities given to take part in the political process. However, given that it is the public interest that is at stake, lack of participation should not automatically lead to rejection of a claim. Standing should only be refused on this basis if the rule of law will not be undermined e.g. someone else will raise the issue of legality, or if any damage to the rule of law is outweighed by other constitutional values.

The ability of the claimant to represent persons affected by the decision has been treated as a significant factor weighing in favour of recognising standing, as in *Greenpeace (No. 2)*. The extent to which this is relevant should vary according to the nature of the representative role. Cane has distinguished between three different types of representative standing: associational, public interest and surrogate standing.<sup>38</sup> Space does not permit a full account but, briefly, by associational standing he means the situation where a group or organisation sues on behalf of its members, by surrogate standing he means the situation in which one person is the nominal pursuer/petitioner but represents the interests of another who may be regarded as the real applicant, and by public interest standing he means the situation in which an individual or group seeks to represent the interests of the whole public or a section of it rather than any identified or identifiable individuals. Whilst the actual capacity of a group or organisation to represent its members is relevant when the organisation sues on their behalf, it seems less so when the petitioner seeks to advance wider public interests rather than a group of people with a defined membership.

Accordingly, I recommend that the Court of Session takes a similar approach to the English courts in developing law and practice on public interest standing and uses the same factors to decide when standing should be recognised. In this way, the court should be able to develop a coherent approach to public interest standing which flows from the rule of law rationale and is consistent with other constitutional values.

### **Applying the new approach: standing after Walton**

As to the second area of uncertainty, it is not yet clear whether the Supreme Court's approach as set out in *Axa* and *Walton* has been wholly accepted by the Court of Session. The most recent case on standing is *Christian Institute v Lord Advocate*,<sup>39</sup> in which four charities and three individuals challenged the validity of Pt 4 of the Children and Young People (Scotland) Act 2014. The challenge related to the 'named person' scheme set up by the Act under which

<sup>38</sup> P. Cane, "Standing up for the Public" [1995] Public Law 276.

<sup>39</sup> [2015] CSOH 7, 2015 SLT 72

there will be, when the legislation is fully operational, for every child or young person in Scotland an identified individual whose functions relate to promoting, supporting or safeguarding the wellbeing of that child or young person. The petitioners argued that that the provisions of Pt 4 were incompatible with (i) certain individual rights under the European Convention on Human Rights, in particular the right to family life (Article 8), freedom of religion (Article 9) and the right to education (Protocol 1, Article 2), (ii) the law of the European Union on data protection, and (iii) fundamental constitutional rights protected by the common law and authorised unjustifiable state interference with the rights of children and young persons and their parents.

The arguments that the named person scheme was unlawful in these ways were weak and rightly rejected by the court. The court's conclusions on standing were also correct in the circumstances of the case. However, some of the court's comments on standing are more problematic. Three of the seven petitioners were parents of school age children and the Lord Advocate conceded their standing. The other four petitioners were charities. Two were Christian charities (the Christian Institute) and the CARE (Christian Action Research and Education)). The purposes of the Christian Institute included the furtherance and promotion of the Christian religion and the advancement of education. It was actively involved in legal work across the UK and claimed to defend cases of national importance for religious liberty. Care's purposes included the provision of resources and help to provide Christian insight and experience in matters of law and public policy in the UK and in Scotland. The third, the Family Education Trust, was committed to researching the causes and consequences of family breakdown and promoting the welfare of children and young people. The fourth, the Young ME Sufferers ("Tymes") Trust provided a service for children and young people suffering from ME and their families. It worked with and advised families, doctors, teachers, other specialists and the government.

