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# A proposal for a new approach to standing in judicial review claims

*"It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing* [unlawful action] *to the attention of the court to vindicate the rule of law and get the unlawful action stopped"* (Lord Diplock)[1]

Case law from this year suggests that, contrary to the "liberal approach" that had developed,[2] English courts have started to apply the rules on standing in judicial review cases more strictly.[3] In that context, it becomes necessary to consider whether the current test (the "**sufficient interest test**") is an effective one. This essay proposes that the difficulty the courts have had in applying the sufficient interest test in the context of public interest claims shows that it is inadequate. As such, to facilitate such claims, the sufficient interest test should be supplemented by an alternative test based on suitability. Under the proposed scheme, a person bringing a judicial review claim in the public interest (a "**public interest claimant**") would have standing if they were a "suitable" claimant, with suitability defined by reference to practical factors derived: (i) from the existing judicial review case law; and (ii) from the approach taken to class action representatives in the Competition Appeal Tribunal. The proposal would provide a principled and bounded way of ensuring that the strict application of the sufficient interest test does not lead to the "*grave lacuna*" deprecated by Lord Diplock.

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[1] *R v Inland Revenue Commissioners Ex p. National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617 HL, 644 (Lord Diplock).

[2] See eg *Civil Procedure* (Sweet & Maxwell 2022) (the 'White Book'), vol 1, para 54.1.11.

[3] See eg *R (Good Law Project) v The Prime Minister* [2022] EWHC 298 (Admin), as discussed further below.

Judicial review and types of judicial review claimants

A judicial review claim seeks a review of the lawfulness of acts or omissions by public bodies exercising public functions.[4] Such claims focus on the lawfulness of the decision-making process, rather than with the merits of the decision.[5] To bring a claim for judicial review, the claimant must first obtain the permission of the court.[6]

There are different types of Judicial review claimant. A legal person (for example an individual or a company) might seek to bring claim arising out of an infringement of their rights, or on the basis of a broader public interest. Alternatively, a "group" may seek to bring a judicial review claim, either on an associational, surrogate or public interest basis.[7]

These various types of individual and group claimants fall into two categories.

1. A "**specific interest claimant**" brings a claim arising out of the interest of one or more identifiable individuals. An individual bringing a judicial review claim in respect of, for example, a planning decision that affects them would be a specific interest claimant. However, so would, for example, a group bringing a claim on behalf of young offenders in a specific area;[8] though the latter group may not have a direct interest in the matter in question, their claim is based on the direct interests of specific individuals.

[4] CPR 54.1(2); White Book, vol 1, para 54.1.1.

[5] White Book, vol 1, para 54.1.4.

[6] Senior Courts Act 1981, s 31(3).

[7] For further discussion of the different types of group claim, see Paul Craig, *Adminstrative Law* (9th edn, Sweet & Maxwell 2021) para 25-023.

[8] As in *R v Stoke City Council, Ex p. Highgate Projects* [1994] COD 414 QBD.

2. A public interest claimant (whether an individual or a group) brings a claim in the public interest. Such a claimant is not a specific interest claimant, because his or her claim is not formulated by reference to the specific interests of one or more identifiable individuals. Instead, a public interest claimant's claim is based on the broader principle that it is in the public interest for unlawful action to be reviewed and the rule of law to be upheld.

This proposal focusses on public interest claimants, since (as considered further below) it is those claimants specifically that fit uneasily within the current sufficient interest test and therefore may be excluded from the judicial review regime if the current test is applied more strictly moving forward.

<u>The development of the current test</u>

The following sufficient interest test for standing in judicial review claims was introduced in 1978:

> *The Court shall not grant permission unless it considers that the applicant has a sufficient interest in the matter to which the application relates.*[9]

Since the test ultimately turns on the exercise of the court's judgement as to **"**sufficiency**"**, it has been described by former Court of Appeal judge Stephen Sedley as **"***deliberately elastic***"**.[10] However, even with that elasticity, the relationship between public interest and sufficiency is conceptually difficult.

In a claim issued by a public interest claimant (unlike in a claim issued by a specific interest claimant), there are three fundamental elements: the subject-matter of the

[9] RSC Order 53 r 3(7). The test is now in Senior Courts Act 1981, s 31(3).

[10] Stephen Sedley, 'Not in the Public Interest' (London Review of Books, Vol 36 No 5, 6 March 2014).

claim, the claimant, and the public. The court's role under the sufficient interest test therefore becomes less clear, since there are various interests involved: the public's interest in the subject-matter of the claim; the claimant's interest in the subject-matter of the claim; the claimant's interest in upholding the public interest. It is not obvious which of those interests is the one which requires analysis by the court.