Lord Pentland acknowledged (referring to *Walton v Scottish Ministers*) that the court should not adopt an unduly restrictive approach to standing given that these were public law proceedings, but thought that the petitioners were 'not in any realistic sense directly affected by Pt 4 of the Act.' He thought that all four lacked sufficient interest entitling them to seek judicial review of Pt 4 of the Act. Fundamentally, none was entitled to challenge the *vires* of the Act on the ground that it contravened Convention rights as none was a "victim" of the violation for purposes of article 34 of the Convention.<sup>40</sup> Insofar as the claims went beyond breach of Convention rights, there were further reasons for concluding that they did not have sufficient interest. Firstly, this was not a case in which their involvement was needed in order to ensure that the rule of law was upheld; that was catered for by the participation of the other three petitioners. Secondly, three of them had failed to participate in the consultation exercise that had preceded enactment. The fourth had participated in the consultation but the views expressed were too insubstantial to engender a sufficient interest. Thirdly, none of them had sufficient levels of expertise to support their claims to act in a representative capacity.

The point concerning Convention rights is discussed below. The first and second of the further reasons appear reasonable in the circumstances. It could not be said that the alleged illegality would go unchallenged if the standing of a public interest petitioner were not recognised, and there seemed to be no good reason why three of the four charities did not

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<sup>40</sup> Scotland Act 1998, s.100.

participate in either the consultation exercise which preceded the Act or the legislative scrutiny of the Act.<sup>41</sup>

Lord Pentland's approach to the issue of expertise is more questionable. He took a very demanding, arguably unduly demanding, approach. Whilst noting that two were Christian charities, he thought that the legislation did not affect questions of religion in any meaningful sense. Another was an educational charity but their activities were not focussed on systems and methods for providing public services relating to children. The Tymes Trust was a charity supporting children and young people with ME but the legislation was not concerned with that condition. Therefore, none of them was entitled to bring these proceedings on behalf of other persons who might potentially have had the requisite standing to challenge Pt 4 of the Act.

Whilst these comments are all accurate, the effect of the Lord Ordinary's approach was that four different charities which amongst them had interests in religion, education and children apparently could not amongst them muster the necessary expertise to be worth listening to. The obvious question is whether there actually exist charities or interest groups with interests and activities which are (a) more tightly focussed, and (b) more directly relevant to the legislation than the four petitioners in this case. There may well not be any. The fact is that interest groups typically define their aims and activities broadly and so they are unlikely to map neatly onto the concerns of any particular piece of legislation. Lord Pentland's approach set an impossibly high standard for judging the relevance of expertise to litigation before the court; the assumption was made rather too readily that they had nothing to offer. If such a strict approach to expertise were to be repeated in future cases that would be a retrograde step that would stifle public interest litigation.

Of course, *Christian Institute* is only one case and is an Outer House decision, but it seems not to be an isolated instance of an approach to standing which continues to be more restrictive and more focussed on individual grievances than that required by *AXA* and *Walton*. Another such instance is the most recent Inner House decision on public interest intervention which is discussed in the next section.

Lord Pentland's summary rejection of the non-parent petitioners' standing to challenge the legislation on the ground that it contravened convention rights was perhaps inevitable, but it points up a significant limitation of the new approach to standing. Under section 7(7) of the Human Rights Act and section 100(1) of the Scotland Act, standing is confined to those who are victims for the purposes of article 34 of the ECHR. Whilst in general it is appropriate to leave it to persons whose rights are infringed by specific acts and decisions, to challenge human rights violations, to leave that the only avenue for raising human rights claims will in practice mean that there will not be adequate supervision of the UK's obligations under the ECHR and this does not satisfy the rule of law rationale.<sup>42</sup>

It might be objected that the rule of law rationale does not apply because whenever a policy of a public body is incompatible with convention rights there will in practice always be a 'victim' who is willing to take a case to court. The objection would not be sound for two

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<sup>41</sup> The Education and Culture Committee of the Parliament had issued a general call for evidence at stage 1.

<sup>42</sup> Limitations of space preclude a full discussion of this topic. For more detailed analysis, see J Miles, "Standing under the Human Rights Act 1988: theories of rights enforcement and the nature of public law adjudication" 59(1) *Cambridge Law Journal* (2000) 133-167 and R. Clayton & H. Tomlinson, *The Law of Human Rights* (2<sup>nd</sup> edn) (Oxford: Oxford University Press, 2009) 22.50-22.58.

reasons. First, as noted above, those who do have standing based on personal interests sometimes choose not to sue (or are unaware that they can sue). Second, particularly when dealing with policy decisions, whether expressed in legislation or otherwise, there will be situations in which it is preferable to have the compatibility of the policy with convention rights determined at an early stage rather than to wait for victims of specific decisions or actions to bring cases before the courts or tribunals.<sup>43</sup> So, there is some need for public interest petitioners in human rights cases even if that need may arise less frequently than in, e.g. environmental law. To allow a public interest petitioner to raise an action in such situations would merely be an application of the general approach to standing mandated by *Axa* and *Walton*.

There are two ways round the obstacle apparently presented by the victim test. One is to rely on common law fundamental rights rather than on convention rights and this basis for standing was accepted by Lord Pentland in the *Christian Institute* case. However, this is not wholly satisfactory; the common law on fundamental rights is relatively undeveloped compared to the law on convention rights and it cannot be said that for every convention right there is an equivalent common law right. It should, therefore, be possible to bypass the victim test in another way; it should be accepted that the failure of a public body to respect convention rights can provide a basis for standing independent of the Human Rights Act and the Scotland Act.

One possible objection is that this would offend against the constitutional principle that an unincorporated treaty is not part of Scots law. That objection would not be sound because the decisions and actions challenged would be unlawful in terms of the Human Rights Act and the Scotland Act. A second possible objection is that it would be incompatible with Parliaments' intention in enacting section 7(7) of the Human Rights Act and section 100(1) of the Scotland Act which was to limit challenges based on convention rights to victims as defined in article 34 of the ECHR. However, this is only one possible interpretation of those sections. A preferable reading is that the enactment of the victim test was not intended to cut across the expansion of public interest standing in administrative law in recent years, such a reading being more compatible with the rule of law than the restrictive reading. This reading does not render the statutory victim tests nugatory as it will only be rarely that the conditions that would justify allowing a non-victim to sue will be present. It does ensure that the requirements of the rule of law in this context are respected.

### **Public interest intervention**

In *Sustainable Shetland v Scottish Ministers*,<sup>44</sup> an environmental campaign group sought judicial review of a decision of the Scottish Ministers to grant consent for the construction of a substantial windfarm in Shetland under the Electricity Act 1989, on the basis, amongst other things, of the failure of Ministers to take proper account of the effect of the windfarm on a migratory bird, the Whimbrel. The Lord Ordinary's decision that it was not competent for the Minister to give consent to a person who did not already have a licence to generate electricity (the applicant did not have such a licence) came as a surprise both to windfarm developers and to the Scottish Ministers. When her decision was reclaimed, applications to

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<sup>43</sup> *Scottish Old People's Welfare Council, Petitioners* 1987 SLT 179 (discussed above) provides an excellent example in a non-human rights context.

<sup>44</sup> The case reached the Supreme Court on the substantive issue. See [2015] UKSC 4; 2015 S.L.T. 95. For the decision of the Inner House on the interventions, see [2013] CSIH 116; 2014 G.W.D. 2-38.

intervene in the proceedings were made: by the Trump Organisation which was opposing another wind farm development in Scotland and which sought to intervene both as a person directly affected and in the public interest; by AES K2 Ltd and others who were all developers of onshore and offshore windfarms who sought to intervene as persons directly affected; and the Royal Society for the Protection of Birds which applied to intervene in the public interest.

It is the treatment of the RSPB which is of most interest. The RSPB had been consulted when the application was made to the Scottish Ministers and had made representations. Their representations had been rejected and they had considered applying for judicial review but decided not to do so because of the potential expense. They had also decided not to enter the process when the case was in the Outer House. However, given that in the appeal, the Court would be considering the proper interpretation of the EU Birds Directive,<sup>45</sup> they had decided to intervene at the appeal stage. They thought that there were wider considerations of which the RSPB had a unique understanding which meant that they could assist the court on the proper interpretation of the Directive. They argued that their intervention would not unduly delay the process, given that they would be content to submit a written submission, although they would prefer to have the ability to lodge a 10,000 word presentation.