The difficulty in principle has been borne out in practice, with case law in the early 1990s in particular producing inconsistent approaches.[11] When faced with public interest claimants, some judges applied the sufficient interest test more strictly and refused to allow claims,[12] whereas others took a more permissive approach.[13] In light of those inconsistencies, the Law Commission proposed a new two-track approach to standing.[14] However, the proposal was not adopted, and the formal issue was not resolved. Instead, in the absence of formal resolution, the issue has been dealt with by the exercise of discretion by the courts, and public interest claims have been allowed by virtue of the courts taking a liberal approach to standing.[15] However, without a resolution of the underlying issue, the possibility of bringing a public interest claim has been dependent on judicial flexibility. As such, there has always been a risk that a shift in judicial approach could cause the fundamental tension within the current test to resurface.

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[11] Eg see the analysis in Peter Cane, "Standing up for the Public" [1995] PL 276, 281.

[12] Eg *R v Environment Secretary, ex p. Rose Theatre Trust* [1990] 1 QB 504, 522 (Schiemann J).

[13] Eg *R v Inspectorate of Pollution, ex p. Greenpeace (No.2)* [1994] 4 All ER 329 QBD, 351 (Otton J).

[14] Law Commission, *Administrative Law: Judicial Review and Statutory Appeals* (No 226, 1994), para 5.22, as discussed further below.

[15] White Book, vol 1, para 54.1.11.

A new judicial approach

Recent case law suggests that the liberal approach to standing might be coming to an end, and the issue of standing may now be subject to significant scrutiny in a way that it has not previously been. This can be shown by the approach taken by the courts to the Good Law Project ("GLP").

Until this year, GLP had had significant success bringing judicial review claims,[16] and even where it was unsuccessful, standing was rarely an issue. For example, in *Pestfix*,[17] a case relating to government Covid-19 contracts, O'Farrell J's judgment covered standing in just one paragraph, finding that GLP had standing on the basis that it was acting in the public interest and had "*some expertise*".[18]

That approach contrasts sharply with the level of scrutiny applied to the issue of standing in two GLP cases decided more recently:

- In *Runnymede*,[19] almost a third of the Divisional Court's judgment focussed on the issue of standing, with the conclusion that GLP did not have standing to bring any of its claims in respect of various covid-related government appointments.[20]

[16] Mark Thornton, 'Effectively holding 'bad chaps' to account? Considering the Good Law Project's procurement judicial review claims' *Lawspring.org* (11 January 2022) <https://lawspring.org/effectively-holding-bad-chaps-to-account-4576ea1bf0f0>.

[17] *R (Good Law Project) v Secretary of State for Health and Social Care* [2022] EWHC 46 (TCC), [2022] PTSR 644 ("*Pestfix*").

[18] *Pestfix,* para 505 (O'Farrell J).

[19] *R (Good Law Project) v Prime Minister* [2022] EWHC 209 (Admin), DC ("*Runnymede*").

[20] *Runnymede,* paras 16-61 (Singh LJ).

- In *Abingdon*,[21] Waksman J took a similarly rigorous approach to analysing GLP's standing, and reached the same conclusion; GLP was found not to have standing to bring any of its claims in respect of the award of a contract for the development of lateral flow tests.[22]

There may well be broader reasons for the shift in judicial approach to standing. In written advice published by GLP, Professor Conor Gearty QC situated the stricter approach to standing within an overall "*important change of judicial mood*", characterised by a "*new focus on rules and a more formalistic approach*".[23] Other observers have noted that the March 2021 report of the Independent Review of Administrative Law specifically encouraged courts to address the issue of standing, even if not raised by the parties.[24] The stricter approach also comes in the broader context of an overall fall in the number of successful judicial review challenges. [25]

Whatever the reason, it seems that the courts may now place far more emphasis on the issue of standing. The result is that the awkward application of the sufficient interest test to public interest claimants has again become a live issue. Absent any changes, it is likely that the ability of public interest claimants to bring claims will now

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[21] *R (Good Law Project) v Secretary of State for Health and Social Care* [2022] EWHC 2468 (TCC) ("*Abingdon*").

[22] *Abingdon,* paras 498-550 (Waksman J).

[23] Conor Gearty, 'The Good Law Project: Planning for Future Litigation' (14 April 2022) <https://drive.google.com/file/d/1HIs3Y06o96je3YFNL NMF9ZGZ7bmD2al4/view>.

[24] Linklaters, 'Standing in judicial review proceedings: no 'carte blanche' for public interest groups' (24 March 2022) <https://www. linklaters. com/en/knowledge/publications/alerts-newsletters-and-guides/2022/march/22/standing-in-judicial-review-proceedings-no-carte-blanche-for-public-interest-groups>.