The Court noted that the approach to be taken to standing in judicial review petitions involving issues of public law was that set out in *AXA* and that this approach applied also to applications to intervene, but refused the motions to intervene from all parties. Lord Carloway, giving the Opinion of the Court, refused the RSPB's application on the basis that, after their objections had been rejected by Ministers, they could have raised their own judicial review petition to challenge that decision or could have intervened in the Outer House. They had chosen not to do so and:

“In these circumstances, the court does not consider it appropriate to allow them to enter the process at the appellate stage under the guise of a public interest intervention. Had they considered that their objections ought to have been sustained, or challenged any other aspect of the consent, they had the opportunity to do so at least in the Outer House proceedings. In any event, standing the positions of Sustainable Shetland and the Scottish Ministers, the court does not consider that any propositions advanced by the RSPB are likely to assist the court. The court will be hearing full argument upon the birds issue as focused in the grounds of appeal and the answers to them.”

The first reason for refusing permission to intervene seems weak and once again is based on the assumptions of the private rights model of standing. Where a party is seeking to advance their personal interest, it would be legitimate to say, “you could have intervened at first instance, but you have now lost your chance.” This is less appropriate when the party represents the public interest because the refusal of permission may set back the public interest, including respect for the rule of law. Moreover, the typical public interest petitioner or intervener faces greater difficulties in funding litigation than do the public authorities and commercial organisations who are so frequently protagonists in environmental and planning litigation. It is worth noting that in another Scottish case, *Doogan v Greater Glasgow and Clyde Health Board*,<sup>46</sup> the Supreme Court saw no obstacle to permitting an intervention

<sup>45</sup> Council Directive 2009/147/EC.

<sup>46</sup> [2014] UKSC 68, [2015] AC 640. The Royal College of Midwives and the British Pregnancy Advisory Service were each given permission by the Supreme Court to intervene in the appeal.

which was first sought only when the case reached that court. If we are serious about allowing public interest litigation we will not insist that public interest litigants must intervene at first instance or not at all.

The second reason for refusing permission to intervene is not entirely convincing either. The court's position seems to be that if a legal issue (in this case the requirements of the EU Birds Directive) is to be argued by one of the parties, there is no benefit to be derived from intervention. However, it should be obvious that there may be more than several points of view on how a disputed legal question should be resolved, and so if the argument is left to the petitioner and the respondent, certain relevant points may not be raised. That is one of the reasons why intervention is allowed. It may be that the Court was influenced by the fact the petitioner was a public interest litigant, so that to allow the RSPB to enter the process would be unnecessary and simply lead to duplication. Again, this is a dubious assumption. The RSPB clearly has great expertise in analysis of bird habitats, and it is not clear that Sustainable Shetland has equivalent expertise or that it would make the same points. The assumption that RSPB had nothing to add seems to have been made rather too briskly.

It is also worth noting just how limited the burden imposed on other parties by public interest intervention under Scottish procedure is. Rule 58.20 envisages that an intervention will typically consist of a written submission which (excluding appendices) does not exceed 5,000 words. Only in exceptional circumstances may the court allow a longer submission or an oral hearing. In the light of that, Sustainable Shetland appears to be a further example of unwillingness in the Court of Session to hear the message of *AXA* and *Walton*. Practice in the English courts appears to be more liberal; there have been many cases in which two or more public interest interveners and/or claimants have been permitted to appear.

### **Protective expenses orders**

The third adjustment to the traditional approach which has been introduced to facilitate public interest litigation has been the protective expenses order. These are a relatively recent development in administrative law, having emerged in England and Wales from the late 1990s and in Scotland, only since 2006. The normal rule in civil litigation is that expenses follow success; the party who loses has to pay the other party's legal costs as well as his/her own. This is likely to act as strong disincentive to public interest litigation; an individual or organisation could face severe financial hardship as a result of losing a case, especially given that judicial review is available only in the Court of Session. The arguments for varying the normal expenses rule in cases brought in the public interest are essentially the same as those which supported a broadening of standing, i.e. the risk that the rule of law will be undermined. Broadening standing removed the most obvious barrier that prevented public interest litigants from bringing cases but left in place another barrier – that of cost – which can be extremely hard to surmount. The arguments for varying the normal rule have been accepted and such orders have become an established part of the system of public law remedies both in Scotland where they are known as protective expenses orders (PEOs) and in England and Wales where they are known as protective costs orders (PCOs).