[25] Haroon Siddique, 'Dramatic fall in successful high court challenges to government policy' *The Guardian* (London, 23 June 2022) <https://www.theguardian.com/law/2022/jun/23/dramatic-fall-in-successful-high-court-challenges-to-government-policy>.

be significantly reduced. As such, this essay proposes an alternative test to ensure that public interest claimants are still able to bring judicial review claims. First, however, it considers the desirability of public interest claims.

Are public interest claims desirable?

The basic argument in favour of public interest claims is the one made by Lord Diplock quoted at the start of this essay. If a public body is acting unlawfully, it cannot be right that the courts could be prevented from intervening simply because no single claimant is deemed to have a close enough relationship with the unlawful act; Professor Paul Craig has described that possibility as "*indefensible*".[26]

However, there are instances where the most senior members of the judiciary have expressed a view that is quite different to Lord Diplock's. For example, in *AXA General v HM Advocates*,[27] Lord Reed said:

> *"…the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted."*[28]

In addition, there are various common counter-arguments to allowing public interest claims, including suggestions that doing so would:[29]

- encourage "busybody" claimants;
- lead to an overwhelming number of claims;

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[26] This has See also Paul Craig, *Adminstrative Law* (9th edn, Sweet & Maxwell 2021) para 25-046, who describes it

[27] *AXA General v HM Advocates* [2011] UKSC 46, [2012] 1 AC 868.

[28] *AXA* [2011] UKSC 46, [2012] 1 AC 868, para 170 (Lord Reed JSC).

[29] See eg Paul Craig, *Adminstrative Law* (9th edn, Sweet & Maxwell 2021) paras 25-039-25-044.

- strain the traditional role of the courts, which is focussed on determining live issues between adversarial parties.

However, those counter-arguments either have limited merit, or can be overcome by the application of the proposal in this essay.

The "busybody" argument can be dismissed most quickly, simply on the basis that the evidence for such individuals is extremely limited. As has been observed, "*the idle and whimsical plaintiff, a dilettante who litigates for a lark, is a spectre which haunts the legal literature, not the courtroom*".[30]

Lord Reed's dictum in *Axa General*, and the argument concerned with the possibility of an overwhelming number of claims, are based on an acknowledgment that there are practical limits to the pursuit of justice, and that the judicial review system might struggle to function if there is a "free-for-all". However, there are two answers to that concern. Firstly, as discussed in more detail below, it is possible to adjust the standing rules in a way that is more permissible to public interest claimants without "opening the floodgates", by requiring that such claimants are suitable. Secondly, standing is not the only constraint on the ability of claimants to bring judicial review claims. In particular, there are separate rules that, for example, help filter out unmeritorious claims,[31] purely academic claims,[32] premature claims,[33] and claims that raise only private law issues.[34] Those rules together provide a principled basis for restricting the

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[30] Kenneth Scott, "Standing in the Supreme Court — A Functional Analysis" (1973) 86 Harv LR 645.

[31] To get permission, claims must be "arguable" or have a "realistic prospect of success": White Book, vol 1, para 54.4.2.

[32] See 'The Administrative Court Judicial Review Guide', para 6.3.4.

[33] See eg *R (Yalland) v Secretary of State of Exiting the European Union* [2017] EWHC 630 (Admin), DC, paras 23-25.

[34] Such issues are not amenable to judicial review: see White Book, vol 1, para 54.1.2.

expanse of the judicial review regime. If a claim gets over all those hurdles, it is perverse to prevent the claim from succeeding solely on the grounds that, by chance, the claimant was not directly affected by the unlawful act or omission.

The argument as to the "traditional role of the courts" can also be answered in two ways. Firstly, the various other rules already mentioned, in particular the rule against the hearing of purely academic claims, helps to prevent a wholesale shift away from the normal focus on determining live issues between parties. But secondly, the concern is not one that arises out of, or can be solved through, the concept of standing. The nature of public law litigation is that it deals with expansive subject-matter, involves unique remedies, and requires specific approaches.[35] It is these issues which cause it to fit uneasily with a model designed for private law disputes. A strict approach to standing will not solve that tension.

As such, while there may be legitimate questions as to how they can be practically accommodated, there does not seem to be any principled reason why public interest claims should not be allowed.

A new proposal for standing for public interest claimants

This essay seeks to provide a practical way of facilitating public interest claims, by proposing a suitability test for public interest claimants, to sit alongside the current sufficient interest test.

Under the proposal, s 31(3) of the Senior Courts Act 1981 would be amended to read:

> *No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall*

[35] Paul Craig, *Adminstrative Law* (9th edn, Sweet & Maxwell 2021) para 25-043.

> *not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates* ***or unless the application is made in the public interest by a suitable public interest applicant.***
>
> (proposed addition in bold)

In addition, a new subparagraph would be added to s 31 of the Senior Courts Act 1981, which would read:

> *A "suitable public interest applicant" is an applicant that –*
>
> *(a) the court considers will act fairly and adequately;*
>
> *(b) does not have a material interest that would be in conflict with the pursuit of relief in respect of the conduct complained of and is not acting for an improper purpose;*
>
> *(c) if the applicant is a pre-existing body, has some relevant experience and expertise;*
>
> *(d) if there is more than one applicant for permission to seek judicial review in respect of the conduct complained of, would be the most appropriate applicant.*

There are a number of aspects of the proposal that require further explanation.

*First*, some of the criteria for suitability are borrowed (with amendments) from rule 78 of the Competition Appeal Tribunal Rules 2015. That rule sets out the factors the Competition Appeal Tribunal must consider when authorising a representative to act on behalf of a class in collective proceedings. The rule provides a helpful source, because it is explicitly *not* predicated on the potential class representative being a

member of the class (or, in judicial review terms, having a sufficient interest).[36] Instead, the rule focuses on practical factors that would be desirable in a class representative. It therefore provides a precedent for dealing with claimants that do not have a direct stake in the outcome of proceedings, and the case law on that rule could help shape the approach to this proposal.

*Secondly*, it will be noted that the proposal provides no definition of "the public interest". This is because the concept of the public interest is already incorporated within s 31(3E) of the Senior Courts Act 1981, and there is therefore existing case law which could be applied to this new test.[37]

*Thirdly,* and relatedly, this proposal would require an amendment to s 31(3E) of the Senior Courts Act 1981. Currently, the effect of ss 31(3C)-(3F) is that, except in cases of exceptional public interest, the court can only grant permission to a claimant where the complained of action caused the outcome for the claimant to be substantially different. Clearly, that requirement makes little sense in the context of a public interest claimant, since there is no specific outcome for the claimant. As such, the requirement would need to be amended so that it did not apply to public interest claimants.

*Fourthly,* requirement (c) is intended to strike a balance between two different factors. On the one hand, the courts have clearly considered it desirable for public interest claimants to be competent and effective.[38] However, it has been observed that

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[36] Competition Appeal Tribunal Rules 2015, r 78(1)(a).

[37] See eg *R (CHF) v Newick CE Primary School* [2021] EWHC 2513 (Admin), [2022] PTSR 756, para 24 (Fordham J).

[38] See eg *R v Secretary of State for Foreign Affairs Ex p The World Development Movement Ltd* [1995] 1 All ER 611 QBD, 620 (Rose LJ).

requiring things like “prominence” from all public interest claimants is elitist,[39] and it can effectively shut out a virtuous normal citizen motivated to bring a valid claim in the public interest. By requiring experience and expertise from pre-existing group claimants only, the criterion ensures that the rationale behind allowing claims by certain groups is retained, while ensuring that individuals without expertise but who could nonetheless act adequately are still able to bring public interest claims.

*Fifthly*, there may be instances where there are potential specific interest claimants and public interest claimants in respect of the same matter. Requirement (d) means that a public interest claimant will only be preferred where it is appropriate to do so.

More generally, it is important to note that the concept of a two-track system for judicial review standing is not new. A two-track approach was proposed as long ago as the 1960s and 1970s by the American legal scholar Louis L. Jaffe,[40] and more recently by the Law Commission.[41] However, previous proposals for a two-track system generally conceive of a purely discretionary track for public interest claimants. By contrast, the key part of this proposal is that it is not discretionary, but instead applies existing requirements and principles to establish a bounded and rational method for allowing public interest claimants. By doing so, it ensures that the future of public interest claims will not be threatened by a change in approach to the sufficient interest test, and ensures that the strictures of the current standing regime do not prevent unlawful behaviour by public bodies from going unexamined.

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[39] Farrah Ahmed, ‘Standing and Civic Virtue’, LQR 2018, 134(Apr), 239-256, 254.

[40] Louis Jaffe, “The Citizen and Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff” (1967−1968) 116 U Penn LR 1033.

[41] Law Commission, *Administrative Law: Judicial Review and Statutory Appeals* (No 226, 1994), para 5.22.

## Conclusion

It is acknowledged that this proposal may seem to move the law in the opposite direction to the prevailing political wind. Recent legislation has sought to restrict the scope of judicial review, for example by abolishing the ability to seek judicial review of certain decisions of the Upper Tribunal (so-called Cart claims),[42] and this proposal may appear to extend the scope of judicial review. However, the author hopes that it will instead be recognised as an attempt to bring greater logic to the judicial review regime while introducing practical elements to ensure that it can operate effectively.

[42] Judicial Review and Courts Act 2022, s 2.