I will not discuss PEOs in detail I have done this in a recent article,<sup>47</sup> but they are worth considering precisely because they have been introduced to facilitate public interest litigation. Their development has been principally the work of the courts but to that has been added the statutory regime set out in Chapter 58A of the Rules of Court. This Rule of Court and the parallel rules for the other UK jurisdictions were made to implement the UK's obligations under the Aarhus Convention and the EU Public Participation Directive (PPD) (Dir. 2011/92/EU). There, are therefore, two distinct legal bases for making PEOs: the traditional discretion of the courts to regulate expenses (these are now referred to as PEOs) and the statutory regime. The former are potentially available in any area of public law; the latter only in environmental cases covered by the PPD. As a result there are significant differences of detail in the law applying to common law PEOs and that applying to environmental PEOs, the most striking of which is that the maximum liability of the applicant where the court makes an environmental PEO is £5000 and the court may reduce the liability to zero, whereas in common law cases there is no upper limit on the expenses cap.

In principle, this seems to be an unsatisfactory situation as the justification for allowing the court to make PEOs in environmental cases is exactly the same as those for allowing the court to make PEOs in cases generally, i.e. upholding the rule of law by facilitating public interest litigation. That justification applies to all public interest litigation; environmental law cases are not uniquely important in this regard. It should not be significantly harder to obtain a PEO in one type of case than the other, nor should the nature of the orders made, e.g. the level of cost protection given two applicants be different in the two types of case.

As yet, there is no clear evidence that it is more difficult to obtain a common law than an environmental law PEO,<sup>48</sup> but the risk of a gap opening up in future remains and the development of such a gap would be inconsistent with the rule of law rationale and it will be important to monitor developments in this area.

## Conclusion

Until recently, there was far less public interest litigation in the Scottish than the English courts. There was an obvious doctrinal reason for that; the private law model of standing that was applied in judicial review cases. That obstacle was apparently removed by the decisions of the Supreme Court in *Axa* and *Walton* and there has definitely been an increase in public interest litigation since those decisions as the cases cited in this article make clear. However, there is a variety of other reasons – space does not permit detailed analysis of them – why we would not expect there to be as many public interest cases per capita in the Scottish jurisdiction as there are in England and Wales. However, substantial further devolution of government functions, following the recommendations of the Smith Commission would increase the potential scope for public interest litigation in Scotland.

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<sup>47</sup> T. Mullen, “Protective expenses orders and public interest litigation”. See also K. Campbell, “Protective expenses orders: where have we got to?” 2014 SLT (News) 19.

<sup>48</sup> For cases in which environmental PEOS have been sought, see *Carroll v Scottish Borders Council* 2014 SLT 659, *Friends of Loch Etive (Petitioners)* [2014] CSOH 116, *John Muir Trust v Scottish Ministers* [2014] CSOH; 2015 G.W.D. 1-20 and *Gibson v Scottish Ministers* [2015] CSOH 41; 2015 G.W.D. 13-224. For a common law application decided since the enactment of Rule 58A, see *Hillhead Community Council v City of Glasgow Council* 2015 SLT 239.

Having said that, it would be a mistake to conclude that all of the specifically legal barriers to public interest litigation have been lowered to an acceptable height. On the evidence of *Sustainable Shetland*, the Inner House does not yet appear to be as receptive to public interest litigants as the Supreme Court and specific decisions such as *Sustainable Shetland*, *Christian Institute* suggest that the implications of the rule of law rationale are not yet fully accepted. There has been substantial progress but more work remains to be done.